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Seventh Edition

Editor
Nicolas Bourtin

The Law Reviews

THE INTERNATIONAL INVESTIGATIONS REVIEW

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THE INTERNATIONAL INVESTIGATIONS REVIEW

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PREFACE

In the United States, it continues to be a rare day when newspaper headlines do not announce criminal or regulatory investigations or prosecutions of major financial institutions and other corporations. Foreign corruption. Healthcare, consumer and environmental fraud. Tax evasion. Price fixing. Manipulation of benchmark interest rates and foreign exchange trading. Export controls and other trade sanctions. US and non-US corporations alike, for the past several years, have faced increasing scrutiny from US authorities, and their conduct, when deemed to run afoul of the law, continues to be punished severely by ever-increasing, record-breaking fines and the prosecution of corporate employees. And while in past years many corporate criminal investigations were resolved through deferred or non-prosecution agreements, the US Department of Justice recently has increasingly sought and obtained guilty pleas from corporate defendants. With the new presidential administration in 2017 comes uncertainty about certain enforcement priorities, but little sign of an immediate change in the trend toward more enforcement and harsher penalties.

This trend has by no means been limited to the United States; while the US government continues to lead the movement to globalise the prosecution of corporations, a number of non-US authorities appear determined to adopt the US model. Parallel corporate investigations in multiple countries increasingly compound the problems for companies, as conflicting statutes, regulations and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence, further complicating a company's defence. These trends show no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot be gleaned from a simple review of a country's criminal code. And while nothing can replace the considered advice of an expert local practitioner, a comprehensive review of the corporate investigation practices around the world will find a wide and grateful readership.

The authors of this volume are acknowledged experts in the field of corporate investigations and leaders of the bars of their respective countries. We have attempted to distil their wisdom, experience and insight around the most common questions and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is it a realistic option for a corporation to defend itself at trial against a government agency? And how does a corporation manage

the delicate interactions with the employees whose conduct is at issue? *The International Investigations Review* answers these questions and many more and will serve as an indispensable guide when your clients face criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that, in its seventh edition, this volume covers 23 jurisdictions.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gift of time and thought. The subject matter is broad and the issues raised deep, and a concise synthesis of a country's legal framework and practice was in each case challenging.

Nicolas Bourtin
Sullivan & Cromwell LLP
New York
July 2017

Chapter 20

PORTUGAL

Fernando Aguilar de Carvalho and Adriano Squilacce[1]

I INTRODUCTION

Corporate conduct and corporate liability for criminal and administrative infringements is a hot topic on the Portuguese legal agenda.

Indeed, recent years have shown a sharp rise in the number of investigations and indictments against corporations, which has resulted in greater awareness of the importance of the implementation and observation of internal rules and guidelines on corporate governance and compliance, generally speaking, with prevention of white-collar crime as a major concern, with tax fraud, tax evasion, corruption and money laundering on the top of the list.

Corporate conduct is subject to close scrutiny by the Portuguese authorities in a variety of areas. The public agency or department that will have jurisdiction over the case varies according to the nature of the conduct and the underlying liability.

The Public Prosecutor's Office is responsible for investigations on corporate conduct that result in criminal liability. The Public Prosecutor's Office has full responsibility and control over the investigations, although certain intrusive measures, such as dawn raids on domiciles and interception of telephone conversations and communications have to be authorised by a judge. Likewise, coercive measures other than identifying and establishing the place of domicile where the suspect can be found and notified have to be granted by a judge. The Public Prosecutor's Office is normally assisted by the judiciary police and, depending on the nature of the crime, by the regular police. It is also common for the tax authorities to work together with and in support of the Public Prosecutor's Office on white-collar crime investigations.

The Bank of Portugal and the Portuguese Securities and Exchange Commission (CMVM) both have investigative powers and jurisdiction over certain administrative offences related to the financial market and to the stock market. Both entities have specific departments that are responsible for such investigations and have the authority to impose fines and other sanctions on corporations, as described below.

