

# International **Comparative** Legal Guides



## Business Crime **2020**

A practical cross-border insight into business crime

**10<sup>th</sup> Edition**

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**Group Publisher**

Rory Smith

**Publisher**

Jon Martin

**Sales Director**

Florjan Osmani

**Senior Editors**

Caroline Oakley

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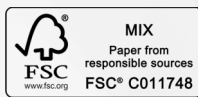
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10<sup>th</sup> Edition

**Contributing Editors:**

**Keith Krakaur and Ryan Junck**

**Skadden, Arps, Slate, Meagher & Flom LLP**

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## Expert Chapters

- 1** **Recent Trends in U.S. Enforcement and the Advent of Technology Legislation**  
Ryan Junck & Pippa Hyde, Skadden, Arps, Slate, Meagher & Flom LLP
- 4** **The Business Crime Landscape**  
Aziz Rahman, Nicola Sharp & Syedur Rahman, Rahman Ravelli
- 12** **Corporate Response to Financial Irregularities and How to Prepare for a Crisis**  
Kaley Crossthwaite & Richard Shave, BDO LLP

## Country Q&A Chapters

- 16** **Argentina**  
Durrieu Abogados: Nicolas Durrieu & Alejandro Ignacio Ramella
- 25** **Australia**  
Clayton Utz: Tobin Meagher & Andrew Moore
- 34** **Brazil**  
Joyce Roysen Advogados: Joyce Roysen & Veridiana Vianna
- 46** **Colombia**  
CMS Rodríguez-Azuero: Jacques Simhon Rosenbaum, Daniel Rodríguez Bravo, Santiago Calle Gómez & María Lucía Amador
- 56** **Czech Republic**  
Noerr s.r.o.: Petr Hrnčíř & Petr Kobylka
- 64** **England & Wales**  
Peters & Peters LLP: Hannah Laming & Karl Masi
- 73** **France**  
Debevoise & Plimpton LLP: Antoine Kirry & Alexandre Bisch
- 83** **Germany**  
AGS Legal: Dr. Jan Kappel & Dr. Jan Ehling
- 92** **Greece**  
Anagnostopoulos: Ilias G. Anagnostopoulos & Jerina Zapanti
- 102** **Hong Kong**  
Haldanes: Felix Ng & Emily Cheung
- 112** **India**  
Kachwaha and Partners: Ashok Sagar & Sumeet Kachwaha
- 123** **Ireland**  
Matheson: Claire McLoughlin & Karen Reynolds
- 136** **Italy**  
Studio Legale Pisano: Roberto Pisano
- 147** **Japan**  
Atsumi & Sakai: Masataka Hayakawa & Kumpei Ohashi
- 158** **Liechtenstein**  
Lawfirm Holz hacker: Dr.iur. Gerhard R. Holz hacker
- 171** **Malaysia**  
Skrine: Lim Koon Huan & Manshan Singh
- 180** **Netherlands**  
Sjöcrona Van Stigt: Sabine ten Doesschate & Pasquale Uijtdewillegen
- 189** **Nigeria**  
AO2 Law: Bidemi Olumide & Ifure Udofa
- 196** **Norway**  
Advokatfirma DLA Piper Norway DA: Berit Reiss-Andersen, Victoria Palm & Ivar Valter Kristiansen
- 205** **Poland**  
Softysiński Kawecki & Szlęzak: Tomasz Konopka
- 215** **Portugal**  
Morais Leitão, Galvão Teles, Soares da Silva & Associados, S.P. R.L.: Tiago Geraldo & Tiago da Costa Andrade
- 225** **Romania**  
ENACHE PIRTEA & Associates S.p.a.r.l.: Simona Pirtea & Madalin Enache
- 233** **Singapore**  
Drew & Napier LLC: Gary Low & Vikram Ranjan Ramasamy
- 241** **Spain**  
Del Rosal & Adame: Bernardo del Rosal & Fernando Adame
- 259** **Switzerland**  
Homburger: Flavio Romerio & Roman Richers
- 270** **Taiwan**  
Lee and Li, Attorneys-at-Law: Michael T. H. Yang & Benoit Feng
- 281** **United Arab Emirates**  
Hamdan Al Shamsi Lawyers and Legal Consultants: Hamdan Al Shamsi, Roger Bowden & Nandini Tiwari
- 288** **USA**  
Skadden, Arps, Slate, Meagher & Flom LLP: Keith Krakaur & Ryan Junck

# Portugal

Morais Leitão, Galvão Teles, Soares da Silva & Associados, S.P. R.L.



Tiago Geraldo



Tiago da Costa Andrade

## 1 General Criminal Law Enforcement

### 1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

Criminal offences are enforced in the courts of law. Enforcement and prosecution of business crimes, as all crime, is undertaken by the Public Prosecutor's Office, which investigates any suspicion of crime, aided by the criminal police bodies. There is no enforcement body or entity specialising in business crimes. The Public Prosecutor's Office has the powers granted to it by law to investigate any facts which may constitute a criminal offence in the Portuguese territory, without prejudice of the rules that govern extra-territorial jurisdiction of Portuguese law. Usually, the investigation of the 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, namely of a violent nature, of particular complexity or those which are highly organised – the latter categories including corporate and business crimes.

### 1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

The only competent body to investigate and prosecute criminal offences is the Public Prosecutor's Office. There are local offices, whose jurisdiction depends on the *locus delicti*, and a central department for criminal investigation and prosecution in Lisbon, which is a coordination and direction body for investigation and prevention of violent, highly organised and particularly complex criminality.

The Public Prosecutor's Office might be aided, among others, by the Judiciary Police, the Food Safety and Economic Authority or the Tax Authority, depending on the subject investigated and the expertise of each criminal police body.

