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White-Collar Crime 2021

Portugal: Law & Practice

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Law and Practice

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CONTENTS

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1. LEGAL FRAMEWORK

1.1 Classification of Criminal Offences

In Portugal, most white-collar offences are characterised as administrative offences or crimes.

Administrative offences are minor, less serious offences when compared to crimes and they generally refer to social ordering. Crimes, in general, have a higher level of harm to legal interests that are essential to the organisation, structure and functioning of the society. Administrative offences tend to have monetary fines as sanctions, and they are processed by administrative authorities. These fines may be challenged in court through an appeal from the administrative authority's decision.

Regarding the necessary conditions for an offence to be punishable, in general, intent is necessary, although intentions are not punishable when they are not carried out in any way. Negligent conducts are only punishable when the law provides so.

However, it is possible for a person to be held liable for attempting to commit an offence, when legally provided. Generally speaking, the penalty is mitigated.

Concerning crimes, an attempt is also punishable if, for the completed offence, the imprisonment time is more than three years (Article 23 of the Portuguese Criminal Code).

1.2 Statute of Limitations

The crimes referred to in the following sections have a general limitation period of 15 years. Although, in Portugal, the limitation period is generally established according to the maximum applicable penalty of the crime, there is a specific legal provision that includes several white-collar crimes such as money laundering and corruption (Article 118, No 1, al. a) of the Criminal Code).

Regarding administrative offences, limitation periods are generally calculated according to the amount of the monetary fine. For instance, the general rule is that, for an offence with a monetary fine higher than EUR49,879.79, there is a limitation period of five years. For those that have a monetary fine between EUR2,493.99 and EUR49,879.79, there is a limitation period of three years; less than this amount, the limitation period is one year.

A limitation period begins to run since the day the fact is perpetrated. Regarding continuing offences, this period begins to run since the day the last act is practiced. However, these limitation periods are subject to normal suspension and interruption rules and may therefore be extended.

1.3 Extraterritorial Reach

Portuguese law is applicable in Portuguese territory, regardless of the agent's nationality, and inside Portuguese ships and aircraft.

Concerning crimes committed outside Portuguese territory, Portuguese law shall be applied when the crime:

- is perpetrated against a Portuguese citizen, by a Portuguese citizen who is established in Portugal;
- is perpetrated by or against a Portuguese citizen, since:
  - (a) the agent is to be found in Portugal,
  - (b) the crime is also punishable under the legislation of the territory where the crime took place, and
  - (c) the extradition cannot be performed, or if there is a decision of not surrendering the agent as a result of a European arrest warrant or other international agreement

binding Portugal;
- is perpetrated by or against a legal person with headquarters located in Portugal.

Portuguese criminal law is also applicable to crimes committed outside Portuguese territory when Portugal is bound to judge them by an international convention or treaty.

Specific Rules

Aside from the general rules, there are some specific rules regarding extraterritorial reach of Portuguese Law. For instance:

- concerning bribery of foreign public officials within international commerce, Portuguese law shall be applied whenever the active perpetrator is of Portuguese nationality;
- concerning the crime of active corruption, Portuguese law shall be applied to acts committed by Portuguese or foreign citizens who are found in Portugal, regardless of where the action took place;
- concerning the crime of passive and active corruption in the private sector, Portuguese law shall be applied, regardless of where the action took place, when the perpetrator who gives, promises, demands or accepts the bribe or promise of a bribe is a public official or a political official or, if of Portuguese nationality, is an official of an international organisation;
- concerning money laundering, Portuguese criminal law shall be applied when any stage of the money laundering process is related in any way to Portugal.

1.4 Corporate Liability and Personal Liability

Both corporate and personal criminal liability are regulated under Article 11, No 1 and No 2 of the Portuguese Criminal Code.

In fact, corporate liability is an exception, so a legal person can only be responsible when expressly provided for by law. The general rule is that only individuals are criminally responsible.

For instance, money laundering, undue receipt of an advantage and corruption are crimes for which corporate liability exists, if the crime is committed on behalf of the company and in its collective interest, by someone who occupies a position of leadership.

In these cases (when corporate liability exists in abstract terms), it may coexist with individual liability and it does not depend on it.

In the context of a merger or a spin-off, the successor entity (or entities) can be held liable of offences committed prior to the merge. Likewise, if there is an acquisition. In short, corporate liability remains with the same legal person by whom the offence has been committed, as a result of the Portuguese constitutional principle that states that punitive liability is personal and non-transferable.

However, those who occupy a leadership position within the company are, in subsidiary terms, responsible for the payment of the monetary fine for which the company was convicted, if the offence was committed during the time they have occupied the leadership position or when, due to their conduct, the company does not have the capacity to pay.

Regarding administrative offences, both companies and individuals may be held liable, although a company liability is excluded when the employee acts against its direct orders. In that case, only the employee may be responsible for the offence.