The economic crisis that affected Portugal between 2008 and 2015 and had a very strong impact on the financial and stock markets has resulted in several investigations and the administering of fines to corporations and their directors by both the Bank of Portugal and the CMVM. Such decisions are subject to appeal before the Antitrust, Supervision and

1 Fernando Aguilar de Carvalho is a partner and Adriano Squilacce is a senior associate at Uría Menéndez-Proença de Carvalho.

Regulation Court, which is seated in Santarém. Whenever the investigations conducted by the Bank of Portugal or the CMVM result in criminally relevant findings, the proceedings are assigned to the Public Prosecutor's Office for prosecution.

The Antitrust and Competition Authority (ADC) is another department that has investigative powers and jurisdiction on corporate conduct, whenever there is a breach of antitrust and competition laws and regulations, with authority to impose fines and other sanctions. The decisions of the ADC are subject to appeal to the above-mentioned Antitrust, Supervision and Regulation Court.

Although there is no legal duty to cooperate with the authorities in case of a criminal investigation and a company under investigation has, in general terms, the same rights as any individual suspect, such as the right to defend itself and to avoid self-incrimination, corporations, particularly listed companies and multinationals, generally prefer to take a cooperative stance.

However, this does not mean that a corporation facing criminal prosecution will not and cannot take an adversarial stance when it disagrees with the charges being pressed against it. In our experience, it is not uncommon to have high-profile and complex cases against corporations, with intensive media coverage and lasting for several years, result in acquittals.

II CONDUCT

i Self-reporting

As mentioned above, Portuguese law sets forth the privilege against self-incrimination. Therefore, whenever internal wrongdoings constitute a crime or an administrative offence, companies and any other legal entities are not obliged to self-report to judicial and regulatory authorities.

Nevertheless, companies and other legal entities may have an interest in self-reporting internal wrongdoings beforehand and cooperating with authorities because this behaviour will be considered – among other factors – for the purposes of reducing the amount of fines and other applicable sanctions or, in certain cases, staying the proceedings or the enforcement of penalties or even granting discharges or leniency, as the case may be.

Regarding administrative offences, self-reporting of internal wrongdoings may be strongly recommended in some cases. For instance, a company that participates in a cartel may benefit from leniency if it self-reports this illegal activity to the Competition Authority and other additional requirements are met, as explained hereunder in relation to whistle-blowing practices.

Without prejudice to the above-mentioned, for regulatory purposes, financial institutions and their directors must report material contingencies to the Bank of Portugal that may either affect their reputation or result from sanctions imposed by judicial or other administrative entities in Portugal and abroad.

ii Internal investigations

Companies and senior management in corporations have a duty to monitor and supervise employees' actions and corporate activity in general, *inter alia*, to prevent internal wrongdoings. The failure to comply with such duty may, as described below, lead to corporate criminal liability for employees' actions.

In addition, as described below, companies and other legal entities should also draw and implement internal guidelines, procedures and policies to prevent and identify internal wrongdoings that may constitute crimes. The existence and effective implementation of such compliance rules may, under certain circumstances, exclude corporate criminal liability.

It is customary to carry out internal investigations in Portuguese corporations whenever there is any suspicion or concern of wrongdoing by employees or even directors. In such cases the internal investigations may be conducted either by internal counsel (e.g., in-house counsel, compliance and auditing departments, etc.) or by external counsel (typically, external lawyers of law firms or auditors). Usually, complex internal forensic investigations and reports are produced by outsourced and specialised entities.

Such investigations will normally involve not only analysis and research of documental evidence, but also witness interviews, which may, subject to authorisation by the interviewees, be recorded.

Nonetheless, there are certain legal constraints regarding access to personal files stored on company computers, servers or data-storing devices, as well as e-mail correspondence, as a result of data-protection laws.

