

PORTUGAL

Rogério Alves¹

I OVERVIEW

Since Portugal has effective legislation against money laundering and economic and financial criminality in general, the jurisdiction does not often serve as a gateway for unlawful funds originating from other parts of the world. Nevertheless, Portuguese civil and criminal law provides fraud victims with several remedies to ensure their compensation for damages suffered as a result of fraudulent acts.

Regardless of any criminal investigation into fraud cases, every victim of a fraudulent act is free to take action under civil law by asserting claims for recovery or damages before the civil courts, but with regard to civil proceedings, victims must rely on general actions to privately trace and recover any assets or proceeds of fraud. There is no specific legislation related to asset tracing and recovery under civil law, including the collection of evidence to support the respective claims.

Criminal proceedings may present some advantages over civil proceedings from the standpoint of a victim of fraud, most notably:

- a There is a time limit for the conclusion of a criminal investigation.
- b In the task of investigating a crime, the public prosecutor (and police resources) and the examining magistrate (a judge specially appointed to intervene during the investigative phase in a criminal procedure) can enable a vast array of procedures for gathering information and proof, such as wiretaps, interception of correspondence and searches.
- c To prevent the dissipation of the defendant's assets or to secure the future payment of a legal compensation (or the payment of other amounts regarding the criminal procedure), the examining magistrate can have the defendants' assets seized and order that he or she settle bail.

However, and also from a victim's standpoint, some of the main principles of the Portuguese criminal system may entail some difficulties: in the face of the principle of *in dubio pro reo*, a suspect of a crime can only be convicted if proof of its responsibility is made beyond any reasonable doubt; the burden of proof lies on the public prosecutor; and suspects (and in limited cases even witnesses) have the right to not respond to questions that can result in self-incrimination (the inalienable right to remain silent).

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Civil remedies

The main remedies in a civil recovery action are restitution through the respective action (where possible) or damages compensation through action in contract.

As a general rule, each party has the burden of submitting and proving the facts upon which his or her claim or defence is based. Everything that remains uncontested by the other party is considered proven, and only contested facts are subject to the assessing of evidence. If a fact is contested by the counterparty, the presenting party must describe the evidence that it intends to rely upon to prove that fact. If necessary, the court will then render an order for the taking of such evidence and freely evaluate the outcome of such gathered actions.

Pursuant to the approval of the new Civil Procedure Code (in force as of September 2013), all evidence must be presented by the parties with their written petitions and must be presented before the trial hearing. In principle, after that, the proper moment to present any other means of evidence or to modify any of those previously presented will be at a pretrial hearing, typically held between the judge and the opposing parties to establish the main facts under dispute and to organise (and, if possible, schedule) the next steps of the proceedings.

Exceptionally, up to 20 days before the trial, the parties can file additional documents that were not presented along with the written statement at the risk of penalty (except when they prove the reason they were not able to present them initially).

In addition, during trial, the parties can only present documents that could not have been presented earlier and that only became necessary due to a recent and subsequent event. This was already possible within the previous Civil Procedure Code, but the rule was seldom used, as the courts freely admitted the presentation of documents at any time upon payment of a fine.

Before the trial and even during its course in court, at the request of the interested party (plaintiff), the court can order a third party (including law enforcement and regulatory agencies) to produce or disclose documents or other information deemed relevant to assess the claim's merit if there is no way for the plaintiff to obtain it directly.

With regard to civil remedies that can be sought against people who assisted the author of the fraud – by receiving its proceeds – the victim may also have to claim for restitution of particular assets (either fixed or moveable) against any person who is currently in

¹ Rogério Alves is the managing partner at Rogério Alves & Associados – Sociedade de Advogados RL.

possession of such assets, even if such person acted as a bona fide party. Furthermore, restitution of profits arising out of the disposal of the victim's assets may be achieved by siphoning off the profits if the person who assisted in committing the fraud disposes of such assets while knowing that they did not belong to him or her and that he or she was not entitled to do so. In either case, the victim has to prove that the defendant benefited from the action taken by a third person involved and the extent of such benefit; however, under certain circumstances ascertained on a case-by-case basis, the defendant may be obliged to disclose information if the victim does not know the relevant facts through no fault of his or her own.

