Decree-Law n.º 325/95 of December 2 : Preventive and repressive measures against the laundering of money and other property that proceed from criminal offences

Fighting against laundering of money and other goods proceeding from criminal activities, in particular from trafficking in narcotic drugs and psychotropic substances and precursors, became a specific feature of the fight against crime since the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was signed in 1988.

In due course, Portugal ratified that Convention and adapted its domestic legislation accordingly (cf. Decree-Law Nº 15/93, of 22 January).

With the same aim, the Council of Europe prepared and adopted the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed by Portugal on 8 November 1990. It encourages Member States to enlarge the scope of their struggle against laundering to include, not only trafficking in drugs and precursors, but also other forms of criminality, such as arms-trafficking, terrorism, trafficking in children and young women, and other serious forms of criminality originating important benefits.

Within the framework of the European Community, Council Directive 91/308/EEC of 10 June 1991 - transposed into the domestic legal system by means of Decree-Law Nº 313/93, of 15 September - reveals the same trend.

An analysis of the first Commission's report on the implementation of the above-mentioned Directive shows that most Member States of the European Union have enlarged the scope of criminalisation of laundering beyond drug-related offences. The same can be said with respect to preventive measures.

Discrepancies still existing between the different legal systems give rise to the ill-functioning of preventive and repressive systems of Member States and thus makes international co-operation more difficult.

Because the adoption of new machinery must be gradual, the translation of the Directive into domestic law was limited to the financial system's support to the laundering of money proceeding from illicit drug affairs. Other forms of criminality were not included. Similarly, prevention was not extended beyond operations and flows that transit through credit institutions, financial companies, insurance companies, and companies that manage pension funds.

It is however clear that the fight against laundering of money and products that proceed from crime implies both the criminalisation of certain behaviours and measures of a more preventive nature. The latter include the detection of laundering activities by the financial system, but also by certain activities and professions, through which money and goods circulate.

Activities linked to games (mainly in casinos, but also lottery winners) and trade in goods of a high value (immovable property, in particular in certain touristic areas, precious stones and metals, antiques, objects of art, automobiles, boats and aircraft), have all been identified as particularly apt to be used for laundering purposes.

The special vulnerability of casinos justifies the application of measures comparable to those that are provided for financial institutions, in particular: a) the identification of clients, especially occasional clients who use cash beyond a certain amount; b) keeping for a certain period of time documents relating to transactions; c) the duty to exercise accrued diligence; and d) the duty to provide information about suspicious transactions.

As to activities relating to the sale of goods of high value - that may be used for purposes of placing or integrating money -practical difficulties should be taken into consideration, especially in view of the fact that traditionally such activities are neither subjected to specific rules nor to the control of a supervising authority.

However, the possibility has been considered of establishing in this area some rules a) providing that information about suspicious transactions should be laid, b) providing for the identification of clients who buy

against cash beyond a certain amount, and c) even providing for a requirement to pay by way of non-cash means in cases of acquisitions against amounts that go beyond a given level.

The Spanish law establishes that the duties relating to the prevention of money laundering imposed on the financial system shall apply to non-financial enterprises, such as casinos, real estate agents and any other activities identified in the law. The German law on money laundering provides similarly.

It is certain that the mobility of launderers and their activities suggests that the legal system should integrate the possibility of extending the supervision to new laundering activities. However, it appears to be premature at this point to extend supervision to certain activities; conversely, it appears to be prudent to await the conclusions of the "Contact Committee" (cf. Article 13 of Directive 91/308/EEC).

The opportunity was used to introduce small improvements both in the field of fighting against laundering of proceeds from drug trafficking and in matters pertaining to the powers to investigate.

Thus:

Giving effect to the authorization given by Parliament to the Government in the Law No. 32/95, of 18 August, to legislate in the following matters, and under the terms of Article 201, paragraph 1, sub-paragraphs a) and b), of the Constitution, the Government decides as follows:

I

Purpose and scope

Article 1

Purpose

This act provides for preventive and repressive measures against the laundering of money and other goods proceeding from such criminal offences as are indicated herein, other than those already provided for with respect of the proceeds of trafficking in drugs and precursors.

Article 2

Conversion, transfer and dissimulation of goods and products

1. Any person who, knowing that certain goods and products proceed from criminal offences amounting to terrorism, arms trafficking, extortion, kidnapping, qualified procuring, corruption or any other offence mentioned in paragraph 1 of Article 1 of Law Nº 36/94, of 29 September:

a) directly or indirectly converts, transfers, assists in or facilitates any conversion or transfer of all or part of such goods or products, in order, either to conceal or dissimulate its illegal origin, or to assist any person involved in committing any such offences in eluding the legal consequences of his or her behaviour, shall be liable to imprisonment for a term of 4 to 12 years;

b) conceals or dissimulates the true nature, origin, whereabouts, layout, movement or ownership of such goods or products, or rights pertaining thereto, shall be liable to imprisonment for a term of 2 to 10 years;

c) acquires or receives such goods or products, whichever the legal title, and uses, holds or keeps them, shall be liable to imprisonment for a term of 1 to 5 years.