Pursuant to Portuguese law, employees are entitled to be assisted by a lawyer when they are being investigated and heard in disciplinary proceedings.

Internal investigations carried out either by in-house or external lawyers are subject to client–attorney privilege. Therefore, as a general rule, companies are not obliged to share the results of their internal investigations with the relevant authorities in line with the privilege against self-incrimination.

iii Whistle-blowers

With the known exceptions of antitrust and competition laws and certain specific provisions for combating corruption and economic and financial crime, detailed below, as a general rule Portuguese criminal and administrative infringement laws do not include a specific whistle-blower statute.

The Portuguese Criminal Procedure Code forbids plea bargains or agreements on conviction sentences. As a matter of fact, evidence collected in criminal proceedings from whistle-blowers upon inadmissible promises of leniency or undue advantages is null and void. Therefore, from a strictly legal point of view, whistle-blowing in the sense of an agreement entered into between whistle-blowers and authorities with the purpose to hold other criminals liable while exempting the whistle-blower from prosecution, is not allowed in criminal proceedings.

Currently, this issue is a hot topic of debate among the legal community because public prosecutors have proposed that the Criminal Procedure Code be amended in order to include and accommodate a specific regime for whistle-blowers, allowing the investigating authorities to negotiate and enter into agreements with whistle-blowers exempting them from being prosecuted or benefiting from special leniency in return for information leading to the prosecution and conviction of other criminals.

Notwithstanding the above, companies and other legal entities may, under certain circumstances, have an interest in self-reporting internal wrongdoings beforehand and cooperating with authorities because such cooperation will be taken into consideration when assessing the corporate criminal liability and determining the applicable punishment.

Self-reporting and cooperation with the authorities will be considered – among other factors – for the purposes of reducing the amount of fines and other sanctions or, in certain cases, staying the proceedings or the enforcement of penalties or even granting discharges or leniency, as the case may be.

Additionally, Portuguese criminal law sets forth some specific mechanisms that incentivise and may benefit whistle-blowers at the end of the proceedings.

For instance, in the case of corruption and undue receipt of advantages, the company that commits such crimes should be discharged from any penalties provided that the following conditions are met: (1) the relevant crime was self-reported up to 30 days from the date when the crime was committed; (2) the crime was reported before the beginning of the criminal proceedings; and (3) the company returned any undue advantage resulting from the crime.

If a company does not meet all these requirements but cooperates in collecting or producing decisive evidence to identify and capture other criminals until the end of the hearing before the first instance court, the applicable penalty will be reduced.

Additionally, the Law on Combating Corruption and Economic and Financial Crime also sets forth that the applicable penalty should be reduced if a person or company that committed a crime cooperates in collecting or producing decisive evidence to identify and capture other criminals (this is also applicable to money laundering cases pursuant to Article 368.º-A, No. 9, of the Portuguese Criminal Code).

In all these cases, the penalty will be reduced according to the terms set forth in the applicable legal provisions.

Finally, whistle-blowers (whether they are suspects or not) may benefit from the witness protection programme set forth in Law No. 93/99 of 14 July.

Regarding administrative infringements related to cartels, a company or corporation that has participated in a cartel may benefit from leniency if the following conditions are met:

a the company that applies for leniency must be the first entity to self-report information and provide evidence on the cartel;

b leniency will only be granted if the Antitrust and Competition Authority deems that the reported information and evidence provided allow for:
- requesting dawn raids and seizing further evidence that the Antitrust and Competition Authority was not aware of when the self-report was made; or
- identifying administrative offences related to cartels on which the Competition Authority did not have enough evidence.

Furthermore, the actual award of leniency depends on the fulfilment of the following additional conditions:

a the whistle-blower company must have cooperated with the Antitrust and Competition Authority on a permanent basis from the moment it applied for leniency (e.g., it has made full disclosure of the information and evidence under its control, provided answers to all information requests, did not disclose that it has applied for leniency, did not disturb investigations, etc.);

b the whistle-blower company did not continue to participate in cartel practices except if otherwise required by the Competition Authority to preserve the ongoing investigations; and

c the whistle-blower company did not exercise coercion or force other businesses to participate in the cartel.