The average period between the initiation and conclusion of the civil proceedings is around six to 12 months at trial level before the civil court and between four and eight months before the court of appeals in the event the defendant lodges a competent appeal; however, complex fraud litigation proceedings may take longer.

Criminal remedies

Civil action for restitution and damages' compensation may be filed simultaneously with criminal proceedings. The civil action may be brought before a civil court but also within the scope of a criminal proceeding if the claimant requires its appointment as a 'civil party'. In this latter case, since the claim for restitution and damages' compensation is based on a criminal offence, the claim must be filed before a criminal court in charge of the respective criminal proceedings except if:

- a charges are not brought within eight months following the criminal inquiry;
- b the criminal proceedings are closed or temporarily restricted;
- c the criminal proceedings are dependent on a previous criminal complaint or private prosecution; and
- d if there are no known damages at the time of the public prosecution, or if they are not known to their full extent.

In all these cases, civil action will progress in parallel with criminal proceedings concerning the same subject matter.

As previously mentioned (see Section I, *supra*), there are several advantages to bringing a civil action for restitution or damages within criminal proceedings. The main positive effect is the fact that the victim will be able to benefit from the action of the public prosecutor in relation to obtaining documental and witness evidence, tracing assets and proceeds of the criminal offence, etc. Furthermore, the victim may obtain a court order granting the freezing of the defendant's assets to prevent their dissipation (being entitled to have its credit satisfied with precedence in the case of conviction and subsequent confiscation). If the committed fraud falls under the statute of money laundering,² the law provides for compulsory confiscation of the relevant proceeds of such criminal offence (even secondary proceeds: i.e., proceeds that have been converted into other property) in the event of conviction (and the possibility of freezing such proceeds at a pretrial stage). In addition, as explained hereunder, the fact that the police (through its financial intelligence unit) can impose a suspension of suspicious transactions directly or indirectly related to the possible commission of the criminal offence renders a relevant assistance to the victim's efforts of asset-tracing proceeds in order to prevent their dissipation.

With regard to the possibility of confiscating property acquired by a third party, in principle, confiscation cannot take place when the asset is in the ownership of a person extraneous to the crime (e.g., a bona fide third party). Nevertheless, confiscation will be ordered if such third party knows of its origin, or has concurred through his or her conduct in making the undertaking of the crime easier or has taken advantage of the fact.

According to Portuguese case law, the only subject who may be considered extraneous to a criminal offence is the one who did not have any direct or indirect (e.g., due to lack of vigilance) negligent link to the undertaking of such offence. Therefore, even property held by close relatives of the defendant can be subject to confiscation.

A special form of confiscation was introduced by Law 5/2002 (and its subsequent amendments) in relation with a compulsory list of crimes (drug trafficking, money laundering, passive and active corruption, embezzlement, trading in influence, etc.) according to which, in the event of conviction, and for purposes of a confiscation order, any difference between the value of the convict's property and the value proportionate to his or her lawful income is construed as an advantage arising from criminal activity (value-based confiscation).

In the event the victim of the criminal offence has not required its appointment as a 'civil party' within the scope of a criminal proceeding, it may in any case claim the ownership of the property subject to confiscation before the court competent to execute it (as a bona fide third party). If a dispute arises over the ownership of such property, the court must refer the case to the competent civil court so as to determine legitimate ownership.

ii Defences to fraud claims

The most common defences to fraud claims that may be raised by a defendant are the lack of jurisdiction from the civil or criminal court in charge of the proceedings (see Section V, *infra*) the acquisition of property by a bona fide third party (additionally considering the recent trend in Portuguese case law to use 'piercing of the corporate veil' as a ground for rejecting such defence) and the elapsing of the statute of limitations.

In general, the statute of limitations is 20 years, including contract liability claims. Nevertheless, there are several exceptions to this general rule, including the following:

- a Non-contractual liability and strict liability: the general limitation period is three years starting from the date when the unlawful action is known by the claimant; however, this period may be extended according to a longer criminal statute of limitations if such action may, in theory, be considered to have occurred simultaneously with a criminal offence.