### 1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

There is no civil or administrative enforcement specifically against business crimes. Business crimes are subject to criminal enforcement alone. Nevertheless, the Bank of Portugal, the Portuguese Securities and Exchange Commission and the Tax Authority, among others, are also responsible for investigating regulatory infractions and misdemeanours related to business crime.

In areas such as drug trafficking, money laundering and other serious crimes, such as corruption, embezzlement and influence peddling, Law 101/2001 allows, under certain circumstances, the existence of covert operations under the control of the Judiciary Police in order to prevent said crimes.

In the field of financial market crimes, the Portuguese Securities and Exchange Commission can perform preliminary enquiries, in line with its supervisory functions, whose findings it must deliver to the Public Prosecutor's Office if a crime is revealed.

### 1.4 Have there been any major business crime cases in your jurisdiction in the past year?

In the recent years, there have been several high-profile cases of business crimes prosecuted and tried in Portuguese courts, all with a significant impact: “Face Oculta”, a case involving 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, related to alleged unlawful concession of Golden Visas; and the “Marquês” operation, considered by many as the biggest corruption case in Portugal's modern history, in which a former Prime Minister and the former CEO of one of the largest Portuguese private banks were formally charged with several counts of corruption, money laundering, document forgery and tax fraud, among other corporate elites, including former chief executives of Portugal Telecom.

## 2 Organisation of the Courts

### 2.1 How are the criminal courts in your jurisdiction structured? Are there specialised criminal courts for particular crimes?

Criminal courts are part of the common judicial courts, separated from the administrative and tax courts. The rules of competence depend on the stage of the procedure, the gravity or the type of crime, the quality of the defendant and the *locus delicti*.

The structure of criminal courts is hierarchical, comprising district first instance courts, courts of appeal and the Supreme Court of Justice. The first instance courts can operate with a singular judge, a panel of judges or as a jury court, depending on the maximum abstract penalty for the offences at trial and the type of crime. Nevertheless, the courts of appeal and the Supreme Court of Justice act as first instance courts to try holders of high political positions and magistrates indicted for crimes undertaken during the performance of their duties.

There are no specialised courts in business crimes, neither could they exist due to the constitutional prohibition on establishing courts competent only to try certain categories of crimes.

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**2.2 Is there a right to a jury in business crime trials?**

If the trial relates to offences against cultural identity and personal integrity, national sovereignty and the accomplishment of the Rule of Law, electoral crimes and offences against international humanitarian law, or crimes – including business crimes – for which the maximum abstract penalty can exceed eight years of imprisonment, the defendant has the right to a jury trial.

However, there can be no jury trial in cases of terrorism, highly organised crimes and crimes committed by holders of political or high-ranking public positions.

In practical terms, however, jury trials are very rare in Portugal.

**3 Particular Statutes and Crimes**

**3.1 Please describe any statutes that are commonly used in your jurisdiction to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:**

**• Securities fraud**

Article 379 of the Portuguese Securities Code punishes, with up to eight years of imprisonment or a 600-day fine, the disclosure of false, deceptive or incomplete information or the undertaking of false operations suitable to artificially alter the normal functioning of the securities market or other financial instruments. Actions intended to alter the normal functioning of the securities markets include, namely, those which might modify the pricing conditions, the normal conditions of supply and demand of securities and financial instruments, the normal launch and acceptance conditions of public tender offers and other actions intended to alter or delay the negotiation phase.

Criminal liability for this specific offence requires criminal intent. Nevertheless, those holding a position in an administration body and those responsible for the direction and auditing of fields of activity of a financial intermediary, with knowledge of the facts described above, committed by persons subject to their direct directions and supervision and in the performance of their duties, who do not immediately terminate such, may also be held criminally liable.

**• Investment and accounting fraud**

Article 379-E of the Securities Code foresees the crime of investment fraud, which encompasses the using of false or misleading information (of economic, finance or legal nature) in the context of operations intended to attract investment, financing or to issue securities. Information is considered false or misleading whenever it presents favourable situations without correspondence in reality or omits unfavourable facts that should be presented. This offence is compatible both with criminal intent, leading to a maximum penalty of eight years of imprisonment, and negligence, in which case the maximum penalty applicable will be halved.

Article 519 of the Companies Code foresees the crime of providing false information, applicable to the disclosure of false, incomplete or deceptive company information, and punishing it with up to one year of imprisonment or a 120-day fine. Criminal intent is required.

Article 256 of the Criminal Code punishes production of false documents, alteration of legitimate documents, signature exploitation and use or concession of said documents, with a penalty of up to five years of imprisonment or a 600-day fine. This offence requires intention to cause losses to another person or the State, to obtain an unlawful benefit or to prepare, foster, execute or conceal another crime.

**• Insider trading**

Article 378 of the Securities Code punishes with up to five years of imprisonment or a 600-day fine whosoever is in possession of inside

information and transmits it outside the normal course of its functions, negotiates, advises someone to negotiate in securities or other financial instruments or commands its trade, as well as whosoever cancels or modifies an order. Criminal intent is required.

Inside information is defined as unannounced information, which is precise and, directly or indirectly, connected with an issuer, securities or other financial instruments, or a related order, which could be used, if released, to appreciably influence market prices.

**• Embezzlement**

Embezzlement by public officials is foreseen as a specific crime under Article 375 of the Criminal Code. This offence, punishable with up to eight years of imprisonment, applies to public officials who unlawfully appropriate, for their own or for another person's benefit, money or any movable or immovable property or public or private property that has been subject to his possession or is accessible to him because of his functions. Article 20 of Law 34/87 foresees the same offence but which is applicable to political and high public officials. Both offences require criminal intent.