Although there is no specific legal provision governing internal whistle-blowing channels, compliance programmes generally include provisions in such regard.

III ENFORCEMENT

i Corporate liability

Criminal liability of corporations[2] was implemented in general terms in Portugal by Law No. 59/2007 of 4 September, which amended Article 11 of the Portuguese Criminal Code (PCC) that until then established that unless otherwise stated, only individuals were subject to criminal liability.

Although there were already known exceptions to this general rule,[3] Law No. 59/2007 added 10 new paragraphs to Article 11 of the PCC, setting forth the conditions and circumstances under which corporations could be criminally liable for actions of individuals.

As a result of the said amendment, corporations are criminally liable for the list of crimes set forth in Article 11, paragraph 2 of the PCC – which include crimes as diverse as sexual harassment, fraud, racial, religious or sexual discrimination, forgery, crimes against the environment and pollution, money laundering and corruption – provided that (1) they were committed in its name and corporate interest (2) by individuals who occupy a leadership position or (3) by individuals who occupy subordinated positions as a result of the failure by the former to observe their supervisory duties.

Portuguese law provides for a broad understanding of what a leadership position means, as this may encompass not only members of the corporate bodies and legal representatives, but also mere employees, provided that they have been effectively invested with the necessary powers to control the company's activity or certain sectors of the company's activity.

Corporate criminal liability can, however, be excluded when the agent or individual has acted against specific orders or instructions issued by the relevant corporate body or entity. This – together with the general duty to supervise the behaviour of its employees – is why it is important that corporations create, implement and observe adequate rules, regulations and guidelines on combating and avoiding criminal and administrative offences, as better described above.

Corporate criminal liability often goes together with civil liability. In the Portuguese legal system, as a general rule, civil liability arising from criminally relevant acts must be prosecuted and assessed within the criminal proceedings. The injured party must, therefore, as a rule, file the civil claim within the criminal proceedings. Exceptions to this general rule include, among others, situations where the criminal proceedings have not resulted in an indictment within eight months following the complaint, or where the proceedings have remained frozen for such period or have been temporarily suspended, in which case the civil claim can be filed separately.

Given that the corporate liability does not exclude that of the individuals acting on behalf and in the interest of the corporation, the matter of possible conflicts of interest often arises when there are criminal investigations with such scope. When no such conflict exists

2 Excluding the state, corporate entities vested in the exercise of prerogatives of public nature and public international organisations.

3 Notably for uneconomic crimes, such as bribery to the detriment of international trade, bribery in the private sector or fraud in obtaining subsidies or subventions (Articles 36 and 41-A, 41.B and 41-C of Law-Decree 28/84, of 20 January) or tax fraud.

it is possible to have the same lawyers or law firm representing both the corporation and the individuals being prosecuted. In our experience, in the absence of conflicts of interest, defendants will choose to share legal representation or, when using separate legal teams, to coordinate their defence efforts.

ii Penalties

The principal penalties imposed on corporations under the PCC include fines or, when the company has been incorporated with the sole or predominant intention of committing crimes or has in practical terms been used exclusively or predominantly for such purpose, dissolution.

Ancillary sanctions include:

a judiciary injunctions or orders;
b prohibition from pursuing certain activities;
c prohibition from entering into certain contracts or from contracting with certain entities;
d prohibition from applying for subsidies or grants;
e shutting down of premises; and
f publicity of the verdict.

Fines are fixed in a number of days within the limits of the penalty foreseen in the relevant legal provision, taking into consideration the guilt of the culprit and the needs of prevention.

