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# THE COMPANY'S FAULT?
# THE PORTUGUESE MODEL OF COLLECTIVE LIABILITY IN THE CONTEXT OF THE (ECONOMIC) CRIMINAL LAW OF THE EUROPEAN UNION

(Conference paper[1])

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## Introduction (economic-financial crisis and corporate governance)

It is widely recognized that economic criminal law has emerged historically as a result of the necessity for public intervention in the economy. It is a superlative form of intervention. Public intervention in the economy is primarily driven by crisis contexts. Just think of the social injustices caused by the Industrial Revolution that greatly contributed to socialist thought. Of the World Wars which led to the Weimar Constitution (1919), the Marshall Plan (1947) and the German Constitution of 1949. Of economic and financial crises in deregulated systems, namely the Wall Street crash (1929) and subsequent great depression (with repercussions in Europe), which led to the implementation of the economic policy known as the New Deal after the election of President Franklin Roosevelt (1932).

[1] Presented at the International Conference on European Criminal Law. From the legal foundations to its impact on national legal orders, held at Lusíada University, Porto, on April 28, 2023 as part of the CEJEIA Research Project "Criminal Law and Globalization. Current and Prospective Challenges". This presentation is further elaborated in a chapter of an edited book: Torrão, Fernando, "Culpa da Própria Empresa? – *Compliance* e Modelo Português de Responsabilização Penal Coletiva e Individual à Luz do Direito da União Europeia", in João Nogueira de Almeida (et. al), *Boletim de Ciências Económicas em Homenagem ao Senhor Doutor Manuel Porto* (forthcoming).

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In the current historical period, characterized by the predominance of self-regulation in the markets, the economic and financial crisis of 2008 emerged.

This crisis initially began as a financial crisis in 2007, which eventually evolved into a "systemic crisis". The financial crisis was primarily driven by the issuance of high-risk mortgage loans (Subprime), resulting in the insolvency of financial institutions and causing repercussions in stock exchanges worldwide. Payment chain disruptions were generated in the global economy, leading to an economic crisis in 2008.

The States were called upon to provide financial assistance to credit institutions that were unable to collect debt, resulting in a rupture of the global economic-financial system that derived from complex factual contexts that made it difficult to identify the individual responsibility – that is, of the ones truly responsible for a crisis that affects the general population –, creating serious problems to the functioning of sanctioning law, namely economic criminal law.

A certain confusion was perceived. Because the culprits were not identified, people began to discuss "the markets' fault" and "the system's fault".

Anabela Rodrigues highlights, however, the role of some penalists, particularly Germans, such as Schünemann, Naücke, Lüderssen and others, who argued against attributing the fault solely to the markets or the system. Although responsibilities seem to be diluted within the system, the "criminal nature of the crisis" is perceived. There were concrete people with concrete actions that caused the crisis. The legal system must find mechanisms capable of regulating the behaviors that lead to these systemic crises. Just as in other contexts of the so-called "risk society", there will be individuals whose behaviors need to be conditioned[3].

Now, the so-called "organized irresponsibility" (*organisierte Unverantwortlichkeit*), in the words of Schünemann[4], which leads to such a "systemic guilt" emerges, to a large extent, in legal persons and within their complexity. The idea that self-regulation in the area of corporate governance needs to be regulated is thus gaining traction in Europe. The new Liberalism is a "regulatory capitalism". It is a new model of public interventionism, where the State intervenes at a distance, by defining the rules of regulation. The Company implements and supervises them.

How does the European Union view this model? What importance does it attach to the protection of economic and financial interests, particularly in its territory?

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[3] See Rodrigues, Anabela Miranda, *Direito Penal Económico – Uma política criminal na era compliance*, Coimbra: Almedina, reimpressão da 2.ª ed., 2021, pp. 43-44

[4] For example, Schünemann, Bernd, *Die aktuelle Forderung eines Verbandsstrafrechts – Ein kriminalpolitischer Zombie*, *Zeitschrift für Internationale Strafrechtsdogmatik* – www.zis-online.com, p. 13.

## 1. European (economic) corporate criminal law?

The protection of economic and financial interests has always been the basis of European integration. The Maastricht Treaty (1993-1999) clearly expresses this path of the European Union: its essential purpose was to prepare for European monetary union and to introduce elements of political union. In this framework, it was recognized that criminal law plays a role in safeguarding economic and financial interests, leading to the development of a criminal policy for the European Union. The goal was to standardize the criminal law related to economic offenses within the European Union.

