LEGAL ENTITIES, COMPLIANCE PROGRAMS AND PENALTIES IN PORTUGUESE LAW

Teresa Quintela de Brito[1]

Abstract
The purpose of this text is twofold: to highlight the substantive effects that compliance programs have in Portugal in terms of the penalties imposed on legal persons; to reflect on the true meaning of these effects (which are not always favorable) and their consequences on the procedural behavior of collective entities pending criminal proceedings, pressured in multiple ways to adopt and implement "reactive" compliance mechanisms. To this end, we will analyze in detail the corresponding amendments to the Portuguese Penal Code

Keywords
Criminal proceedings. Compliance *ex ante* and *ex post delicto*. Qualitative and quantitative penalties to be applied to legal persons. State interference in collective organization and management.

Summary

[1] Professor, Faculty of Law. Lisbon University - PT

I. SUBSTANTIVE EFFECTS OF *COMPLIANCE* PROGRAMS ON THE PUNISHABILITY OF COLLECTIVE ENTITIES: GENERAL FRAMEWORK

1. Basic option of Law No. 94/2021: not to modify the model for attributing liability to legal persons enshrined in Article 11 of the Penal Code

Portuguese Government's National Anti-Corruption Strategy 2020-2024 warned that the rules on the substantive relevance of *compliance* programs would leave untouched "the model for attributing liability for the act to the legal person (...) adopted in the Penal Code, in extraordinary criminal legislation, and in administrative offense legislation (hetero-responsibility model)," despite recognizing "the increased relevance of such programs when the self-responsibility model is adopted." Thus, "without revising the provisions of Article 11 of the Penal Code," regulatory compliance programs should have substantive effects "in terms of determining the penalty in a broad sense (...), reviewing the scope of the main, accessory, and substitute penalties applicable to legal persons."

In terms of the Penal Code, the Portuguese government therefore opted not to modify the mixed model of hetero- and self-responsibility of collective entities for "catalog" crimes that arise from their organization; a model that is enshrined in Article 11 of the Penal Code[2] . This is the right choice, considering, moreover, that the *primary function of criminal compliance*

[2] In adjectival terms, the legal model for attributing liability has repercussions: (i) on the degree of autonomy and personality of the criminal procedural position of the accused legal entity, (ii) on the subject matter of the proceedings brought against it, which covers not only the facts constituting the type of offense in question, but also those constituting the legal criteria for attributing liability to the legal person; and, thus, (iii) on the delimitation of the substantial or non-substantial (quantitative or qualitative) alteration of the facts that are the subject of the indictment, the indictment, or the conviction of the legal entity in the first instance (Article 1(*f)* of the CPP).

systems is to predict, prevent, and reduce "ex ante" the risks of typical and generally foreseeable criminal offenses, due to the collective activity and the places where it is carried out, the organizational structure of the entity and its complexity, the *modus operandi*, and even the corporate culture[3] . On the other hand, the focus of attributing criminal liability to the collective entity according to the model set out in Article 11 of the Penal Code lies in the specific crime (from the "catalog") that has occurred, making it important to investigate the circumstances of how, when, where, and which individuals were involved in the crime and how it relates to the legal entity. To this end, it is necessary to consider, in particular, the sectors of collective activity functionally involved in its practice, the sphere of responsibility and competence of the respective individual agents within the collective organization, the proven contribution they made to the entity's actions (especially those in leadership positions with regard to the specific illegal act attributed to them), and the particular way in which the entity is organized, operates, and pursues its purpose, including, therefore, its corporate culture. Precisely because this is the primary function of criminal *compliance* systems and the focus of Article 11 of the CP, it is easy to understand why the mere existence of a regulatory compliance system that meets the legal requirements for its adoption and effective implementation cannot lead to the exemption or exclusion of the entity's criminal liability for a specific "catalog" crime[4] .

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[3] LAMAS LEITE 2020, 224: "With regard to risk analysis, one must start from a study of the specific activity of the legal person and thus identify abstract risks of committing illegal acts, as well as the specific activities most exposed."

[4] Similar, but not identical, BUSATO 2021, 231 *et seq*. For the author, the legal-criminal consequence of implementing a *compliance* system should be situated at the level of the secondary precept of criminal law, as a factor in reducing the penalty. This reduction should be greater when the implementation of the *compliance* system precedes the crime and also proportional to the respective "degree of approximation" to *legal standards* and the containment of the "criminal occurrence" itself. In favor of not exempting or excluding legal entities from criminal liability for *Criminal Compliance*, BUSATO points out: (a) the configuration of the criminal offense as a "violation of fundamental legal rights," and not

Following this decision, Law No. 94/2021 amended the Criminal Code, limiting itself to regulating the substantive effects of the adoption and implementation of regulatory compliance programs in terms of determining (qualitatively and quantitatively) the penalty to be applied to legal persons. In this vein, it modified the catalog of accessory penalties and alternative penalties applicable to legal persons, standardizing them in relation to those provided for in extraordinary criminal legislation.

2. Regulation of substantive-punitive effects without prior definition of a regulatory compliance program by the Penal Code

André Lamas Leite[5] notes that Law No. 94/2021, by introducing into the Penal Code rules concerning the relevance of regulatory compliance

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as a "challenge to the stability of a norm," so that the attribution of criminal responsibility and punishability cannot be conditioned by the "stability of expectations of compliance" with criminal norms; and (b) the raison d'être of Criminal Law and punishment, which sees in "the exercise, on behalf of all, of social control over conduct considered intolerable" because it affects fundamental legal rights, which is, in fact, the raison d'être that legitimizes the orientation of the content of punishment toward the exercise of such social control. Thus, although an effective *compliance* system corresponds to "what can be done [preventively] in business terms," this "does not exhaust (...) the purposes of punishment," and is only likely to have an impact on the respective "quantification."
If judged correctly, and this was precisely the option chosen by Law No. 94/2021, the criminal *compliance* system should not only be reflected in the quantitative determination of the penalty, but also in its qualitative determination, since the content of the penalty can and should be oriented towards the "social control of the intolerable," to use the expressions of BUSATO 2021.

[5] "The criminal sanctioning regime for legal persons and similar entities, especially after Law No. 94/2021 of December 22," *Revista* – Supremo Tribunal de Justiça, No. 01, January-June 2022, pp. 121-123, available at https://repositorio-aberto.up.pt/bitstream/10216/141536/2/565122.pdf, and "Considerations on Law No. 94/2021, of December 22, and some proposals for revision of the Penal Code," 2022, available at https://repositorio-aberto.up.pt/bitstream/10216/141736/2/568163.pdf, pp. 47-49. On this issue, see also SANHUDO 2022, 43-46.

programs in the punishment of legal persons, made the "enormous mistake" of not defining what the interpreter-enforcer should understand by a regulatory compliance program for this purpose. This is indeed a very serious gap which, in addition to opening the door to judicial discretion regarding the concept in question, its content and requirements of the respective criminal-punitive value (with obvious damage to legal certainty and security), violates the principle of legality by implying an "absence of [sufficiently] enabling rules" for attributing relevance to *compliance* programs within the framework of the sanctioning system for legal persons.