**• Bribery of government officials**

Passive corruption, punishable by Article 373 of the Criminal Code with up to eight years of imprisonment (without counting with possible aggravating factors), can be defined as the request or acceptance of an undue advantage by a public official as repayment for having carried out or in order to perform an official act. In turn, active corruption, punishable by Article 374 of the Criminal Code with up to five years of imprisonment, can be defined as the offering or the promise to offer an undue advantage to a public official in return for having carried out or in order to perform an official act. Articles 17 and 18 of Law 34/87 are applicable to bribery offences related to holders of political positions and high-ranked officers, committed in performance of their duties.

The corruption provisions will apply regardless of whether the undue advantage is accepted by or offered to a public official/politician/private worker/sportsperson/military official or through an intermediary (if there is consent or ratification), and also regardless of whether the undue advantage is intended for the public official/politician/private worker/sportsperson/military official or for a third party, by his indication or with his knowledge.

Finally, Article 372 of the Criminal Code, Article 16 of the Law on corruption of political and high public officials and Article 10-A of Law 50/2007 (regarding bribery in the context of sports competitions), holds criminally liable public officials/political or high-ranking public officials/sports agents that simply allow to be promised or accept an undue advantage for himself or for a third person or whosoever offers, promises or grants such advantage, even without the requirement of practising a specific action or omission in return.

A bribe (“undue advantage”) can be defined as a monetary or non-monetary advantage which benefits its recipient in any way without any legal ground or justification. The relevant advantage may be given to a public official/politician/private worker, but it can also be given to a third party, if requested or consented by any of the abovementioned group of individuals. In all cases, the bribe can also be executed by means of an intermediary, and requires always criminal intent.

**• Criminal anti-competition**

There are no statutes to prosecute cartels or anti-competition conduct on a criminal level. Anti-competition and cartel offences are subject to administrative enforcement alone under the Portuguese Code of Industrial Property and Law 19/2012.

Nevertheless, under Article 8 of Law 20/2008, passive corruption is punishable where a private sector worker, by himself or through an intermediary, demands or accepts, for himself or for a third person, an undue advantage, or the promise thereof, to practice an action or omission which violates his professional duties. Under Article 9 of the same law, active corruption in the private sector is punishable where an individual, by himself or through an inter-

mediary, grants or promises to grant an undue advantage to a private sector worker, or to a third party with his consent or ratification, to obtain an action or omission which violates the private worker's professional duties. Where the action or the omission practised by the private sector worker constituting the counterpart of the undue advantage is intended to distort competition or to cause economic losses for third parties, the maximum applicable penalty is increased.

#### • **Cartels and other competition offences**

See "Criminal anti-competition" above.

#### • **Tax crimes**

Tax crimes are established in Law 15/2001. Article 103 of said Law foresees tax evasion as a specific offence which punishes the failure to settle, present or pay taxes or other monetary advantages in order to reduce payable tax by concealment or modification of facts and values or by simulation of transactions, punishable with up to eight years of imprisonment or a 1,920-day fine.

Article 105 of Law 15/2001 foresees tax misappropriation, which applies to persons who simply fail to pay the value it was obliged to, punishing said conduct with up to five years of imprisonment or a 1,200-day fine.

Both offences require criminal intent.

#### • **Government-contracting fraud**

There is no specific offence relating to government-contracting fraud.

However, such behaviours will likely fall under the general range of fraud and forgery related offences provided under the Criminal Code, some of them described above.

For example, the crime of fraud, punishable under Articles 217 and 218 of said Code with up to eight years of imprisonment, and applicable to whosoever, with the intent of obtaining for himself or a third person an unlawful material benefit, damages the property of another by causing an error or a mistake. Another example: the crime of false declarations, punishable under Article 348-A of the Criminal Code with up to one year of imprisonment, and applicable to whosoever falsely declares or attests to a public authority or official in the exercise of his or her identity, a state or other capacity with legal effects, whether own or regarding third parties.

Other specific offences may apply, such as the following.

Article 377 of the Criminal Code punishes, with up to five years of imprisonment, the crime of taking an economic advantage in public office, applicable to any public official who, in the course of a legal transaction, and intending to obtain an economic unlawful participation for himself or a third party, damages in whole or in part the public interest that he has the duty to manage, supervise, defend or carry out. Article 23 of Law 34/87 foresees the same offence applicable to political and high-ranking public officials.

Influence-peddling is also a criminal offence under Article 335 of the Criminal Code, which punishes with up to five years of imprisonment whosoever requests or accepts, for himself or for third parties, a monetary or non-patrimonial advantage, or its promise, to abuse his influence, real or supposed, before any public entity, in order to obtain a favourable decision.

All these offences require criminal intent.

#### • **Environmental crimes**

Article 279 of the Criminal Code punishes sound, air, water, soil, fauna and flora pollution in violation of legal or regulatory acts or of any obligations imposed by the competent authority in accordance to said acts, with up to five years of imprisonment or a 600-day fine.

Article 270-A of the Criminal Code punishes environmental hazardous substances handling with up to three years of imprisonment or a 600-day fine.

Article 280 punishes the creation of risks to human life or physical integrity, to property or to cultural and historic monuments through pollution with up to eight years of imprisonment.

All these offences foresee punishment through negligence, apart from criminal intent.

#### • **Campaign-finance/election law**

There is a wide variety of electoral offences established in the electoral laws of the President of the Republic (Decree-Law 319-A/76), Parliament (Decree-Law 14/79), Regional Parliaments (Decree-Law 267/80 and Organic Law 1/2006), Local Authorities (Organic Law 1/2001) and European Parliament (Law 14/87), as well as in Articles 336 to 342 of the Criminal Code (*e.g.* electoral fraud or bribery of voters), all of which require criminal intent.

Under Article 28 of Law 19/2003, personal participation in the allocation or obtainment of unlawful campaign funding is punishable with up to three years of imprisonment. Criminal liability requires criminal intent.

