

## ABSTRACT

This study is titled “The criminal responsibility of legal persons and equivalent for complicity under Portuguese criminal law”, and subtitled “Defence and delimitation of its admissibility”.

Corporate complicity is an internationally well-known phenomenon. Probably, even someone that is not a lawyer has already come across the concept of corporate complicity through situations publicly disclosed. From the famous case *Zyklon B*, brought to the light of justice in post-World War II, passing through multiple cases of corporate complicity of multinationals violating human rights, particularly of those coming from developing countries (for example, the case *Doe v. Unocal*), until the very recent *suspicion* of complicity in tax evasion by the Swiss branch of British bank HSBC, in the case known as “*Swiss Leaks*” – in all of the above mentioned situations there is a conviction or a mere suspicion that a legal person helped another person in a crime’s commission. Despite being a well-known phenomenon, the *criminal* sanctioning of such conduct appears to still be taking the first steps in the *international jurisdiction*, where it is still absent the possibility of criminal liability of legal persons under the Statute of the International Criminal Court. More significant have been the signals given by national *jurisprudence* and *legislation* of certain *European countries*. In particular, this study uses, as an example of the above mentioned more significant signals, the case decided by the *French* courts, condemning the “Société Bancaire Privée (SBP)” [which until 2003 had been the “Société financière privée (sofpriv)”] for *complicity* in fraud and aggravated money laundering.

Regarding the *Portuguese* case, this issue appears to still remain far from being treated. It is difficult to find any references to the admissibility of criminal liability of legal persons for complicity under national criminal law, either from the jurisprudence of higher courts or from legal literature. Fewer or even non-existent are the developments on its terms, i.e., the delimitation of responsibility. *Who* can be held responsi-

ble? *For which types of assistance provided to which crimes?* And *how?* These are questions to which this study aims to answer, bearing in mind the previous (and fundamental) answers to the question on *why* it is key to defend this responsibility (i.e., which arguments can be mobilized to support the criminal responsibility of legal persons and equivalent for complicity under Portuguese criminal law). This study is based, for better illustration, on a set of four hypothetical cases, which we will attempt to answer at the end of this study.

In *Chapter I*, we start by analysing *the problem* through the enunciation of the four, above mentioned, hypothetical cases of legal person's (or equivalent entity) complicity under Portuguese criminal law. These cases reflect the different aid types that might exist and be punishable as complicity, as well as the diversity of crimes that may be assisted by legal persons.

In *Chapter II*, after a brief reference to the legal person's complicity phenomenon *reality in international and foreign law's plan* (which is a first argument), we list a number of other arguments to *defend the admissibility* of criminal liability of legal persons and equivalent for complicity under Portuguese criminal law: *political-criminal*, *dogmatic* and *interpretative* arguments [in the latter, we expose *constitutional*, *grammatical*, *systematic*, *teleological(-functional)* and *historical* arguments].

As *political-criminal* arguments, we list not only the inadequacy of both civil and administrative responses, but also the injury of criminally protected legal assets. These arguments testify towards the defence of a *criminal* response. Moreover, the difficulty of individualizing the responsible agent for the act constitutes an argument in favour of the accountability of the *legal person*.

As *dogmatic* arguments, we affirm that legal persons are capable of *typical action* and *typical guilt of an accomplice*, analogously to individuals. Then, we take the opportunity to make a *brief reference to the subjective imputation*, arguing that such imputation of an act of aid to the legal person logically depends on its prior imputation to one of its "qualified agents".

Finally, in the list of *interpretative* arguments, we describe the *constitutional* argument, consisting in mobilizing not only Articles 12/2 and 2 of the Constitution of the Portuguese Republic, usually mobilized to support the criminal liability of legal persons *tout court*, but also Article

13, to establish its specific responsibility *for complicity*. The *grammatical* argument is extracted from the literal wording of Articles 11/2 and 27/1 of the Penal Code that enables the punishment of a legal person or equivalent for complicity. The *systematic* argument consists in the absence of any logical-systematic barrier that could derail the connection between Articles 11 and 27. The *teleological(-functional)* argument is a projection, on the interpretative level, of the political-criminal argument that we have previously described. By accepting the legal persons' punishment for complicity, in the situations referred to in paragraphs 1 and 2 of Article 11, we will be able to fulfil, at the same time, the *criminal law's function* of subsidiary protection of legal assets and the *specific teleology of incriminating criminal rule* (which translates in the defence of the concrete legal asset protected by this rule) specifically violated by the legal person. Finally, through an *historical* argument, we argue that whether interpreting with an objectivist perspective, or with a subjectivist one, the reform of the Penal Code operated by Law No. 59/2007, of 04/09 (which created the possibility of criminal liability of legal persons under primary criminal law), the conclusion must always lead us to the possibility of criminal responsibility of the legal person for complicity.

