

# CHANGES FAILING TO ADDRESS CRIMINAL CONCERNS

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**While yet to see a wave of convictions, Portugal has seen an increase in fraud allegations levelled at executives at some of the country's leading financial institutions.**

While there is a growing emphasis on criminal, tax and white collar investigations by the Portuguese authorities, recent amendments to its Criminal Code have done little to address major challenges, say lawyers. These include the poor co-ordination of cases and the difficulties in securing convictions.

"A number of the most high-profile investigations of recent years have faced significant delay in part because of the complexity of the issues under investigation," says Paulo Farinha Alves, Litigation Partner with PLMJ, "and also a degree of confusion among the various agencies involved, and the simple fact that the courts are overwhelmed".

The amendments reflect efforts to speed-up the investigative and judicial processes and are a welcome move, say lawyers, many of whom are still engaged in fraud cases dating back to the mid-2000s. The Portuguese Parliament has also recently approved amendments to the Penal Code,

Criminal Procedure Rules and Enforcement Code, all aimed at simplifying trial and pre-trial procedures.

The changes to the Code include an increase in the use of summary judgments before trial, greater reliance on written statements, and a reduction in the grounds for appeal to the Supreme Court. This is aimed at freeing up more judicial time for cases involving organised crime, security and human rights issues.

The relative impact of such changes has yet to be evaluated, say lawyers. The issue has taken on greater significance with the launch of insider trading investigations at the start of 2013 against senior executives at Banco Espírito Santo (BES), and also those involving price manipulation by some of the key institutions involved in the privatisations EdP and REN.

"A number of cases that are still awaiting a final resolution are not the result of behaviours during the downturn, but products of the pre-crisis era," says Farinha Alves. "Fundamentally the key difficulty all this delay brings is a lack of guidance. If judges are not deciding cases then we lack the necessary precedents to help define the parameters of acceptable corporate behaviour. We have seen a lot of allegations but not many convictions."

Examples of such cases include some from 'Operation Hurricane', launched by the state authorities in the mid-2000s to explore the legality of tax avoidance schemes promoted by a number of financial institutions that saw the launch of thousands of criminal prosecutions. Albeit most were stayed against those investors that utilised the schemes, pending the repayment of taxes owed, cases are nonetheless pending against the advisers who conceived them.

That investigation led to a deeper analysis of the banking sector, prompting criminal cases involving executives at Banco Privado Português (BPP) and Millennium BCP shareholders – many of which are also still pending. The collapse of privately-owned Banco Português de Negócios (BPN), which was nationalised in 2008 after revelations of debts of €1.8bn, has also thrown up ongoing fraud allegations.

Aside from the procedural and analytical challenges such investigations present, a major recurring issue is the lack of co-ordination and the degree of involvement of potentially competing state agencies, say lawyers.

The Portuguese Central Investigation and Penal Action Department (DCIAP) is the body usually charged with investigating financial and fraud cases, but often also drawn in is the State Tax Authority, Bank of Portugal and the Securities Market Commission (CMVM), says Farinha Alves who is representing parties involved in the BPP and BCP cases.

With a greater analysis being made by the Authorities into the tax affairs of both individuals and companies, the need for clearer guidance is paramount, say lawyers. And further changes are necessary if the challenges of Portugal's criminal system are to be rectified.