The maximum and minimum amounts of the fines are determined with reference to the prison sentences applicable to the individuals. Each month of prison sentence corresponds to 10 days' fine. Each day's fine corresponds to an amount between €100 and €10,000, that the court will set based on the economic and financial situation of the culprit and its expenses with its employees.

The court may, under certain circumstances (i.e., when the applicable fine is below 240 days, the damage has been repaid and there are no previous convictions over the last three years) replace the fine with a formal notice or (when the fine is below 600 days) set bail at between €1,000 and €1 million subject to good behaviour for one to five years.

For administrative infringements, such as those set forth in the Securities Code and the Credit and Financial Institutions Code, penalties imposed on corporations include fines between €2,500 and €500,000 for simple infringements, €12,500 and €2.5 million for serious infringements and €25,000 and €5 million for aggravated infringements in the first case and between €3,000 and €1.5 million for simple infringements or €10,000 and €5 million for aggravated infringements in the second case, which can – in either case – be cumulated with the loss of the benefit obtained as a result of the infringement.

If two times the benefit obtained as a result of the infringement is determinable and exceeds the maximum amount of the fines mentioned above, the said maximum is elevated to such amount.

iii Compliance programmes

As mentioned above, under Portuguese law the existence and effective implementation of adequate compliance programmes can exclude corporate criminal liability.

Although there are no written rules on the requirements of such programmes, there is a general understanding that they must include the following:

a a clear and comprehensive set of rules and code of conduct;

b an adequate chain of command through which the said rules and code of conduct are passed down to all personnel or staff, together with regular training;
c a compliance staff or officer, in charge of overseeing the implementation and compliance with the programme as well as dealing with breaches of the same;
d appropriate reporting channels, which guarantee and preserve the confidentiality and anonymity of those making disclosures (whistle-blowers) and adequate follow-up mechanisms;
e disciplinary measures for offenders; and
f a monitoring mechanism for the effectiveness and completeness of the programme and periodic review of the same.

In the last few years we have seen an increase in the number of clients seeking assistance to draw up, establish and implement compliance programmes.

iv Prosecution of individuals

As mentioned above, corporate liability does not exclude individual liability. The manner in which a company deals with such situations will normally depend on the existence of conflicts of interest.

If no such conflicts exist and both the company and the individuals share the same views and position on the charges being brought against them and the underlying facts, it is common, as mentioned above, to have the same legal teams acting on behalf of all defendants or at least to coordinate the defence when acting through separate legal representation. It is also common, under such circumstances, to have the company cover legal costs for its directors or employees or even to have insurance coverage for such legal costs, including lawyers' fees.

However, if, on the contrary, the company finds that the individuals have acted against corporate policies and guidelines or in breach of legitimate orders or instructions, it is possible to discipline them and even dismiss them with just cause, depending on the circumstances (as a general rule, dismissal with just cause is possible when the breach of contractual or legal duties by the employee affects the relationship between the parties to the point where it cannot be expected to be maintained).

Our experience is that corporations tend to weigh the circumstances carefully and seek guidance from external legal counsel before deciding on such matters.

IV INTERNATIONAL

i Extraterritorial jurisdiction

As a general rule and unless otherwise stated by international treaties and conventions, Portuguese criminal law is applicable to crimes committed abroad by or against legal or corporate entities with a registered office in Portugal.

Furthermore, Portuguese criminal law is also applicable to crimes that occurred abroad if specific requirements are met, for instance:

a when the crimes constitute specific offences (e.g., IT and communications fraud, crimes regarding the counterfeiting of currency, credit notes, public official stamps, weighing scales and similar instruments);
b crimes against Portuguese nationals, committed by Portuguese nationals that were domiciled in Portugal when the relevant crimes occurred and who were found in Portugal; and

c when the crimes constitute specific offences (e.g., environmental damage, urban-planning crimes, etc.) and the suspect is found in Portugal but cannot be extradited or delivered under a European arrest warrant or any other international instrument.

