THE STRATEGIC VIEW

Business Crime 2016

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PORTUGAL

Paulo Saragoça da Matta and Nuno Arêde de Carvalho offer an insight into business crime and business misdemeanours in Portugal and the practical value of the right to remain silent rule in administrative regulation proceedings *versus* criminal procedures

1. What trends, in terms of activity or focus, have you seen in the prosecution of business crimes in your jurisdiction in the last 12 months?

In the last 12 months, we've witnessed an increase in the number of investigations related to business crimes, especially those that target not only corporations and individual members of the boards of such entities but also civil servants (or former civil servants) and members of the government.

That focus was already visible prior to that period, but it has gained some momentum given recent and publicly known developments in investigations that target, amongst others, a former Prime Minister and a former Member of the Portuguese government.

It is possible to detect, but that is a subjective feeling, that the public interest in such cases has reinforced the use, by the Public Prosecutors Office, of aggressive approaches of investigation. These are, nevertheless, limited by the type of crime that is under investigation and has been an argument to: on one hand, delay the end of the investigations and subsequent trial of the charges that emerge from those inquiries; and on the other, to allow the continuous opening of new fronts in those investigations.

2. Are enforcement agencies particularly focused on any specific industries or crimes?

In the last five years, there has been a focus on the investigation and prosecution of business crimes, with special attention being given by the

> [T]he Portuguese Penal Code allows the prosecution of foreign citizens and corporations if the relevant fact is committed in national territory, regardless of the agent's nationality

enforcement agencies to the financial and banking system and to the National Health System (NHS) in association with pharmaceutical, pharmacies and other suppliers.

Regarding the first, we can say, with relative certainty, that the attention given to such matters is also the consequence of the economic and financial crisis in Portugal since 2008. The public's feeling that the bankers are directly responsible for the crisis has reinforced the enforcement agencies attention to such cases and, in no minor extent, in our perspective, has been used by those same agencies, the *Ministério Público* (Public Prosecutors Office) and Courts to sustain less than reasonable inquiries, prosecutions and verdicts.

With regard to the second (NHS), although we can relate the importance given to the prosecution of cases with the economic crisis – bearing in mind that the NHS represents an important part of public spending – there is the idea that there are special fragilities in that area: deriving of the number of public contracts celebrated every year and the number of individuals and entities that are involved in the decision-making process.

In both cases the prosecutions are focused on fraud, tax fraud and corruption (broad sense of the expression) crimes.

3. Are enforcement agencies more or less focused on pursuing cases against corporations or individuals?

The general feeling is that the enforcement agencies are specifically focused on individuals rather than moving against corporations. One of the reasons for such situation is the fact that in some of the most relevant cases (concerning the public attention) those individuals truly "represent" the system.

Examples of what is said are the procedures (administrative and criminal) concerning the financial system, because some families had control of several banking institutions (i.e. BES and BANIF), owning the majority of the capital and assuring their administration, thus making it relatively easy to associate the corporations to some of those individuals.

This being said, there are cases of prosecution of corporations and individuals that were part of those entities.

Nevertheless there are more cases of corporations participating in the proceedings (administrative and criminal), against those individuals (former owners or board members), as auxiliaries of the enforcement agencies (or of the Public Prosecution in trial) so that they can assure future compensation if the misconduct and consequent criminal liability of those individuals is proven.

4. Does the legal framework concerning the prosecution of business crimes allow for extraterritorial enforcement? Are such matters being pursued?

The Portuguese Penal Procedure Code is applicable in the Portuguese territory but also applicable within the limits of international treaties and other instruments of international law. Moreover the Portuguese Penal Code allows the prosecution of foreign citizens and corporations if the relevant fact is committed in national territory, regardless of the agent's nationality (article 4th a) of the Penal Code).

There is also the possibility, as previously stated, of prosecution for facts committed abroad, in such cases as computer and communications fraud (article 221st); coin counterfeiting (article 262nd) and others typified in the article 5th of the Penal Code.

The legal framework also recognises the possibility of prosecuting foreign nationals that are found in Portugal when it is not possible (and having been requested) that their extradition is not (or cannot be) fulfilled.

Furthermore the Portuguese legislation – Lei n.º 20/2008, 21.04 – incorporated EU legislation which allows the prosecution of the crime of corruption in international commerce in such terms that, as long as the agent, regardless of its nationality, is found in Portugal the place where the facts occurred is irrelevant.

In the last few months, there have been several cases of investigations concerning business crime adding to the prosecution and trials pending that

have money laundering schemes and tax fraud (via international corporations based offshore, for example) as one of their objects.

5. What judicial or legislative developments have impacted the prosecution of business crimes in your jurisdiction in the last 12 months? Are there any significant proposals for reform of the legal framework that governs business crimes in your jurisdiction?

There have been no relevant developments in the last 12 months or significant proposals to reform the legal framework. However, there is the notion that some of the legal instruments that are used by the Public Prosecutors Office are interpreted in a way susceptible to imperil the right to a due process of law.