1.5 Damages and Compensation

Those who are victims of white-collar offences can ask for a compensation, within the criminal procedure and, therefore, in the criminal court. This requires a global analysis of the facts and is intended to avoid contradictions with regard to the same facts. The victim has to demonstrate that there is an illicit fact, the offender's guilt, the damages suffered and a relationship between the fact and the damage.

However, in some cases it is possible to do it in the civil court, separately. For instance, if the criminal procedure does not lead to an accusation within eight months or if the damages occur after the charges or if they are not known (or completely known) by that time (Articles 71 and 72 of the Portuguese Criminal Procedure Code).

1.6 Recent Case Law and Latest Developments

Recently, there have been several high-profile cases related to white-collar offences. For example:

- the "Marquês" operation, in which a former Prime Minister and the former CEO of one of the largest Portuguese private banks (among other corporate elites, namely the former chief executives of Portugal Telecom) were formally charged with several counts of corruption, money laundering, document forgery and tax fraud;
- the "E-Toupeira" operation, related to alleged corruption practices in sports, which to begin with involved a major Portuguese football club that was subsequently entirely dismissed from any liability in the pre-trial stage;
- the "Lex" operation, related to alleged corruption practices in the judicial system, where two former judges of the Lisbon Court of Appeals were formally indicted;
- the "CMEC" case, related to alleged corruption practices in the energy sector, involving top managers from major Portuguese companies operating in the energy sector and former ministers and secretaries of state from the Portuguese government.

Recently, the president of a major Portuguese football club was also detained on suspicion of deception, breach of trust and money laundering.

Concerning legislation, the Portuguese Parliament, regarding National Strategy to Fight Corruption (*Estratégia Nacional de Combate à Corrupção* 2020–2024), is now discussing several alterations to the Portuguese Criminal Law – the Criminal Code, the Criminal Procedure Code and related laws. These alterations imply, for example, the introduction of plea-bargaining mechanisms.

2. ENFORCEMENT

2.1 Enforcement Authorities

White-Collar Crimes

Regarding the investigation of white-collar crimes, the authority responsible is the Public Prosecutor's Office, aided by police agents, namely the Judiciary Police, especially the National Anti-Corruption Unit and the National Unit to Combat Cybercrime and Technology Crime.

Usually, the investigation of most relevant cases is carried out by the Central Department of Investigation and Prosecution, which has nationwide jurisdiction to co-ordinate and direct the investigation and prevention of some specific criminal offences, namely those which are of a violent nature, of particular complexity or highly organised, such as white-collar crimes.

The Public Prosecutor and police agencies have full competence regarding white-collar criminal

offences. However, the Bank of Portugal, the Portuguese Securities Market Commission, the Registry and Notary Office and the Tax Authority, among others, are also responsible for investigating regulatory infractions related to white-collar offences.

These entities may also impose, in their areas of competence, regulations which create requirements to ensure adequate compliance and measures, which help to prevent white-collar offences.

2.2 Initiating an Investigation

Most white-collar crimes are public crimes – therefore the investigation is officially initiated by the Public Prosecutor. It is possible for him or her to know about the crime on their own, via the criminal police or upon complaint.

In these types of crimes, it is not necessary for the offended to present a complaint for the criminal procedure to run its course – it is possible for the procedure to begin and proceed only by the Prosecutor's Office initiative.

Also, the entities referred in **2.1 Enforcement Authorities**, within their monitoring and supervision activities, can detect a suspicious situation and start an investigation. As a result, they can report the facts to the Public Prosecutor's Office if they suspect that there is a crime. If the situation is qualifiable as an administrative offence, these authorities can start the investigation, investigate and convict the perpetrator.

2.3 Powers of Investigation

There are powers generally endowed to the Public Prosecutor's Office in any criminal investigation. It is possible to examine people, places, things; it is also possible to search people and places when it is suspected that someone keeps items related to a crime or when it is suspected that something related to a crime is to be found in a private place; it is possible to intercept calls and other media; it is also possible to talk to witnesses.

Aside from these general powers, there are some special provisions, namely regarding organised crime and economic and financial crime. Law 5/2002, 11 January 2002, which establishes measures to combat organised and economic-financial crime, allows a more effective collection of evidence by means of requesting documentation and information. Under this law, any breach of banking and professional secrecy must be ordered by the judiciary authority conducting the proceedings. This order must identify the envisaged individuals and it must specify the information and documents to be surrendered, 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.

The enforcement body also has complete access to the tax administration database. Financial institutions are required to provide the information requested within a period of five days (if the information is available as computer data), or 30 days (if the information is not available as computer data); the latter timeframe is reduced to 15 days if there are suspects detained under custody. All documents not voluntarily rendered can be apprehended by court order.

2.4 Internal Investigations

In Portugal, only some activities are regulated regarding internal investigations.

For instance, financial institutions and auditors must maintain an independent, permanent and effective "function of compliance" to monitor and enforce internal control procedures regarding AML and other risks.

