



# ICLG

The International Comparative Legal Guide to:

## **Business Crime 2013**

**3rd Edition**

A practical cross-border insight into business crime

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## General Chapters:

1	<b>Controlling the Fallout: Minimising Follow-on Investigations in Multijurisdictional Settlements</b> – Gary DiBianco & Matthew Cowie, Skadden, Arps, Slate, Meagher & Flom LLP	1
2	<b>Dodd-Frank Whistleblowers and the Evolving Landscape of FCPA Enforcement</b> – James Walker, Richards Kibbe & Orbe LLP	5
3	<b>US Government Investigations: What Every Non-US Company Should Know</b> – Robert W. Henoch & Michael S. Kim, Kobre & Kim LLP	14
4	<b>The Overseas Reach of U.S. Antitrust Laws: Navigating a Maze of Uncertainty</b> – Alan Mansfield & William C. Silverman, Greenberg Traurig, LLP	20
5	<b>The Rights of Employees in Post-Stein Internal Investigations</b> – Douglas R. Jensen & Amy Dieterich, Park & Jensen LLP	26
6	<b>The New Anti-Money Laundering Law and its International Aspects</b> – Antonio Sergio Altieri de Moraes Pitombo & Denise Provasi Vaz, Moraes Pitombo Advogados	32

## Country Question and Answer Chapters:

7	<b>Australia</b>	Piper Alderman: Gordon Grieve & Simon Morris	36
8	<b>Austria</b>	Schoenherr Attorneys at Law: Heidemarie Paulitsch	44
9	<b>Brazil</b>	Sica, Tangerino, Quito Advogados: Davi de Paiva Costa Tangerino & Carina Quito	52
10	<b>Cayman Islands</b>	Maples and Calder: Martin Livingston & Adam Huckle	59
11	<b>Czech Republic</b>	Schoenherr: Martin Nedelka & Martin Gracz	67
12	<b>Dominican Republic</b>	Jiménez Cruz Peña: Marcos Peña Rodríguez & Laura Medina Acosta	75
13	<b>England &amp; Wales</b>	BCL Burton Copeland: Guy Bastable & Shaul Brazil	84
14	<b>Germany</b>	WESSING & PARTNER: Prof. Dr. Juergen Wessing & Dr. Heiko Ahlbrecht	92
15	<b>Greece</b>	Anagnostopoulos Criminal Law & Litigation: Ilias G. Anagnostopoulos & Jerina (Gerasimoula) Zapanti	98
16	<b>India</b>	Kachwaha & Partners: Ashok Sagar & Sumeet Kachwaha	106
17	<b>Italy</b>	Studio Legale Pisano: Roberto Pisano	114
18	<b>Japan</b>	Nishimura & Asahi: Yoshinori Ono & Norimitsu Yamamoto	123
19	<b>Jersey</b>	Baker & Partners: Stephen Baker & Cyril Whelan	134
20	<b>Liechtenstein</b>	Lampert & Schächle Attorneys at Law Ltd.: Siegbert Lampert & Rudolf Schächle	141
21	<b>Luxembourg</b>	Turk & Prum avocats à la Cour: François Prum & Anouk Loesch	148
22	<b>Mexico</b>	Portos, Ortiz Larregui y Asociados, S.C.: José Manuel Portos Ubierna	156
23	<b>Nigeria</b>	Bloomfield – Advocates and Solicitors: Adekunle Obebe & Dayo Adu	163
24	<b>Portugal</b>	Carlos Pinto de Abreu e Associados – Sociedade de Advogados, RL: Carlos Pinto de Abreu & Vânia Costa Ramos	169
25	<b>Russia</b>	Ivanyan and Partners law firm: Vasily Torkanovskiy	178
26	<b>Serbia</b>	Moravčević Vojnović Zdravković in cooperation with Schoenherr: Srđana Petronijević & Nataša Lalatović	188
27	<b>Spain</b>	PEREZ-LLORCA: Adriana de Buerba Pando & Juan Palomino Segura	195
28	<b>Switzerland</b>	Homburger: Flavio Romerio & Roman Richers	203
29	<b>Thailand</b>	Tilleke & Gibbins: Michael Ramirez & Amanda Davy	213
30	<b>Turkey</b>	ELİG, Attorneys-at-Law: Gönenç Gürkaynak & Ceyda Karaođlan	220
31	<b>USA</b>	Skadden, Arps, Slate, Meagher & Flom LLP: Gary DiBianco & Gary A. Rubin	227

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# Portugal

Carlos Pinto de Abreu



Vânia Costa Ramos



**Carlos Pinto de Abreu e Associados –  
Sociedade de Advogados, RL**

### 1 General Criminal Law Enforcement

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

In Portugal, all crimes are prosecuted by the Public Prosecutions Office (*Ministério Público*). There are local offices in many cities and there is a central investigations' office (DCIAP) in Lisbon which is responsible for investigating nationwide crimes, as well as transnational crimes. Public Prosecutors may delegate some tasks on specialised police forces (in business crimes it will usually be the *Policia Judiciária*), but they are always responsible for controlling the investigations and deciding whether to bring charges, or not. Although all investigations are led by Public Prosecutors, there are some cases in which certain private persons have to file the charges after the investigation is closed (these are the so-called private crimes, such as, e.g., slander or libel).