² Article 368 of the Portuguese Criminal Code.

- b The statute of limitations is five years, starting from the date when the right could have been exercised, in the event the claim is based on rents due by lessees, interest, dividends from companies, alimonies and any periodically renewable benefits.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Civil remedies

To prevent the dissipation of assets by suspects of involvement in fraud (or where there is a material risk of dissipation of assets), Portuguese law provides for protective attachments, which consist of a request for the court to issue an order regarding a debtor's property or rights (e.g., bank accounts, real estate property, shares, credits over a third party). The effect of the court order depends on the nature of the assets in question. The attachment of real property is registered at the competent land registry office as a charge in favour of the claimant; the attachment of personal assets is done by seizing the assets and placing them in the custody of an enforcement agent appointed by the court on behalf of the claimant; and the attachment of defendant's rights is achieved by notification to the third-party debtor, which must place the credit at the disposal of the enforcement agent.

The substantive requirements of protective attachments described above are represented by *fumus boni juris* and *periculum in mora*. The first is the presentation of preliminary evidence of the existence of the right that the requested attachment is aimed at protecting; the second is evidence of a serious and concrete risk that the lack of attachment could compromise the asset recovery in a main lawsuit.

Even if instrumental to a full trial, protective attachments may also be granted at trial stage and even after a merit judgement on the cause, provided that both substantive requirements are met.

In terms of proceedings, the attachment order can be issued *ex parte* if the prior knowledge by the defendant could compromise the successful execution of the order. Such being the case, the defendant is entitled to raise his or her defence 10 days after the attachment order, and such order will therefore be subject to confirmation, amendment or revocation by the court, otherwise the court may decide on the application for protective attachment after a hearing in which all parties are entitled to present their allegations.

In terms of interim relief for obtaining information, the Portuguese Civil Procedure Code provides that, upon request by a party, the court can order pretrial depositions (and even, under certain circumstances, prior to filing the lawsuit) in the event there is a serious risk that their deposition during trial will be impossible or extremely difficult.

Criminal remedies

The Portuguese Criminal Procedure Code (CPC) foresees two kinds of provisional measures dubbed as 'patrimonial guarantee measures': the 'precautionary attachment' and the 'economic surety'.

Precautionary attachment is an interim measure aimed at freezing the proceeds of a crime (and the means used for the practice of such crime) in view of a future confiscation; or protecting and satisfying the credits of the state or the victim of a crime, by freezing or seizing the defendant's assets (or those of third parties liable for compensation arising out of a convicting sentence) to prevent their dissipation (analogous with the protective attachment provided for civil purposes). This measure can only be ordered by the court upon request of the public prosecutor and is immediately revoked if the defendant posts 'economic surety'. Precautionary attachment orders suspend or prohibit any civil recovery proceedings related to the assets subject to attachment.

'Economic surety' is aimed at guaranteeing the enforcement of any confiscation penalty imposed by the court or compensation due to a victim of a crime. This surety may be posted by any form of a patrimonial guarantee (deposit, pledge, mortgage or bank guarantee).

Pursuant to Article 178 of the CPC, provisional seizure, carried out by the Asset Recovery Office (ARO)³ on behalf of the public prosecutor, is also available in respect of legal persons suspected of committing a criminal offence of 'objects' used or intended to be used in the undertaking of a crime or representing the proceeds, profit or prior compensation; all 'objects' left by the offender at the scene of the crime; and any other 'object' that might serve as a proof.

Seizure of assets must be authorised, ordered and validated by judicial authorities.

ii Obtaining evidence

Civil proceedings

The collection of evidence (interrogatories, testimonies, expert evidence, etc.) is carried out within the trial and is conducted by the court mainly at request of the parties. With regard to documentary evidence (see Section II.i, supra), the parties may produce all documents that, in their view, may prove the grounds of their respective claims or defences.

With some exceptions (e.g., 'authentic acts' such as extracts from the commercial or land registry offices or public deeds), the court is free to assess any produced evidence at its discretion, but has to substantiate the reasons for its assessment in its final decision.

