– A SHY LEGAL REGIME AIMING FOR THE PREVENTION OF CORRUPTION –

Portuguese Government has decreed (as an annexe) the legal regime for the prevention of corruption. Decree-Law nº. 109-E/2021 was very recently officially published (last 9 December), and the said new regime was published as an annexe of the law that creates the Anti-Corruption Nacional Mechanism ("Mecanismo Nacional Anticorrupção").

About this new regime, the Prosecutor General of the Portuguese Republic already reacted, spoken about it as too low in its ambitions. In fact, bearing in mind the National Strategy Anti-Corruption 2020-2024, approved by the Portuguese Government last 18 March, and the fact that is has been discussed after a long period of public reflexion, we would say that this is a very shy legal regime.

If we look for different international experiences on this matter, any comparisons with the well-known FCPA, the U.S. Foreign Corrupt Practice Act (several Portuguese ADR companies trading on the US OTC markets are subjected to this regime), or with the UK Bribery Act, both used as models by several jurisdictions, are practically impossible. In fact, if we look only for the internal company procedures arising from the adoption of Compliance programs (such as company top-level commitment, assessment of commonly encountered risks on these matters, due-diligence, training, monitoring and review, confidential reporting and internal investigations), now mandatory for private Portuguese companies or to Portuguese subsidiaries of abroad companies with more than 50 employees, we easily reach to the conclusion that the new Portuguese regime is not too much more than a list of general principles – failing, moreover, in the regulation of some of the important procedures curtly listed above – too far short of the above said National Strategy Anti-Corruption 2020-2024.

But even if we look for more closer, for instance for the French *Loi Sapin II*, the new Portuguese law omissions are easily spotted, for instance, in what concerns to risk assessment, the complete lack of regulation concerning the effectiveness of the relevant procedures, such as – similar to what happens with the French law – the mandatory existence of a detailed document, regularly updated, identifying and monitoring corruption risks by geographical and activity criteria (risk mapping), or third party due-diligence, verifying the integrity of customers, partners and suppliers, or, finally, the complete lack of accounting control as a pilar for corruption prevention.

Even closer, concerning the criminal liability of legal persons, we look to the Spanish regime where the adoption of Compliance programs, demonstrating its effectiveness, may lead to the exclusion of criminal liability. Even being sensitive to the deep dogmatic discussion around these contentious issues of self-regulation, it is precisely on this that the new law shows one of its greatest vulnerabilities and timidity, as no (*good*) consequences are foreseen for the case of a company, responding as defendant, demonstrates the effective adoption of a Compliance program. Namely, if we understand that we cannot go that far excluding the criminal liability of the said company, what about the quantum of the penalty? No answers by this new law, that imposes penalties for the non-adoption of Compliance programs, but no good news for the compliant.

By another hand, but still within the above said matters of self-regulation – and no doubt about the new paths now open, even timidly, by the law –, in what concerns to whistleblowing mechanisms, the new law refers, though in a shy way, to (internal) *investigations* triggered by the report of EU law breaches. But no procedures, or, even better, no processual consequences arising from these private investigations are foreseen by the law. Within today, was officially published Law n.º 93/2021, of 20 December, transposing Directive (EU) 2019/1937 of the European Parliament and of the Council, of October 23, 2019, relating to the protection of persons who report EU law breaches. But again no legal provisions on private investigations bearing in mind that these matters will move deeply with fundamental criminal law principles such as non-incrimination.

In any case, **this new legal regime will come into force on the 7 June, 2022**. By this time, Portuguese private companies or Portuguese subsidiaries of abroad companies with more than 50 employees will have do adopt and to implement a Compliance program aiming to the prevention of corruption. However, **the respective sanction's framework will only come into force one year later, on the 7 June, 2023**. In what concerns to **small and medium-sized companies** with a yearly turnover not exceeding 50 million euros, or with a total annual balance-sheet not exceeding 43 million euros, the said framework will only come into force on the **7 June, 2024**.

A final word drawing on from what was just stated to reaffirm, also on these matters, the shyness of the new law, not only evidenced by these inexplicable said dates of enforcement of the respective sanction's framework, but also by the total amount of the fines: less than € 45.000,00.

The fact that the sanctioning framework is not adjusted to the size of the companies (together with a not to neglect possible inefficient public inspection) can lead to situations where the legal risk of breach of the duty to implement the Compliance program is preferable to the possible impact in reducing company profits, making possible undesirable phenomena such as the so-called *compliance trap*.

Specifically in what concerns to this issue of the adoption and implementation of Compliance programs as legal remedies to prevent corruption, we will have to wait to see if this new regime, more focused on general obligations to adopt Compliance programs but failing with regard to specific regulation aiming to its effectiveness, will not lead to situations of pure cosmetic (*window dressing*), merely decorative, inept with regard to the day-to-day reality of companies. It will certainly be by this perspective that we will determine whether this (timid) delegation of public powers in the private sector with regard to fighting corruption proves to be successful or not.

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