2. Sanctions applied to persons found guilty of having committed any of the offences punishable under the terms of paragraph 1 shall comply with such maximum and minimum levels of sanctions as are provided in respect of the respective predicate offence.

3. Any acts and omissions as typified under paragraph 1 shall also be punishable where the respective predicate offence will have been committed outside the national territory.

II

Financial institutions

Article 3

Prevention by financial institutions

The provisions of Chapter II of this act shall apply to financial institutions, as defined under Article 2 of Decree-Law Nº 313/93, of 15 September, with respect to any operation that involves, or may involve, committing any act or omission criminalised under Article 2 above. However, liability of financial institutions shall be excluded, under the terms of Article 13 of Decree-Law Nº 313/93, of 15 September.

III

Non-financial institutions

Article 4

Casinos

1. Companies acting under a concession granted in order to operate games in casinos shall be under the duty:

a) in premises for traditional games, to identify customers with reference to amounts in excess of PTE2 500 000 involved in operations that they conduct whereby they acquire against cash any token or any tokens, or any other conventional object or objects usable for playing games;

b) in premises for traditional games, not to issue any cheque against tokens, unless the payee is a customer who has acquired tokens by means of a bank card or a non-endorsed cheque; the value of the cheque may not be in excess of the amount spent by the payee in thus acquiring tokens;

c) in premises for slot-machines, not to issue any cheque unless the payee is a customer who has won a prize as a result of the machines' payments' plan;

d) to identify customers to whom cheques are made out to; such cheques must bear the name of the payee and must be crossed;

e) to keep a copy or the references of the evidence required for identification for a period of at least ten years;

f) as soon as they have knowledge thereof, to inform the competent judicial authorities of any operation that, because of the sums involved or because of their being repeated, arise suspicion that activities are being carried out that amount to the laundering of money or other goods or products.

2. Identification as mentioned in sub-paragraphs a) and d) of paragraph 1 shall be possible only on the basis of any document containing the photograph of the bearer, as well as his name, place of birth and age.

3. Information as mentioned in sub-paragraph f) of paragraph 1 shall be incumbent on the managing director or directors of the company involved.

Article 5

Real estate agents

1. Any physical or legal person acting as real estate agent, as provided for in Decree-Law Nº 285/92, of 19 December, shall be under the duty:

a) to identify any contracting party and any property involved in any transaction, where the amount paid equals or exceeds PTE 25 000 000;

b) to keep, for a period of at least ten years, a copy, or the references, of the evidence required for identification;

c) to inform the competent judicial authorities, as soon as they have knowledge of any operation or operations that, inter alia, because of the amounts involved, the repetitiveness of the operations, or the financial and economic situation of any person involved therein, or the means of payment used, raise grounds for suspicion that laundering of money or other goods or products is being carried out.

2. The provisions of paragraph 2 of Article 4 above shall apply to the identification of contracting parties.

Article 6

Buying and re-selling real estate

1. Any entity who buys real estate with a view to re-selling it shall be under the duty:

a) to inform the authority empowered to supervise its activity that its activity has started;

b) to forward every half-year, to the authority empowered to supervise its activity, forms, as adequate, containing the following information with respect to each transaction carried out:

i) the identification of any person involved;

ii) the amounts involved;

iii) the references of the title thereof;

iv) the means of payment used;

c) to keep, for a period of at least ten years, the documents concerning each transaction;

d) to inform the competent judicial authorities, as soon as they have knowledge of any operation or operations that, inter alia, because of the amounts involved, the repetitiveness of the operations, or the financial and economic situation of any person involved therein, or the means of payment used, raise grounds for suspicion that laundering of money or other goods or products is being carried out.

2. The provisions of paragraph 2 of Article 4 above shall apply to the identification of contracting parties.

Article 7

Bearer coupons and securities

Any entity who pays out to winners of bets or lotteries prizes of an amount equal or exceeding PTE 1 000 000, must identify the bearer, in compliance with the provisions of paragraph 2 of Article 4 above, and keep the relevant data for a period of at least ten years.

Article 8

Goods of high individual value

1. Any entity who trades in precious stones or metals, antiques, objects of art, aircraft, boats or automobiles shall be under the duty:

a) to identify any client and any operation carried out, where the amount paid in cash equals or exceeds PTE 500 000;

b) to keep, for a period of at least ten years, a copy, or the references of, the evidence required for identification ;

c) to inform the competent judicial authorities, as soon as they have knowledge of any operation or operations that, inter alia, because of the amounts involved, the repetitiveness of the operations, or the financial and economic situation of any person involved therein, or the means of payment used, raise grounds for suspicion that laundering of money or other goods or products is being carried out.

2. The provisions of paragraph 2 of Article 4 above shall apply to the identification of contracting parties.

Article 9

Scope of duties

1. Duties resulting from the provisions of Articles 4 to 8 above shall apply to the laundering of goods and products that proceed from any offences, as listed in Article 2 above; they shall also apply to the laundering of goods and products that proceed from trafficking in drugs and precursors.