#### • **Market manipulation in connection with the sale of derivatives**

See "Securities fraud" above.

#### • **Money laundering or wire fraud**

Article 368-A of the Criminal Code punishes with up to 16 years of imprisonment anyone who converts or transfers funds – or intervenes or aids in such operations – to conceal their unlawful origin, from predicate offences, such as tax evasion, bribery and corruption, influence-peddling, trafficking, and any other crime. Criminal liability requires criminal intent.

Law 83/2017 brought forth a heavy framework of obligations to prevent money laundering offences, granting powers to several institutions, such as the Bank of Portugal, the Portuguese Securities and Exchange Commission, the Portuguese Insurance and Pension Funds Supervisory Authority and even the General Inspectorate for Finance, to supervise compliance. Failure to comply with Law 83/2017 and the orders of the competent authorities is enforced with administrative sanctions of up to €5,000,000, depending on the nature of the entity, which may be aggravated to double the economic benefit of the infraction or up to 10% of the annual revenue of the business in certain cases.

Besides the crime of money laundering itself, crimes related to violations of anti-money laundering obligations include (i) illegitimate disclosure of information, (ii) disclosure and improper favouring of identity discovery, and (iii) disobedience of lawful orders or instructions from the competent authorities.

#### • **Cybersecurity and data protection law**

Cybercrime statutes are established in Law 109/2009, which foresee a punishment of imprisonment for computer falsehood, software or informatic data damage, computer sabotage, unlawful access, unlawful interception of data and unlawful reproduction of protected software, all of which require criminal intent.

Data protection offences are established in Law 67/98 and comprehend the crimes of failure to comply with data protection obligations, unlawful access, vitiation or destruction of personal data, false data insertion, aggravated disobedience and violation of professional secrecy. These offences require criminal intent, except for the offences of vitiation or destruction of personal data and violation of professional secrecy, which enable punishment for negligent actions.

The General Data Protection Regulation (GDPR), which is currently applicable in Portugal, foresees several obligations enforceable by administrative law. Law 58/2019, of 8 August, intended to ensure the execution of the GDPR in Portugal, also foresees several criminal offences, such as the use of data in terms incompatible with the purpose of its collection, the unlawful access to data, the data deviation, the forgery or destruction of data, the insertion of false data, the breach of secrecy or the disobedience to specific orders issued by the Portuguese Data Protection Authority.

#### • **Trade sanctions and export control violations**

Whosoever, in violation of a restrictive measure to which Portugal is bound, makes available, directly or indirectly, to designated persons or entities, any funds or economic resources that they may use or from which they may benefit from, or perform a prohibited transfer of funds, shall be punished with up to five years of imprisonment. The same penalty applies to whosoever establishes or maintains a legal relationship with persons or entities included in trade sanctions lists.

Apart from criminal intent, this offence foresees punishment through negligence, in which case the penalty will correspond to a fine of up to 600 days.

Also, a wide variety of trade sanctions are foreseen in Decree Law 28/84, including punishment of up to two years of imprisonment or a 100-day fine for the unlawful and unlicensed exportation of goods. Negligent conduct is punishable.

• **Any other crime of particular interest in your jurisdiction**  
The Criminal Code punishes fraud, insurance fraud, food, beverage and services fraud, computer fraud and employment fraud. Law 15/2001 punishes tax fraud and social security fraud. Decree-Law 28/84 punishes subsidy or grant fraud, credit fraud and merchandise fraud.

**3.2 Is there liability for inchoate crimes in your jurisdiction? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?**

There is liability for inchoate crimes in Portugal. As a general rule, whenever the maximum penalty applicable is greater to three years of imprisonment, or when explicitly foreseen, the attempt to commit a crime is punishable.

**4 Corporate Criminal Liability**

**4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity?**

For a limited number of crimes, listed in Article 11(2) of the Criminal Code and in special legislation, essentially legal person may be held liable if the relevant offence is committed: (i) in its name and in the collective interest by individuals who occupy a position of leadership; or (ii) by an individual who acts under the authority of someone occupying a position of leadership due to a violation of the monitoring and control duties pertaining to the latter.

A position of leadership is comprised by the bodies and representatives of the legal entity and by whoever has the authority to exercise control over its activity.

**4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime? Under what circumstances?**

Corporate liability may coexist with individual liability, considering the same exact set of facts, if the manager, officer or director fulfils the elements of the crime and the requisite mental state.

Criminal liability may not be transmitted to another entity, due to the constitutional principle that states that punitive liability is personal and non-transferable. However, the directors of the relevant company may alternatively be asked to pay the fine to which the company was sentenced, if the entity lacks the required financial capacity for crimes committed (i) at the time of the exercise of their directive functions, without their express opposition, (ii) before the beginning of their functions, when it was their fault that the asset of the legal entity became insufficient to pay the fine, or (iii) before the beginning of their functions, when the definitive decision of the sanction was communicated during their mandate and they are responsible for defaulting on the payment due by the company.

**4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?**

Legally and constitutionally, and due to the legality principle, in its procedural perspective, authorities are not allowed to choose who to pursue; they are obliged to pursue both the corporate entity and the individuals when they receive news of the crime.

**4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?**

Irrespective of its former or current owners or shareholders, corporate liability remains contained in the same legal person within which (and regarding whose activity) the relevant offence was committed.

**5 Statutes of Limitations**

**5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?**

Statute of limitation periods depended on the abstract maximum penalty applicable for the crime: 15 years for crimes punishable with a maximum penalty greater than 10 years of imprisonment or specific offences, such as influence-peddling, bribery and corruption, embezzlement and taking economic advantage in public office; 10 years for crimes punishable with a maximum penalty of at least five years of imprisonment but less than 10; five years for crimes punishable with a maximum penalty of at least one year of imprisonment but less than five; and two years for the remaining cases.