#### 1.2 If there are more than one set of enforcement agencies, please describe how decisions on which body will investigate and prosecute a matter are made.

The jurisdiction of the local offices of the Public Prosecutions Office is venue-based. Each office has jurisdiction on crimes committed within the boundaries of their jurisdiction. The DCIAP has competence for crimes which are located in more than one jurisdiction and consequently have a national or transnational dimension. In certain situations – mainly if the case is of exceptionally high complexity or if certain persons (e.g., politicians holding higher positions or members of the judiciary) – the investigations can be conducted by higher ranking public prosecutors (deputy general prosecutors or the General Prosecutor himself).

The local public prosecutions offices in major cities have specialised departments which investigate business crimes. The Criminal Police (*Policia Judiciária*) also has specialised departments for the investigation of business crimes.

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

There is no civil enforcement against business crimes. Civil claims arising from criminal conduct will, in general, be filed within the criminal case by the plaintiff (State or private persons and

companies). There is no administrative enforcement of crimes. The Securities Market Commission (*Comissão do Mercado de Valores Mobiliários*) conducts preliminary criminal investigations concerning securities market crimes, but a subsequent investigation of these crimes must be conducted by the Public Prosecutions Office, which will bring the criminal charges before a court with jurisdiction in criminal matters. Apart from this there is a wide range of regulatory business administrative offences, which are enforced by a respectively large number of independent administrative agencies (e.g., Securities Market Commission, Bank of Portugal, Insurance and Pension Funds Supervisory Authority and the Competition Authority). The decisions of these authorities can be appealed to a court with jurisdiction in criminal matters, which makes litigation in these cases very similar to litigation in business criminal offences.

### 2 Organisation of the Courts

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

In Portugal, there is a specialisation of criminal courts, but there are no courts with jurisdiction for a limited nature of crimes (such as business crimes, or murder, etc.). The division of jurisdiction is fundamentally based on the severity of the applicable criminal sanctions (crimes punished with prison sentences up to five years or more), the structure of the applicable proceedings (summary, condensed or ordinary) and, in certain cases, the crime at stake.

There are no courts specialising in business crimes.

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

In Portugal there is a right to a jury trial in criminal cases concerning crimes punishable by imprisonment of a maximum of eight years. Business crimes will usually not fall within these cases, but this may happen if there are aggravating circumstances (e.g., bribery, if the promise of solicited advantage is higher than €5,100.00). If the crime before trial concerns a politician or a holder of a high-ranking public office, there is no right to a jury trial.

### 3 Particular Statutes and Crimes

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

##### o Fraud and misrepresentation in connection with sales of securities

Article 379 of the Securities Code (market abuse).

This crime punishes “whoever discloses misleading, incomplete, exaggerated or biased information, carries out fictitious transactions or executes other fraudulent practices that are capable of artificially altering the regular functioning of the securities or other financial instruments market”. This crime can be punished with a maximum imprisonment of five years or a fine. The acts “considered capable of altering artificially the regular functioning of the securities market are, namely, acts that may change the conditions of price development, the regular conditions of offer or demand of securities or other financial instruments or the normal conditions of issue and acceptance of a public offering”.

Members of the administrative board and those responsible for the general management or supervision of areas of activity of a financial intermediary who, having knowledge of the facts described in paragraph 1, performed by individuals directly subject to their management or supervision, and in the performance of their functions, do not stop them immediately, will be held criminally liable and can be punished by a maximum imprisonment of four years or a maximum fine of 240 days, if a more serious punishment is not applicable under any other legal provision.

Attempted market abuse is punishable. Negligence is not criminally punishable.

There is an English version of the Securities Code available on [http://www.cmvm.pt/EN/Legislacao\\_Regulamentos/Codigo%20Dos%20Valores%20Mobiliarios/Pages/default.aspx](http://www.cmvm.pt/EN/Legislacao_Regulamentos/Codigo%20Dos%20Valores%20Mobiliarios/Pages/default.aspx).

##### o Accounting fraud

Article 256 of the Criminal Code (this is the general provision for forgery of documents, as there is no specific criminal provision).

The required mental state of the accused is intent: to commit the crime, as well as an intent to cause loss to the State or another person; or to gain an illegitimate benefit for himself or for a third person; or to prepare, facilitate, commit or cover up another crime. Both production and use of the false accounts are punishable.

The applicable sanction for false accounting under article 256 is of imprisonment of a maximum of three years, or a fine.

Attempted forgery of accounts is punishable. Negligence is not criminally punishable.

##### o Insider trading

Article 378 of the Securities Code.