Despite the limitation of the objective and subjective scope of application of the General Corruption Prevention Regime (RGPC – Articles 2 and 3), perhaps this gap can and should be filled by resorting, *mutatis mutandis*, to Articles 5 to 11 of DL No. 109-E/2021, as proposed by André Lamas Leite. But also, it is added, by making use of the rules to which the latter refer: Articles 15 and 17 of the same decree, regarding the evaluation systems for *compliance* programs; and Articles 8 to 11 of Law No. 93/2021, regarding internal reporting channels *ex vi* Article 8 of the RGPC. This is becaus , the regulatory compliance programs regulated under this general regime have not only preventive purposes, but also detection, investigation, information/evidence gathering, and sanctioning (internal and external) purposes, through the implementation of reporting channels, the conduct of internal investigations "or communication to the competent authority for the investigation of the offense" (Articles 5/1 and 8 of DL No. 109-E/2021, and 11/2 of Law No. 93/2021 - General Regime for the Protection of Whistleblowers). All things considered, this opens the door, as far as collective entities are concerned, to a certain sense of privatization of investigation (insofar as private entities are called upon to participate in the exercise of public functions of prevention, detection, and repression of administrative or criminal offenses), to reward solutions in terms of sanctions, to diversion solutions in relation to the normal course of proceedings, and even to negotiation of the form of proceedings and the penalty applied to them in summary proceedings, in a model, such as the Portuguese one, which until now has clearly given precedence to the

principle of legality over that of the opportunity for criminal prosecution, at least as regards natural persons[6] .

However, this would still constitute an analogy that is prohibited in criminal law because, in some situations, the adoption or implementation of a compliance program or the failure to adopt or implement such a program justifies the application of additional and/or alternative penalties to legal entities (see Article 90-A/5 and 6 of the CP), which clearly restrict their respective rights and freedoms, with the consequent violation of Articles 18/2, 29/1 and 3, 165/1(*c)* of the CRP, and 1/3 of the CP. Therefore, André Lamas Leite[7] proposes that a paragraph 12 be added to Article 11 of the CP, with the following wording: "For all legal purposes, a compliance program is understood to be that provided for in Articles 5 to 11 of the General Corruption Prevention Regime, approved in the annex to Decree-Law No. 109-E/2021, of December 9."

However, given, on the one hand, the legislator's decision to regulate the substantive effects of *compliance* programs and mechanisms without altering the legal model for attributing liability to legal persons enshrined in Article 11 of the Criminal Code, and, on the other hand, the need to avoid raising doubts about this choice, it seems that a rule with such content should rather be added to Article 90-A of the Penal Code. This provision rightly regulates the penalties applicable to them and the criteria for determining them (qualitative and quantitative). In addition, such a rule should be inserted into Article 1 of the Code of Criminal Procedure, with the necessary adaptations, due to the procedural repercussions of criminal *compliance* programs.

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[6] These consequences of the importance attributed to preventive-repressive criminal *compliance* are discussed, among others, by ROTSCH 2022, 291-292; NIETO MARTÍN, 2013/2014, 197-200; NEIRA PENA 2017, 66-84, 94-102, 325-332; PÉREZ GIL, , 2017 38-46; ANTUNES 2018, 119-127; SOUSA 2019, *passim*.

[7] "Considerations on Law No. 94/2021, of December 22, and some proposals for revision of the Penal Code," cit., p. 49, and "The criminal sanctioning regime for legal persons and equivalent entities, in particular after Law No. 94/2021, of December 22," cit., p. 123.

II. THE SUBSTANTIVE PENAL EFFECTS OF COMPLIANCE PROGRAMS, IN PARTICULAR

1. Favorable to legal entities?

1.1. General mitigating circumstance in determining the specific measure of the penalty

According to Article 90-B/4 of the CP, when setting the daily fines to be applied to the entity, in accordance with the criteria established in Article 71, "the circumstance that the legal person has *adopted and implemented*, after the commission of the offense and *until the date of the trial hearing*, a regulatory compliance program with appropriate control and surveillance measures to prevent crimes of the same nature or to significantly reduce the risk of their occurrence" may be taken into account.

The forward-looking nature of the requirements that the regulatory compliance program must meet in this regard (including control and surveillance measures suitable for *preventing crimes of the same nature or significantly reducing the risk of their occurrence*) presupposes *ex post facto* proof of a self-imposed reduction in the risks of recidivism by the legal person, giving it the opportunity to do so until the date of the trial hearing[8] .

The consideration of this circumstance is not foreign to the Penal Code[9] , since, according to Article 71: (a) in determining the specific

[8] MAGALHÃES 2022, 111, clarifies that the "date of the trial hearing" means "the start of the trial hearing sessions." According to the author, the setting of *this terminus ad quem* is based on the need to present, before the trial court, the "Herculean" evidence of the adoption and implementation of a regulatory compliance program with the characteristics indicated, and therefore such evidence should not be referred to the penalty determination phase, after proving that a penalty should be applied to the legal entity (see Article 369 of the CPP).

[9] Similarly, PAIS 2022, 321-323.

measure of punishment, depending on the guilt and the requirements of prevention, "the court shall take into account all circumstances which, not being part of the type of crime, speak in favor of or against the agent"[10] ; (b) among these circumstances, paragraphin paragraph 2*(e)*, "conduct prior to or after the crime," especially (but not only) that intended to repair the consequences of the crime, so that nothing prevents the conduct in question from taking a forward-looking approach (reducing the risk of future recidivism) and not just a "retrospective" one (repairing the consequences of the crime). Furthermore, the adoption *and implementation* of a compliance program with legally defined characteristics, after the crime has been verified, does not affect guilt for the act, but certainly reduces the general-positive[11] and special-positive preventive requirements, with the consequent reduction of "punitive needs"; and nothing in Article 71/1 and 2 of the CP requires that the subsequent behavior of the agent be "evaluated in a comprehensive manner" in relation to the risk of future commission *of any crime*. Quite the contrary, as these are criteria for determining the specific penalty to be imposed on the perpetrator for committing a given crime, based on the guilt and the prevention requirements related to that fact and

[10] Similarly, §15(3) of the German Government's Draft Law on a *Gesetz zur Sanktionierung von verbandsbezogenen Straftaten (Verbandssanktionengesetz – VerSanG)* of June 16, 2020, establishes that, in determining the fine to be imposed on the legal entity, the court must weigh the circumstances favorable and unfavorable to the association, among which the following stand out: previous offenses, measures taken before the fact to prevent and detect associative offenses, efforts made by the entity to detect the associative fact and repair the damage, measures taken after the fact to prevent and detect associative facts (n.os 6 and 7).

[11] In order to guarantee the future (or prospective) preservation of the legal-criminal assets in question, ultimately depending on the special prevention requirements that arise in the specific case. Clearly, this is the only sense of positive general prevention for the protection of fundamental legal rights (see Article 18/2 of the CRP), which prevents the retributive purpose of the penalty from being disguised as positive general prevention for *the retrospective* (*i.e.*, vindictive) protection of the legal-criminal interest that has already been violated.

the individual position of the perpetrator in relation to it, including their personal circumstances and economic situation[12] .

1.2. Criterion for mandatory special mitigation of the sentence

The *adoption and implementation*, *prior to the commission of the crime,* of a compliance program "suitable for preventing the commission of the crime or crimes of the same kind" is *a mandatory special mitigating criterion*[13] *for the penalty applicable* to the legal person (Article 90-A/4 of the CP), with the consequent application of the new Article 283/3(*c)* of the Code of Criminal Procedure[14] , under penalty of nullity of the indictment[15] . However, this penalty shall not prevail over the purposes of criminal proceedings to discover the material truth and enforce the law, preventing the accused legal person from requesting the opening of an investigation with the aim of alleging and presenting evidence of the existence, *ex ante facto*, of a compliance program "suitable for preventing the commission of the crime

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[12] For these reasons, it does not seem appropriate to support the criticism of LEITE 2022, 120-121, of the new Article 90-B/4 of the CP. Basically, the author criticizes this provision on the grounds that the adoption and implementation, *ex post facto*, of a regulatory compliance program aimed at reducing the risk of recidivism by the legal person is foreign to Article 71 of the CP: (i) because it refers to a moment subsequent to *the tempus delicti;* (ii) because it (pre-)assumes that this circumstance has no impact on prevention requirements, and (iii) because it is limited to preventing recidivism of the same type of crime.