If the defendant does not respond to a lawsuit, the court must verify whether the service has been made in accordance with all applicable legal procedures and, if it finds any irregularity, must order the repetition of such service. If, having been correctly served, the defendant still does not respond, the facts presented by the plaintiff in his or her initial claim are considered proven with some exceptions (e.g., facts challenged by one of the defendants in a lawsuit with several defendants).

³ A unit of the criminal police whose mission consists of identifying, tracing and seizing property or proceeds related to crimes, both at internal and international level.

If defendants fail to respond when duly summoned, the file is made available for examination for 10 days, first to the plaintiff's lawyer and then to the defendant's (if the defendant has appointed a lawyer, despite not having presented a response). Both lawyers are given the opportunity to present written allegations within that period, and the court must subsequently issue a ruling.

Criminal proceedings

In accordance with Portuguese constitutional principles (the presumption of innocence, which provides that a defendant cannot be considered guilty until its final conviction), the burden of proof lies on the public prosecutor, either in proving beyond reasonable doubt the defendant's guilt in relation to certain criminal offences, or in proving that specific assets are the proceeds of such criminal offence and, as such, must be confiscated.

In a criminal trial, the relevance of oral evidence given before the court by both prosecution and defence witnesses should be highlighted. The main principle applicable to the taking of testimonies is that of a fair trial, whereby the court must ensure during the trial the equal footing of the prosecution and defence and, as such, the defendant must be able to directly present his or her defence and examine the prosecution witnesses who have testified against him or her.

With regard to documentary evidence, it should be noted that in criminal proceedings related to organised crime and economic and financial criminality, the public prosecutor has the power to lift bank secrecy and to issue a reasoned order to banks and other financial institutions that, in turn, must comply and send the requested information within an allocated time frame.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Banking and money laundering offences are punishable with a prison sentence of up to 12 years by Article 368-A of the Portuguese Criminal Code.

Law No. 25/2008 (and its subsequent amendments) sets out measures of prevention and law enforcement to combat money laundering and terrorist financing, transposing to the Portuguese jurisdiction Directives 2005/60/EC of the European Parliament and of the Council (of 26 October 2005) and 2006/70/EC of the Commission (of 1 August 2006) on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

Since the approval of such Law, financial institutions and a large number of non-financial institutions, such as casinos, real estate agents, auditors, notaries and lawyers, are bound not to participate in any suspicious or criminal activities related to money laundering and to report such activities to the public prosecutor or the Unit of Financial Information. In particular, the referred-to entities must:

- a identify and verify customers and beneficial owners;
- b carry out due diligence measures, including gathering information regarding the purpose and intended nature of the business relationship, and risk assessment;
- c refuse to carry out a transaction whenever the above-mentioned identification and due diligence duties are not fulfilled;
- d keep, for a minimum period, documents, evidence and relevant data referring to the compliance of customer due diligence and to business transactions;
- e examine and pay special attention to any activity that they regard as particularly likely, by its nature, to be related to money laundering or terrorist financing;
- f inform (on their own initiative) the competent authorities of any facts suspected of being related to money laundering or terrorist financing;
- g refuse to carry out a transaction whenever such operation is known or suspected of being related to money laundering or terrorist financing;
- h promptly collaborate with the competent authorities (the supervisory authorities responsible for the prudential and market conduct supervision);
- i not reveal to the customer or any third party such disclosure of information to the competent authorities;
- j adopt appropriate policies and procedures to comply with the legal duties regarding internal control, risk assessment, risk management and internal due diligence; and
- k adopt appropriate measures to keep staff well informed of all the legal duties applicable.

ii Insolvency

Civil liability may arise as a consequence of criminal insolvency offences. In fact, the intentional breach of certain duties (e.g., destruction or dissipation of assets, artificial reduction of profits or assets, and fictitious increase of debts) and gross misconduct (e.g., exaggerated expenses or failing to file for a restructuring procedure while knowing of the company's economic and financial difficulties) are punishable under the Criminal Code.

