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Recent developments and proposed reforms affecting the legal profession in Portugal

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The “Anti-Corruption package”

December 2009:

- ad-hoc Commission
- politically monitoring the phenomenon of corruption
- conduct an integrated analysis of possible solutions to fight against corruption

July 2010

- Final report
- Various legislative proposals - “Anti-Corruption Package”.

The “Anti-Corruption package”

September 2010 – 8 new laws approved

- Law no. 32/2010 of September 2, which changes the Criminal Code, adding a new crime of violation of city-planning rules, and changes the crimes punishing corruption; this law also creates these crimes concerning persons who hold a political office.
- Law no. 36/2010, of September 2, changing the Legal Framework of Credit Institutions and Financial Companies and creating a database identifying all bank accounts existing in the Portuguese banking system and its respective holders.
- Law no. 37/2010, of September 2, approving a derogation of banking secrecy, withdrawing it from the generally applicable rules;

Law no. 32/2010 of September 2

Changed the corruption crimes enshrined in the Criminal Code:

- Creation of the crime of “undue receipt of an advantage” (art. 372/1) and a crime of “undue offer of an advantage or its promise” (art. 372/2);
- The sanction applicable to the crime of passive corruption for a non wrongful act has been aggravated (before fine up to 240 days or 2 years imprisonment; now from 1 to 5 years imprisonment);

Law no. 32/2010 of September 2

- The minimum sanction applicable to the crime of active corruption for a wrongful act has been aggravated (before – 6 months imprisonment; now 1 year imprisonment);
- Creation of aggravated crimes due to the value of the advantage obtained (art. 374-A)

Law no. 32/2010 of September 2

- Possibility of exemption of the sanction if the agent of the crime “blows the whistle” during the 30 days after the act has been practiced and before the criminal proceedings have been initiated (article 374-B; was already foreseen in another law);

Law no. 32/2010 of September 2

- Enlargement of the statute limitation terms to 15 years for crimes of corruption (articles 372, 373, 374, 374-A).
- Broadening of the concept of public official, which now includes jurors, experts and arbitrators (art. 386, no. 1, c)).

Law no. 32/2010 of September 2

- Purpose:

Improve the criminal prosecution of corruption through:

- creation of new offenses that do not demand the proof of the link between the payment of the bribe and a particular act or omission by the public official.
- Encourage whistle blowing .

Law no. 32/2010 of September 2

- New crimes inspired by the German Criminal Code (*Vorteilsgewährung* §333, Abs. 1, and *Vorteilsannahme* §331, Abs. 1 StGB).
- But - Portuguese Criminal Code has a specific general exemption clause – if the conducts are socially adequate and are in accordance with the usual business practices

Law no. 32/2010 of September 2

NOTE: bribing a foreign public official of an EU Member State is included in articles 372 ff (see article 386, no. 3).

Portugal has jurisdiction as long as the offense has been committed at least partially in Portugal.

Corruption in international commerce

- Corruption in the scope of international commerce is also an offense
- Not in the Criminal Code - see Law 20/2008, of April 21 – implementing Council FD 2003/568/JHA, of July 22
- Article 7: bribery of a public official to obtain or maintain a business, a contract or any other undue advantage in international commerce is punished with a prison sentence up to 8 years.

Corruption in international commerce

- Portugal has jurisdiction in cases of active corruption of foreign public officials in international commerce as long as the perpetrator is found in Portugal, irrespective of the *locus delicti* and of his/her nationality).

Law no. 36/2010, of September 2,

- Until now: no centralized list of all Portuguese bank accounts.
- From now on: list available at the Bank of Portugal
- Prosecuting authorities had to send requests to all financial institutions individually.
- This was sometimes quite time-consuming and therefore seen as an obstacle against prosecution in white-collar crimes in general and in particular in corruption offenses.
- The new list should be ready after June 2011.

Law no. 36/2010, of September 2,

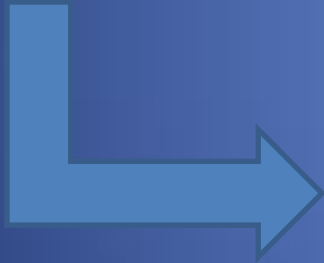
- Includes information on:
 - dates of opening and closing of bank accounts;
 - name of the banking institution;
 - name of account holders and of all those who are authorized to operate the accounts.
- The information from the list may only be given to judicial authorities (prosecutors and judges) and for purposes of criminal proceedings.

Law no. 36/2010, of September 2,

- There are many doubts concerning the application of this new regime and its conjugation with the Code of Criminal Procedure.
- In the previous legal framework, if the banking institutions legitimately invoked banking secrecy, the prosecutor or judge would have to submit the case to the Court of Appeals, in order for this Court to weigh the interests at stake and to determine, or not, the breach of secrecy
- This was disputed, but finally in 2008 the Supreme Court fixed its case law in that direction – Sentence no. 2/2008 (DR, I S, n.º 63, de 31/03)

Law no. 36/2010, of September 2,

- Changes to the Legal Framework of Credit Institutions and Financial Companies



- originated a discussion on whether financial institution may now be obliged to produce information covered by secrecy to the prosecutor without being able to refuse this.

Law no. 36/2010, of September 2,

- Two positions:
 - Obligation to supply the information:
 - The legislator would have weighed the interests at stake (criminal prosecution VS privacy) and decided that a criminal prosecution always justifies the breach of secrecy.
- VS
- Possibility to ask for the prosecutor to justify its request on the basis of an analysis of the interests at stake.
- institutions at stake may request the “investigating” judge to conduct this analysis and also to appeal from this decision to the Court of Appeals.

Law no. 37/2010, of September 2

- Changed legal framework of access to bank accounts information by the tax authorities (in tax proceedings).
- Different regime for “tax secrecy”, when compared to the other secrecy regimes:
 - Access to privileged information by the tax authorities usually depends on judicial authorization.
 - Banking secrecy has now been withdrawn from this rule and can usually be breached by decision of the tax authorities, in most cases without previously hearing the person or company concerned.

Two final notes

1. There has also been a change to the Criminal Code concerning statute limitation which predicts a suspension of the terms for statute limitation while the prosecution is waiting for a response to a rogatory letter;
2. On April 28 2011 a Law implementing Council FD 2007/845/JHA was passed and an Asset Recovery Office, working in the Judiciary Police, has been created.

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Budapest, May 7 2011.

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