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# Corruption and confiscation

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# CORRUPTION AND CONFISCATION

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*CORRUPÇÃO E CONFISCO*

*(Notas de Conferência)*

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## 1. The scourge of corruption

Corruption is an international scourge. It infiltrates the various sectors of societies and States, weakening democracies.

Its fight is faced with multiple obstacles. The "culture of corruption"

stands out, i.e., systemic corruption, which is woven over time and masks acts of corruption. It disguises above all the "intended agreement" which characterizes the act of corruption. Framing the discourse in public corruption, the "culture of corruption" is warped by those who adopt behaviors which provide advantages to public officials. These officials who, sooner or later, end up facing, in the exercise of their obligations, the need to make decisions which will, directly or indirectly, involve the interests of those who provided the advantages. In this context, the public official tends to feel conditioned by the "favorable climate" that was provided to him and, consequently, to favor those who benefited him. There was, in fact, no express agreement (an "intended agreement") of "exchange of favors". And yet, this is the corruption which infiltrates States and corrupts

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Public Administration. This is the corruption which must be urgently fought. But it is also the most difficult to prove.

**2. The classic legal type of corruption**

If we think about the concrete act of corruption, what does it look like? Something like this: Mr. *A*, a businessman, meets with Mr. *B,* a civil servant, informing him that he is involved in a public tender for the construction of a hospital and is willing to pay a large sum of money to win such tender. Mr. *B* accepts the amount, committing to fulfil his "end". This behavior by the official fits into a classic legal type of "passive corruption", such as, for example, that which is provided for in Article 372.º, n.º 1, of the Portuguese Penal Code as amended by Decree-Law n.º 48/95, of 15 March: «*An official who by himself or through a third party, with his consent or ratification, requests or accepts for himself or a third party, without it being due, a patrimonial or non-pecuniary advantage, or the promise thereof, in exchange for an act or omission contrary to the duties of his office, shall be punished by a term of imprisonment of between 1 and 8 years*».

This legal type implies the existence of an intentional unlawful agreement, proof of which is very difficult or, in most cases, almost impossible. Because a concrete agreement along these lines usually takes place in a private place, accessible only to those involved. Because in future conversations about the agreement, verbal codes will be used which are capable of dispelling suspicion or, at least, of making it difficult to prove its true meaning. Because it is not written in a document that can later be used as body of proof of the act of corruption.

If, in short, a conviction for corruption in court implies proof of the intended illicit agreement, this is unlikely to be obtained.

**3. Legislative changes in Portugal**

3.1. Within the scope of the legal types of crime

Various international legal instruments of which we would highlight the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (1997), the *Convention on the fight against corruption involving EU officials or officials of EU countries* (1997) or the *United Nations Convention against Corruption* (2003) have imposed obligations on States in order to implement and articulate measures capable of overcoming these difficulties. In this context, the amendments introduced in Portugal by Law n. º 32/2010 of 2 September stand out, namely the establishment of a new legal type of crime: "*undue receipt of advantage*" (article 372.º of the Penal Code). By simply criminalizing the act of an official of requesting or accepting (by him/herself or through a third

party, with his/her consent or ratification), in the exercise of his/her functions or because of them, an undue advantage, whether financial or non-financial, this type of law is broadly foreseen in line with international guidelines. The legal type waives the "intentional illicit agreement" between corruptor and corrupted, with the legislator anticipating the penal protection when assuming the imminent abstract danger of the counterparts to the request, acceptance or receipt of undue advantage. This is a legal type that aims to avoid the creation of goodwill in relation to future decisions. It aims, therefore, to avoid the "culture of corruption", thus overcoming evidentiary difficulties. If the legal type provided for in article 372.º, n.º 1, of the Penal Code, criminalizes the official for unduly receiving an advantage (or even merely requesting or accepting such an advantage), n.º 2 criminalizes, *mutatis mutandis,* the act of promising payment, or the act of making the payment, undue for the official.