The Portuguese Insolvency Act sets out the main rules and procedures regarding insolvency and restructuring for companies in Portugal. Several amendments to this Act, in force since 2004, have continually aggravated the penalties of crimes related to insolvency and implemented a formal procedure of insolvency (simpler than the previous procedure), as well as procedures aimed at recovering assets by employees and third parties directly affected by the insolvency (e.g., persons whose own assets have been unduly considered as property of the debtor); they have also implemented a considerable number of duties that the debtor and the directors of companies in financial difficulties must comply with.

iii Arbitration

Despite the fact that arbitral courts have the necessary powers to order interim measures under Portuguese arbitration law, there is no record of victims of fraud resorting to arbitration in connection with fraud and asset recovery.

iv Effect of fraud on evidentiary rules and legal privilege

As far as legal privilege is concerned, public prosecutors do not have, in theory, the power to seize or request the production of documents subject to legal professional privilege (e.g., correspondence between the suspect and its defence lawyer) unless such documents are deemed 'elements' of a criminal offence.

Notwithstanding this, the scope of protection granted under Portuguese law differs according to the professional's particular practice. Lawyers, for instance, benefit from broad and strict protection, whereas employees and directors of financial institutions do not (see Section III.ii, supra).

Privilege at trial is not considered an absolute right and, in most cases, it is possible to lift it, albeit through a complex procedure. The main rule on this issue is set out in Article 135 of the Portuguese Criminal Procedure Code, which stipulates that only superior courts may decide whether privilege should be lifted and thus consequently force the disclosure of protected facts. The superior court's decision must always be taken according to the principle of the prevailing interest, which binds the court to, inter alia, considering the gravity of the criminal offence and the interests pursued through the criminal procedure.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

Under Portuguese law, the international jurisdiction of the Portuguese courts is determined by the following criteria:

- a according to Portuguese territorial jurisdiction rules (e.g., *forum rei sitae*, when the defendant is resident in Portugal), the lawsuit may be filed in a Portuguese court;
- b the facts determining the cause of action took place in Portugal; and
- c the rights of the plaintiff may only be made effective through a lawsuit filed in Portuguese courts or when bringing legal action in a foreign country may present relevant difficulties for the plaintiff and, simultaneously, there is a relevant connection between the lawsuit and the Portuguese jurisdiction.

Furthermore, EU Regulation 44/2001 on jurisdiction is fully applicable in Portugal.

It should be noted that, whenever a situation occurs in which Portuguese courts are internationally competent, pursuant to domestic law or EU Regulation 44/2001, they will be, as such, internationally competent for the lawsuit. In fact, the rule of *forum non conveniens*, as followed in some common law jurisdictions, does not apply in the Portuguese legal system.

ii Collection of evidence in support of proceedings abroad

Judicial cooperation is mainly governed by EC regulations (with respect to EU countries) and the international conventions ratified by Portugal.

With respect to all EU countries, requests by other Member States for the taking of evidence in Portugal are governed by EC Regulation No. 1206/2001. The main provisions of such EU Regulation set out that:

- a the taking of evidence should be executed expeditiously (ordinarily within 90 days), and refusal should be confined to exceptional situations; if a special procedure is requested in accordance with the law of the requesting state, the competent foreign court should comply with such a requirement unless this procedure is incompatible with the applicable law;
- b requests should be transmitted directly from the requesting court to the competent court of the foreign state;
- c the presence and participation in the foreign state of the relevant parties and of the representatives of the requesting court can be allowed; and
- d the direct taking of evidence by the requesting court can take place under certain conditions (e.g., if videoconferencing is available to take testimonies).

As far as non-EU countries are concerned, the most relevant international convention is the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. In accordance, requests to obtain evidence must be made in writing and sent to the central authority of the foreign state appointed for that purpose. The main terms and conditions are in line with those set out in EC regulations referred to above.

In the absence of any treaty, Portuguese law provides that letters rogatory of foreign authorities be analysed by the public prosecutor for public interest reasons prior to execution. If granted, the competent court will be responsible for ensuring compliance with them, except if the execution of such letters rogatory does not require the intervention of a Portuguese court.

iii Seizure of assets or proceeds of fraud in support of the victim of fraud

Two legal frameworks may be applied: a general legal framework under ordinary law, and the specific and simplified legal framework applicable within the EU.