Additionally, the idea of creating a European Union Criminal Code focused on the protection of its respective economic and financial interests has emerged. In 1997, a group of experts was called upon to create a document known as *Corpus Juris* and, within the framework of the Treaty of Amsterdam (1999-2009), which emphasized the creation of an area of freedom, security and justice, this document was further refined, giving rise to the Corpus Juris (Florence version) in 2000. Although other projects were proposed subsequently (Eurodelitos, in 2002; Alternative European Criminal Justice Project in 2004), the conditions were not met to progress towards a European Criminal Code, primarily due to concerns regarding the sovereignty of Member States. Nevertheless, the respective norms (in particular those of the Corpus Juris, Florence version) did not fail to serve as a barometer for the political-criminal and dogmatic perspective of the European Union for criminal law, truly launching the discussion on the unification of European criminal law[5]. What stands out from here? On one hand, the nature of the crimes typified; on the other hand, the liability model of "corporate crime" (*Unternehmenskriminalität*, in Schünemann's terminology[6]), that is, liability for crimes committed within the company, affecting external legal goods. The offences covered (fraud affecting EU interests, misappropriation of subsidies, corruption, money laundering, market abuse, criminal association) are mainly economic and financial crimes. Regarding the liability model of "corporate crime", two paths appear: (1) that of Article 12 that holds the Leaders (of the company) responsible for (a) crimes committed by their employees with their knowledge and (b) (holds the Leaders responsible) for crimes committed by employees due to their failure to supervise; (2) and that of Article 13, which holds the legal person itself responsible for the crimes committed by its Leaders.

[5] Cf. Leite, Inês Ferreira, *Direito Penal Europeu: do Corpus Juris aos métodos de integração europeia*, in Maria Fernanda Palma, Augusto Silva Dias, Paulo de Sousa Mendes (Coord.), *Direito Penal Económico e Financeiro*, Coimbra: Coimbra Editora, 2012, pp. 343-344.

[6] For the first time in Schünemann, Bernd, *Unternehmenskriminalität und Strafrecht: eine Untersuchung der Verantwortlichkeit der Unternehmen und ihrer Führungskräfte nach geltendem und geplantem Straf- und Ordnungswidrigkeitenrecht*, Heymann, 1979.

This is the model that was adopted by the Council of Europe in the Criminal Law Convention on Corruption, Trafficking in Influence and Money Laundering, of 27 January 1999 (ETS no. 173), and by the European Union, supported in subsequent Framework Decisions. It is a model that establishes criminal or administrative liability of companies, and Member States are not obliged to impose criminal liability on legal entities.

## 2. Compliance and criminal liability of legal persons

The Treaty of Lisbon, in force since 1 December 2009, confers, pursuant to Article 83(1), competence to the European legislator to legislate in the areas of crime provided for therein, which now includes Money Laundering. The European legislator has enacted legislation on this matter through Directive (EU) 2015/849 of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering. This Directive was transposed by Law no. 83/2017, of 18 August (last amended by Law no. 99-A/2021, of 31 December), which establishes measures to combat money laundering and terrorist financing, applicable to financial and non-financial entities.

The obligation to create corporate governance in these entities, translated into the creation and implementation of compliance programs for the prevention of money laundering, stands out. That is to say, a system that adheres to Laws and Regulations and requires the collective entity to adopt a set of procedures aimed at reducing the risk of the occurrence of crimes or other illicit acts, including money laundering.

The aforementioned Law no. 83/2017, of 18 August, establishes rules, such as: imposition of preventive duties (Article 11) and control duties (Article 12); the competence and responsibility of the management body of obligated entities for the application of policies and procedures, and controls on the prevention of money laundering and terrorist financing" (Article 13, paragraph 1); the duty, of this body, to designate the person responsible for regulatory compliance: the Chief Compliance Officer (CCO) (Article 16), who heads the Compliance Department and who implements rules aimed at preventing the occurrence of crimes (money laundering) in the collective context, as well as a self-monitoring system, with protocols for investigation, detection and reporting of irregularities, thus giving rise to whistleblowers. The CCO is the point of contact for authorities (judicial and police), and has the duty to report any suspicious operations within the collective entity and cooperate with the authorities. This implies conditions of autonomy and independence vis-à-vis the body of the Administration, since it may have to report administrators or directors, if they are suspected of wrongdoing.