These circumstances are mere examples and do not correspond to an exhaustive description of all situations that may trigger the application of criminal law to crimes committed abroad.

Portuguese criminal law is applicable to crimes occurred abroad only when corporations or legal entities have not been judged in the country where the crime was committed or if they have avoided the enforcement of a foreign criminal conviction. Nevertheless, if the criminal law of the place where the crime was committed is more favourable than Portuguese law, the foreign law is applicable except in the situations mentioned in items (a) and (b) *supra*.

Regarding administrative infringements, legal provisions set forth both in the Credit and Financial Institutions Code and in the Law on Combating Money Laundering and the Financing of Terrorism are also applicable to facts occurred abroad, for which financial institutions or other legal entities with registered office in Portugal should be held liable, as well as for acts carried out through their branches in foreign countries or services rendered abroad.

ii International cooperation

International cooperation on criminal matters is mainly governed by several international conventions and multiparty or bilateral treaties to which Portugal is a party. In a global overview, Portugal is very cooperative with other jurisdictions, particularly regarding mutual assistance on exchange of information and evidence.

For instance, Portugal is party to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (29 May 2000) and the Protocol established by the Council in accordance with Article 34 of the Treaty on European Union (16 October 2001).

Pursuant to Article 13 of this convention, Portuguese public prosecutors recently set up joint investigation teams with authorities of other jurisdictions for specific purposes and limited periods to carry out criminal investigations in one or more of the Member States. The possibility of entering into an agreement with other states to set up joint investigation teams is also set forth in Portuguese law regarding international assistance in criminal matters.

Furthermore, Portugal is party to international conventions of the Council of Europe, namely:

a the Convention on Mutual Assistance in Criminal Matters (20 April 1959) and Additional Protocols (17 March 1978 and 8 November 2001);

b the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (8 November 1990);

c the Convention on Cybercrime (23 November 2001); and

d the Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism (16 May 2005).

Moreover, Portugal is party to international conventions of United Nations, such as, for instance, the Convention against Transnational Organized Crime (15 November 2000) and the Convention against Corruption (31 October 2003).

Additionally, Portugal is party to the Convention on Mutual Assistance on Criminal Matters between the Members of the Portuguese-Speaking Community (23 November 2005).

If no international convention or treaty is applicable, international cooperation is carried out by means of a rogatory letter pursuant to the Portuguese law. Pursuant to the Portuguese law, international cooperation must be denied, *inter alia*, when: (1) the requested act is forbidden under Portuguese law or is contrary to Portuguese public policy; or (2) the enforcement of a rogatory letter goes against the sovereignty or security of the state.

Lastly, extradition is also governed by international conventions and multiparty and bilateral treaties.

For instance, Portugal is party to the European Convention on Extradition (27 April 1977) and its protocols. In accordance to the reservations made by Portugal, extradition will be refused, *inter alia*, in the following situations:

a if the extradited will be subject to a trail that affords no guarantee of criminal proceedings complying with the conditions internationally recognised as essential to the protection of human rights or will serve their sentences in inhuman conditions;

b if the extradition is being demanded in connection with an offence punishable by a life-long sentence or detention order;

c extradition in respect of Portuguese nationals;

d extradition for offences punishable by the death penalty under the law of the requesting state; or

e extradition for offences punishable by deprivation of liberty for up to one year only.

Portugal is also party to bilateral (e.g., the United States) and multilateral treaties on extradition (e.g., signed between the members of the Portuguese-speaking community).

If there are no international conventions or treaties applicable to a specific case, Portuguese domestic law is applicable. Pursuant to Portuguese law, extradition will be refused *inter alia* in the following cases: (1) the crime was committed in Portugal; (2) the extradited person is Portuguese (this general rule has specific exemptions); or (3) the extradition process does not comply with the European Convention on Human Rights or other relevant international instruments on this matter.