The required mental state of the accused is intent. Negligence is not punishable.

This crime punishes “any person who possesses inside information: a) By virtue of his membership of the administrative, management or supervisory bodies of the issuer or his holding in the capital of the issuer; or b) By virtue of his having access to the information through the permanent or occasional exercise of his employment, profession or duties in respect of the issuer or any other entity; or c) By virtue of his public employment or office; or d) By virtue of his criminal activities; and discloses such information to any person other than in the normal course of the exercise of his functions or who, on the basis of such information, trades or advises anyone to

trade in securities or other financial instruments, or directly or indirectly orders their subscription, purchase, sale or exchange for own account or third party’s account”.

The applicable sanction is of imprisonment of a maximum of five years or a fine. Attempted crimes are punishable.

Furthermore any other person can be punished for insider trading if “having become aware of inside information, discloses it to a third party or, on the basis of said information, trades or advises anyone to trade in securities or other financial instruments, or directly or indirectly orders their subscription, purchase, sale or exchange for own account or third party’s account”. The applicable sanction is of imprisonment of a maximum of four years or a fine of a maximum of 240 days.

Inside information is defined as “information of a precise nature which has not been made public relating, directly or indirectly, to one or more issuers, securities or other financial instruments and which, if it were made public, would be likely to have a significant effect on their market”. In relation to derivatives on commodities, inside information is defined as “information of a precise nature which has not been made public relating, directly or indirectly, to one or more such derivatives and which users of markets on which such derivatives are traded would expect or would be entitled to receive in accordance with accepted market practices or regulations on the disclosure of information on those markets, respectively”.

##### o Embezzlement

Article 205 of the Criminal Code.

The mental state required is intent. Negligence is not punishable.

This crime punishes the person who illegitimately appropriates a movable asset which was delivered to him without a transfer of ownership. The applicable sanction is imprisonment of a maximum of three years, or a fine. If the assets at stake are worth over €5,100.00, the crime is punishable with imprisonment of a maximum of five years, or a fine of a maximum of 600 days. If the assets at stake have a value above €20,400.00 the crime is punishable with imprisonment of between one and eight years.

Attempted embezzlement is punishable.

##### o Bribery of government officials

Articles 16 and 18 of Law 34/87 of July 16.

Articles 372 and 374 of the Criminal Code.

The mental state required is intent. Negligence is not punishable.

The person who, directly or through a third person whose action he approves, offers or promises to offer a patrimonial or non-patrimonial undue advantage to the holder of a political office or to the holder of a high ranking public office in the exercise of the respective office or function, or because of these, will be held criminally liable.

The applicable sanction is imprisonment of a maximum of five years, or a fine of a maximum of 600 days.

If the person offered or promised to offer the undue advantage in order for the holder of a political office or of a high ranking public office to perform actions contrary to the duties deriving from the respective offices, the crime is punished with imprisonment from two to five years. If the acts performed by the government official were not contrary to his professional duties, the crime is punishable with imprisonment of a maximum of five years.

The applicable sanctions will be more severe if the advantages promised are higher than €5,100.00 or €20,400.00.

If the government official is not a high ranking official, nor a holder of a political office, both as defined in Law 34/87, articles 372 and 374 of the Criminal Code apply and the prison sentences applicable will be lower.



Conducts which conform to the social habits and usages are not punishable.

Attempted bribery of government officials is punishable.

Negligence is not criminally punishable.

#### o Criminal anti-competition

Criminal anti-competition is not punishable as a crime in Portugal. There are regulatory administrative offences described in Law 19/2012, of May 8.

#### o Tax crimes

Articles 103, 104 and 105 of Law 15/2001, of June 5.

These articles foresee tax fraud (simple and aggravated – articles 103 and 104, respectively) and tax money embezzlement (article 105).

Simple tax fraud is punishable with imprisonment of a maximum of three years or a fine of a maximum of 360 days.

Tax fraud which results or is susceptible to result in an undue advantage under €15,000.00 are not criminally punishable.

Tax fraud is described as the illegitimate conduct aiming not to declare, deliver or pay any tax moneys, or unduly to obtain a tax advantage, payback or any other patrimonial advantages which are susceptible to cause a diminishing of tax revenue.

The illegitimate conducts are described in the law and include, among others, hiding or altering facts or values which should be on accounting or commercial books, or on the tax declarations; celebrating simulated contracts, either regarding the value, or the nature of the contract, or through the interposition, omission or substitution of intervening persons.

Aggravated fraud is punishable with imprisonment of between one to five years for individuals and of 240 to 1200 days fine for companies. There is aggravated fraud if at least two of the following circumstances occur: (i) conspiracy with third persons who hold accessory obligations for purposes of tax control; (ii) the agent is a government official and has severely abused his/her functions; (iii) the agent falsifies, changes, destructs or refuses to deliver or show books, programmes or computer files and any other documents or evidence requested by tax law; (iv) if the agent uses those books or elements knowing that they have been falsified or changed by a third person; (v) if there was an interposition of individuals or legal entities residing or incorporated outside of Portugal and benefiting from a clearly more favourable tax regime abroad; and/or (vi) if the agent conspired with third persons with whom he/she has a special relationship.