[13] MAGALHÃES 2022, 109-110 also reaches this conclusion, alluding to the power and duty of the court to verify the legally established circumstances, without any margin for discretion, although subject to the obligation to justify the absence of special mitigation of the penalty.

[14] Also included in the Code of Criminal Procedure by Law No. 94/2021.

[15] CORREIA 2025, explains the provisions of subparagraphs *b)* and *c)* of paragraph 3 of the CPP as follows: "it would be incomprehensible if the Public Prosecutor, despite investigating 'à charge et à décharge' and collaborating with the court in discovering the truth and enforcing the law [see Article 53/1 of the CPP], did not include in the indictment all the available circumstances relating to the determination of the penalty to be imposed."

or crimes of the same kind" (Articles 287(1*)(a)* and (2), 288(4), 289, 291(1) and (3)); to file a defense for the same purpose (Article 311-B/3); or to request at trial the production of all evidence deemed necessary for their defense (Articles 340/1 and 2, and 341, subparagraph *c)*, all of the CPP).

Now, the language adopted by Article 90-A/4 of the CP (*adoption and implementation, prior to the commission of the crime,* of a compliance program "*suitable for preventing the commission* of *the crime* or crimes of the same kind") presupposes a retrospective judgment that compares *the specific criminal offense committed by the collective organization with the adopted and implemented by the collective entity*, but which nevertheless failed to prevent the commission of a crime listed in the "catalogue," in a context that allows its attribution to the legal person under the terms of Article 11/2, subparagraph *a)* or *b)*, and 6, of the CP.

Precisely because it is not a question of merely assessing the adoption and implementation of a compliance program in accordance with the requirements of the RGPC, Article 90-A/4 of the CP does not in any way seek to "reward" the legal person for complying with a legal obligation. There is anoth y reason for this: the possibility of special mitigation of the penalty under Article 90-A/4 of the CP, outside the scope of application of the RGPC and the existence of a legal duty for the legal person to adopt and implement a criminal *compliance* program.

Clearly, the provision for this mandatory special mitigation of the fine imposed for the crime attributed to the legal entity (taking into account the conversion rules enshrined in Article 90-B/1 and 2 of the CP) aims to encourage all criminally liable entities to adopt and implement criminal *compliance* systems, even those that are not legally obliged to do so, for example, because they employ fewer than 50 workers. Furthermore, this is an incentive with a multiplier effect, as the special mitigation of the fine applicable to legal persons may open the door to the application of alternative penalties to the specific fine: warning, good conduct bond, or judicial supervision (Articles 90-A/3, 90-C, 90-D, and 90-E/1 of the Penal Code).

1.3. Grounds for replacing the fine with an "alternative penalty"

a) Alternative penalty to the fine as the main penalty

Maria Da Conceição Ferreira Da Cunha[16] draws attention to the diversity of the *rationale* behind substitute penalties applicable to legal persons compared to that which governs substitute penalties applicable to natural persons: it is not a question of avoiding imprisonment (which is inapplicable to legal persons)[17] , but, at most, the risks associated with fines, namely their repercussions on third parties[18] (specifically: customers/consumers, partners/associates/shareholders, creditors, and employees) and the difficulty of complying with them in the case of entities in a precarious financial situation. Even so, the Plaintiff argues: (i) what is at stake is the replacement of the fine with a lighter penalty (we will see that this is not always strictly the case), which "may have important preventive effects" (example: judicial supervision – Article 90-E of the Penal Code); (ii) also with regard to legal persons, substitute penalties only apply to minor or medium-level crimes (not necessarily, as we shall see, when judicial supervision is involved in the form provided for in Article 90-E/2); (iii) the criteria determining substitution are the same for both types of legal-criminal agents: "adequacy and sufficiency" of the alternative penalty "to

16 2022, 263-264.

17 Regarding the historical and criminal policy connection between alternative penalties in the strict sense and combating the criminogenic and desocializing effects of short or medium-term prison sentences, FIGUEIREDO DIAS 2009, Chapter 3, §§80-81, Chapter 10, §§490-492; and ANTUNES 2017, 30-32.

18 Including as a cost in the final price of goods and services, with the consequent suppression of their general preventive effectiveness, but above all their special preventive effectiveness. KLAUS VOLK 1993, 432-434, draws attention to this aspect, asking how the fine should be determined and structured so that it effectively and lastingly affects the company without being treated as a "cost factor," "transmitted and externalized" to such an extent that it only burdens innocent parties.

achieve the purposes of punishment," *i.e.*, "special prevention and general prevention and, thus, the protection of legal rights."

Article 90-A/6 of the CP provides for the possibility of replacing the fine (applied in any measure[19]) with "*an alternative penalty* that adequately and sufficiently achieves the purposes of punishment, considering, in particular, the *adoption or implementation* by the legal person of a compliance program adequate to prevent the commission of the crime or crimes of the same kind." If correctly assessed, the use in Article 90-A/6 of the expression "alternative penalty" instead of "substitute penalty" aims to establish, for legal persons, the concept of an *alternative penalty to a fine* (the main penalty normally applicable to these legal-criminal subjects) *as a "penalty (of substitution) applied as the main penalty or in the main form*." This is because the application of such an "alternative" penalty is not conditional on the predetermination of the specific daily fines to be applied to them, followed by *an independent assessment of the replacement* of this main penalty with another that adequately and sufficiently fulfills the purposes of the punishment; namely in cases where the collective entity has adopted *or* implemented, *ex ante* or *ex post facto* (until the date of the judgment – see Article 90-A/5, *in fine*, or until the start of the trial hearing – see 90-B/4?), a compliance system suitable for preventing the commission of the crime that occurred or crimes of the same kind.

It remains to be seen, however, whether the alternative set out in Article 90-A/6 can effectively dispense with the determination of the specific fine to be imposed on the entity based on the offense and the guilt

[19] The "alternative penalty" specifically referred to in Article 90-A/6, *in fine*, appears to be the judicial supervision provided for in Article 90-E/2 of the CP. This is no longer a substitute penalty for the fine to be imposed on the entity for a period not exceeding 600 days, as referred to in Article 90-E/1 of the CP. SANHUDO 2022, 31-32. In fact, one of the requirements of substitute penalties in the strict sense, in addition to their non-institutional or non-custodial nature, is the prior determination of the measure of imprisonment to be applied and enforced instead. Thus, FIGUEIREDO DIAS 2009, Chapter 10, §505; ANTUNES 2013, 32, and ANTUNES 2017,. 30-31.

attributed to it, if only because the "alternative penalty" imposed, even if as a principal penalty, must adequately and sufficiently fulfill the purposes of punishment, *i.e.*, the general positive prevention of the protection of legal rights and special prevention (see Articles 71/1 and 40/1 of the CP)[20] . If the answer is negative, as it appears to be, then, "from a dogmatic point of view," Article 90/6 of the CP will not prevent the application to legal persons of genuine alternative penalties to fines that do not exceed a certain number of fine days.