The Bank of Portugal and the Portuguese Securities Market Commission define several requirements for this "function" – they must have an effective risk management model; they have several periodic reporting duties; they must have a compliance officer to ensure the effective implementation of policies and procedures and adequate controls.

However, there is no general regulation regarding internal investigations. So, each company adopts (if and when it wants) specific procedures of internal investigation.

If a company has internal investigations, the proof obtained can be considered by enforcement authorities and courts, when carried out to the criminal procedure. However, it is mandatory to respect the legal provisions regarding legality of evidence, mainly stated in the Criminal Procedure Code. That is to say that forbidden methods of evidence obtainment are still applicable.

2.5 Mutual Legal Assistance Treaties and Cross-Border Co-operation

Regarding Mutual Legal Assistance, Law 144/99, 31 of August 1999 predicts international judiciary co-operation in criminal matters, which regulates both active and passive extradition.

Portuguese citizens extradition is only admitted when in conditions of reciprocity, in cases of terrorism and international organised crime, and it is mandatory for the demanding country to ensure a due process of law.

Portugal is also signatory of several international agreements and treaties regarding international co-operation, which include white-collar offences. For instance: the Convention on Cybercrime, the Convention against Corruption and the Convention on Action Against Trafficking of Human Beings.

2.6 Prosecution

If the Public Prosecutor's Office, in face of the probatory elements gathered during the investigation, considers that there is sufficient evidence of a crime, it prosecutes the company or the individual.

The existence of sufficient evidence means that there is a reasonable possibility that the offender will be subject to a penalty or a security measure during the trial.

When these conditions are fulfilled, the Public Prosecutor's Office presses charges, including in regard to white-collar crimes.

2.7 Deferred Prosecution

It is possible for the Public Prosecutor and the defendant to agree on the provisional suspension of enforcement procedure, in accordance with a judge (Articles 281 and 282 of the Criminal Procedure Code) and without a trial. This mechanism allows for the procedure to be suspended upon the defendant adhering to an injunction and certain rules of conduct.

There are several conditions that must be fulfilled for the agreement to be offered:

- the crime must be punishable by imprisonment for not more than five years, or with a penalty different from the prison sentence;
- the defendant and the offended party (when part of the procedure) must agree on the suspension;
- the defendant must not have any previous conviction for similar crimes (ie, a crime of the same nature);
- the defendant must not have benefitted from a previous provisional suspension for a similar crime;
- the defendant must not be submitted to institutionalisation as a safety measure;
- the absence of a high level of guilt; and

- it has to be foreseeable that compliance with the injunction and the rules of conduct are deterrent enough to fulfil the prevention demands in the concrete case.

Aside from this general prediction, there are also specific predictions. For instance, Law 36/94 – that refers to measures applicable to the fight against corruption and financial and economic criminality – establishes that, in cases involving active corruption crime in the public sector, the provisional suspension of the procedure may be offered to a defendant where he or she has reported the crime, or the Public Prosecutor considers him or her to have made a decisive contribution towards the unveiling of the truth.

The suspension in such cases requires fewer conditions: apart from the defendant's contribution, it is only necessary that he or she 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 in the concrete case.

2.8 Plea Agreements

For the time being, it is not possible for the defendant to have a plea agreement – the defendant cannot negotiate the sentence or its execution with the judge. However, the Portuguese Parliament is now discussing this possibility, regarding the National Strategy to Fight Corruption (*Estratégia Nacional de Combate à Corrupção* 2020–2024) which implies alteration to Portuguese criminal law, introducing, among other things, plea-bargaining mechanisms.

3. WHITE-COLLAR OFFENCES

3.1 Criminal Company Law and Corporate Fraud

Portuguese Commercial Company Code, between Articles 509 and 529, establishes several offences, both criminal and misdemeanour, such as the following.

- The manager or administrator who omits mandatory acts for share capital inflows is punishable with a fine of up to 60 days. If the perpetrator intends to jeopardise a partner, the society or a third party then the fine is up to 120 days.
- The manager or administrator who subscribes or acquires for the company its own shares, or helps another to do the same, in violation of the law, is punishable with a fine of up to 120 days.
- The manager who redeems a not-released share, in violation of the law, is punishable with a fine of up to 120 days.
- The manager who redeems or allows to redeem, totally or partially, a share with a right of use or with a pledge, is punishable with a fine of up to 120 days.
- The manager of the administrator who proposes to the partners an illegal assets distribution is punishable with a fine of up to 60 days or up to 120 days if the distribution is made without the partners' approval.
- Those in charge of calling a general meeting of shareholders who omit the calling within the mandatory deadlines, and those who do it without the mandatory formalities, established by law or by contract, are punishable with a fine of up to 30 days.
- Those who show up at an assembly presenting themselves falsely as shareholders and vote are punishable with a fine of up to 90 days.