If false invoices or equivalent documents concerning non-existing operations or operations with a different value or different intervening entities have been used, the crime is punishable as aggravated fraud.

Tax fraud requires intent and is therefore not punishable by negligence. Attempted aggravated tax fraud is punishable.

Tax embezzlement punishes embezzlement of tax moneys exceeding €7,500.00 with imprisonment of a maximum of three years or a fine of a maximum of 360 days. The applicable sanction will be of between one to five years or of a fine of 240 days to 1,200 days for legal entities if the amount of embezzled funds is higher than €50,000.00. Only in the latter situation is attempted embezzlement punishable.

Tax embezzlement requires intent and is, therefore, not punishable by negligence.

#### o Government-contracting fraud

Article 217 of the Criminal Code (swindling).

This is the general provision concerning fraud. It is also applicable to fraud against the government. It punishes whoever cunningly

deceives or misleads someone else and leads him/her to take actions that will cause a patrimonial loss to this or to a third person, with the intention of gaining an illegitimate enrichment.

The applicable sanction is imprisonment of a maximum of three years or a fine. This sanction will be more severe if the loss caused is higher than €5,100.00 or €20,400.00, if the agent commits this crime habitually, if the agent takes profit of particularly vulnerable victim, or if the victim is put in a hard financial situation due to the crime.

Concerning the mental state of the accused the law requires intent.

Negligent conduct is not punishable.

Attempted fraud is punishable.

#### o Environmental crimes

Article 279 of the Criminal Code.

The violation of legal or regulatory acts, or any obligations imposed by the competent authority according to the former acts, originating sound, air, water, soil pollution, fauna or flora, or damaging in any way the characteristics of these environmental elements, causing substantial damages is punishable with imprisonment of a maximum of three years or a fine of a maximum of 600 days. Negligence is punishable with imprisonment of a maximum of one year or a fine of a maximum of 240 days.

If no substantial damages were caused, but the conduct was susceptible of causing them, the intentional crime will be punished with imprisonment of a maximum of two years or a fine of a maximum of 360 days. Negligence in this case will be punished with imprisonment of a maximum of six months or a fine of a maximum of 120 days.

None of these conducts is punishable if there is only an attempt, but there are aggravated crimes which are punishable with higher sentences and also in the attempted form (e.g., if harm or danger to human life has been caused).

#### o Campaign-finance/election law

Article 28 of Law 19/2003 of June 20.

The mental state required is intent. Negligence is not punishable. Attempted crimes are not punishable.

Persons and directors of legal entities who offer or participate in the raising of illegal financing to political parties in general or for a political campaign are punishable with imprisonment from one to three years.

Among other forbidden conducts it should be underlined that political parties may not receive anonymous donations from anyone, nor pecuniary donations or loans from national or foreign legal entities, with the exception of loans granted by banks or other financial institutions.

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

In Portugal there is, as a general rule, no liability for inchoate crimes. The law foresees only some exceptions. A person can be held liable for attempting to commit a crime punishable with imprisonment of a maximum of over three years. The attempt is only punishable nevertheless, if the commission of the crime has already been started (i.e., the mere design of a plan to commit a crime is, as a general rule, not punishable).

## 4 Corporate Criminal Liability

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

There is entity liability for some criminal offences. Entity liability must be specifically stated for each crime, otherwise it will not be applicable. The conduct of an employee will be imputed to the entity in the following cases: (i) the acts have been committed on behalf and in the interest of the entity and by a person holding a leadership position; (ii) the acts have been committed by any person under the authority of a person holding a leadership position, due to a breach of the surveillance or control duties of the latter. The criminal code defines a “person holding a leadership position” as any person belonging to the organs and representatives of the legal entity, as well as any person within the company who has an authority to control its activities. The entity will not be responsible for the crime if its employees acted against an explicit order of a person entitled to give this order within the company.

### 4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime?

The criminal liability of entities and persons is independent. Although the company liability is derived of the individual liability of certain persons (that can be managers, directors or officers), as explained above, managers, officers and directors cannot be automatically punished for crimes committed by a company.

Nevertheless the law foresees a subsidiary responsibility of persons occupying a leadership position concerning the payment of criminal fines and any compensation imposed to the entity, concerning crimes: (i) committed during the time in which the person held the leadership position, if the person did not explicitly oppose to the commission of the criminal acts; (ii) committed before the person held the leadership position, if the assets of the entity became insufficient due to the conduct of that person; or (iii) committed before the person held the leadership position, if the final decision imposing the payment was served to the entity during the time in which that person held a leadership position and lack of payment is attributable to him/her. This responsibility can only lead to obliging leadership persons to pay pecuniary sums; it is not possible to impose imprisonment.