Furthermore, it is important to ascertain whether, from a political-criminal point of view, the "alternative penalty" referred to in Article 90-A/6 will not always constitute a substitute penalty[21] , intended: on the one

[20] Next ANTUNES 2022, 80-83, referring, however, to the cumulative application of a principal or substitute penalty and an accessory penalty (as principal) for the punishment of certain types of crimes, as this combination is, from the outset, the most appropriate from the point of view of the purposes of punishment. The author explains that the application of the accessory penalty as a principal penalty means that: (i) its imposition no longer depends on the prior determination of the principal or substitute penalty and on proof of the existence of general and special prevention requirements, which the possible accessory penalty is intended to satisfy; and (ii) the "consideration of the requirements of prevention [is carried out] simultaneously, in the determination of the main penalty and the accessory penalty applied cumulatively, with the limits imposed by the guilt of the agent, according to the criteria established in Article 71(1) of the Penal Code." Thus, in the opinion of MARIA JOÃO ANTUNES, the main penalty will tend to be limited to the minimum necessary for the "defense of the legal order and social peace," with the remaining special prevention requirements being "satisfied through the application of the additional penalty," thereby making "the reintegration of the perpetrator into society more effective."

[21] The words were quoted and the teaching of FIGUEIREDO DIAS 2009, Chapter 10, §§ 81, 489, and 507. According to the author, the category of alternative punishment, within substitute punishments, corresponds to situations in which "the judge [may] apply a punishment other than imprisonment without having to proceed" to the prior determination of the prison sentence "specifically applicable to the case" (§§81 and 489). At that time, in the Portuguese Penal Code, this only applied to the rules of evidence set out in Articles 53 to 58, before the amendments introduced by Decree-Law No. 48/95.

hand, to combat the weak general preventive effectiveness and, above all, the special preventive effectiveness of fines imposed on legal persons; and, in certain cases at least, to reward the legal entity which, *ex ante facto* or pending criminal proceedings, has sought to comply with the specific legal and criminal requirements, without neglecting the prevention of recidivism through the application of any of the alternative penalties provided for in the Criminal Code for legal entities. Substitute penalties whose non-compliance or revocation determines, precisely, the enforcement of the fine determined in the sentence (see Articles 90-D/4 and 90-E/5 of the Penal Code). A fine that, in the end, will always have to be set, although considering, *simultaneously and not successively, the preventive, general, and special requirements that must be satisfied through it and the "alternative" penalty*.

b) Characteristics of the regulatory compliance program and timing of its adoption or implementation

The characterization made by Article 90-A/6 of the compliance program (suitable for preventing the crime that actually occurred or crimes

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Article 53 allowed the judge to apply the rules of evidence based on the abstract penalty imposed for the crime of which the defendant had been found guilty ("not exceeding three years, with or without a fine"), when it was possible to conclude that this would enable the defendant to be "removed from criminality" and provided that this was not opposed by "the need to condemn and prevent crime." Under the terms of Article 57/2 then in force, only in the event of revocation of the probation regime would the "sentence that would have been imposed for the crime if the probation regime had not taken place be determined, and the agent could not demand the restitution of any payments made." FIGUEIREDO DIAS 2009 §507 recognized that, although from a dogmatic point of view it was questionable to classify probation as a true alternative penalty (since it did not presuppose the autonomous predetermination of the specific prison sentence), from a criminal policy point of view, such a regime constituted an authentic substitute penalty intended to combat the criminogenic effects of imprisonment, especially of short duration. For this reason, FIGUEIREDO DIAS 2009 §81 concluded that there was no need for the "doctrinal autonomization of a category of alternative penalties within substitute penalties."

of the same kind) points, once again, to a retrospective judgment that compares the crime that occurred with the compliance system adopted *or* implemented by the legal entity, *ex ante* or *ex post facto*, although still and always pending criminal proceedings (see Article 90-A/5, *in fine*, of the CP).

If properly assessed, the replacement of the fine to be imposed on the entity may occur because it *adopted or implemented measures before the crime was committed or only while the proceedings were pending* (at the latest until the start of the penalty determination phase – Articles 369 of the CPP and 90-A/5, *in fine*, of the CP)[22] a compliance program that meets the requirements of Article 90-A/6 of the CP. The disjunctive adoption *or* implementation seems to preclude the possibility of combining the substitution of the fine, under the terms of Article 90-A/6 of the CP, with the mandatory special mitigation of the penalty, reserved for cases of *adoption and implementation*, *prior to the commission of the crime,* of a compliance program with identical

[22] One might think that the *terminus ad quem* for the application of Article 90-A/6, *in fine*, should be the date of the trial hearing, similar to what is determined in Article 90-B/4, regarding the consideration of the adoption *and* execution (*ex post facto*) of a program of regulatory compliance with surveillance and control measures suitable for preventing crimes of the same nature or significantly reducing the risk of their occurrence, as a factor in determining the specific fine to be imposed on the entity. However, as will be better understood below, this does not seem to be the best solution. Firstly, because Article 90-A/6, *in fine*, unlike Article 90-B/4, does not directly establish any time limit, which is reached indirectly by comparison with the parallel provision (regarding the qualitative determination of the penalty to be imposed on the entity) of Article 90-A/5, *in fine*, of the CP. This indirect determination points to a later *terminus ad quem*. Secondly, because the diversity of requirements and characteristics assigned to *compliance* programs by Articles 90-A/6, *in fine*, and 90-B/4, suggest a differentiation in the predominant purposes pursued by each of them (perhaps special preventive in the first provision and general preventive in the second). Finally, because the elevation of the substitute penalty to the main penalty, under Article 90-A/6 of the CP, implies a determination of the substituted fine in light of the purposes (especially preventive-special) justifying the application of the "alternative" penalty, never raising the question of imposing the fine as the main penalty. This is precisely the situation referred to in Article 90-B/4 of the CP.

characteristics (suitable for preventing the commission of the crime or crimes of the same kind).

It should also be noted that the replacement of the fine (Article 90-A/6 of the Penal Code) cannot be combined with the prior consideration, in determining the specific daily fines to be applied to the entity, of the fact that it has *adopted and implemented*, *after the commission of the offense and until the date of the trial hearing*, a regulatory compliance program "with control and surveillance measures suitable for preventing crimes of the same nature or significantly reducing the risk of their occurrence" (Article 90-B/4 of the Penal Code). The incompatibility of the respective conditions for application (*adoption and implementation*, *after the commission of the offense and until the date of the trial hearing* – Article 90-B/4 – *vs. adoption or implementation, without indication of any time lapse* – Article 90-A/6), there is also the diversity of characteristics and requirements set out for the compliance program in each of these provisions. These characteristics and requirements seem to be based on different value perspectives (prospective *vs.* retrospective), which point to the pursuit of different overriding purposes (reward, prevention, or punishment).

In the case of Article 90-B/4 (regulatory compliance program "with appropriate control and surveillance measures to prevent crimes of the same nature or to significantly reduce the risk of their occurrence"), these requirements suggest an exclusively prospective approach to self-minimization of the risk of recidivism by the legal entity, thus satisfying considerations of special positive prevention of (re)socialization. This is understandable, given that it concerns only the assessment of positive behavior by the accused collective entity subsequent to the commission of the crime, i.e., after the violation of the asset or interest protected by the criminal offense in question.

