

THE DECISION-MAKING PROCESS AND CRIMINAL CORPORATE LIABILITY IN PORTUGAL

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The recent reform of Portugal's criminal law has introduced significant changes to the corporate liability regime. As we know, by the decisions that they take, companies can be liable for their actions at a number of levels, criminal liability is among them.

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Una reciente
modificación del
derecho penal
portugués ha

introducido cambios significativos en el régimen de la responsabilidad corporativa.

En este sentido, la ley admite dos elementos de responsabilidad - uno penal y otro similar al delito alemán «Ordnungswidrigkeiten», es decir, el delito cometido por el empleado de una empresa producido por la falta de supervisión por parte de sus superiores.

José Manuel Vilalonga, socio mayoritario del bufete portugués Raposo Bernardo, enumera las nuevas condiciones en las que los juzgados pueden imponer multas a los directivos de una empresa, de manera individual o conjunta.

Asimismo, el autor considera que a pesar de que la modificación del derecho penal ha clarificado varios aspectos de la responsabilidad corporativa, también ha introducido otros que carecen de claridad.

law presents two types of responsibility: criminal liability, and another form of liability similar to the German *ordnungswidrigkeiten*. The latter normally applies when the offence is committed by a corporation's agent in the exercise of its functions. Conversely, corporate criminal liability depends on the express forbidding of a specific action.

Leadership position

The recent legislative reform has however widened the scope of the application of criminal corporate liability, to encompass the differing levels of corporate decision-making.

Thus, companies are criminally liable when a crime is committed in its name or in the collective interest by individuals who occupy a leadership position. A company may also be liable for crimes committed by those who undertake an action under the authority of those that occupy a leadership position – notably when it results from a lack of supervision or control expected by a company's superiors.

For this to have effect, a position of leadership in a company is considered to be exercised by its agents, representatives, or those who have the authority to exert control over an activity.

Corporate liability only extends however to decisions taken by those who exert sufficient power in the organisation, thus companies are only liable where an offence is committed after a decision that can be considered the direct manifestation of its will. Thus, where an agent of a company commits an offence against the specific orders or express instructions of its superiors, the company is excluded from liability.

On the other hand, collective responsibility does not exclude the responsibility of a company's agents. But it does also not expressly include it. As a matter of fact, both situations co-exist.

Another important aspect of the new regime is that corporate liability is no longer excluded when a company splits, or merges with another company. In the event of a merger, corporate responsibility exists when the merger is complete; in the event of a split, responsibility is assumed by the entities that result.

Individual responsibility

Those who occupy a position of leadership

in a company may also be liable for a fine when a company is convicted of a criminal activity. This may arise when:

- a crime is committed by the company while the individual exercises a position of leadership, and without their express opposition;
- a crime is committed previous to the period where the individual exercised a position of leadership, but where a lapse of the responsibility of the company has resulted in it having no monetary capacity for the respective payment; or
- a crime is committed previous to the period where the individual exercised a position of leadership, but the decision occurred in that same period, and the company's non-payment is imputable to them.

If the leadership responsibility falls to several individuals there will be joint liability, which means that each is liable for the entire sum, or that one may demand from the others their respective part.

These are the general themes of Portugal's new corporate liability regime. The amendments have improved many old issues, but also created conditions that prompt new questions and which will thus require particular attention.

Independent of the problems that will surely appear, the new regime creates however an important framework around which companies can define and execute their corporate governance strategies.

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