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

If there is entity liability, authorities will prosecute both individuals and the legal entity. In some regulatory administrative offences (for instance, those related to the securities exchange market) there seems to be a tendency to prosecute the legal entity first, and then the individuals. This strategy seems to be a way of making the prosecution of individuals easier, thus entities and individuals have conflicting interests (many times the company wishes to end the proceedings as soon as possible and is therefore keen to make a plea bargaining or to accept a certain conviction; the individuals on the other hand usually wish to use all possible means to defend their position in court).

## 5 Statutes of Limitations

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

Enforcement-limitations periods are defined in the Criminal Code and in some cases in special legislation (e.g., for tax offences).

The statute limitation period is of: (i) fifteen years for crimes punishable with imprisonment of a maximum of over ten years, as well as for some specific crimes such as bribery, embezzlement by a public official, economic participation in a business by a public official, fraud concerning subsidies or subventions, etc.; (ii) ten years for crimes punishable with imprisonment of a maximum of at least five years, but not exceeding 10 years; (iii) five years for crimes punishable with imprisonment of at least one year, but under five years; and (iv) two years in the remaining cases.

The enforcement-limitations period starts running: (i) when the crime is consummated (this implies the production of the result in certain cases, e.g., in a homicide case it would start counting from the day of the death of the victim); (ii) if the crime is of a permanent nature, when the consummation finishes; (iii) if the crime is continued or repeated, when the last act has been committed; and (iv) in attempted crimes, when the last execution act has been undertaken.

Statute limitation periods are subject to the legality principle and may not, therefore, be applied retroactively. The above-mentioned periods correspond to the law in force since March 1, 2011, and apply to crimes committed after this date. If the crime has been committed before that date, it is necessary to calculate the period according to the law in force at that time.

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

If the crime is considered to be a “continued crime” (a pattern of practice conducted under the same background circumstances, if this leads to a diminution of guilt), the statute limitation only initiates after the completion of the last acts. Therefore there will usually be no statute limitation for the older acts. This is nevertheless subject to dispute and in some crimes, statute limitation may occur separately for each conduct (e.g. in tax offences for each tax year). If crimes have been committed within the activity of a criminal organisation, there are independent periods of statute limitation for those crimes and for the crime of founding or pertaining to a criminal organisation.

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

Yes. Statute limitations will be tolled: (i) if the proceedings are suspended because it is necessary to wait for the decision of a non-criminal court; (ii) after the service of the accusation or indictment (for a maximum of three years); (iii) as long as the defendant has absconded and has been declared absent (*declaração de contumácia*); (iv) as long as it is not possible to serve the judgment on the defendant who was tried in absentia; and (v) as long as the defendant is serving a prison sentence abroad.

Furthermore, limitations periods will be “reset” – i.e., the period will start running again – if: (i) the person has been declared formally as a suspect; (ii) the accusation or indictment was served on the accused person; (iii) the defendant has absconded and has been declared absent; and (iv) the defendant has been served on the judicial order setting up the date for the trial hearing.

In any event, the maximum limitations period cannot exceed the sum of the basis limitation period and the half of this period, plus any suspension periods: e.g., in a fraud case – punishable with imprisonment of up to three years – the basis statute limitation period is of five years, but statute limitation can reach seven years and six months, if the period has been reset and if the accusation has been served on the person, which leads to the period being tolled for three years (three years basis + one and a half years + three years' suspension).

The legality principle and prohibition of retroactivity also applies to toll and reset of statute limitation periods. The above rules correspond to the law in force since September 15, 2007, and apply to crimes committed after this date. If the crime has been committed before that date, it is necessary to calculate the period according to the law in force at that time.

## 6 Initiation of Investigations

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

Investigations are initiated on a crime report. The public prosecutions service must always open proceedings when a crime is reported. There are no rules or guidelines governing the initiation of an investigation.

There are also legal obligations for financial institutions, banks, real estate agencies, casinos, lawyers, solicitors, in the sense that they should report operations which they find likely to be money laundering operations. These reports to the Financial Intelligence Units of the Criminal Police, apart from informal autonomous inquiries, may as well generate criminal investigations.

### 6.2 Do the criminal authorities have formal and/or informal mechanisms for cooperating with foreign prosecutors? Do they cooperate with foreign prosecutors?

There are formal cooperation mechanisms – international conventions, etc. – and there are cooperation networks, such as the Interpol, Europol, Eurojust, etc.

## 7 Procedures for Gathering Information from a Company

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

In general, the public prosecutor and the courts can ask for production of information as long as there are grounds to believe that the company possesses relevant documents to a criminal investigation. If someone who is not a suspect refuses to give information, he may be prosecuted for contempt. Prosecutors may also order searches and seizure of documents and in certain cases police authorities may also conduct searches on their own initiative (these will have to be validated by the prosecutor). To search houses, lawyer's premises, medical premises, banks, to seize correspondence or e-mails the prosecutor must obtain a judicial warrant.