Limitations periods start to run from the day the crime is committed.

**5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?**

Generally, the limitations period hinders prosecution. Nevertheless, the limitations period only begin running (i) for permanent crimes, on the day the criminal act as a whole ends, (ii) for continuous crimes, on the day of the last criminal action, and (iii) for inchoate crimes, on the day of the last criminal action.

**5.3 Can the limitations period be tolled? If so, how?**

The limitations period can be tolled (i) during the period in which the criminal process cannot proceed due to lack of legal authorisation, delivery of sentencing or of resolution of a prejudicial question by a non-criminal court, (ii) during the period in which the criminal procedure is pending after the communication of the charge or judicial indictment, (iii) during the period in which there is a declaration of judgment by default, (iv) during the period in which the sentence cannot be communicated to an absent defendant, (v) during the period in which the sentence, communicated to the defendant, is not *res judicata*, and (vi) during the period in which the defendant is serving a sentence in a foreign country.

**6 Initiation of Investigations**

**6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that**



**allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?**

As a general rule, Portuguese criminal law is applicable to all acts committed in the Portuguese territory, regardless of the offender's nationality. Portuguese law shall equally apply, notably, when the relevant crime: (i) is perpetrated by Portuguese citizens against other Portuguese citizens that live in Portugal; (ii) is perpetrated by Portuguese citizens or by foreigners against Portuguese citizens, if the perpetrator is to be found in Portugal and if the facts are punishable in the territory where they took place (unless the punitive power is not carried out in that place) and extradition cannot be performed or if it is decided not to surrender the offender as result of a European arrest warrant or another international agreement binding on Portugal; or (iii) is perpetrated by or against a legal person with its headquarters in the Portuguese territory. Portuguese criminal law is also applicable to acts committed abroad when it so results from international conventions to which Portugal is bound.

**6.2 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.**

Investigations are initiated whenever the Public Prosecutor's Office receives news of a crime. As stated above, the opening of an investigation is mandatory in such cases, although there is a general system of objectives and priorities foreseen in Law 96/2017 for some crimes to be primarily prevented and investigated.

**6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?**

Law 144/99 establishes the rules for international cooperation in criminal matters from the Portuguese authorities. There are also international conventions regarding international cooperation to which Portugal is bound. However, the most commonly used cooperation mechanism is the European arrest warrant, nationally regulated by Law 65/2003, which is a judiciary decision that requires another Member State to arrest and transfer a criminal suspect or sentenced person to the issuing state so that the person can be put on trial or complete a detention period.

In addition, other mechanisms of international cooperation are foreseen in Articles 229–233 of the Portuguese Criminal Procedural Code: Law 158/2015 regarding the transmission and execution of criminal sentences of imprisonment and other measures involving deprivation of liberty; Law 36/2015 on the surrender of a person between Member States of the EU in case of default of a preventive measure; Law 88/2009 regarding the emission and execution of orders of confiscation of the instruments, products and advantages of the crime; and Law 74/2009 on the interchange of criminal data and information in the EU.

## **7 Procedures for Gathering Information from a Company**

**7.1 What powers does the government have generally to gather information when investigating business crimes?**

Besides the powers generally endowed to the Public Prosecutor's

Office in any criminal investigation – searches, seizures, examinations and telephone tapping – there are special provisions (such as those provided under Law 5/2002) regarding the breach of secrecy of financial institutions, allowing a more effective collection of evidence by means of requesting documentation and information.

### **Document Gathering:**

**7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?**

Under Law 5/2002, the Public Prosecutor's Office may demand the documents relevant to the investigation. If that request is not fulfilled on time, or if there are substantiated suspicions that documents or information were hidden, the judiciary authority may seize the documents, in some cases only if previously authorised by the judge.

**7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?**

The privilege against self-incrimination is recognised in Portugal and may be used as a defence to refuse the production and presentation of information by the defendant.

The refusal of the production or seizure can also be grounded on the professional secrecy privilege of a lawyer. However, a judge can determine the breach of secrecy, considering the indispensability of the document, the severity of the crime and the necessity of protection of the legal interests at stake.

Under Law 5/2002, breach of banking and professional secrecy must be ordered by the judicial 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.

**7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?**

The free movement of personal data within the European Union is the main applicable principle. However, Law 74/2009 on the interchange of criminal data and information in the EU, which transposes EU Council Framework Decision 2006/960/JAI, establishes as limits to the cooperation duty (i) the gathering and conservation of data and information with the intention of disclosure to the law enforcement of other Member States, (ii) the provision of data and information to be used as evidence before a

judicial authority, and (iii) the obtainment of data and information through means of taking evidence, as defined by Portuguese law. Portuguese legislative bodies are also working on the transposition of Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data (Draft Law 125/XIII).

In addition to the General Data Protection Regulation, Article 28 of Law 58/2019, of 8 August, which ensures the execution of the GDPR, and Articles 17 to 22 of the Portuguese Labour Code, foresee limitations regarding employees' personal data.

According to the GDPR and said Law 58/2019, any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall take place only if, subject to the other provisions established therein, some specific conditions laid down are complied with by the controller and processor, including for onward transfers of personal data from the third country or an international organisation to another third country or to another international organisation.

**7.5 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?**

Despite the privilege against self-incrimination, the Public Prosecutor's Office may demand the production of documents as stated in question 7.2 above.

If there is a strong suspicion that the documents are being hidden in a house or an office, these can be searched, and the documents seized.

**7.6 Under what circumstances can the government demand that a third person or entity produce documents to the government, or raid the home or office of a third person or entity and seize documents?**

See question 7.5 above.

