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III RESEARCH QUESTIONNAIRE - III WORKPACKAGE

Assessing the possibility to apply the REG to legal persons and enterprises

December 2023 – March 2024

National report for Portugal

For each question it is important to answer considering the scholars' opinion and the evolution of the jurisprudence/case law (Constitutional Court, Supreme Court, etc.).

Section I – The models of confiscation against legal persons: harmonisation

1. How was the **Directive 2014/42/EU transposed in Your national legal order** and how did this affect national law in relation to legal persons?

The Directive 2014/42/EU was transposed in our national legal order by the Law 30/2017, form 30th Mai that didn't affect much the national law in relation to legal persons. As you are going to see, in Portugal the confiscation of legal persons is similar to the confiscation of natural persons. So the transposition of the Directive didn't impose many changes in the national law.

Therefore isn't surprising that the Law 30/2017 only mentions legal persons twice in less important aspects: 1) to make clear that the Assets Recovery Office has access to the national accounts databases to get information about natural and legal persons (article 3, that amended article 8.º, n.º 5 of Law 45/2011, from 24 June); 2) to make clear that the Assets Management office has access to the national registry of legal persons (article 7, that introduced the new 11.º-B of Law 45/2011, from 24 June).

2. Which models of confiscation applicable against natural persons, **can affect indirectly the assets of legal persons? E.g. If the proceeds are got by the legal persons or when the confiscation involves the share in legal entity held by the convicted person.**

For forms of confiscation also applicable to natural persons, you may refer to the answers to the previous questionnaire, highlighting particular issues related to the application of confiscation to legal persons.

The models of confiscation applicable against natural persons can't indirectly affect the assets of legal persons.

The assets of a legal person only can be confiscated if the company has committed an offence that gives rise to proceeds of crime or if they are instrumentalities of that crime.

In the cases where they are only beneficiaries (legal persons who don't participate in the commitment of the fact but receive directly, without intermediaries, the proceeds of the crime) or mala fides third parties (legal persons who knew or ought to have known or at least a diligent person would have had reasons for this knowledge) the origin of the instruments, products or proceeds or that the purpose of the transfer was to avoid confiscation, there is also no indirect confiscation of the legal person's assets, but rather its own liability as an entity subject to confiscation, under the same terms as natural persons.

The confiscation of the shares or participations of a legal person does not raise any challenges and is admissible in Portugal without special reservations.

A different issue is the confiscation of company assets, simply because the perpetrator (a natural person) owns shares in that legal person. In such cases, regardless of whether it is possible to confiscate the shares, if they have economic value, the assets held by the legal person can only be affected if it can be considered to be in bad faith, namely because the natural person accused exercised the exclusive influence of control over it.

The confiscation of the shares is possible but not effective since the company's owner can devalue the natural person (for example, selling its assets) and in the end the shares may worth nothing.

So, in Portugal it is possible to confiscate the assets of a company if the company commits a crime, if the company is a beneficiary or a malas fides third party. If the confiscated person holds something in the company it is possible to confiscate his how assets (for instance: shares in the company)

3. Which models of confiscation can be applied directly against legal persons? Please, provide us with **the related legislative provisions**. Does your country provide for **criminal liability of legal persons**?

All types of confiscation can be applied directly against legal persons (see previous questionnaire). It works as if they were natural persons.

If they are criminally liable and the crime gives rise to proceeds or is an offence included in the catalogue of Law 5/2002, it is possible to confiscate the instrumentalities, the proceeds and the unexplained wealth/extended confiscation of the legal person.

Portugal had since 1982 (Law 20/84, from 20 January: crimes against the economy and public health) criminal liability of legal persons.

The law 59/2007, from 4 September introduced the criminal liability of legal persons in the criminal code (article 11) for certain kind of offenses, such as slavery, human beings trafficking, piping, theft, burglary, embezzlement, forgery, pollution, criminal association, money laundering or corruption.

The same happens with other separate penal law like drug trafficking (article 33.º-A Decree Law 15/93 also introduced by the law 59/2007), tax fraud (article 7.º of Law 15/2001, from 5 de June). So confiscation isn't always available since the legal persons aren't always liable (for instance murder).

Legal persons are in this case all the legal persons (with the exception of the State, legal persons exercising the prerogatives of public power and organizations governed by public international law) and also entities equivalent to legal persons, civil societies and *de facto* associations.

4. Which is the object of the confiscation and its meaning/interpretation? (proceeds – gross or net of expenses -, products of the crime, instruments of the crime, etc.). Clarify if and in which case it is possible to confiscate the 'value equivalent'.

The object of the confiscation is the same as if they were natural persons (see previous questionnaire).

Value confiscation is always possible, either if the proceeds are a value or if it is impossible to confiscate the original proceeds.

5. **Which are the elements to be realised and/or to be assessed for its application?** e.g., conviction for a crime, property or availability of the confiscation object, link -between the crime and the proceeds/instruments/products, etc., disproportionality (“*the value of the property is disproportionate to the lawful income of the convicted person*”), illegal origin (suspects/presumption of illegal origin), temporal connection with the crime, the lack of a justification of the legal origin by the owner, etc.

The elements to be realized are the same as if they were natural persons (see previous questionnaire).

6. **Which are the elements to demonstrate in order to apply the *freezing* order against the legal persons?**

The elements to demonstrate in order to apply the *freezing* are the same as if they were natural persons (see previous questionnaire).

7. **Can this model of confiscation be applied when the crime is statute barred (i.e. after the prescription) or somehow (in particular circumstances) without the conviction?**

The situation is the same as if they were natural persons (see previous questionnaire). If there are some assets left, the confiscation can take place even after the liquidation of the legal person.