As for the general framework, except if international conventions provide otherwise, requests for assistance issued by foreign judicial authorities are sent to the Portuguese judicial authorities through diplomatic channels, and the enforcement documents are

returned through the same route. In urgent cases, requests for assistance can be sent directly to the Portuguese authorities with jurisdiction to act on them. In a case of assistance concerning provisional measures – notably attachments – foreign authorities can request assistance from the Portuguese authorities with the freezing of assets that appear to be the proceeds of a criminal offence (and of any asset the value of which is equivalent to the proceeds of such offence) in view of future confiscation. This request may be refused if, for example, the underlying facts do not constitute an offence under Portuguese law or if the respective assets cannot be confiscated under Portuguese law.

With regard to the legal framework applicable within the EU, applications for freezing orders and subsequent enforcement are decided by the public prosecutor with territorial jurisdiction and, upon previously examining the regularity of the application, immediately enforced (through ARO); however, ARO may refuse to enforce the freezing order under certain circumstances⁴ or to defer such order in several other situations.⁵ If the public prosecutor decides to defer the enforcement, he or she must inform the judicial authority of the issuing state of the reasons for the deferral and, if possible, the foreseeable duration.

Following the entry into force of Law No. 30/2017 by transposition of the EU, Directive 2014/42/UE, several amendments have been made in the Portuguese criminal and complementary criminal laws setting measures for the control of organised crime and economic or financial crime.

iv Enforcement of judgments granted abroad in relation to fraud claims

Within the EU, Directive EC 44/2001 (with its subsequent amendments) sets out the conditions under which a judgment (concerning civil and commercial matters) issued in a Member State can be enforceable in another. Therefore, pursuant to this Regulation, a judgment issued in a Member State and enforceable in that Member State may be enforceable in Portugal when, upon application by the interested party, it has been declared enforceable. The application of enforceability is filed with the competent superior court.

Without prejudice to any international conventions and treaties in force (e.g., the Lugano Convention), under Portuguese law, it is generally possible to enforce foreign court civil judgments provided that these are subject to a prior confirmation procedure before a Portuguese court. Said confirmation will be granted whenever:

- a there are no well-grounded doubts concerning either the authenticity of the submitted documents or the judiciousness of the decision;
- b the decision is final according to the law of the country in which the judgment was rendered;
- c the object of the decision does not fall within the exclusive international jurisdiction of Portuguese courts and the jurisdiction of the foreign court has not been determined fraudulently;
- d there are no other proceedings between the same parties, based on the same facts and having the same purpose, and no ruling on the same case has been issued by a Portuguese court;
- e the defendant was duly notified of all the proceedings according to the law of the country where the judgment was rendered;
- f the foreign court proceedings complied with the procedural law requirements and each party received an adequate opportunity to present their case fairly; and
- g the acknowledgement of the decision is not patently incompatible with the international public policy of the state.

v Fraud as a defence to enforcement of judgments granted abroad

Under Portuguese law, the general rule is that both parties can appeal any decision or order of the Court of Appeals during the confirmation procedure. Confirmation of the foreign judgment may be challenged if any of the confirmation requirements outlined above (see Section V.iv, supra) are not fulfilled according to the defendant's perspective.

VI CURRENT DEVELOPMENTS

In civil proceedings, the Portuguese Constitutional Court, in its recent judgment No. 847/14, declared unconstitutional the suppression of the enforceability – introduced by the Portuguese Civil Procedure Code – of private documents signed by the debtor that establish or acknowledge pecuniary obligations, dated prior to 1 September 2013 (the date of entry into force of the new Portuguese Civil Procedure Code), since it violates the principle of legitimate expectations. In fact, with the entry into force of the new Civil Procedure Code, such private documents ceased to be enforceable even with legally certified signatures (registered or authenticated by a notary or other entity with such power to certify). This change means that creditors holding this kind of document must file a (declaratory) action – and support all burdens arising thereof – to obtain a judicial title enabling them to enforce their credit rights.

