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**Do it the American Way: The Rise of Plea Bargaining, Leniency
Agreements & Criminal Settlement in Civil Law Jurisdictions –
Portugal**

October 23, 2:30 PM- 4:00 PM

1. What were the main issues that were raised at the time of the implementation of the settlements in your jurisdiction? What principles of criminal procedure had to be adapted/modified?

Portugal has very limited settlements, so-called diversion mechanisms, which only include the pre-trial stage and typically lesser crimes.

The main issues raised had to do with: 1) possible “privatization” of criminal proceedings due to the influence of the victim in settlements; 2) inequality in the application of settlements; 3) jeopardizing the truth-finding purpose of criminal proceedings; 4) giving judicial power to the prosecutor.

The question of the constitutionality of diversion mechanisms (provisional suspension of proceedings) in the legislative proposal for a new Criminal Procedure Code in 1987 was raised and the Constitutional Court declared the proceedings as such admissible, but unconstitutional if applied without the intervention of a judge.

For more details on plea bargaining in Portugal, see the paper “Is there plea bargaining in the Portuguese Legal System?”.

2. The roles of the different parties in the process

- The prosecutor:
 - o The Public Prosecution Office is an autonomous judiciary organ, lead by the General Prosecutor, which acts under a command of legality and objectivity. Governmental intrusion in the activity of the Public Prosecution Office is not permitted.
 - o Prosecutors are responsible for the investigation of criminal cases and decide whether there is enough evidence to file a bill of information against the suspect. They are supposed to investigate all circumstances, favorable or unfavorable to the defendant. They have the power to propose diversion mechanisms, which are a form of plea bargaining.
 - o After the bill of information has been filed, the prosecutor is responsible for sustaining the accusation during trial, but if no evidence of guilt has been produced he should ask for an acquittal.
 - o Prosecutors may appeal on both acquittals and convictions against of for the defendant.
- The suspect/defendant



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- The suspect may be represented by a lawyer (in some cases representation is mandatory).
 - The defendant is always represented by a lawyer.
 - The suspect/defendant's consent is always necessary for applying diversion mechanisms.
 - Legal persons may be held criminally responsible for certain crimes.
- The victim
- Victims may have an active role in the proceedings, acting as "assistant" to the prosecution.
 - In these cases they will be represented by a lawyer and will have to consent to most of the applying diversion mechanisms and may influence the contents of possible agreements.
 - Legal persons are considered victims of certain crimes and may also intervene.
- Investigating judge/judge
- There must be judicial approval of any diversion mechanisms.
 - Diversion mechanisms are generally proposed by the prosecutor (many times without consulting the defendant as to its terms) and, if the suspect/defendant (and the victim, when applicable) accepts the proposal, it is sent to the investigating judge/judge for approval.

3. How has settlement changed the practice of the law in your jurisdiction? Any change in the attorney-client relationship?

The possibility of having diversion mechanisms applied lead the lawyers to try and negotiate possible agreements with prosecutors and victims, thus increasing cooperation with them.

Contact with victims is easy when lawyers represent them. Contact with prosecutors is not always easy, as many times no communication lines are open. Nevertheless in withe-collar complex cases that communication is becoming more frequent.

Lawyers (and even clients) tend to prefer a diversion mechanism, as it usually does not involve criminal records as a consequence.

The possibility of benefiting from diversion mechanisms tends to lead suspects to cooperate and provide information to the prosecuting authorities, which could be in their benefit, but is commonly material evidence of the actions of other persons involved.

The possibility of reaching some kind of agreement leads lawyers not to risk bringing up legal arguments that are disputed or new in favor of their clients, but instead preferring to avoid trial.



4. How has settlement procedures in Common Law countries and/or international organizations influenced national procedure? How does that impact advice on cross-border matters?

So far Portugal has been more influenced by the German legal system in what concerns diversion mechanisms. This influence has so far been limited legislatively to pre-trial agreements.

Advice in cross-border matters is affected by our limited plea bargaining system. Multi-national lawyer teams should be set and assess:

- i)* Whether an agreement in Portugal or in another legal system is possible;
- ii)* If so, where would the conditions of the agreement be more favorable to the suspect/defendant;
- iii)* Does a foreign agreement bar prosecution in Portugal?
- iv)* Does a Portuguese agreement bar prosecution abroad?
- v)* Does the foreign agreement bar extradition to Portugal?
- vi)* Does the Portuguese agreement bar extradition to other countries?

Common law countries have had no influence in the Portuguese legal system concerning plea bargaining, but it is possible that they will in the future.

Whether our system will walk the road towards a “pure” plea bargaining model is unlikely. But the influence of foreign plea bargaining models is present and it is likely that the pressure of economic crisis, the rising quantity of pending proceedings, as well as the increasing complexity, length and number of white-collar criminal cases and the associated financial burden¹ will lead to a wider and more flexible plea bargaining model and probably the enactment of laws allowing for settlements for the application of criminal sanctions at the trial stage.

This will require a rethinking of the lawyer’s role and defense strategy, which will also have influence on advising clients in cross-border cases.

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¹ Trial hearings in high profile complex cases usually takes months and sometimes even years.