Questioning of Individuals:

**7.7 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?**

The Public Prosecutor's Office, by itself or aided by the criminal police bodies, can question whoever has direct knowledge of facts relevant to the subject of the inquiry. However, a witness can refuse to answer if the relevant reply may contribute to its own criminal liability. If the employee, officer or director of the company acts as a representative of the indicted company, they can also refuse to answer, based on the company's privilege against self-incrimination.

**7.8 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?**

See question 7.7 above.

**7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?**

The defendant has the right to be assisted by an attorney in every procedural act in which he participates. Nevertheless, there are circumstances in which there is a legal obligation of assistance by an attorney, including questioning of an arrested or imprisoned defendant, questioning by a judicial authority, in the examining debate and in the trial hearing. A witness, whenever questioned, even in an act restricted to the public, may also be accompanied by an attorney. Both the defendant and the witness may exercise the privilege against self-incrimination. The exercise of that right can never signify an inference of guilt at trial.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

**8.1 How are criminal cases initiated?**

See question 6.2 above.

**8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?**

See question 6.2 above.

**8.3 Can a defendant and the government agree to resolve a criminal investigation through pre-trial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution agreements are available to dispose of criminal investigations.**

Portuguese law provides a mechanism for provisional suspension of proceedings, under Articles 281 and 282 of the Criminal Procedural Code and Article 9 of Law 36/94 (Measures applicable to the Fight against Corruption and Financial and Economic Criminality).

This outcome, materially similar to some plea-bargaining systems, is agreed during the investigation stage between the Public Prosecutor and the defendant, with the consent of a pre-trial judge, leading to the suspension of the proceedings upon the defendant adhering to an injunction and/or certain rules of conduct. The conditions for such an agreement to be offered are the following: (i) the crime must be punishable with imprisonment not greater than five years or with a penalty other than imprisonment; (ii) agreement of both the defendant and the offended party (when the offended party is part of the proceedings); (iii) absence of previous convictions for a crime of the same nature; (iv) absence of previous provisional suspensions for crimes of the same nature; (v) absence of institutionalisation as a safety measure; (vi) absence of a high level of guilt; and (vii) prediction that compliance with the injunction and the rules of conduct is deterrent enough to fulfil the prevention demands claimed by the case.

In the event of an active corruption crime within the public sector, Article 9 of Law 36/94 establishes that the provisional suspension of the proceedings may be offered to a defendant when

he has reported the crime, or the Public Prosecutor considers him to have decisively contributed to the unveiling of the truth. Suspension in such cases requires fewer conditions: apart from the defendant's contribution, it is only necessary that he agrees with the suspension and that it is foreseeable that compliance with the injunction and the rules of conduct will be deterrent enough to fulfil the prevention demands claimed by the case.

The suspension of the proceedings can last up to two years, during which the limitation period is also suspended. If the defendant complies with the set of injunctions and rules of conduct prescribed, the Public Prosecutor dismisses the proceedings. In contrast, failure to comply with the terms agreed or recidivism causes the process to resume its course, ultimately leading to formal indictment.

**8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.**

As stated in question 8.3 above, the provisional suspension of the proceedings must be approved by a pre-trial judge who attests to the absence of a high level of guilt and the prediction that compliance with the injunction and the rules of conduct is deterrent enough to fulfil the prevention demands claimed by the case.

**8.5 In addition to, or instead of, any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies may apply.**

A defendant in a criminal procedure can be subject to civil compensation for the emerging losses and damages of the crime. That indemnification can be claimed by the victim of the crime or by any other person or legal entity who suffered losses or damages caused by the criminal conduct.

In principle, the civil claim is submitted in the criminal procedure, only exceptionally being filed in a separate civil procedure. The compensation might be attributed without any civil claim being demanded by the interested party whenever specific victim protection needs are deemed to be present.

## 9 Burden of Proof

**9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?**

The burden of proof in Portuguese criminal procedural law rests on the Public Prosecutor's Office side. The defendant solely has the burden of proof regarding circumstances which might exclude or diminish his liability. These circumstances do not exclude the power of the judge to actively request new evidence in the name of the truth and the well-founded verdict of the case.

**9.2 What is the standard of proof that the party with the burden must satisfy?**

The evidence must convince the trial judge beyond reasonable doubt that the defendant committed the crime. Except when the law provides otherwise, the evidence is evaluated according to the standards of experience and the unhindered conviction of the judge.

**9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?**

It is the judge who determines whether the burden of proof was adequately satisfied. As stated in questions 2.1 and 2.2 above, the court can function with a singular judge, a panel of judges or as a jury court, depending on the maximum abstract penalty for the crime at trial and the severity of said crime.

## 10 Conspiracy / Aiding and Abetting

**10.1 Can a person who conspires with or assists another to commit a business crime be liable? If so, what is the nature of the liability and what are the elements of the offence?**

If a person assists another to commit a crime, he or she might be liable as if he or she was the main perpetrator provided that such assistance was directly involved in the execution of the crime, by agreement or in joint action with the perpetrator. If an individual exclusively provides material or moral aid to the perpetrator, he or she may be held criminally liable as an accomplice, with a particularly tempered sentence.

## 11 Common Defences

**11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?**

It is a perfectly valid and common defence to argue that the defendant did not have the requisite criminal intent to commit the crime. As stated in section 3 above, several statutes regarding business crimes foresee the requirement of intentional misconduct, meaning that if said defence proceeds, there can be no criminal liability for the defendant. However, if the crime is punishable for mere negligent behaviour as well, the defendant may still be held criminally liable.

**11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law, i.e., that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?**

In general terms, knowledge of the law is legally presumed and does not exempt the defendant from criminal liability, except if the crime is of very low ethical-social value, in which case ignorance of the criminal prohibition leads to the exclusion of intent, under Article 16(1) of the Criminal Code.