#### Document gathering:

Searches can be conducted to gather documents at any time. The production of documents can also be ordered, but not against a

suspect or accused person, thus it violates the privilege against self-incrimination. In regulatory administrative offences the courts have been divided as to whether it is possible to force a suspected person to produce documents – some have considered that this is legal, others have not.

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

The production of documents can be ordered, but not against a suspect or accused entity, thus it violates the privilege against self-incrimination. In regulatory administrative offences the courts have been divided as to whether it is possible to force a suspected entity to produce documents – some considered that this is legal, others did not. Raids are always possible if there is a suspicion that a crime has been committed and that the documents to be found are likely to be relevant for the investigation, subject to the order of a prosecutor or, in certain cases, of a judge.

### 7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does Portugal recognise any privileges protecting documents prepared by attorneys or communications with attorneys? Do Portugal's labour laws protect personal documents of employees, even if located in company files?

In general, companies will only be able to invoke protection of documents that are located in lawyers' offices inside the company's premises, under the lawyer-client privilege. Employee's documents will have no protection in general, unless they belong to the intimacy sphere of the employee (this will nevertheless be hard to argue; thus intimate documents are usually not kept in the company's premises).

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

Prosecuting authorities may demand the company for the production of documents, as long as there are grounds to believe that the company possesses documents relevant to a criminal investigation. Prosecuting authorities should ask for the production from the managing or compliance departments of the companies. These departments may invoke the privilege against self-incrimination on behalf of the company.

If prosecuting authorities ask any employee to provide them with documents, he/she may refuse to produce them if production results in self-incrimination of the employee. If it results in self-incrimination of the company, the employee should ask the authorities to direct the request to the directors or representatives of the company.

If an employee has been abusively used to provide documents that incriminate the company and he did not have powers within the company to produce these documents to external persons, one may argue that there has been a violation of the privilege against self-incrimination of the company.

Nevertheless this is a very disputed matter.

Raids of homes or offices of employees are possible in general, as long as there is a suspicion of a crime and it is likely that the



documents to be found are relevant for the investigation, but the prosecutor has to seek a judicial warrant to search a house.

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

Prosecuting authorities can ask for production from third persons, as long as there are grounds to believe that these persons possess relevant documents to a criminal investigation. These persons may only refuse to produce them if production results in self-incrimination.

Raids of homes or offices of third persons are possible in general, as long as there is a suspicion of a crime and it is likely that the documents to be found are relevant for the investigation, but the prosecutor has to seek a judicial warrant to search a house.

**Questioning of Individuals:**

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

As long as there is an ongoing criminal investigation, all persons can be submitted to questioning. If there is a suspicion against that person, the person must be declared as a suspect and may remain silent. Witnesses may also refuse to answer certain questions, if this results in their self-incrimination, and may even request to be declared as suspects, in order to benefit from the right to remain silent.

Questioning will, in general, be conducted by a prosecutor or the criminal police. If the person has been detained, the questioning must be conducted by a judge.

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

As long as there is an ongoing criminal investigation, all persons can be submitted to questioning. If there is a suspicion against that person, the person must be declared as a suspect and may remain silent. Witnesses may also refuse to answer certain questions, if this results in their self-incrimination, and may even request to be declared as suspects, in order to benefit from the right to remain silent.

Questioning will, in general, be conducted by a prosecutor or the criminal police.

**7.8 What protections can a person being questioned by the government assert? Is there a right to refuse to answer the government's questions? Is there a right to be represented by an attorney during questioning?**

The person being questioned may always have an attorney with him, irrespectively of whether the person has been summoned to be heard as a suspect or as a witness.

If the person has been summoned to be heard as a suspect, he/she may simply refuse to answer any questions.

If the person has been summoned to be heard as a witness, he/she may refuse to answer incriminating questions, or, if they feel that there is a suspicion against them, they can request to be declared formally as suspects and refuse to answer any questions.

A witness may also refuse to testify under certain special circumstances. It is legitimate for witnesses who are, for example, the spouse, parents, children of the suspects, as well as unmarried life partners to refuse to testify.

**8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions**

**8.1 How are criminal cases initiated?**

Criminal cases are initiated when a crime is reported, by means of an order of a public prosecutor who acquired knowledge of the crime. Opening the investigation of a reported crime is compulsory.

**8.2 Are there any rules or guidelines governing the government's decision to charge an entity or individual with a crime? If so, please describe them.**

There are only guidelines concerning minor criminal offences, such as road offences. In these minor offences there are some guidelines concerning the use of alternative sanctioning mechanisms.

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

Yes. Pre-trial diversion or deferral of prosecution may be used if the person has no criminal records and in general if the damages have been compensated, or will be compensated during the deferral period (e.g., in tax crimes it is usually necessary to pay the taxes evaded). These mechanisms may only be used if the crimes under investigation are punishable with a maximum of five years of imprisonment.

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

A defendant may be convicted to pay compensation to the State or a particular victim (company or individual) for the damages caused by the criminal actions.