- The manager or administrator who refuses the consultation of documents that, according to the law, must be consulted in order to prepare an assembly, as well as the one who refuses himself or herself to send that information or does it outside the legal deadlines is punishable with a fine of up to 60 days. If he or she does the same thing during an assembly, the fine is up to 90 days and there is a jail sentence of up to three months.
- Those in charge of providing corporate information, who provide false information, are punishable with a fine of up to 60 days. If the perpetrator intends to jeopardise a partner, the fine is up to 90 days and the jail sentence can be up to six months. If this conduct generates serious damage, the fine is up to 120 days and the jail sentence up to a year.
- Those in charge of calling a general meeting who provide false information within the call are punishable with a fine of up to 150 days and with a jail sentence up to six months. If the perpetrator intends to jeopardise a partner, the fine is up to 180 days and the jail sentence can be up to a year.
- Those who are obliged to write or sign the social assembly's minute and, without a justification, do not do so, and those who prevent someone from signing or writing it, are punishable with a fine of up to 120 days.
- The manager or administrator who prevents or hampers the necessary acts in regard to the auditing of the company, as defined by law, is punishable with a fine of up to 120 days and with a jail sentence up to six months.
- The company that does not have a stock register or does not meet the legal requirements regarding the record and deposit of the shares is punishable with a fine between EUR500 and EUR49,879.79.

3.2 Bribery, Influence Peddling and Related Offences

Bribery

In Portugal, concerning bribery, it is possible to point out the following infractions:

- undue receipt of an advantage – Article 372 of the Criminal Code;
- undue receipt of an advantage by a political or high public official (Article 16 of Law 34/87, 16 July 1987);
- undue receipt of an advantage in the context of sports competitions (Article 8 of Law 50/2007, 31 August 2007).

Regarding the undue receipt of an advantage, it is important to point out that there must be a public official involved, but there is no requirement that the results expected by the perpetrators occurs. A bribe (undue advantage) can be defined as a monetary or non-monetary advantage which benefits the individual who receives it in any way without any legal ground or justification.

When a public official is involved, bribery may qualify as an undue receipt of an advantage, defined as a crime in Article 372 of the Criminal Code and Article 16 of the Law on Crimes of the Responsibility of Political Officials, without any requirement that the results expected by the perpetrators actually occur.

Active Corruption – Article 374 of the Criminal Code

- Corruption of political and high public officials (Article 17 of Law 34/87, 16 July 1987).
- Active corruption in international commerce and active corruption in the private sector (Articles 8 and 9 of Law 20/2008, 29 January 2008).
- Active corruption in the context of sports competitions (Article 10-A of Law 50/2007, 31 August 2007).

- Active corruption of an individual serving in the armed forces or other military force (Article 37 of Law 100/2003, 15 November 2003).

Passive Corruption – Article 375.º of the Criminal Code

- Corruption of political and high public officials (Article 18 of Law 34/87, 16 July 1987).
- Passive corruption in the private sector (Article 8 of Law 20/2008, 29 January 2008).
- Passive corruption in the context of sports competitions (Article 9 of Law 50/2007, 31 August 2007).
- Passive corruption of an individual serving in the armed forces or other military forces for the performance of an illicit action (Article 36 of Law 100/2003, 15 November 2003).

Passive corruption can be defined as the request or acceptance of an undue advantage in order to perform an action or an omission and active corruption as the offer of or promise to offer an advantage of the same kind with that purpose.

Hospitality and promotional expenditures, as well as facilitation payments, may fall within the category of a bribe, particularly in contexts where they may be regarded as consideration for the action or omission to be performed.

However, certain types of conduct are excluded from the criminal legal framework if they are considered to be socially adequate and in line with habits and normal practices.

Article 386 of the Criminal Code provides a very broad definition of "public official" for crime-related purposes. It includes politicians, civil servants, administrative agents, arbitrators, jurors and experts, members of managing or supervisory bodies or workers of state-owned or state-related companies, among others.

Bribery of foreign public officials is also criminalised. Under Article 7 of Law 20/2008, active corruption in the context of international commerce is punishable when an individual, acting on their own behalf or through an intermediary, gives or promises to give an undue advantage to a public official, national or foreign, or to an official from an international organisation, or to a third party with consent or ratification from any of the previously mentioned groups of individuals, as a means to obtain or maintain a business, a contract or another undue advantage in international commerce.

Regarding private parties, active corruption is covered under Article 9 of Law 8/2020. So, those who promise to give or give out an undue advantage to a private-sector worker, or to a third party with his or her consent or ratification, in order to obtain an action or omission constituting a violation of the private worker's professional duties, are punishable with a jail sentence up to five years or a fine up to 600 days. Attempted corruption is punishable in this situation. Where the action performed or omission made by the private-sector worker in return for the undue advantage is capable of distorting competition or causing economic losses for third parties, the maximum possible penalty is applied.

Passive corruption is punishable as well, when a private-sector worker, acting on their own behalf or through an intermediary, demands or accepts, for themselves or for a third person, an undue advantage, or the promise thereof, to perform an action or make an omission constituting a violation of his or her professional duties.