As for criminal proceedings, a cutting-edge update has been the recent enactment of Law 30/2015 aiming to comply with the recommendations addressed to Portugal on corruption by GRECO, the UN and the OECD, which introduced several amendments to the Portuguese Criminal Code, the law relating to crimes committed by political-office holders and high public officials (Law 34/87), the law on corruption in international trade and in the private sector (Law 20/2008) and the legal framework for whistle-blowing on corruption related matters (Law 19/2008). The most significant amendments introduced by said Law are:

- a the criminal liability of legal persons governed by public law (e.g., state-owned companies);
- b the increase of the statute of limitations to 15 years for influence-peddling offences;
- c the punishment of bribery attempts as criminal offences;

⁴ For example, if the underlying facts do not constitute an offence under Portuguese law or if the enforcement infringes the double jeopardy rule.

⁵ For example, when there is a risk that such a decision may undermine a criminal investigation in progress in Portugal, or when the assets or items of evidence have already been attached or frozen in the context of a domestic criminal proceeding.

- d penalty discharge on corruption offences (which was mandatory in certain situations of repentance) has become a discretionary legal power of the judgement court;
- e for a 'repentant' to benefit from a penalty discharge, he or she must voluntarily turn any unlawful advantages obtained from the corruptor; and
- f the scope of incrimination for embezzlement offences has been expanded to the appropriation and use of fixed assets.

Another important update has been the approval of Law 36/2015 – which adopted the Council's Framework Decision 2009/829/JHA of 23 October 2009 – on the application between EU Member States of the principle of mutual recognition of decisions on coercive measures (such as the obligation to remain in the territory of the executing state, to report at specified times to a specific authority or to avoid contact with specific persons related to the offences allegedly committed) as an alternative to pretrial custody.

Finally, another relevant development has been the Portuguese Constitutional Court decision (in its recent judgment No. 377/2015) ruling that the criminalisation of unlawful enrichment proposed by the Portuguese Parliament Bill No. 369/XII is unconstitutional on the grounds of breach of the constitutional principles of proportionality, mandatory prosecution and presumption of innocence. The Bill proposed the introduction of a new article to the Portuguese Criminal Code establishing the punishment with a penalty of up to three years' imprisonment of any person who directly or through a third party acquires or owns property inconsistent with his or her respective income.

While already provided for in the CCP, e-auctioning within enforcement proceedings only became fully operational in 2016 upon the approval of Ministerial Order 12624/2015, which appointed the Solicitors and Enforcement Agents Chamber to manage the corresponding platform. The most relevant changes implemented have been the elimination of sale through an expression of interest submitted in a sealed letter as well as the waiver of a court order to schedule the auction date.

Upon enactment of Law 13/2016, tax enforcement proceedings may not target the attachment of the debtor's family home except if its rateable value falls within the property transfer tax maximum rate applicable to the acquisition of urban property destined to be a permanent dwelling. In such case, proceedings aimed at selling the property through auction may only take place at least one year upon the expiry of the payment period concerning the earliest tax debt.

ABOUT THE AUTHORS

ROGÉRIO ALVES

Rogério Alves & Associados – Sociedade de Advogados RL

Rogério Alves is the managing partner of Rogério Alves & Associados. With over 30 years' experience, and a former chairman of the Portuguese Bar Association (from 2005 to 2007), his professional activity ranges from general litigation, with a particular emphasis on criminal and white-collar criminal law and financial regulation infringements, and commercial and corporate litigation.

Rogério Alves has a law degree, granted in 1984 by the Faculty of Law at the Lisbon Catholic University, and has been a professor in legal discourse and presentation at the University since 2005. He is classed as a 'Leading Individual' by *Chambers Europe* in white-collar criminal law and litigation (Band 1).

ROGÉRIO ALVES & ASSOCIADOS – SOCIEDADE DE ADVOGADOS RL

Avenida Álvares Cabral, 61 – 4º

1250-017 Lisbon

Portugal

Tel: +351 21 391 10 40

Fax: +351 21 391 10 41

ra@raassociados.pt

www.raassociados.pt