In *Chapter III*, we outline the *delimitation of the admissibility* of the criminal liability of legal persons and equivalent for complicity under Portuguese criminal law, answering the following questions: *Who* can be held responsible? *For which types of assistance* provided to *which crimes*? And *how*?

In response to the question of *who* can be held responsible, we draw the circle of *legal persons and equivalent that can be held criminally liable for complicity*, taking into account, from a critical perspective, the latest amendment to the Penal Code, carried out by Law No. 30/2015, of 22/04. We furthermore refer to the *conditions* necessary to operate the *subjective imputation* of an act of aid to any of these legal persons: the act of aid must have been committed by persons holding a “leadership position” (Article 11/4 of the Penal Code) and acting in the “name and in the collective interest”, as required by Article 11/2/a) of the Penal Code; the aiding may not have been committed “against express orders or instructions properly issued” (Article 11/6 of the Penal Code); and still has to be verified the guilt of the legal person.

In response to the question *for which types of assistance* provided to *which crimes* legal persons can be held responsible, we begin by noticing *which illicit types* may be attributed to legal persons. Then, we refer to the *doctrinal criterion to objectively impute the fact*, following closely Figueiredo Dias, and to the *legal criterion of subjective imputation* [looking if both subparagraphs, a) and b), of Article 11/2 of the Penal Code may be mobilized, concluding that only subparagraph a) may serve as imputation criterion of the act of aid]. We also establish the *types of aid* subsumable under the concept of complicity, under Article 27/1 of the Penal Code. And lastly, we try to understand *for which crimes* (regarding their different *nature* or “*typical structure*”) *can the legal person be held responsible for complicity*. The suggested response to this question is that it is required the commitment of intentional crimes by an action or omission, attempted or accomplished.

Finally, after we conduct a summary of the *steps to take* to effect the criminal liability of legal persons for complicity, we give an answer to the question of *how* to establish accountability, indicating the legal consequences that may result for the accomplice legal person, with particular emphasis on primary penalty fine, which involves a special reduction (imposed by Article 27/2) at the time of application of the penalty to an accomplice. We establish, in detail, the steps necessary to achieve a concrete *quantum* of penalty, after had been applied the above mentioned special reduction, and even in the event of concurrence of offenses.

In *Conclusion*, we present a resolution for each one of the cases listed in Chapter I. The absence of law that supports the punishment of a legal person in the last case presented (it concerns offense against physical integrity) sets the tone to raise the question: would it be adequate to advance to *another criminal responsibility model of legal persons and equivalent*, that abandoned the use of the list of attributable legal types (based on Article 11/2 of the Penal Code) and consecrated a solution – which has been in place in other countries of the European area (such as France, Belgium or the Netherlands) –, in the general part of our Penal Code, of a general responsibility, that legal persons may *potentially* be perpetrators or accomplices for the practice of *any crime*? Such a review, of the terms in which is enshrined the criminal liability of legal persons and equivalent, does not seem shocking for us. Wi-

thout going into deep justification, that could deviate us from the core of our study, we summarily present a set of arguments that lead us to believe that this revision is an *option to take into consideration* (no more than that, given the fact that we have not taken into consideration the hypothetical disadvantages): beyond the fact that it is a solution that has already been accepted in another countries – which seems to give to this model some credibility –, other arguments can be mobilized by appealing to *political-criminal*, *dogmatic* and *equal* treatment considerations (*equal* treatment between individuals and legal persons – the two *agents* known to criminal law). Even though, in *reality*, legal persons and individuals *are not the same thing*, which may justify differences of degree of responsibility, it seems not to overshadow that they are *equal* (*rectius*, *analogous*) in what essentially matters: in their *ability to commit a crime*. Moreover, this was the belief that we had in mind throughout this study, to admit criminal liability of legal persons and equivalent for complicity.

**Keywords:** criminal responsibility; complicity; legal person or equivalent; Portuguese criminal law; defence of admissibility; delimitation of admissibility.