Influence Peddling

Influence peddling, foreseen in Article 335 of the Criminal Code, is a criminal offence of a general nature for which any person – whether a public official or not – may be held liable.

As a result, anyone who asks or accepts a monetary or non-monetary advantage, or the promise of an advantage, in order to abuse his or her influence with public entities is punishable with: a jail sentence between one and five years if he or she intends to obtain an illicit decision; or with a jail sentence of up to three years or a monetary fine if he or she intends to obtain a favourable licit decision. Those who do it through an intermediary, or with his or her consent or ratification, are also punishable.

Those who give or promise a monetary or non-monetary advantage in order to obtain an illicit favourable decision are punishable with a jail sentence up to three years or with a fine.

3.3 Anti-bribery Regulation

Portuguese law does not provide a general duty to report bribery. Nevertheless, the failure to report imminent bribery or corruption practices by those who assume a leading position within the organisation, and who are therefore bound by law to prevent unlawful outputs, may result in the liability of the company itself and the omitting agent.

The Portuguese Companies Code provides that the company's statutory auditor and the members of its supervisory board, as well as the chairman of the audit committee on limited liability company by shares, must disclose before the Public Prosecution Office any criminal suspicions which have come to their knowledge and which may have relevance as a crime of procedural public nature, as it is the case of corruption.

Anti-bribery and anti-corruption are subject to criminal enforcement only. There is, however, an independent administrative entity called the Council for the Prevention of Bribery that develops measures in the field of bribery and related offences. The Council, entitled with soft-law powers only, has issued several instructions and recommendations, namely asking public entities to prepare, apply and publicise bribery prevention plans.

3.4 Insider Dealing, Market Abuse and Criminal Banking Law

Although the majority of banking law offences are misdemeanours, Portuguese law also establishes some crimes related to it. Further, it forbids insider dealing and market abuse.

The Portuguese Securities Code generally forbids the misuse of privileged information. Article 378 sets out which conducts are criminally forbidden, regarding privileged information. So, those who have this kind of information cannot share it with outsiders nor negotiate, advise someone to negotiate or demand, for themselves or for a third party, the subscription, the acquisition, the sale or exchange of securities or financial instruments. Those who violate what is stated are punishable with a financial penalty or with a jail sentence up to five years.

Article 380 predicts accessory sanctions such as:

- losing to the state the object of the offence and the economic benefit derived from it;
- closing of the establishment where the agent develops the activity, or any job related to the offence, for a period of up to two years;
- prohibition of professional activity, or any job related to the offence, for a period of up to three years;
- prohibition of exercising certain directorial and representative functions, among others, in obliged entities to the supervision or control by a sectorial authority, for a period of up to three years; and
- publication of the definitive conviction.

Also, Article 379, No 1 of the Securities Code forbids market manipulation conducts such as (i) disclosure of false, incomplete, exaggerated or biased information, (ii) carrying out operations of a fictitious nature, and (iii) execution of other fraudulent practices which may artificially alter the regular functioning of the securities market or other financial instruments. Those who violate what is stated are punishable with a financial penalty or with a jail sentence of up to five years. If the conduct causes or contributes to an artificial change in the regular functioning of the market, the perpetrator is punishable with a financial penalty of up to 600 days or with a jail sentence of up to eight years.

Conducts that may alter the pricing, the normal conditions of supply or demand for securities or other financial instruments are examples of forbidden practices.

Accessory sanctions predicted under Article 380, previously explained, are also applicable.

Regarding criminal banking law specifically, the General Regime for Credit Institutions and Financial Companies punishes, with a jail sentence of up to five years, those who receive from the public, by themselves or by a third party, deposits or other refundable funds without the mandatory authorisation (Article 200); negligent conducts are not punishable.

Secrecy violation is another crime associated with banking law: banking professionals must not reveal any secret that they have become aware of because of their professional practice. Those who reveal this kind of secret are punishable with a jail sentence of up to a year or with a fine up to 240 days.

However, the majority of banking law offences are misdemeanours (Articles 210 and 211 of the General Regime for Credit Institutions and Financial Companies). For instance: the exercise of activity without observing Bank of Portugal registration obligations; the violation of rules concerning the subscription or realisation of share capital regarding deadlines, amount and representation; the omission, within legal deadlines, of mandatory publications, are examples of misdemeanour punishable with fines between EUR3,000 and EUR1.5 million for legal persons and between EUR1,000 and EUR5 million for individuals. The fraudulent realisation of shared capital and intended acts of ruinous managements, harmful to depositors, investors and other creditors, practiced by corporate members are examples of especially serious infractions, punishable with fines between EUR10,000 and EUR5 million for legal persons and between EUR4,000 and EUR5 million for individuals.

3.5 Tax Fraud

The goal of tax fraud is the non-liquidation, delivery or payment of tax due or the undue obtainment of tax benefits, refunds or other material advantages susceptible to cause a decrease in tax revenues. It can take place by:

- concealment or alteration of facts or values that must be included in the accounting books, or in the declarations presented to the tax administration;
- concealment of undeclared facts or values that must be disclosed to tax administration;
- celebration of simulated deals, either in terms of value, nature or through interposition, omission or substitution of people.

