

# CORPORATE FRAUD & CORRUPTION

ANNUAL REVIEW 2020



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MAY 2020 • ANNUAL REVIEW

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

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## INTRODUCTION

Corporate fraud and corruption can strike companies of any size, damaging these organisations as well as the broader economy. It is imperative that companies are prepared to tackle financial misconduct no matter what guise it takes.

In the coming months and years, as the global economy suffers then recovers from the damage caused by the COVID-19 outbreak, vigilance will be more important than ever. It would be easy for firms to take their eye off the ball as they focus on other matters.

Being proactive is the key to avoiding fraud and corruption. To be successful in the fight against fraud and corruption, companies must have sufficient controls and measures in place to address internal misconduct, but also within third parties. Companies must do their due diligence. They must carry out fraud risk assessments, develop effective policies and procedures, provide awareness training to employees and deliver consistent messaging to all stakeholders. Strong leadership in these areas can help companies overcome the challenges.



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## Portugal ■

■ **Q. To what extent are boards and senior executives in Portugal taking proactive steps to reduce incidences of fraud and corruption from surfacing within their company?**

**GERALDO:** All boards and senior executives of important Portuguese companies acknowledge that mere suspicions of fraud and corruption pose serious operational and reputational risks. The concrete measures adopted to avoid incidents depend on their sense of the relevant compliance risks, which in turn depend on the industry sector those companies operate in. In regulated sectors, Portuguese boards are increasingly aware and taking proactive steps toward a broad and effective compliance culture. Besides the management mentality ‘revolution’ we saw taking place after the 2007-08 crisis, the affirmative defence – provided under Portuguese criminal law – of having in place adequate procedures to prevent fraud and corruption, also encourages companies to prioritise such preventive procedures and tools.

■ **Q. Have there been any significant legal and regulatory developments relevant to corporate fraud and corruption in Portugal over the past 12-18 months?**





**GERALDO:** The new regime for the exercise of political and high public positions was approved in 2019, listing the impediments within the exercise of those positions, their declarative obligations and the respective sanctioning regime. It also governs registering interests and the general regime applicable to institutional offers and hospitalities, setting the limit value of €150 for offers, even if any offers, regardless of the value, must always be registered before a public body. Invitations to official events or from national or foreign public entities may be accepted, as well as offers with a value higher than €150, provided they are compatible with the institutional nature or the relevance or representative nature of the office or correspond to a socially adequate conduct in accordance with the normal practices. Offers for transport or accommodation made in the context of family or personal relationships can also be accepted and are not subject to registration. The Portuguese Ministry of Justice recently announced the creation of a task force to study some potential major developments in this field, including the creation of anti-corruption specialised courts, the possibility of splitting mega-cases and the introduction of plea-bargaining mechanisms, similar to *'delação premiada'* in Brazil.

■ **Q. When suspicions of fraud or corruption arise within a firm, what steps should be taken to evaluate and resolve the potential problem?**

**GERALDO:** If suspicions of fraud or corruption arise within a company, an internal investigation should be launched immediately. That presupposes that the company already had in force an effective compliance programme built to identify and fix potential legal problems – a sort of ‘internal enforcement’ policy. Key issues

for such programmes include ‘hotlines’ and general communication channels and overall responsibility, preservation of relevant data and sources of information, and the evaluation of data governance considerations. In practical terms, an archetypal internal investigation encompasses three stages: planning and framing the scope, collecting information and evidence, and reporting. The procedural legitimacy of the internal investigation is paramount and should run its course absolutely without any conflict of interest. For that reason, in addition to knowledge and experience reasons, it may be advisable to engage outside legal consultants accustomed to handling similar cases. The outcome of the internal investigation may recommend the need for disclosure to authorities and taking appropriate measures – namely, providing compliance training to employees – to prevent further incidents in the future. Such sensitive decisions must be made with extra care and regard to all relevant internal and external considerations.

■ **Q. Do you believe companies are paying enough attention to employee awareness, such as training staff to identify and report potential fraud and misconduct?**

**GERALDO:** Although stronger measures to reduce fraud and corruption risks within a company are often tailored and implemented after a legal incident is uncovered, in recent times Portuguese companies seem to understand that prevention is better than cure. In fact, many companies are investing heavily in ensuring that their employees undergo some sort of compliance awareness training. However, due to the dynamic legal environment, with all the abrupt legal and regulatory changes, they may sometimes lack the



discipline to update those training sessions with the necessary periodicity.

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■ **Q. How has the renewed focus on encouraging and protecting whistleblowers changed the way companies manage and respond to reports of potential wrongdoing?**

**GERALDO:** Compared to other countries, the legal framework for whistleblower protection is still incipient in Portugal, though relevant developments may be expected ahead. The Ministry of Justice is preparing broad legislative package on fraud and corruption that may include actual plea-bargaining mechanisms. Several legal practitioners have spoken out, asking the government and parliament to discard some extreme examples and take a balanced approach that avoids retaliation against the whistleblower, so the latter may be seen as an additional and important means of fighting corruption, but also – and no less importantly – to avoid the staggering harm caused to the life and career of falsely accused defendants. Within private companies, however, the ‘protect the whistleblower’ culture is changing before our very eyes and already enjoys massive popularity. It is currently leading to the deployment of several internal ‘hotlines’ and encouraging more and more employees to come forward – which has proven to be beneficial for the company itself.

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■ **Q. Could you outline the main fraud and corruption risks that can emerge from third-party relationships? In your opinion, do firms pay sufficient attention to due diligence at the outset of a new business relationship?**

**GERALDO:** Unlike what happened a few years ago, the scope of due diligence screening has started to include fraud and corruption risks, as well as other operational and reputational contingencies, such as anti-money laundering (AML) and conflict of interest, among others – vis-à-vis other companies and their owners and corporate bodies. Such background assessment relies on all available sources, such as corporate registration details, criminal records, bankruptcy checks, lists of banned and disqualified persons, litigation history and the internet, including social media. That comprehensive risk-related analysis is currently carried out, not only on relevant mergers and acquisitions, but also at the outset of new business dealings and to existing third-party relationships. Red flags raised at those moments may prevent serious incidents and losses in the future. But there is still room to improve. Portuguese companies need to pay greater attention to the risks related to contracting with local government officials and politically exposed people (PEPs) and also to the existence of anti-bribery laws with extraterritorial jurisdiction,



*“A compliance programme may never be seen nor construed nor applied as a prêt-à-porter suit. To be effective, it must be tailor-made: planned, designed and dressed to fit all the legal and regulatory demands and requirements of a given company.”*

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which may hold Portuguese companies and their boards liable for actions of third parties in their name or on their behalf performed abroad.

**■ Q. What advice can you offer to companies on implementing and maintaining a robust fraud and corruption risk management process, with appropriate internal controls?**

**GERALDO:** To use a simple and suggestive metaphor, a compliance programme may never be seen nor construed nor applied as a prêt-à-porter suit. To be effective, it must be tailor-made: planned, designed and dressed to fit all the legal and regulatory demands and requirements

of a given company. To design and implement such a specific programme, one must assess thoroughly and monitor permanently all the existing and supervenient legal, operational and reputational risks. Routinely testing the adequacy of the programme and the policies in force, and consolidating awareness through repeated, and updated, training sessions to the company's employees is also of key importance. Finally, and although it is commonly spoken and understood as a cliché, the truth is that there is no such thing as an effective compliance programme or an authentic compliance culture without a clear tone from the top. Leaders must lead – first and foremost, by example. ■

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Morais Leitão, Galvão Teles, Soares da Silva & Associados is a leading full-service law firm in Portugal, with decades of experience. Moraes 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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