



INDEPTHFEATURE

CORPORATE FRAUD & CORRUPTION

2021

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Introduction

The spectre of fraud and corruption can hang over any business, irrespective of industry or jurisdiction. Though companies have made great strides to address the risks, COVID-19 has changed the paradigm.

The mass migration to remote working in response to the pandemic means more employees are operating with reduced oversight. Now more than ever, companies must implement strategies to prevent fraud to the extent possible. Regular training to help employees recognise fraud should be carried out, as they form the vanguard when it comes to raising red flags. Anonymous reporting systems also encourage staff to come forward with information. If fraud is detected, a thorough investigation should follow, and it may be necessary to notify and cooperate with authorities.

Around the world, governments are cracking down on fraudulent activities and corrupt practices. In the US, for example, the Biden administration is expected to take a more aggressive stance.

As we move into the next phase of the pandemic, a return to the 'normal' we knew is unlikely. Remote working, for example, is set to persist, at least in some capacity. Companies must protect themselves and arm their employees for the fight against fraud and corruption in the 'new normal'.

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canvasses the opinions of leading
professionals on current trends in
corporate fraud & corruption.

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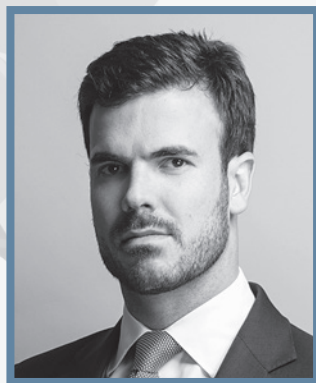
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PORTUGAL

*Morais Leitão, Galvão Teles,
Soares da Silva & Associados*

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Tiago Geraldo is a managing associate in the regulatory offences and compliance department. 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 relevant regulatory disputes in sectors such as energy, banking, capital markets, telecommunications and media. He teaches criminal law as assistant teacher at the University of Lisbon School of Law and regularly writes and lectures in seminars and conferences about a broad range of topics related to criminal justice.

Morais Leitão, Galvão Teles, Soares da Silva & Associados

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

A. In recent years, there has been steady growth, both in the number of cases and in their media exposure, of corruption-related investigations and related criminal infractions, mainly involving the political and public sector and the sports sector in Portugal. The number of corruption investigations related to international trade or in the private sector has been negligible. However, the aftermath of economic crises, such as COVID-19, can lead the authorities to pursue mega-investigations which lack credible evidence and push forward cases that simply do not hold up in court, which leads, wrongly, to the notion that in Portugal the punishment for corruption is still too soft, which is far from the case.

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?

A. In addition to the traditional crimes of active and passive corruption and related incriminations, the Portuguese government is preparing some changes that may have a large impact on the fight against corruption. Among these changes is the creation of a legal regime for the protection of whistleblowers and the obligation to implement compliance programmes in public entities and large and medium-sized companies, with minimum standards and potential consequences for failure to adopt such programmes. Furthermore, this new legislative package provides for increased penalties applicable in corruption convictions and sentencing agreements in corruption cases, inspired by plea-bargaining agreements available in the common-law system that could significantly improve the length and effectiveness of investigations.

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

A. In Portugal, there is no regulatory authority in charge of centralised law

Morais Leitão, Galvão Teles, Soares da Silva & Associados

enforcement for corruption. However, the new legislative package also provides for the creation of a General Regime for Corruption Prevention (GRCP) applicable to both public and private sectors, as well as an Agency for Corruption Prevention, responsible for monitoring the implementation of the GRCP, among other preventive functions. Currently, law enforcement for corruption matters is carried out only by criminal investigation authorities spread throughout the country, in the respective investigation departments of the Public Prosecutor's Office, which in the largest judicial districts include specialised anti-bribery sections. In particularly complex cases and with territorial dispersion, the investigation is conducted by the Central Department of Investigation and Penal Action. While the lack of a regulatory authority is lamentable, it is not a valid reason to explain the lack of efficiency in investigations.

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

A. A company which is targeted in a corruption case has the exact same rights as anyone who is considered a suspect or who becomes a defendant in a criminal case, starting with the presumption of innocence. It is recommended in all circumstances that a lawyer is present and follows the investigation or the dawn raid, to understand its nature, be it criminal or regulatory, the main features of the case at hand, its relationship with the targeted company and its procedural status, notably in order to better and more thoroughly advise the company on an appropriate reaction. Companies should undertake any recommended action, which may include, *inter alia*, an internal risk analysis, mapping the possible consequences that the company may suffer or supporting a more grounded decision by management on the position to adopt in the proceedings.

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?



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A. In tackling and dismantling corrupt practices, where there is normally a pact of silence, the role of the whistleblower is and will always be fundamental, starting from within organisations, which should promote the implementation of whistleblower channels and mechanisms and encourage them through guaranteed anonymity and by taking effective measures following a legitimate accusation of illicit acts or omissions committed by company officers or employees. We cannot and should not, however, fall into the opposite extreme and create a culture of permanent whistleblowing, where workers watch each other looking for the slightest fault to report. Moreover, although the public opinion and media discourse is currently sensitive and supports the need to expand whistleblowing channels and the role of whistleblowers, there are some risks to be aware of, such as those associated with so-called professional whistleblowers, often outsiders to the organisation who resort to crimes to obtain supposedly incriminating information.

Q. What advice can you offer to companies on conducting an internal



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investigation to follow up on suspicions of fraud or corruption?

A. My first and main advice to Portuguese companies on this matter is quite simple: you should do more internal investigations. Although today corporate compliance is a well-known reality, and routines well developed in the most relevant Portuguese companies, internal investigations and audits are still uncommon, especially compared to countries where this practice has existed for a long time and with good results. In order to change habits, it is necessary to raise awareness and make it clear that internal investigations are neither a threat nor a means to expose the company. On the contrary, internal investigations can be defined as a prophylactic risk management exercise: just like going to the doctor for a check-up or seeking a specialist consultation for a suspected health issue, internal investigations often help to prevent major legal problems, or at least contain their impact, by avoiding or mitigating the company's liability. To be useful and effective, internal investigations must be planned and conducted considering all relevant legal aspects, defining the subject

matter and the evidence to be collected, and providing for a non-judgmental environment that encourages openness from those who are cooperating, which tends to be easier to achieve when people independent of the organisation are involved with the process.

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

A. Companies must start by recognising the obvious: prevention is better than cure. In today's business context, and in a globalised economy, there is no company that, from the point of view of its management, does not realise that corruption and fraud, although they may theoretically generate immediate financial benefits, always result in an enormous loss of value, reputation and goodwill, which can only be recovered several years later, if at all. Furthermore, individual penalties may include imprisonment for those responsible, and companies can be subject to significant fines, among other measures, such as being barred from contracting with public entities. Once that premise is established, companies must be consistent

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and establish themselves as the first line of defence against the risk of corruption and fraud, identifying sensitive risk areas within their businesses, creating awareness among officers and employees, and closely monitoring activity in those risk-sensitive areas, ideally in partnership with qualified risk advisers. But companies should not expect miracles. Even if it can be reduced to a marginal level, the criminal risk within a company will always exist. However, if the company has done everything possible to contain it, these efforts can prevent criminality and its associated liabilities from spreading throughout the organisation. □

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MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS is a leading, full-service law firm in Portugal, with a solid background of decades of experience. Widely recognised, the firm is a reference in several branches and sectors of the law on a national and international level. The firm's reputation among both its peers and clients stems from the excellence of legal services provided, characterised by unique technical expertise, combined with a distinctive approach and cutting-edge solutions that often challenge some of the most conventional practices.

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