8. **Which is the legal nature of the confiscation against legal persons?** (a criminal sanction - accessory or principal criminal penalty -, a preventive measure - *ante delictum* criminal prevention measure -, security measure in a broad sense, administrative measure, civil measure *in rem*, a civil consequence of committing an offense - provided for by criminal law -, another type of autonomous - *sui generis* - instrument, etc.)

Once again the answer isn't different from the previous questionnaire. The legal nature of the confiscation doesn't change depending on whether a legal entity or a natural entity is concerned. So, the legal nature of the confiscation against legal persons is a civil consequence of committing an offense (see previous answer). Of course it is possible to find dissenting opinions on the literature and on the jurisprudence. Even so the majority opinion argues that it is a civil measure grafted onto the criminal process.

9. For each model of confiscation against legal persons:

○ **Which is the procedure for its application?** (the qualification/nature, the competent authority, the different steps, etc.)

○ The procedure for its application is the same as if they were natural persons (see previous answer).

○ **Which is the standard of the proof/is the reversal of the burden of the proof admitted?**

The rules concerning the standard of the proof or the reversal of the burden of the proof are the same as if they were natural persons (see previous answer).

○ **Which are the safeguards (limitations e.g. proportionality clauses, relevant legal remedies)?**

The safeguards are the same as if they were natural persons (see previous answer).

- **Is the trial in absentia possible in your legal system in order to apply the confiscation?**

In certain cases, yes (see previous answer)

- For the confiscation without conviction: **can this form of confiscation be applied also in case of acquittal?**

Yes (see previous answer).

10. For each model of confiscation against legal persons, **does it comply with the principles of:**

- **legality? legal specificity of a statute?**

-
- (see previous answer).

- **non-retroactivity of the /more severe/statute?**

-
- (See previous answer).

- **the right to private property?**

-
- (See previous answer).

- **the proportionality?**

-
- (See previous answer).

- **the right to a fair trial?**

-
- (See previous answer).

- **the right to defence?**

-
- (See previous answer).

- **the presumption of innocence?**

-
- (See previous answer).

- **the ne bis in idem principle?**

-
- (See previous answer).

- **and other relevant rights – what sort of?**

(See previous answer).

11. For each model of confiscation:

- **Are there constitutionality issues which have been detected in the legal doctrine and is there any relevant jurisprudence ruling on the constitutionality (or not) of the confiscation measure against legal persons?**

No.

- **Is there any significant national case law of your Supreme Court on the application of freezing or confiscation measures against legal persons?**

No.

- **12. Are there European Court of Human Rights cases in relation to “Your” model of confiscation against legal persons?** Please, explain the position of the ECHR about “Your” model of confiscation against legal persons.

No.

- 13- Is there any CJEU decision concerning “Your” confiscation model against legal persons?**

No.

- 14. In Your system of law are there other efficient measures to prevent the or react against the involvement of corporations in crime (and in particular in organised crime), in other words alternatives to freezing and confiscation (e.g. in Italy judicial administration or judicial control) for targeting the illegal assets of legal persons?**

From a repressive perspective: The penalties applicable to legal persons are set out in Article 90a and subsequent articles of the Penal Code.

Among the different penalties, the possibility of applying judicial supervision (*monitoring by a judicial representative, for a period of 1 to 5 years, so that the latter monitors the activity that led to the conviction, as well as monitoring effective compliance with a regulatory compliance program with control and monitoring measures suitable for preventing crimes of the same nature or significantly reducing the risk of their occurrence*) and judicial injunction (*the court orders: a) the adoption and execution of certain measures, namely those necessary to cease the illegal activity or avoid its consequences; or (b) the adoption and implementation of a compliance program with control and surveillance measures suitable for preventing crimes of the same nature or significantly reducing the risk of their occurrence*) stands out in this regard (Articles 90.º E and 90.º J).

It is important to note, however, that these are penalties which are not, in any case, alternatives to confiscation.

Whenever the crime has generated proceeds, there is no alternative to confiscation in Portugal, it must always take place.

- 15. Do you have statistical data on the application of confiscation measures against legal persons at national level? And could you compare them with those against natural persons?**

No.

SECTION II. The application of the Regulation 1805/2018 for the mutual recognition of freezing and confiscation orders against the legal persons.

1. Can You give some **statistical data** about the application of the Regulation in case of freezing or confiscation orders in regard to legal persons (e.g.: how many cases, which models of confiscation)?

Portugal doesn't have such kind of data.

2. Which are the **problems** encountered in applying the Regulation (both in executing requests from foreign authorities in Your country and in obtaining the execution of Your requests abroad) in cases of freezing orders and confiscation orders related to legal persons? And which are the **grounds for refusal** applied in the praxis in this sector?

So far we no problems have been reported.

3. Do you have **any proposals of harmonization of MS legislation, also in consideration of the new proposal of a directive (May 2022) on freezing and confiscation orders involving legal persons?**

4. Could you give your inputs about **possible guidelines** on the practical implementation of the Regulation in relation to legal persons?

5. Do you have any further **reform proposals**, at a national or international level, in this sector?

According to some European Union pieces of legislation Member States (for instance Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law) must implement legal persons liability and confiscation (article 9).

However, according the United Nations Conventions «subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative» (article 10, n. 2, and article 26, n. 2, of United Nations Conventions Against Corruption Transnational Organized Crime and Against Corruption, respectively). This allows different solutions making cooperation outside the space of freedom security and justice more difficult. So, since the world is now global, more «harmonization» is needed. It is impossible to play a game with different rules.

6. Do you have any further **policy recommendations**, at a national or international level, in this sector?