Confiscation of instruments, products and proceeds of crime may also be ordered. In business crimes the prosecution can request for an "enlarged confiscation", which will include all assets which do not correspond to the legitimate income of the defendant. In this case the prosecution has to prove the difference between the legitimate income and the value of the assets. The defendant will have to prove the legitimate origin of those assets in order to avoid confiscation.

**9 Burden of Proof**

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

The prosecution has the burden of proof concerning all crimes.



Theoretically this also includes proof that there were no situations that excluded the unlawfulness of the acts or the guilt of the defendant. In practice, nevertheless, when the prosecutor proves beyond reasonable doubt that there was a crime (an act explicitly foreseen in the law as a crime), the judge will derive therefrom the non-existence of facts which would exclude unlawfulness of the conduct or guilt of the defendant. This means that, in practice, if defendant uses an affirmative defence (e.g., self-defence) he must raise facts that will prove the likelihood of the affirmative defence (it does not have to be beyond reasonable doubt, it is a lower standard). If the defendant proves facts that make it likely that the situation underlying the affirmative defence might have occurred, the prosecutor will have to prove beyond reasonable doubt otherwise.

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

The prosecution has to prove the crime beyond reasonable doubt. There is no established “standard of proof” concerning other facts.

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

In general, this is established by a judge or a panel of judges. In a jury trial it will be the jury (which is made out of three professional judges and four lay judges plus four substitute lay judges).

## 10 Conspiracy / Aiding and Abetting

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

Yes, a person may be held liable for assisting another person to commit a crime. The liability is of a criminal, but accessory nature. This means that the criminal liability of the person assisting depends on the practice of certain actions by the person committing a crime.

In Portugal there are two different forms of punishment for people who conspire or assist another person to commit a crime: as a principal (*autor*); or as an accomplice (*cúmplice*).

People who are punished as principals will be sentenced in the same way as the person who committed the crime. Accomplices will be punished with a specially mitigated sentence (the maximum applicable sentence will be one third lower than the sentence applicable to the principal and the minimum applicable sentence will also be lowered).

Accomplices are people who provide a moral or practical assistance in the commission of the crimes, but have no domain over the commission of the fact (e.g., the murderer explains his plans to someone else who encourages him to go ahead, or who provides him with a weapon). In Portuguese criminal law no one can be punished for negligent complicity. There must be intent. The accomplice will only be punished if the principal started performing the crimes (e.g., if the murderer tried to shoot the victim) and if its contribution was essential to the commission of the crimes.

Instigators (persons who lead others to decide to commit a crime) will be punished as principals, but only if the principal starts performing the crimes.

Finally, co-conspirators of a crime which are not present at the commission of the crime are considered to be principals if they also have a domain over the criminal actions – for instance, if they can impede the commission of the crime, or make it very difficult.

## 11 Common Defences

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

Yes, but this defence can lead to the conviction for a negligent crime in certain cases. Intent must be proved by the prosecution, but proof of intent is many times derived from the proof of the facts and therefore the defendant will have to present evidence of lack of intent.

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

In general, ignorance of the law does not exempt the defendant from conviction. In certain cases (such as economic crime, or crimes that have a lower ethical meaning) ignorance of a certain prohibition may exempt the defendant from conviction for an intentional crime, but he could still be convicted for the negligent crime (if the law foresees punishment for the crime committed with negligence). In rare cases lack of consciousness about the unlawfulness of a certain conduct may lead the court to consider that the defendant acted unlawfully, but without guilt. This will hardly be applicable to business crimes.

Knowledge of the law is generally assumed. Therefore the defendant will have to prove that he did not know the law.

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

Yes. The burden of proof weighs on the prosecution.

## 12 Voluntary Disclosure Obligations

### 12.1 If a person becomes aware that a crime has been committed, must the person report the crime to the government? Can the person be liable for failing to report the crime to the government?

Persons in general are not obliged to report crimes. Public officials and public servants are obliged to report crimes which they became aware of during the exercise of their functions. Police authorities are obliged to report crimes.

As private persons in general are not obliged to report crimes, they cannot be held liable for failing to report them.

### 13 Cooperation Provisions / Leniency

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

Usually, the report of crimes or the cooperation of the person committing the crime in finding out the truth is only relevant for sentencing, as a general mitigating circumstance within the applicable punishment.

There are some exceptions, namely within the scope of terrorist acts, organised crime, corruption and drug trafficking for instance, where the offender may benefit from a special mitigating circumstance that diminished the legal sentence applicable, or even be exempt from punishment itself.

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

There are no guidelines whatsoever to fit the cooperation or the concrete exercise of the judicial authorities' discretionary powers into this particular field.

### 14 Plea Bargaining

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

The Criminal Procedure Code does not foresee this possibility. Nevertheless there has been a proposal by a very reputed law professor that courts should be able to negotiate charges and sentences in exchange for the defendant's confession. Some courts have accepted this possibility, while others are reluctant to accept it without an explicit legislative command.