The requirements of Article 90-A/6 of the CP (a compliance program adequate to *prevent the commission of the crime or crimes of the same kind*), on the other hand, do not dispense with, as has been said, a retrospective approach of comparing the crime that occurred with the compliance system adopted *or* implemented by the legal entity. However, this alternative,

associated with the lack of a time limit, implies that the adoption or implementation of a *compliance* program aimed at preventing the crime that occurred or crimes of the same type can take place either *ex ante facto* or while the criminal proceedings are pending. Thus, there seems to be nothing to prevent the replacement of the fine with an alternative penalty from being based on positive conduct by the entity subsequent to the commission of the crime, consisting precisely in the effective implementation of the previously existing compliance system, which may already have been geared towards the prevention of the crime that occurred or crimes of the same type (although inoperative). However, the *ex post* facto behavior of the legal entity may also consist of the adoption *ex novo* of a *compliance* system designed in response to the crime that occurred and geared towards the prevention of crimes of the same type.

In either case, this is similar to a self-redirection of the legal entity towards legality, or at least an effort in that direction, which seems to justify replacing the fine with an alternative penalty. *Which alternative penalty or penalties these will be will depend on the seriousness of the crime and the culpability of the entity, as well as the requirements of general prevention and prevention of recidivism (positive and/or negative special prevention), which are still relevant at the time of sentencing.*

In fact, it is only in this light that the use of the term "alternative penalty" in Article 90-A/6 of the CP can be understood, rather than simply referring to the substitute penalties provided for in Article 90-A/3 of the CP. In fact, the "alternative penalty" provided for in Article 90-A/6, despite always being, from a political-criminal point of view, a substitute penalty applied as a primary penalty (*i.e.*, simultaneously with the determination of the fine, obeying the same criteria and purposes), it does not in all cases correspond, from a dogmatic point of view, to a classic alternative penalty limited to minor and medium-level crime, given the seriousness of the crime for which the entity is liable and the judgment of guilt directed at it. This opens up the provisions of Article 96-A/6 to the pursuit of special preventive purposes (positive and/or negative), but also general preventive

purposes for the future protection of the legal-criminal asset already affected by the crime attributed to the entity.

c) Specific "alternative" penalties: characterization and purposes

Under the terms of Article 90-A/6 of the Penal Code, the fine imposed in the sentence may be replaced by the following penalties: (i) good behavior bond (Article 90-D: replacing a specific fine not exceeding 600 days); (ii) admonition (replacing a specific fine not exceeding 240 days), which must be combined with the additional penalty of publicizing the conviction (Articles 90-C and 90-M/1); or (iii) *judicial supervision*, but, *prima facie, only in the form provided for in Article 90-E/2* of the Penal Code[23] . This consists of monitoring by a judicial representative, without powers of management of the collective entity, whose function is *to control the adoption*

[23] The type of judicial supervision referred to in Article 90-E/1 of the CP is a substitute penalty for the fine imposed on a legal person for a period not exceeding 600 days and consists of *supervision* by a judicial representative *of* "*the effective implementation of a compliance program with appropriate control and surveillance measures to prevent crimes of the same nature or to significantly reduce the risk of their occurrence*." The consistency of the legal formulas and the forward-looking approach of the requirements made of the regulatory compliance program suggest that this other form of judicial supervision (truly substituting the fine in the classic sense) is primarily intended to monitor compliance by the collective entity, of the accessory penalty of a judicial injunction to adopt *and* implement a regulatory compliance program that includes "*appropriate control and surveillance measures to prevent crimes of the same nature or to significantly reduce the risk of their* occurrence" (Article 90-G/1, subparagraph *b)*, of the CP). This additional penalty may be imposed under Article 90-A/5 of the CP, among other reasons, because, at the beginning of the penalty determination phase (Article 369 of the CPP), the legal entity has not yet "*adopted and implemented an adequate regulatory compliance program to prevent the commission of the crime or crimes of the same kind*."
It is important to determine whether Article 90-A/5 can (or cannot) be applied cumulatively, and under what terms, with the provisions of Article 90-A/6, in order to allow the accumulation of some "alternative" penalty to the fine (especially judicial supervision) with an accessory penalty, namely the judicial injunction provided for in Article 90-G/1(*b)* of the CP. We will return to this issue.

or implementation (depending on the specific pre-action of the collective entity) of *a regulatory compliance program appropriate to prevent the practice of the crime or crimes of the same kind*. Note, on the one hand, the wording used in Articles 90-A/6 and 90-E/2 of the CP and, on the other hand, the fact that none of these provisions refers to the specific measure of the fine that may be replaced. This allows the fine to be replaced by judicial supervision, even if a fine of more than 600 days must be imposed on the legal entity due to the seriousness of the crime with which it is charged and the judgment of censure directed at it. Both the substitute penalty (Article 90-E/1) and the alternative (Article 90-E/2) of judicial supervision will be revoked, and the legal entity will have to comply with the fine imposed in the sentence: (i) if it is convicted of a new crime revealing that the purposes of the judicial supervision penalty could not be achieved by means of it; or (ii) if it does not effectively adopt or implement the regulatory compliance program *that meets the legal requirements*[24] (Article 90-E/5 of the CP).

The type of judicial supervision described in Article 90-E/2 of the CP, namely when applied as an "alternative" penalty to a specific fine exceeding 600 days[25] , there seems to be a particular emphasis on the

[24] Thus, SANHUDO 2022, 31-32) rightly warns of the "invitation to 'fraud against the law'" that would be interpreting Article 90-E/5 of the CP in the sense that the alternative penalty would only be revoked if the legal person had not adopted or implemented *any* regulatory compliance program, exempting itself from the penalty of a fine by adopting or implementing a compliance system that is "inadequate and has no effect on the activity of the collective entity."

[25] It should be noted that the fact that Article 90-E/2 of the Penal Code does not refer to any specific amount of the fine to be imposed on the entity allows this type of judicial supervision to be imposed even if the specific fine, replaced under the terms of Article 90-A/6, is equal to or less than 600 days. This immediately raises at least three fundamental questions. *First*: what, after all, is the purpose and scope of Article 90-E/1 of the Penal Code? *Second*: how does this provision relate to the provisions of Article 90-A/5 and what are the consequences of this relationship in terms of the primary purposes of the accumulation of penalties (substitute and accessory) imposed on the entity? *Third*: is it possible to apply to a legal entity that, *ex ante* or *ex post* facto but pending proceedings, has

requirements of positive general prevention for the future protection of legal rights (already affected by the crime attributed to the entity) and special prevention, both positive (socialization: controlling adoption) and negative (intimidation: controlling implementation)[26] . Such a penalty, especially if imposed for a longer period, will perhaps be reserved for cases of: (i) greater seriousness of the crime attributed to the entity and the judgment of guilt directed at it, and (ii) mere adoption *or* implementation, already pending criminal proceedings, a compliance system designed or modified in response to the crime committed and intended to prevent the commission of crimes of the same kind. This positive behavior, assumed *ex post facto* by the legal entity while still in the course of criminal proceedings (see Article 90-A/5 of the Penal Code), does not erase or attempt to neutralize the seriousness of the offense and the guilt attributed to it. Nevertheless, the legal person should be rewarded for its efforts to bring itself into line with the relevant legal and criminal obligations that it had previously failed to respect, as well as for its self-organization and self-monitoring in this regard. This unequivocally reduces the need for general and special (positive and negative) prevention measures that would otherwise would exist, especially in comparison with that other collective entity which, having committed a criminal offense of equal gravity, at the beginning of the penalty determination phase had not yet adopted or implemented a compliance

adopted *or* implemented an adequate compliance system to prevent the commission of the crime that occurred or a crime of the same kind, the judicial supervision provided for in Article 90-E/1, perhaps accompanied by a judicial injunction to adopt and implement a regulatory compliance program "with appropriate control and surveillance measures to prevent crimes of the same nature or to significantly reduce the risk of their occurrence," under Article 90-A/5 of the CP, which allows for the cumulative application of an accessory penalty with a substitute penalty? Below, we will attempt to answer these three questions.