That can only be properly addressed if, and when, the Portuguese Bar Association decides to exercise its influence by the legislative branch, considering that there is a general acceptance, by the un-informed public, of restrictions of rights of those accused of corruption and fraud. In fact, there is little awareness to the fact that aggressive methods of investigation in such cases will be, in due time, easily applicable to other crimes or suspects. Thus putting at risk the basic notions as the right to privacy, property (by means of precautionary measures that limit ones right to dispose of his assets), etc.

6. How common is it for enforcement agencies in your jurisdiction to exchange information and cooperate internationally with other agencies? What are the consequences of cross-border cooperation on prosecutions of entities and individuals in your jurisdiction?

Nowadays it is common practice, by the Public Prosecutors Office, to collaborate, exchange information with and ask for information from other jurisdictions.

In that area we should emphasise the role of the *Departamento Central de Investigação e Ação Penal* – a special force of the Public Prosecutors' Office, responsible for the investigations of complex and transnational crimes, such as business crime and tax fraud. This Department works in close collaboration and supervising the *Polícia Judiciária*, a specialised judiciary police force that also operates under the instructions of the Ministry of Justice and tax authorities. In fact, this department has been able to perfect the way in which the collaboration is asked for and given.

The EU law is obviously an instrument of the utmost importance in that context and facilitates the exchange of such information.

The consequences of that cooperation can be divided into two different categories:

a) It enforces entities and individuals to be prepared to engage any attempts by (and in) foreign jurisdictions to impose restrictions

> There are general provisions in the Penal Code that foresee mitigation of criminal responsibility if the agent cooperates, confessing the crime, or by showing a proactive repentance

to rights as a consequence of the requests presented by the Portuguese judicial authorities (for example, the breach of bank secrecy, freezing orders of propriety in those jurisdictions) and simultaneously doing the same in the Portuguese jurisdiction.

b) It limits, to some extent, the knowledge of the content of the inquiries (in Portugal the criminal procedure may be subjected to various degrees of secrecy that limit access of the suspect) because the existence of the exchange of information and its results are, as a rule, not known by the supposed author of the crimes.

7. What unique challenges do entities or individuals face when enforcement agencies in your jurisdiction initiate an investigation?

The most complicated situation arises when some entity or individual faces an administrative regulation procedure and a criminal procedure simultaneously. The situation is complicated because it is compulsory for all entities and individuals to cooperate with the regulators, providing documents, records and testimonies (under an obligation of truth), and usually the regulators use that evidence not only for conviction, but also – and here the "illegality" arises – to send it to criminal investigations. Considering the right to remain silent and the right not to cooperate with any diligences that can result in self-incrimination, the situation gets constitutionally inadmissible. However, Courts are admitting this perculiar situation.

Defence counsellors are struggling daily with this situation, but until now with no success, especially as scholars are not being prudent to the gravity of the violation of the right to remain silent rule.

Another strange situation arises in this type of investigation: the judge that compulsorily controls the investigations of the public prosecution office, tends not to play the role of an insurer of the rights of the defendants (and of the legality of the investigation), but acts precisely as a "*second line*" (sometimes even more aggressive) of the investigators. This is a situation that is being disputed by defence counsellors, but also in this case with no success, once the position of the appeal Courts is, almost unanimously, a "*pro-investigation*" one.

8. Do enforcement agencies in your jurisdiction provide incentives for individuals or entities to self-report a business crime or otherwise provide assistance to the government? If so, what factors should individuals or entities consider when assessing whether to self-report a business crime or cooperate with a government investigation?

The incentives for individuals and entities to self-report criminal or misdemeanour situations are not "granted" by the government or enforcement agencies. Law directly foresees them. For example, in crimes such as corruption, money laundering, etc., the person who cooperates with the law enforcers directly benefits from: no responsibility at all for mitigation of the imprisonment duration or fines. There are also general provisions in the Penal Code that foresee mitigation of criminal responsibility if the agent cooperates, confessing the crime, or by showing a proactive repentance (point to other agents, identify evidence elements, etc.).

At the same time, considering what said in question 7, there is a general obligation to report all the types of business crimes (cases such as corruption are evident) to the regulators, in areas such as banking, insurance, tax consulting, etc. It must be stressed that even lawyers are, by law, obliged to report the knowledge of some business crimes, which is contrary to the secrecy of lawyers' activity.

9. Do enforcement agencies in your jurisdiction use non-prosecution agreements ("NPA") or deferred prosecution agreements ("DPA")? If so, how do such agreements work in practice and what can entities or individuals do to reach an NPA or a DPA with enforcement agencies? If not, do you believe it is likely that such agreements will become part of the legal framework in the next five years?

As stressed under question 8 *supra*, there are general legal provisions in the Penal Code for

situations that can be subsumed in a category similar to non-prosecution agreements. For minor crimes (the ones that are punished with imprisonment of less than five years in prison), there is a possibility for the public prosecution office (PPO) not to prosecute, once some injunctions are fulfilled by the agent. In any case, we are speaking of general rules of law provisions, that the PPO can use or not, and that depend also on the acceptance of the defendant, of the "victims" of the crime (when applicable), and of the Judge responsible for the control of the activity of the PPO.

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