3.2. In the context of legal consequences. The revelance of extended confiscation.

Measures have also been implemented regarding the legal consequences of crimes of corruption, aimed above all at facilitating the corresponding proof of the facts and the loss of illicit advantages.

As for the proof of the facts, in the reform of the Criminal Code by Decree-Law n.º 48/1995, of 15 March, a legal system that we can describe as a "premial right" emerged, provided for in article 372.º, n.º 4, of the Penal Code. This provision allows for the possibility that the penalty for passive corruption for unlawful acts may be specially mitigated if the agent (the official) concretely assists in the collection of evidence decisive in the identification or capture of other persons responsible. This possibility of mitigating the penalty that resulted from this became mandatory after the entry into force of Law n. º 108/2001, of 28 November.

Criminal procedural law, in the context of the Roman-Germanic legal family (as opposed to the criminal procedural law of Anglo-Saxon countries), is not governed by principles that give the Prosecutor the opportunity, at the investigation stage, to guarantee the accused a penalty reduction. In any case, the implementation of the obligation to apply this mitigation (by Law no. 108/2001, of 28 November) allows the Prosecutor to promise to mitigate the penalty if the collaboration effectively occurs, since the Court is obliged to apply it. This encourages collaboration at an early stage of the criminal process, with the advantages that this entails.

On the other hand, it must be taken into account that corruption is a crime in which the perpetrator aims at an illicit profit. And that the fight against profitable crimes should be guided, above all, by the maxim that "crime does not pay". That there are more problems than benefits in committing a crime. The

dissuasive strategy must be, then, to demonstrate that the criminal does not get rich through criminal activity. Or to prevent the criminal, especially after conviction, from maintaining a luxurious way of life provided by the criminal activity.

In this context, Law n.º 5/2002 of 11 January (last updated by Law No. 99-A/2021 of 31 December) implemented a new extended confiscation regime.

This is not a legal regime exclusive to the crime of corruption. It falls within the scope of the aforementioned Law (Law n.º 5/2002 of 11 January**)** which establishes measures to combat organized and economic-financial crime, namely white-collar crime.

The extended confiscation institute is one of those measures that applies to a list of crimes provided in article 1 of this law, the so-called "catalogue crimes" of organized crime, among which are "undue receipt of advantage" and "active and passive corruption" (article 1.º, n.º 1, paragraphs e) and f)).

In the context of the international legal framework, inspired by the principles of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime- implemented in the European Union since 1998)-, the Portuguese legal system (like others in the European context) has created a system of extended confiscation. This is a procedural incident, inserted into criminal proceedings for a "catalogue crime" (such as corruption), which makes it possible to investigate the existence of the defendant's "incongruous assets", i.e., those resulting from the difference between the total value of their assets and the value corresponding to their (justified) lawful income. In the event of a criminal conviction for a catalogue crime (for example, for a crime of corruption), any incongruous assets are presumed to have arisen from criminal activity and are then confiscated.

This power to apply extended confiscation is legitimized by the presumption that the incongruent assets stem from criminal activity.

This presumption has generated, as might be expected, doctrinal and jurisprudential controversy as to its conformity with constitutional and international principles, namely the principle of presumption of innocence.

At international level, the European Court of Human Rights (ECtHR) was asked to rule on the compatibility of extended confiscation (provided for in the Drug Trafficking Act *of* 1994) with the principle of presumption of innocence (enshrined in Article 6(2) of the ECHR - European Convention on Human Rights). The ECtHR, in its Judgement of 5 July 2001 – in the famous *Phillips v. United Kingdom* case –, ruled that extended confiscation does not result from a new indictment or a new conviction. Rather, it consists of an operation analogous to that of determining the amount of a fine or a prison sentence to be imposed on a person who has already been convicted.