The crime is provided for in Article 103 of the General Regime of Tax Infringements and it is punishable with penalty of imprisonment of up to three years or a fine up to 360 days. The crime is not punishable if the illegal advantage is inferior to EUR15,000.

However, aggravated fraud is also predicted, and it is punishable with a penalty of imprisonment between one and five years for individuals, and a fine between 240 and 1,200 days for legal people. Examples of aggravated fraud are: (i) a material advantage superior to EUR50,000; (ii) the fraud takes place by the usage of invoices or equivalent documents of inexistent operations or with different values, or with the intervention of people or entities different from those of the underlying transaction.

3.6 Financial Record-Keeping

Article 256 of the Portuguese Criminal Code establishes the crime of document forgery, which includes forgery of financial records. So, those who elaborate false financial records or any of its elements, those who forge or alter any of its elements, those who counterfeit another person's signature to forge financial records, those who use one of these documents, and those who provide or hold a falsified document are punishable by imprisonment for up to three years or with a monetary fine.

Aside from the crime of document forgery, Article 379-E of the Portuguese Securities Code currently includes the crime of capital investment fraud, which encompasses the use of false or wrongful information in capital investment operations launched by public companies with a maximum imprisonment of eight years.

Negligent behaviour is also punishable, although this leads to a reduction of the applicable penalty by half.

The General Regime for Credit Institutions and Financial Companies establishes as a regulatory offence the forgery of accounting and the non-existence of organised accounting, as well as the breach of the applicable accounting rules determined by law or by the Bank of Portugal.

3.7 Cartels and Criminal Competition Law

In Portugal, the Competition Authority is responsible for the detection, investigation and punishment of restrictive competition practices, which include agreements, concerted practices and decisions made by business associations which have, as effect, the prevention, distortion or restriction of the competition in all or part of the national market. Cartelisation is an example of these practices, as well as share markets or sources of supply.

Competition law also includes dominant position abuses (for example, limited production, distribution or technical development) and economic dependency abuses (unjustified termination of an established business relationship).

In case of an infraction, the Competition Authority can impose a fine, which cannot exceed 10% of the turnover carried out in the fiscal year immediately preceding the final condemnatory decision, to each of the infringing companies or, in case of an association of companies, the aggregated turnover of the associated companies.

3.8 Consumer Criminal Law

In Portuguese courts, many cases involving Consumers Criminal Law are regarding the complaints book. For instance, if a company does not have a complaints book, does not provide the necessary information for the consumer to file the complaint, does not send the complaint to the competent authority within 15 days, or practices an administrative offence, it is punishable with a monetary fine.

3.9 Cybercrimes, Computer Fraud and Protection of Company Secrets

In Portugal, is possible to find offences related to cybercrime in Law 109/2009, 15 September

2009 (Cybercrime Law), which includes the following.

- Computer falsehood – those who alter informatic data or, in any way, interfere in a computer processing of data, producing non-genuine data or documents, with the intention that they are used as genuine data for legally relevant purposes, are punishable by imprisonment for up to five years or with a fine of 120 to 600 days. Those who use this data or documents, with the intention to harm others or to obtain an illicit benefit, are also punishable.
- Damage related to informatic programs or other informatic data – it is also a crime to erase, alter or destroy informatic programs or other computer data. The crime is punishable by imprisonment of up to three years or with a monetary fine.
- Informatic sabotage – those who prevent or severely disturb the functioning of an informatic system – for instance, by introducing or erasing informatic data, are punishable by imprisonment of up to five years or with a fine of up to 600 days.
- Illegitimate access – those who enter an informatic system without permission are punishable by imprisonment of up to five years.
- Illegitimate interception – it is also a crime to intercept informatic data transmissions, without permission, and to sell or distribute programs that allow others to do the same interception. The perpetrators are punishable by imprisonment for up to three years or with a monetary fine.
- Illegitimate reproduction of a protected program – those who reproduce or show to the public a protected informatic program are punishable by imprisonment for up to three years or with a monetary fine.

Regarding secret violation, see **3.4 Insider Dealing, Market Abuse and Criminal Banking Law**.

3.10 Financial/Trade/Customs Sanctions

The main offences related to financial crime are:

- fraud (see **3.5 Tax Fraud**);
- electronic crime (see **3.9 Cybercrimes, Computer Fraud and Protection of Company Secrets**);
- money laundering (see **3.13 Money Laundering**);
- terrorist financing (Article 5A of Law 52/2003, 22 August 2003, punishable with eight to 15 years of imprisonment);
- bribery and corruption (**3.2 Bribery, Influence Peddling and Related Offences**);
- market abuse and insider dealing (**3.4 Insider Dealing, Market Abuse and Criminal Banking Law**).