2. The provisions of paragraphs 3 and 4 of Article 10, and Article 13 of Decree-Law Nº 313/93, of 15 September, shall apply to any information laid in compliance with the duties provided for in the preceding Articles.

Article 10
Authority empowered to supervise

1. The Inspecção-Geral de Jogos3 shall be empowered to supervise compliance with the duties provided for in Articles 4 and 7 above; the Inspecção-Geral das Actividades Económicas4 shall be empowered to supervise compliance with the duties provided for in Articles 5, 6 and 8 above.

2. Where, in the course of inspections or otherwise, any authority mentioned in the preceding paragraph discovers any fact that might constitute evidence of any offence qualifying as laundering of money or other goods or products, that authority shall inform the competent judicial authority.

IV

Regulatory offences

Article 11

Financial institutions

Any breach of any duty provided for in Article 3 shall constitute a regulatory offence punishable under the terms of Chapter III of Decree-Law Nº 313/93, of 15 September.

Article 12

Non-financial institutions

1. Any breach of any duty provided for in sub-paragraphs a) to e) of paragraph 1 of Article 4 above, in sub-paragraphs a) and b) of paragraph 1 of Article 5 above, in sub-paragraphs a) to c) of paragraph 1 of Article 6 above, in Article 7 above, or in sub-paragraphs a) and b) of paragraph 1 of Article 8 above, shall constitute a regulatory offence punishable with a coima 5 from PTE 500 000 to PTE 50 000 000.

2. Negligence may be punished.

Article 13

Serious regulatory offences

1. Any breach of any duty provided for in sub-paragraph f) of paragraph 1 of Article 4 above, in sub-paragraph c) of paragraph 1 of Article 5 above, in sub-paragraph d) of paragraph 1 of Article 6 above, or in sub-paragraph c) of paragraph 1 of Article 8 above, shall constitute a regulatory offence punishable with a coima from PTE 1 000 000 to PTE 100 000 000.

2. Negligence may be punished.

Article 14

Subsidiary law

The provisions of Chapter III of Decree-Law Nº 313/93, of 15 September, shall subsidiarily apply, mutatis mutandis, to individual and collective liability for any offence provided for in this Chapter.

Article 15

Powers

1. The supervising authorities mentioned in paragraph 1 of Article 10 above shall be competent to investigate any regulatory offence provided for in Articles 12 and 13 above and organise and institute proceedings with respect to such offences, depending on their respective nature.

2. The Minister for Trade and Tourism shall be empowered to impose coimas and ancillary sanctions.

Article 16

Allocation of revenue from coimas

The revenue from coimas shall be allocated as follows:

a) 60% to the State;

b) 40% to the Fundo de Turismo6 or the Inspecção-Geral das Actividades Económicas, depending on whether the investigations were led by the Inspecção-Geral de Jogos or the Inspecção-Geral das Actividades Económicas, respectively.

CHAPTER V

Final provisions

Article 17

Safeguard of rights of bona fide third parties

1. Where property seized within the framework of criminal proceedings for an offence relating to laundering of money or other goods or products, is registered in a public register in the name of third parties, the latter shall be notified to argue the case of their rights and produce summary evidence of their bona fide; the property may be immediately returned to them.

2. Where a register is not available, third parties who claim bona fide ownership with respect to seized property may argue the case of their rights within the framework of the proceedings.

3. The case for the rights of third parties who claim bona fide ownership may be argued only until the property in question is declared to be confiscated; it must be submitted by way of a request addressed to the judge; submissions must indicate the evidence which will be produced.

4. Submissions shall be joined to the file of the proceedings; the Public Prosecutor shall be notified and may argue otherwise; the Court may order any measures as it deems fit and shall decide.

5. In view of the complexity of the case or because of envisaged undue delays in the criminal proceedings, the judge may refer the case to a civil court.

Article 18

Powers

Article 4 of Decree-Law Nº 295-A/90, of 21 September, with the wording of Article 10 of Law Nº 36/94, of 29 September, shall read as follows:

Article 4

[...]

1. .....
a) .....
b) .....
c) .....
d) .....
e) .....
f) .....
g) .....
h) .....
i) .....
j) .....
l) .....
m) .....
n) .....
o) .....
p) .....
q) .....
r) .....
s) .....
t) .....
u) .....
v) .....
x) .....
z) laundering of money or other goods or products.

2. .....

3. .....

4. .....

Article 19

Information and documents

For purposes of investigations, taking of evidence and trial of any offence, as listed in Article 2 above, the provisions of Article 60 of Decree-Law Nº 15/93, of 22 January, shall apply to laying of information and surrender of documents, both by any entity mentioned therein, and any entity mentioned in Article 2 of Decree-Law Nº 313/93, of 15 September.

Article 20

Controlled deliveries

The measure provided for in Article 61 of Decree-Law Nº 15/93, of 22 January, shall apply to any offences qualifying as laundering of money or other goods or products proceeding from trafficking in drugs and precursors.

(Translaction by Cândido Cunha)