The Portuguese Constitutional Court has also raised the question of whether extended confiscation complies with constitutional principles, particularly

the principle of presumption of innocence as enshrined in article 32.º, n.º 2, of the Constitution of the Portuguese Republic (CPR). In essence, the Constitutional Court ruled that it is not a question of determining any criminal liability of the defendant, but rather of determining the value of the incongruity of assets that leads to the presumption of their illicit origin. Without specifying the legal nature of the institute (although it seems to consider it to be of an administrative legal nature), the Constitutional Court stated that the conviction for a catalogue crime is configured as a mere presupposition of an action to investigate the illicit acquisition of property. In this investigation procedure the rules of presumption of innocence, the right to silence or the accusatory structure of criminal proceedings (other principles whose violation was also raised) no longer apply, and the understanding prevails that the legal presumption established in Law no. 5/2002 of 11 January, does not violate these constitutional principles.

On this issue, within the reasoning of the ECtHR and especially of Professor Silva Dias (who considers extended confiscation to be an accessory consequence of the penalty), and considering that in economic-financial crimes (that aim at profit) in the context of general positive prevention the adage that "crime does not pay" (or should not pay) has special relevance, it seems to me that extended confiscation should be considered an accessory penalty similar to a fine, the calculation of which is defined with reference to the defendant's assets (as is relevant in fines), even though in this case (of extended confiscation) it specifically refers to the defendant's incongruous (unjustified) assets.

It is not, in this context, a confiscation of the proceedings of a crime but a true accessory penalty that guarantees the confidence-building effect for citizens that, literally, "crime does not pay". A penalty which respects the principle of guilt, as it is established as an accessory to the main penalty (like any other accessory penalty) and has a method of calculation related to the assets of the defendant, namely the unjustified assets obtained during the five-year period prior, precisely, to the constitution of that person as a defendant under Portuguese law.

Other models of confiscation exist with the same objective of combating illicit profit, namely confiscation not based on conviction: the so-called confiscation *in rem*.

But this is a topic which shall remain, who knows, for a future opportunity.

## (RESUMO EM PORTUGUÊS)

Sabe-se que a corrupção é um flagelo de cariz global. Que se contextualiza no fenómeno da criminalidade organizada e se infiltra em diversos sectores das sociedades e dos Estados, fragilizando os correspondentes regimes políticos e as estruturas económicas e sociais. As medidas legislativas que se vão implementando, em vista da diminuição do flagelo, suscitam, normalmente, dúvidas nos

diversos Estados, nomeadamente nos Estados democráticos. Dúvidas que tanto respeitam à sua eficácia, quanto à sua conformidade com os direitos, liberdades e garantias, inerentes ao princípio do Estado de Direito democrático e liberal.

No contexto Internacional e Europeu, no âmbito da criminalidade organizada e económico-financeira, Portugal tem implementado, nos últimos anos, medidas de combate à corrupção, das quais se destacam a simplificação de tipos legais de crime (ligados à corrupção), de modo a facilitar, em termos probatórios, a verificação dos respetivos pressupostos, a possibilidade de recurso a colaboradores (premiados?) na tarefa de recolha de prova que se revele decisiva para identificação e captura de (outros) responsáveis ou a aplicação de medidas sancionatórias dissuasoras que extravasam as consequências penais tradicionais, como é o caso do "confisco ampliado" (baseado em condenação) e correspondente gestão do lucro ilícito (injustificado).

Será possível conciliar estas medidas com os inalienáveis princípios da legalidade, da proporcionalidade, da presunção de inocência, do julgamento justo e equitativo (cuja principal dimensão se expressa no *nemo tenetur se ipsum accusare*, englobando o direito ao silêncio e o direito de não facultar meios de prova), com a estrutura acusatória do processo penal, com a tutela do direito de propriedade (património)? Será, ainda, tempo de avançar para outras medidas das quais se destaca o confisco não baseado em condenação ou, mais especificamente, o confisco *in rem*?