[26] ALBUQUERQUE 2024, No. 1 to Article 90-E, emphasizes that judicial supervision is especially used "in serious cases that require special monitoring by the Court."

system shaped by the crime committed and aimed at preventing crimes of the same kind.

The provisions of Article 90-A/6 of the CP appear to be based on a logic of rewarding the behavior assumed by the legal person, *ex ante* or *ex post facto*, but until the conviction is handed down, namely consisting of the adoption or implementation of a compliance program *adequate to prevent the commission of the crime or crimes of the same kind*. In this case, if correctly assessed, this allows the "alternative" penalty to the specific fine to be configured as a "reward-based sanction," "attributed on the basis of compliance with the same legal-criminal norm" whose violation the reward-based sanction aims to prevent. Yes, because the violation of a criminal legal norm can be prevented both by the "threat of harm" and by the "promise of good." Because "rewards or incentives [presuppose] compliance with the same rule that they prevent the violation of, (...) they are sanctions that are strictly symmetrical to repressive sanctions, are also assessed on the basis of the past and not the future, and are distinguished from merely preventive sanctions"[27] . In this light, it is understood that the characteristics and requirements set out in Article 90-A/6 of the CP for the compliance program (*suitable for preventing the commission of the crime that has already occurred or crimes of the same kind*) imply a retrospective approach of comparing the crime that has occurred with the compliance system adopted *or* implemented by the legal person, *ex ante* or *ex post facto*, but until the beginning of the penalty determination phase (see Articles 90-A/5, *in fine*, of the CP, and 369 of the CPP).

The replacement of a fine with a good behavior bond, under Article 90-A/6 of the Penal Code, can only be decreed when the fine to be imposed on the entity does not exceed 600 days[28] . This situation, assuming the average

[27] As BRITO 1984, 165-166

[28] ALBUQUERQUE 2024, n. prior to Article 90-D) warns that the configuration of good conduct bail as a substitute penalty limits its scope of application, "it cannot be applied alongside a fine [as an accessory penalty] or when the fine exceeds a certain limit."

seriousness of the crime and the guilt for which the legal person is liable, implies significant needs for positive general prevention of future protection of the legal-criminal asset (already affected by the crime attributed to it) and special negative prevention of intimidation[29] . The purpose of the good conduct bond is, fundamentally, the provisional assignment of "a portion of the legal entity's assets [in the amount of between €1,000 and €1,000,000] to the non-repetition of the crime," as it will be returned if, at the end of the bond period (1 to 5 years)[30] , the person has not been convicted of any new crime (Article 90-D/2 of the CP). Therefore, there is no payment or actual loss of the amount in question to the benefit of the injured party, institutions, or the State, as is the case with the obligations that condition the suspension of the prison sentence imposed on the individual (see Article 51/1 of the Penal Code)[31] . However, this does not prevent the good conduct bond from resulting in a genuine suspension of the execution of a

However, in his view (*idem*, n. 5 to Article 90-D), the alternative penalty of good conduct bond may already be combined with the accessory penalties of publicity of the conviction, *or* prohibition from entering into contracts *or* deprivation of the right to subsidies.

This is, in fact, a possibility enshrined in Article 90-A/5 of the CP, although it is limited to the application of one (and only one) accessory penalty together with the main or substitute penalty, except in cases provided for by law. Examples of these are Article 90-G/3, which allows the accumulation of accessory penalties of judicial injunction, prohibition from entering into contracts, and deprivation of the right to subsidies, grants, or incentives; and Article 90-M/1, parts 1 and 2, concerning, respectively, the imposition or permission to combine the accessory penalty of publicity of the conviction with certain (or any) accessory penalties, or with the substitute penalty of admonition.

[29] This will be better understood when the peculiarities of the alternative penalty of good conduct bond applied to legal persons are explained below.

[30] CUNHA 2022, 266-267 rightly points out that both the penalty of good conduct bond and that of judicial supervision presuppose "the autonomous determination of the substitute penalty (according to the general criteria of Article 71, with the necessary adaptations)."

[31] LEITE 2020,. 230-231.

fine not exceeding 600 days[32] , the purpose of which is "to subject the legal person to a probationary period"[33] , while ensuring compliance with the additional penalty of prohibition from entering into certain contracts or contracts with certain entities, which may be imposed together with that penalty, under Article 90-A/5 of the CP.

Even in the context of alternative penalties applicable to legal persons, the penalty of good conduct bond has "unique features," namely: (i) conviction for any type of crime[34] within the respective period of validity determines the loss of the value of the bond, not the revocation of the alternative penalty and the enforcement of the fine imposed in the sentence; (ii) this enforcement will only take place if the legal entity does not provide the bond within the period set in the conviction (respectively, Article 90-D/2 and 4 of the CP). Nevertheless, "the threat of a fine if the bond is not complied with and the threat of forfeiture of the bond if a crime is committed, as well as the determination of the period [not the amount, one

[32] Therefore, the current Article 90-A/6 of the CP responded to the criticism made by ALBUQUERQUE 2024 for not having enshrined the possibility of suspending the enforcement of fines imposed on legal persons, unlike, for example, Article 132-30 of the French Penal Code.

[33] ALBUQUERQUE 2024 no. 7 to Article 90-D.

[34] And not only for crimes that reveal that the purposes of the good conduct bond could not be achieved through it, as is the case with the substitute penalty of judicial supervision imposed on legal persons (see Article 90-E/5(*a)* of the Criminal Code) and, in general, with the alternative penalties applicable to natural persons (Articles 46/3(*b*), 56/1(*b*), and 59/2(*c*) of the Criminal Code). CUNHA 2022, 267-268; and LEITE 2022., 130.
Clearly, the automatic loss of the value of the bond in the event of conviction for a new crime carries the risk of discouraging the autonomous determination of the value of the bond, bringing it closer to the amount of the fine for which the entity was convicted and which it was supposed to replace.

wonders?[35]] based on guilt and the need for prevention, are aspects that bring [the good conduct bond] closer to other alternative penalties"[36] .

If correctly assessed, *the bond of good conduct* as a substitute penalty for a fine imposed on the entity for a period not exceeding 600 days constitutes a *mixed penalty, both punitive and preventive or coercive*.

Punitive because "determined or fixed at a time when it is no longer possible or effective to achieve the interest protected by the rule"[37] , since the legal right protected by the criminal offense attributed to the collective entity has already been definitively affected; and mixed "with a prevalence of the punitive function," because there is a "typological identity" between the coercive sanction (the good conduct bond) "and the punitive sanction provided for non-compliance with the duty," both of which are pecuniary sanctions[38] . In fact, in the event of failure to provide the good conduct bond within the period set by the court (non-compliance with the alternative penalty), the bond is revoked and the fine determined in the conviction is enforced (Article 90-D/4 of the Penal Code)[39] ; in the event

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[35] ALBUQUERQUE 2024, no. 2 to Article 90-D, maintains that the value of the bond "must be proportional to the severity of the fine replaced," while the period of validity of the bond "must be set according to the preventive needs of the case." In explicit contrast, the STJ Judgment Establishing Case Law No. 8/2013. On this issue, MARIA JOÃO ANTUNES 2017, 80-81, insists on the need for autonomous determination of the substitute penalty "based on the criteria established in Article 71 of the CP."