The main offences related to illegal trade are those that include drugs, human beings (Article 160 of Criminal Code), weapons (Article 87 of Law 5/2006, 23 of February), wildlife and timber (Convention on International Trade in Endangered Species of Wild Fauna and Flora).

Buying and selling goods in cyberspace – involving, for example, passwords, botnets and malware – can also be qualified as illegal trade.

3.11 Concealment

To establish concealment as a criminal offence, the intention of jeopardising a creditor must be proven. Also, the destruction, the damage or the concealment of one or more assets, carried out by the defendant must be established. If so, the crime is punishable by imprisonment of up to five years or with a fine of up to 600 days.

Also, another concealment criminal offence is established under Article 227-A of the Portuguese Criminal Code. So, those who, after an enforceable sentence, destroy, damage, causes to disappear, conceal or hide part of their assets

in order to frustrate the satisfaction of a credit shall be punished, if the enforcement proceedings are instituted and the creditor's rights are not fully satisfied. The crime is punishable by imprisonment of up to three years or with a monetary fine.

In these cases, the defendant is held liable for both the predicate offence and the concealment of assets.

3.12 Aiding and Abetting

In Portugal, the following are punishable as authors of the crime: those who execute an offence, by themselves or through another person; those who take part in the execution of the crime, by mutual agreement or together with others; and those who determinate others to execute the crime. The applicable penalty will be determined within the legal framework.

Those who help, physically or morally, are punishable as accessories and the penalty is diminished compared to the one provided for the author.

3.13 Money Laundering

Criminal Offences

The Portuguese Criminal Code, under Article 368-A, predicts which requirements must be fulfilled for a conduct to be punished as money laundering.

Regarding predicate offences, the list provided the article includes:

- pimping;
- child sexual abuse;
- extortion;
- traffic (arms, drugs and organs);
- tax evasion;
- bribery;
- corruption;
- fraud; and
- influence peddling.

It also includes any offence punishable with a minimum imprisonment sentence of over six months or a maximum sentence of over five years.

According to Article 368-ANo 2, anyone who converts, transfers, helps or facilitates a conversion or transference operation of property, in order to conceal or disguise its unlawful origin, is punishable with a jail sentence between two and 12 years. However, the jail sentence must not be superior to the one predicted for the predicate offence.

In case of legal entities, the imprisonment sentence is converted into a monetary fine. One month of imprisonment corresponds to a ten-day fine, and each day of fine corresponds to an amount between EUR100 and EUR10,000, which the court shall set depending on the economic and financial situation of the convicted entity and its expenses with employees.

All these elements must be proven by the authorities, in order to convict a defendant for money laundering. In addition, the Public Prosecutor must also prove the wilful intent of the perpetrator, namely the agent has to know that the advantage comes from one of the predicate offences and has the intention to dissimulate its illicit origin or has the intention to avoid that the author or participant of the offence is criminally pursued or subjected to a criminal reaction.

In Portuguese law, "property" also includes any property subsequently obtained through the original property that resulted from the predicate offences.

Other Offences

There are several entities that are responsible for investigations related to money laundering

offences, such as the Bank of Portugal, the Portuguese Securities Market Commission, the Tax Authority and the Registry and Notary Office.

These entities impose in their areas of competence regulations which create requirements to ensure adequate compliance and clear and precise development of the general duties imposed by Law 83/2017.

Penalty provisions include:

- illegitimate disclosure of information, communications, analyses or other elements to clients or third parties;
- disclosure or improper favouring of identity discovery of those who provided information, documents or elements concerning suspicious transactions; and
- non-compliance with orders or legitimate instructions from sectorial authorities, or, by any means, creating obstacles to the execution of such orders/instructions.

If the obligations are not full flied, the entity may entail a penalty of up to EUR5 million, which may be aggravated by up to double of the economic benefit obtained from the infraction or up to 10% of the annual turnover in certain cases.

In addition to monetary fines, regulatory offences may entail additional sanctions such as:

- losing to the state the object of the offence and the economic benefit derived from it;
- closing of the establishment where the agent develops the activity, or any job related to the offence, for a period of up to two years;
- prohibition of professional activity, or any job related to the offence, for a period of up to three years;
- prohibition of exercising certain directorial and representative functions, among others, in obliged entities to the supervision or control by a sectorial authority, for a period of up to three years; and
- publication of the definitive conviction.

4. DEFENCES/EXCEPTIONS

4.1 Defences

A defendant charged with a white-collar crime has the same rights as any other defendant in criminal proceedings, based on the fundamental principle of the presumption of innocence and its interplay in dubio pro reo.

In case of legal persons, their criminal liability may be excluded where the material perpetrator has acted against express orders or instructions given by people with proper authority within the organisation.

A company can also avoid liability if it can demonstrate that the criminally relevant act or omission was not perpetrated on its behalf or collective interest, and that there were no violations of any duties of due vigilance or control by the person with a leadership position responsible for these duties.

Also, a conduct is excluded from criminal legal relevance if it is considered to be socially adequate and in line with habits and normal practices.