In addition, ignorance of the unlawful nature of the conduct of the defendant is a valid defence which excludes guilt. However, under Article 17 of the Criminal Code, if said ignorance is found to be reprehensible, the defendant remains liable and may only benefit from a penalty decrease.

**11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts, i.e., that he did not know that he had engaged in conduct that he knew was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?**

It is a defence arguing that the defendant did not know that he had engaged in a conduct which he knew was unlawful. If the defendant, knowing the applicable law, thought that the relevant factual framework was one which did not make it possible for him or her to be committing a crime, even though he or she was mistaken regarding the reality of the facts, Article 16 of the Criminal Code forbids him or her to be charged with a penalty as if he or she acted with criminal intent. Nevertheless, the defendant may be punished due to negligent behaviour, safeguarding the relevant criminal offence allows such possibility.

## 12 Voluntary Disclosure Obligations

**12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?**

Portuguese law does not provide a general duty of report or denunciation *vis-à-vis* private entities or individuals. However, police, public officials and servants are obliged to report any crimes they become aware of during the performance of their duties to the Public Prosecutor's Office.

The failure to report imminent business crime practices by those who assume a leading position within an organisation, and who are therefore bound by law to prevent unlawful and harmful outputs arising from the company's activity, may result in the liability of the company itself (and the relevant omitting agents).

Regarding potential benefits from voluntary disclosure, besides being considered in the sentencing, Article 8 of Law 36/94 establishes a mitigation of the penalty for corruption cases where the defendant aids the investigation in the gathering of evidence or in the identification and capture of other criminally liable persons.

## 13 Cooperation Provisions / Leniency

**13.1 If a person or entity voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person or entity, can the person or entity request leniency or "credit" from the government? If so, what rules or guidelines govern the government's ability to offer leniency or "credit" in exchange for voluntary disclosures or cooperation?**

Although there is no specific regime affording special protection to whistleblowers, several provisions grant a waiver or mitigate the penalty for perpetrators who, under certain conditions, report the crime (within limited timeframes) or who decisively contributed to the gathering of evidence which allows the identification and capture of other criminally liable persons.

In general terms, Law 93/99 establishes special measures for the protection of witnesses in criminal proceedings. In addition, Article

4 of Law 19/2008 establishes that government, state-owned company and private sector workers, who report offences that they become aware of during their work or because of the exercise of their duties cannot, in any form, including non-voluntary transfer or dismissal, 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.

In the event of an active corruption crime within the public sector, Article 9 of Law 36/94 establishes that the provisional suspension of the proceedings may be offered to a defendant where he or she has reported the crime, or the Public Prosecutor considers him or her to have decisively contributed to the unveiling of the truth.

**13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in your jurisdiction, and describe the favourable treatment generally received.**

Article 374-B of the Criminal Code is applicable to crimes of corruption in the public sector and undue receipt of an advantage and, under certain conditions, establishes that penalties can be mitigated or waived altogether.

Waiving of the penalty under this article requires: (i) the perpetrator of the crime to report the crime within 30 days of its occurrence, assuming criminal proceedings have not already been initiated, and as long as the perpetrator voluntarily returns the undue advantage or its value; (ii) before the practice of the act or omission, the perpetrator to voluntarily repudiate the undue advantage previously accepted or return it; and (iii) before the act or omission is practised, the perpetrator to withdraw the promise or refuse its offering or request its return.

On the other hand, the penalty may be mitigated if the perpetrator: (i) specifically aids the investigation in acquiring and gathering decisive evidence or capturing other responsible persons; or (ii) practised the criminal facts by request from the public official, either directly or by means of an intermediary.

## 14 Plea Bargaining

**14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed-upon sentence?**

The Portuguese Supreme Court of Justice has already declined the possibility of an agreed-upon sentence, mainly because of the lack of a specific legal regulation for it.

The defendant can keep silent because of the privilege against self-incrimination but not in exchange for reduced charges. The defendant can also confess the facts for which he or she is indicted, renouncing the giving of any further evidence with the facts being considered as proved, meaning the determination of the penalty is made immediately, reducing the judicial fee by half. However, the confession can only have said effects if it was free, complete and unreserved and if the maximum penalty for the crime is equal to or fewer than five years of imprisonment.

**14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?**

There are no specific applicable guidelines.



## 15 Elements of a Corporate Sentence

**15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of a sentence on the defendant? Please describe the sentencing process.**

After the court determines that a defendant is guilty of a crime, it will decree the sentence. The applicable punishment is established by the criminal statutes with a minimum and a maximum penalty. These limits can be extended or diminished in case there are mitigating (such as whether the commission of the crime was by abetting or was solely attempted) or aggravating circumstances (for instance, the defendant is a recidivist).

Within the legal boundaries of the penalty, the court decides the sentence by means of an analysis of the defendant's level of guilt and the deterrence requirements. Between the maximum limit given by the defendant's guilt and the minimum limit corresponding to the protection needs of the legal interest endangered by the commission of the crime, the specific value of the penalty will be set based on ensuring that the defendant will no longer commit crimes in the future due to said sentence.

In that calculation, the court considers (i) the degree of unlawfulness of the behaviour, the execution of the crime and the severity of its consequences, as well as the nature of the duties infringed by the defendant, (ii) the intensity of the criminal intent or negligence, (iii) the emotions displayed in the commission of the crime and the objectives and motives of the defendant, (iv) the personal conditions of the defendant and its economic situation, (v) the defendant's behaviour previous to the crime, especially when the defendant should reverse the consequences of the crime, and (vi) the condition of maintaining lawful behaviour if he or she is sentenced to a penalty.

Under certain circumstances, the court can replace the penalty with other sanctions, including suspension of imprisonment, a fine or even the prohibition to exercise a profession, function or activity.