[36] CUNHA 2022, 266-267. The Author also draws attention to another peculiarity of the good conduct bond: only the conviction of the legal person during the respective period of validity (not the mere commission of a new crime) can lead to the loss of the bond value. On this point, a different (more favorable) solution is adopted than that which applies in similar situations for alternative penalties imposed on individuals (see Article 57/2, to which Articles 46/4 and 59/3 of the CP refer).

[37] Thus, LEITE 2016, 514, citing FAVEIRO 1948, 88.

[38] FERREIRA LEITE 2016, 516-517.

[39] Next, FERREIRA LEITE 2016, 514: "the coercive sanction cannot be applied whenever the agent (...) expresses a definitive refusal to comply," in this case, the substitute coercive sanction of good conduct bond.

of failure to comply with the obligation not to commit new crimes during the probation period corresponding to the term of application of the good conduct bond (an obligation which this alternative sentence is intended to ensure), the value of the bond is forfeited to the State (Article 90-D/2 of the Penal Code)[40] .

The good behavior bond is also a coercive or preventive sanction, because "in it, past wrongdoing is merely a prerequisite and never the raison d'être, much less the measure of the sanction. It does not define a relationship of justice with the previous offense," because it is "based on the future and not the past," although it presupposes a "justice of prevention." As for the presumed offense, it can only be said that it aims to prevent the repetition of similar acts, being, in this sense, merely preventive[41] . In fact, the coercive sanction "arises as a punitive reaction to a first degree of violation of the norm," its imposition being justified "as a form of coercion on the agent and protection of the interests at stake," but the respective criterion for determining it is based "not on the degree of fault of the agent," but rather "on the specific needs for protection of the interest in question and on the degree of coercion foreseeably necessary for that purpose"[42], although, it should be added, always within the limits of the agent's fault (Articles 40/2 and 71/1 of the CP). For this reason, and because the "legitimacy of the coercive sanction lies in its instrumental nature in ensuring compliance with the legal duty" – in the case of the good conduct bond, the legal duty not to commit crimes during the probation period, which, in turn, serves the legal interest protected by the criminal offense attributed to the entity – its accumulation with possible punitive sanctions may be justified"[43] (*e.g.*, accessory sanctions prohibiting the

[40] FERREIRA LEITE 2016, 514-515: "the coercive sanction (...) shall cease (...) upon verification that compliance with the duty has become impossible."
[41] BRITO 1984, 163.
[42] FERREIRA LEITE 2016, 512-513.
[43] FERREIRA LEITE 2016, 515-516.

conclusion of certain contracts or contracts with certain entities *or* depriving the right to subsidies, grants, or incentives, under Article 90-A/5 of the CP), aimed at satisfying general and/or special prevention needs not safeguarded by the substitute penalty of good conduct bond. However, "the overall severity of the coercive sanction," possibly combined with some accessory penalty, should not be disproportionate to "the intrinsic importance of the [criminal-legal] interest ultimately protected"[44] by any of these types of penalties, nor, it should be added, exceed the limit of the agent's guilt (Articles 40(2) and 71(1) of the CP).

In turn, *the replacement*, under the terms of Article 90-A/6 of the CP, *of the fine with a warning*, which must be combined with the additional penalty of publicizing the conviction, depends on the lesser severity of the crime and the guilt attributed to the legal person, as it can only be decreed if the fine to be imposed does not exceed 240 days[45] . The reduction of the needs for positive general prevention of prospective protection of the legal-criminal asset (already affected) and special prevention (positive and negative) allows them to be satisfied through so-called "*shame* sanctions"[46] (admonition and publicity of the conviction). The admonition, although applied to the convicted legal person, is suffered by its legal representative or, alternatively, by the person who occupies a leadership position in it, to

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[44] In this sense, FERREIRA LEITE 2016, 516, alluding to the need for "proportionality control resulting from the prohibition of excess", when coercive and punitive sanctions are combined, and to the "direct interference of *ne bis in idem"* in the face of coercive sanctions of a "dual nature – compulsory and punitive, with a prevalence for the punitive function," as we have seen to be the case with the substitute penalty of good behavior bond.

[45] To this is added the repair of damage by the legal person; the court's assessment that, through admonishment, "the purposes of punishment are adequately and sufficiently achieved"; and, as a rule, the non-conviction of the collective entity in any penalty, including that of admonition, in the three years prior to the fact (Article 60/2 and 3, *ex vi* Article 90-C/1, both of the CP).

[46] On this concept and the discussion of its legitimacy, see HYSENI 2023.

whom the court addresses the "solemn oral censure in court" in which that penalty consists (Article 90-C of the CP). This constitutes a "direct intervention on the representatives of the convicted [legal entity]," intended to create a "counter-incentive" to recidivism, "through those who, in practice, must act on [its] behalf and in [its] interest"[47] .

André Lamas Leite[48] is right in stating that *judicial supervision* is "the most intrusive" of all alternative penalties to fines, based on the "thinking inherent in suspended sentences with probation," provided for individuals (Articles 53 and 54 of the Penal Code), but, in his view, not yet established for legal persons. The replacement of the fine imposed on a legal entity with an alternative penalty, under the terms of Article 90/6 of the Penal Code, is the closest to the suspension of imprisonment with probation, *when the alternative penalty consists of judicial supervision provided for in Article 90-E/2*. In fact, in any form of judicial supervision, the "content of the obligations imposed" on the legal person is not limited to "not reoffending"[49] . This only happens in the case of the alternative penalty of good conduct bond, the punitive nature of which consists essentially in the aforementioned provisional assignment of a certain portion of the collective assets "to non-criminal recidivism" during the term of the bond . In any form of judicial supervision, the individual is obliged to make *positive contributions*, respectively, effective compliance, adoption, *or* implementation of a

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[47] The warning and the words in quotation marks in the text are from LEITE 2020., 228-229. The author, despite advocating de *lege ferenda* the abolition of the penalty (which he considers symbolic) of admonition (LEITE 2019, 148-153), associates this penalty with a resocializing purpose, which, on the contrary, appears to be completely absent from "*shame sanctions*." These pursue exclusively general prevention purposes (especially negative, to intimidate potential offenders) and special negative prevention, to intimidate or neutralize the offender by provoking in them a "feeling of shame or social reproach." This last expression is from LEITE 2020, 229.

[48] 2022, 128-129.

[49] LEITE 2020, 232.

regulatory compliance program that meets legal requirements. Therefore, it is not believed that "Article 54" of the CP, relating to the social reintegration plan that translates into the probation regime for individuals, is "much more demanding" than the judicial supervision penalty imposed on the collective entity[50] . In fact, it seems easy to draw a parallel between the social reintegration plan for individuals (which covers "the resocialization objectives to be achieved by the convicted person, the activities they must carry out, the respective phasing and the support and supervision measures by the social reintegration services" - Article 54/1) and the compliance, adoption, *or* implementation, by the legal person of a compliance system "with appropriate control and surveillance measures to prevent crimes of the same kind or to significantly reduce the risk of their occurrence" or a compliance system "suitable for preventing the commission of the crime or crimes of the same kind," under the supervision or control of a judicial representative (Article 90-E of the CP)[51] . The approximation of judicial supervision (in any of its forms) to the rules of evidence for natural persons is even more evident if, under Article 90/5 and 6 of the CP, it is possible to impose on the legal person that substitute or alternative penalty to a fine together with the accessory penalty of a judicial injunction (Article 90-G of the CP).