The existence of an effective compliance programme can be a defence – for instance, if it exists it is easier for the company to prove that the offence was committed against express orders or instructions given by people with proper authority within the organisation.

4.2 Exceptions

There are no exceptions set forth in the Portuguese jurisdiction.

4.3 Co-operation, Self-Disclosure and Leniency

The Portuguese Criminal Code, under Article 72, sets which legal requirements must be filled for a certain perpetrators' conduct to be considered a mitigating factor. These circumstances must reveal a diminished guilty, illegality and necessity of penalty. Article 72 No 2 illustrates these situations including, for instance, the presence of acts that demonstrate sincere regret on the part of the perpetrator – namely, repairing the damage caused, and a long period of time having passed since the crime was committed.

Self-disclosure and co-operation can be mitigating factors, especially when they have made a decisive contribution towards the unveiling of the truth.

If these requirements are not fulfilled, it is still possible to consider these conducts when establishing the actual penalty, within the crime's legal frame.

4.4 Whistle-Blower Protection

Within Portuguese legislation, we can find some legal provisions mitigating or withdrawing the penalty of the perpetrator who reports the crime or who has contributed to the gathering of evidence which allows the identification and capture of others who are criminally liable.

In general terms, Law 93/99, 14 July 1999, establishes special measures for the protection of witnesses under criminal procedure.

Also, according to Article 374-B of Portuguese Criminal Code, applicable to the crimes of corruption in the public sector and undue receipt of an advantage, it is possible for the agent to be waived if: he or she reported the crime within 30 days of its occurrence and if he or she voluntarily repudiates the undue advantage previously accepted or returns it before the act or omission takes place; or if the perpetrator withdraws the promise, refuses its offering or request its return before the act or omission is takes place.

It is possible for the penalty to be mitigated if the perpetrator helps to obtain evidence or to capture other responsible or performed the criminal acts at the request of a public official, either directly or by means of an intermediary.

Furthermore, Article 4 of Law 19/2008, 21 April 2009, also establishes that workers of the public administration and of state-owned companies, as well as private-sector workers, who report offences that they become aware of in the course of their work or because of the exercise of their duties, cannot be jeopardised in any way, including by means of non-voluntary transfer or dismissal. These workers also have the right to remain anonymous until a charge is brought. After the charge has been brought, they have the right to request a transfer to a different position, which cannot be refused.

Also, Article 8 of Law 36/94 about measures to combat corruption and economic and financial crime, establishes a mitigation of penalty for corruption cases where a defendant aids the investigation, either in terms of the gathering of evidence or the identification and capture of others who are criminally liable.

5. BURDEN OF PROOF AND ASSESSMENT OF PENALTIES

5.1 Burden of Proof

The Constitution of the Portuguese Republic establishes, under Article 32, No 2, that if there is a doubt regarding the agents criminal responsibility, the case must be decided as not guilty (in dubio pro reo). So, there is an innocence

presumption – any guilt presumption would be offending this principle.

Therefore, for the perpetrator to be found guilty, there must be sufficient evidence in the process for the conviction. The Portuguese Procedure Code has a general principle of free appreciation by the judge of the proof provided in the process, although there are some legal criteria applicable to some evidences (eg, expert evidence). However, the judge's conviction must be "beyond a reasonable doubt" and it must be well-argued in the sentence.

During the investigation, the Public Prosecutor's Office gathers the evidence related to the crime. The defendant can also carry probatory elements to the process. During the trial, such evidence and the proof produced during the sessions will lead to the judge's decision.

5.2 Assessment of Penalties

When a defendant it deemed guilty of a white-collar offence, punishable with imprisonment and another penalty that does not imply loss of freedom, the court chooses the second option if it adequately and sufficiently carries out the punishment purposes.

In determining the actual penalty, within the legal framework, the court shall take into account all the circumstances that are not part of the crime's provision, either in favour of the offender or against him or her. For instance, the degree of illegality of the fact, the manner of its execution and the gravity of its consequences, as well as the degree of violation of the duties imposed on the agent and the agent's personal conditions and economic situation.

It is also possible for the penalty to be specially reduced or even dismissed if the crime is punishable by imprisonment for a period not exceeding six months, or by a fine not exceeding 120 days. For the court to find the defendant guilty but not impose any penalty, it is also necessary:

- that the unlawfulness of the act and the culpability of the perpetrator are diminished;
- that the damage has been repaired; and
- the absence of preventive reasons opposing to a dismissal.

On the other hand, recidivism is valued as an aggravating circumstance.

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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. Broadly recognised, Morais Leitão is a reference in several branches and sectors of the law at national and international level. The firm's reputation amongst both peers and clients stems from the excellence of the legal services provided. The firm's work is characterised by a unique technical expertise, combined with a distinctive approach and cutting-edge solutions that often challenge conventional practices. 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), Mozambique (HRA Advogados) and Cabo Verde (VPQ Advogados).

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