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

There are no guidelines, but any aspect of plea bargaining concerning the sentence will have to be approved by the court.

### 15 Elements of a Corporate Sentence

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

Applicable sentences are defined through a legal minimum and maximum sentence for each crime.

Within that legal framework, the criminal code foresees the circumstances that have to be taken into account for sentencing. The main factors are the degree of guilt (which limits the maximum

sentence), deterrence (which will determine the minimum sentence) and special prevention (need for re-socialisation). Other factors are the degree of unlawfulness, the way the crime has been perpetrated, the severity of its consequences, the degree of violation of the agent's duties, the personal and financial situation of the agent, the agent's conduct before and after the crime, in particular whether there has been compensation of damages.

The criminal code also foresees the circumstances under which a prison sentence may be suspended (sentences up to five years imprisonment, under certain circumstances) or substituted by a pecuniary fine, community work or house arrest.

There are no quantitative guidelines.

As a general rule, there is no separate independent hearing for sentencing. The court rules of guilt and sentence in the same judicial decision are adopted after the trial hearing.

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

The criteria are as far as possible, due to the differences between the nature of a legal and a human person, essentially the same as for individual persons. The following circumstances, among others, are considered: the seriousness of the crime; the degree of guilt; the consequences of the crime; the actions taken before and after the crime; and the financial situation of the company.

The sanction of compulsory dissolution of the company will only be imposed: (i) if the company has been incorporated with the single or predominant purpose of committing crimes; or (ii) if the reiterated commission of crimes by the company demonstrates that the company is being used by the persons with a leadership position within the company exclusively or predominantly for the purpose of committing crimes.

### 16 Appeals

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

A guilty verdict is appealable by both the defendant (asking for acquittal or for conviction for a less severe crime or for a lower sentence) and the prosecution, in favour (asking for acquittal or for conviction for a less severe crime, or for a lower sentence) or against the defendant (asking for a higher sentence or a conviction for a more severe crime).

In certain cases, private persons who were accepted to act as assistants to the prosecution (victims or persons which the law entitles to assist the prosecution – e.g., any citizen in cases of bribery) may also appeal against a non-guilty verdict. It is disputed if these persons may appeal a guilty verdict with the single purpose of asking for a higher sentence to be imposed (the tendency is to refuse such appeals).

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

The sentence and the verdict form a single decision and are appealable as described above.

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

Courts of appeals have jurisdiction concerning the facts and the law. There is no definition of the standard of review, but one could say that the Courts of appeals follow a low standard of review, varying or overturning the decision if there has been any error in the lower court's decision. Nevertheless Courts of appeals are quite reluctant to change the lower court's decisions concerning the facts. The Supreme Court only reviews matters of law. There is no definition of the standard of review for these matters – the court will change or overturn the decision if it would have decided otherwise. If there is a visible and manifest error concerning the determination of the

facts which can be ascertained by reading the lower court's decision, the Supreme Court may annul the decision. In this case the standard of review could be described as a high standard.

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

If the appellate court upholds an appeal, it will either change the decision of the lower court accordingly, or reverse the decision and remand the case to the lower court for a re-trial.

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Carlos Pinto de Abreu is the managing director. He has been dealing with criminal law over the last 20 years, mainly White Collar Crime and Regulatory Offences, and has successfully represented many high profile clients - suspects, accused, victims and plaintiffs. His main working languages are Portuguese and English. He has held several positions at the Portuguese Bar Association and is currently the Vice-President of the Superior Council. He is also a Member of the European Criminal Bar Association (ECBA) and both he (as President of the General Assembly) and Vânia Costa Ramos are founding members of the Portuguese Criminal Lawyers' Association (Forum Penal).

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Carlos Pinto de Abreu e Associados is a medium-sized law office based in Lisbon and with an Oporto branch, but acting all over Portugal. The firm was founded by Carlos Pinto de Abreu together with 3 partners and 10 lawyers and its team has expertise in all Criminal Law areas, ranging from classical Criminal Law to White Collar Crime and extending to Regulatory punitive proceedings and to Disciplinary Proceedings.

Portuguese Law allows every person to be accompanied and represented by a lawyer. It is of utmost importance to seek advice from a criminal lawyer at the earliest possible stage, not only when facing criminal charges, but also when considering establishing a business in order to assess all regulatory and criminal law implications. Crime victims may also take an active part in the criminal proceedings, either as assistants to the prosecution or as civil claimants. This pro-activity is very important to defend one's rights, in particular in cases of a high-degree of complexity or of a transnational nature.

The firm is able to provide direct legal assistance in Portuguese, English, German, French and Spanish. With the assistance of interpreters and translators we are also able to provide our services to clients and companies in other languages, such as Arabic, Chinese, Italian, Japanese and Russian. Moreover, we have a vast network of contacts abroad, which ensures a direct, simple, swift and cost effective way ahead.

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