So, how does the compliance system work for the purposes of criminal liability?

To simplify, let's consider hypothesis 1: an attempted crime occurs in a busi-

ness context (typical and illicit action) that is detected by the compliance system: offenders are reported to the authorities.

In this scenario, the legal person should not be censured or punished. This is because the compliance system worked and offenders should be punished in the context of individual responsibility. Let's consider a sub-hypothesis: the offenders managed to deceived a well-implemented system, and it was found that the company's managers did not violate their duty of vigilance and control. In this case, the legal person should also not be censured, being exempt from criminal liability due to the exclusion of fault (guilt).

Consider, now, hypothesis 2: a crime occurs within a business context, which is favored by the lack of compliance system, or such a system exists, but is defective as to the rules implemented and / or in the monitoring of its compliance, failing to detect the illicit act. In this case, the behaviour of the legal person will be reprehensible and must be punished. It is a question of censurability and consequent punishment of the legal person itself, which is separate from the natural person in a model of self-responsibility. It is important to note that the natural person may also be censured or not, depending on the circumstances).

If Article 31 bis of the Spanish Penal Code translates this perspective (as well as the Italian system, but only in terms of administrative liability), supporting a model of self-responsibility of the company, the Portuguese model may raise doubts: Article 11(2)(a) of the Penal Code supports a model that fits into the logic of the theory of organs.

Regarding Article 11(2)(b), this provision pertains to a crime committed by an official who is 'under the authority of the individuals referred to in the preceding subparagraph [Leaders] due to a breach of their supervisory or control duties'.

There is a tendency to interpret this provision in a way that aligns, like the previous one, with the model of hetero-responsibility (based on the theory of organs), which implies that, for the legal entity to be held accountable, the accountability of a natural person (individual) who occupies a leadership position is necessary7 (such as, for example, Susana Aires de Sousa).

However, considering the content of our law, it is doubtful that we are facing a model of hetero-responsability, in relation to the situations of subparagraph b). Either it is understood that it is the content of subparagraph b) itself that attributes this responsibility to the Leader, which immediately appears problematic from the perspective of the doctrinal limits of individual criminal responsibility, since such a situation can occur where, e.g., the behavior of the Leader of the company is outside the limits of impure omission – because the crime may not be

[7] Thus, for example, the interpretation of Sousa, Susana Aires de, *Questões fundamentais de direito penal da empresa*, Coimbra: Almedina, 2019, p. 134.

even of result – or remain beyond the limits of criminal participation.

Or, then, it is understood that subparagraph b) is not a source of individual criminal liability of the Leader and, in this case, if he commits a crime of omission (e.g., for violation of control over the source of danger), then the criminal liability of the legal person operates *ex vi* subparagraph a). This is without prejudice to the violation of the duty of vigilance or control being able of implying administrative responsibility of the Leaders (but this is another problem).

The function of subparagraph b) appears to be rather the attribution of criminal liability to the legal person itself, even if the Leader is not responsible for committing a crime. It will have the function of addressing those behaviours in which collective responsibility is, in fact, more pressing: within "organized irresponsibility". Thus opening the door for the establishment of a model of corporate self-liability for employee crimes. A model that does not imply the responsibility of the Leader / Manager, nor does it exclude it.

## Conclusion

The dilution of responsibilities in a collective context within complex economic and financial operations poses serious difficulties to the legal system in identifying individual responsibility and, consequently, in conditioning (preventing) illicit behaviors.

Accountability tends to shift "upwards" in this collective context, making leaders responsible for "company crimes" and raising questions about the limits of criminal responsibility.

In this framework, the compliance model assumes significant importance, as a model of "corporate self-responsibility", and that begins to emerge in the scope of European legislation.

This model is able to prevent the commission of crimes in a collective context and to hold the legal person responsible in the context of "corporate crimes" in which individual responsibilities tend to be diluted (in the context of the so-called "organized irresponsibility").

This seems to be the path of European criminal law in the comprehensive horizon of a concept of "(company) fault by organizational deficiency" (Klaus Tiedmann).