**15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.**

Similar to the process of sentencing a singular person, a sentence on a corporation must be primarily decided by the deterrence factor and consider (i) the degree of unlawfulness of the behaviour, the execution of the crime and the severity of its consequences, as well as the nature of the duties infringed by the defendant, (ii) the intensity of the criminal intent or negligence, (iii) the emotions displayed in the commission of the crime and the objectives and the motives of the defendant, (iv) the personal conditions of the defendant and its economic situation, (v) the defendant's behaviour previous to the crime, especially when the defendant is meant to reverse the consequences of the crime, and (vi) the condition of maintaining lawful behaviour if it is sentenced to a penalty.

The main applicable penalties are a fine, which might be replaced by an admonition, good conduct monitoring, and the dissolution of the legal entity. The court may also decide to require the corporation to exhibit certain behaviour needed to cease the unlawful activity, order a prohibition to enter into agreements, restriction of access to subsidies or grants or the exercise of an activity, the closure of an establishment and the publication of the sentence.

## 16 Appeals

**16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?**

A guilty verdict is appealable by the defendant. Both convictions and acquittals are appealable by the Public Prosecutor's Office, according to the legality and objectivity principles that guide its procedural conduct and depending on the position assumed by the Public Prosecutor's Office at trial, that – at least, in theory – may be entirely favourable to the defendant.

If the people whose interests have been frustrated by the commission of the crime, and for who the law especially intended to protect, demand to be recognised with the formal status of victims, they are also granted legal standing to appeal the acquittal of the defendant.

Parties who claim civil compensation from the defendant can also appeal against the parts of the decision not favourable to them.

**16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?**

The Portuguese Criminal Procedural Law does not separate a guilty verdict and the sentence itself. The internal reasoning, voting and deciding process of the judges or jury is not appealable, only the sentence (which also communicates the guilty verdict of the court) itself and as a whole.

**16.3 What is the appellate court's standard of review?**

As stated in question 2.1 above, the appellate court's structure includes courts of appeal and the Supreme Court of Justice.

The courts of appeal have jurisdiction concerning factual and legal matters, whereas the Supreme Court of Justice only has jurisdiction regarding legal issues. However, even when the law restricts the jurisdiction of the court to legal aspects, the appeal can be founded, if the invalidity results from the wording of the sentence, on insufficiency of proof for the decision, an irreconcilable contradiction of rationale or a mix of rationale and decision and manifest error in the assessment of evidence.

There are also extraordinary appeals in Portuguese jurisdiction, namely for the standardisation of jurisprudence, the revision of *res judicata* decisions under particular circumstances and the appeal of the enforcement of an unconstitutional rule to the Constitutional Court.

**16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?**

Excluding the rulings from the Constitutional Court, that are restricted to a purely normative analysis (although with practical implications within the proceedings, to be duly implemented by the appeal court) and what was said above regarding limitations of jurisdiction, the appellate court can fully alter the sentence of the lower court or it can remand the process for new trial regarding the whole case or on only the specific questions underlined in the appeal, whenever the superior court cannot decide on the case (for example, if a new critical assessment of proof is required).



**Tiago Geraldo** joined the firm in 2008. He is a member of the litigation department. His practice focuses in the area of criminal litigation, including regulatory offences, especially in the economic and financial fields. He also provides collaboration within the areas of competition law, corporate law, labour law and tax law, regarding criminal or quasi-criminal aspects. In parallel, he has been counselling companies and individual clients on a variety of matters related to compliance and regulatory enforcement, in different sectors such as banking, capital markets, energy, telecommunications and media. He is an Assistant Teacher at the University of Lisbon School of Law, teaching criminal law. He is also a Researcher at the Center for Research in Criminal Law and Criminal Studies (IDPCC) and founding associate of the Institute of Criminal Law and Criminal Studies (IDPCC) of the University of Lisbon School of Law, participating as a guest lecturer in conferences and postgraduate courses on matters related to criminal law, criminal procedure, regulatory offences and compliance.

**Morais Leitão, Galvão Teles, Soares da Silva & Associados, S.P. R.L.**  
 Rua Castilho, 165  
 1070-050 Lisbon  
 Portugal

Tel: +351 213 817 400  
 Email: [tgeraldo@mlgts.pt](mailto:tgeraldo@mlgts.pt)  
 URL: [www.mlgts.pt](http://www.mlgts.pt)



**Tiago da Costa Andrade** joined the Firm in September 2018. He is currently a member of the corporate and M&A team. Previously, he was a member of the litigation and arbitration team. Tiago has been a Teaching Assistant for criminal procedural law at the Law Faculty of the University of Coimbra (2017). He is the author of a monograph – *O Crime de Burla: Bem Jurídico e Imputação Objectiva (The Crime of Fraud: Legal Interest and Objective Imputation)* – has published articles about criminal and misdemeanours law and participates in international conferences as a guest speaker in the fields of criminal law and criminal procedural law.

**Morais Leitão, Galvão Teles, Soares da Silva & Associados, S.P. R.L.**  
 Rua Castilho, 165  
 1070-050 Lisbon  
 Portugal

Tel: +351 210 050 502  
 Email: [tcandrade@mlgts.pt](mailto:tcandrade@mlgts.pt)  
 URL: [www.mlgts.pt](http://www.mlgts.pt)

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With a team comprising over 250 lawyers at a client's disposal, Morais Leitão is headquartered in Lisbon with additional offices in Porto and Funchal. Due to its network of associations and alliances with local firms and the creation

of the Morais Leitão Legal Circle in 2010, the firm can also offer support through offices in Angola (ALC Advogados), Hong Kong and Macau (MdME Lawyers) and Mozambique (HRA Advogados).

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 GALVÃO TELES, SOARES DA SILVA  
 & ASSOCIADOS