Extradition of Portuguese nationals only is allowed under very strict circumstances (international conventions must set forth this possibility, extradition request must be based on terrorism or international organised crime and the requesting state must assure a due and fair process). In any case, if the extradited person is convicted, he or she should return to Portugal to serve sentence unless otherwise stated by the extradited person.

iii Local law considerations

Unless otherwise stated in international conventions or treaties, Portuguese legal provisions on privilege to refuse rendering statements, seizures, telephone-tapping, professional privilege, state secrecy and any other relevant legal provision on privilege or secrecy are applicable in the enforcement of international assistance requests.

For instance, in criminal proceedings, client–attorney privilege cannot be withdrawn except if there are grounds for thinking that client–attorney privilege is being used to carry out crimes (in this case, the lawyer himself should be considered a formal suspect). Therefore, as a general rule, communications between formal suspects and attorneys cannot be seized unless these communications are thought to have been used in criminal conduct.

Additionally, it is also important to restate that Portuguese law sets forth that evidence collected by means of deception tactics, threatening people or entities with legally inadmissible

measures, denying legal rights or promising illegal advantages is null and void. Therefore, evidence collected in Portugal under international cooperation at request of another state cannot be obtained through these means.

Regarding international assistance requests to obtain statements from witnesses, Portuguese law sets forth, for instance, that certain relatives of formal suspects (e.g., the spouse, parents and children of the suspect) are entitled to the privilege to refuse rendering statements as witnesses.

V YEAR IN REVIEW

The last few years in Portugal have been marked by several high-profile investigations by the public prosecutor and the regulators, particularly the Bank of Portugal and the CMVM, which involve politicians, magistrates, senior directors of financial institutions and some of the main banks and companies in the country.

The list of alleged crimes and infringements being investigated and in some instances prosecuted include, among others, corruption, embezzlement, fraud, tax fraud, forgery, money laundering, market manipulation, insider trading and malicious management.

The regulators have been particularly active in reaction to what are perceived as being the causes for the financial constraints and difficulties that some of the major banks in the country have faced since the beginning of the financial crisis in 2008.

Although many cases ended in acquittals, there have also been several convictions, including the application of maximum fines and jail sentences for former directors of companies and banks, which is a sign of things to come, as it is expected that the judges will be handing down more severe sentences for these types of infringement.

VI CONCLUSIONS AND OUTLOOK

As a result of the clampdown by authorities, compliance and pre-emptive action is a top priority and concern for all major corporations and will presumably remain so over the coming years.

At the same time, the possible amendment of the Criminal Procedure Code in order to include specific provisions on whistle-blowers applying to a broad scope of crimes, is also a hot topic of debate, as mentioned above.

The debate is a result of a proposal from certain sectors of the judiciary, inspired by the example of Brazil, where the ‘Car Wash’ investigation on corruption, which has led to the imprisonment of several former directors of some of the major corporations in the country, began and has been fuelled by whistle-blowers, who in return for leniency, turn in other suspects.

The debate on such matters, given their relevance and implications, should occur under the appropriate circumstances with objectivity and calm.

We fear, however, that such conditions may not exist in Portugal when the subject is being debated, owing to the current climate of suspicion and the public appetite for justice to be seen to be done.

Appendix 1

ABOUT THE AUTHORS

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Fernando Aguilar de Carvalho began his career as a lawyer at Proença de Carvalho Advogados in 1992, and joined Uría Menéndez-Proença de Carvalho in 2010 when the firms merged.

He focuses on various areas of litigation, arbitration, white-collar crime and corporate law. He advises both national and foreign companies.

Between 1995 and 1996 Fernando combined his practice at Proença de Carvalho Advogados with the post of in-house legal advisor at Hewlett-Packard Portugal.

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Adriano Squilacce joined Uría Menéndez-Proença de Carvalho in September 2006 as a trainee.

His professional practice is focused on civil, commercial, corporate, insolvency litigation and white-collar crime at every level of the Portuguese court system. He also represents clients in arbitration proceedings.

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