To conclude this point, it is important to emphasize that the "replacement" of the fine imposed by an "alternative penalty," under the terms of Article 90-A/6 of the CP, does not always translate into a favorable substantive effect of the criminal *compliance* system adopted or implemented by the legal entity, *ex ante facto* or pending criminal proceedings. One need only consider the degree of intrusion into the freedoms of association,

[50] LEITE 2020, 233.

[51] CUNHA 2022, 267, recognizes that "the commitment [to regulatory compliance programs] and their supervision" has "significant preventive potential, being appropriate to prevent 'recidivism'" by the legal entity, although not in the technical-legal sense of Article 75 of the Penal Code.

pursuit of the respective purpose (Article 46/1 and 2), private economic initiative (Article 61/1), business organization and management (Articles 80(*c)* and 86/2, all of the CRP) of a penalty such as judicial supervision, possibly combined with the application of one or more additional penalties (see Articles 90-A/5, 90-G/1 and 3, and 90-M/1 of the CP)[52] . Added to this are the reputational and economic damages to the legal person, its shareholders, partners or associates, managers, and employees, arising from *the* "*shame* sanctions" of admonishment (in the person of the legal representative of the entity, if any, or of the person who occupies a leadership position therein) and publication of the conviction.

1.4. Concluding considerations regarding the "favorable" effects of compliance

The *preventive adoption and implementation* (*i.e.*, *before the crime is committed*) of a regulatory compliance program that is "adequate to prevent the commission of the crime or crimes of the same kind" is *a mandatory special mitigating factor in sentencing*, as it implies a *significant reduction in the unlawfulness of the act, the guilt of the legal person and/or the need for punishment* (Articles 90-A/4 and 72/1 of the Penal Code)[53] . This is undoubtedly a favorable effect of

[52] ALBUQUERQUE 2024, no. 4 to Article 90-E, draws attention to the possibility of combining judicial supervision with the additional penalty of publicizing the conviction (see Article 90-M/1, part 2, of the Penal Code). However, the author also admits the cumulative applicability of judicial supervision, the prohibition on entering into contracts, and the deprivation of the right to subsidies. This does not seem possible, given the rule defined in Article 90-A/5 (*one* principal or substitute penalty and *one* additional penalty), unless the collective entity is subject to the substitute or alternative penalty of judicial supervision *and* the additional penalty of judicial injunction. This can be combined with the accessory penalties of prohibition from entering into contracts and deprivation of the right to subsidies, grants, or incentives (Articles 90-A/5 and 90-G/3 of the CP).

[53] In the same way, LEITE 2016,
114. SOUSA 2019, 15, points to *ex ante facto compliance* as having only a function of exclusion or mitigation of guilt.

the adoption and implementation of an *ex ante facto* compliance system, since it is geared towards the prevention of the crime that has actually occurred or crimes of the same kind. This is a benefit that is based on a retrospective assessment, comparing the previous compliance system with the crime that has actually occurred and which, moreover, can have a "multiplier effect." The special mitigation of the fine imposed for the crime attributed to the entity may open the door to the application of one of the (classic) alternative penalties generally provided for legal persons (Articles 90-A/3, 90-C, 90-D, and 90-E/1 of the Penal Code).

In this way, the Penal Code aims to encourage all legal entities liable to criminal liability to define and impose a culture of *Criminal Compliance* so broad and comprehensive that it allows them to comply as fully as possible with the requirements of criminal law imposed on them according to their respective characteristics and activities. This reward with an implicit requirement goes far beyond: (i) *from a subjective point of view*, the entities legally obliged to adopt and implement criminal *compliance* programs; and (ii) *from an objective point of view*, the crimes for which the law imposes such a duty (extending to all those for which legal persons may be liable, provided for in the Penal Code or in special legislation, pursuant to Article 8 of this Code), and also the generic (and minimum) requirements that regulatory compliance programs must meet according to the various separate laws, under penalty of administrative liability (individual and collective).

However, the adoption and implementation of compliance systems, which enable criminally liable legal entities to satisfy, to the fullest extent possible, the requirements of the legal-criminal duty imposed on them, entail high economic, organizational, and human costs, which they will have to bear if they wish to benefit from legal rewards in the event of criminal proceedings. These costs, which the State—with the assistance of legal entities through *compliance* programs in the performance of public functions of prevention, detection, investigation, and prosecution of legal offenses—will tend to offset by opening criminal proceedings against them to diversion, dejudicialization, and consensus solutions.

The *adoption and implementation, after the commission of the crime* and until the date of the trial hearing, of a *compliance program "with appropriate control and surveillance measures to prevent crimes of the same nature or to significantly reduce the risk of their occurrence,"* are *mitigating factors in determining the specific fine to be imposed on the legal person* (Article 90-B/4 of the CP). Now, in accordance with the "prospective" thinking also underlying Article 71/2(*d)* and (*e)* of the CP, the personal circumstances and behavior of the collective entity that, *ex post facto* or during the criminal proceedings, equipped itself with and implemented a compliance system with measures appropriate to reducing the risk of recidivism in the commission of crimes of the same kind are viewed positively. This mitigates the requirements for special positive prevention of socialization and reduces the need for punishment.

Once again, we are faced with a favorable effect of "reactive" *Criminal Compliance, i.e.,* subsequent to the commission of the crime or the initiation of criminal proceedings, which implies the assumption of high economic, organizational, and human costs by legal entities[54] . These are costs that they are willing to bear, not so much because of the benefits they may obtain in terms of punishment, but above all because of the potential for favorable criminal procedural repercussions of regulatory compliance programs, including for the exercise of the right of defense of collective entities.

On the other hand, the *"reactive" adoption or implementation*, *i.e.*, subsequent to the commission of the crime and until the beginning of the

[54] Referring only to the provisions of Article 90-B/4 of the CP, LEITE 2022, 120 sees in the respective provision "an incentive for the legal person, once it knows that a criminal investigation is pending against it, to adopt measures to prevent recidivism" without there even being "legal certainty that it committed the offense." This observation applies in full to the provisions of Article 90-A/6, when the "replacement" of the fine with an "alternative" penalty depends on the adoption *or* implementation, during the criminal proceedings, of a compliance program geared *towards* and tailored *to* the specific crime with which the entity is charged.

penalty determination phase (see Article 90/6, *in fine*, of the CP), *of a compliance program "suitable for preventing the commission of the crime or crimes of the same kind,"* justifies the *replacement of the fine with an "alternative penalty"* (Articles 90-A/6 of the CP).

This alternative penalty may be: (i) a *penalty replacing the collective fine imposed for a period not exceeding a certain number of days – e.g.*, a warning, a bond of good conduct (Articles 90-C, 90-D), or, perhaps, judicial supervision in the form described in Article 90-E/1 of the Penal Code; or the *alternative penalty of judicial supervision provided for in Article 90-E/2,* which no longer constitutes a substitute penalty for a fine imposed for a period not exceeding 600 days (Article 90-E/1 of the Penal Code).

Judicial supervision in any of its forms is a much more intrusive criminal sanction than a fine, which, especially in cases where it replaces a specific fine of more than 600 days (Article 90-E/2), is justified by the high needs for positive general prevention of future protection of legal rights, given the seriousness of the crime and the guilt attributed to the legal person in conjunction with considerable requirements for positive (socialization) and/or negative (intimidation) special prevention.

If these requirements are particularly intense, *they* may even justify the cumulative application of the substitute penalty of judicial supervision and the accessory penalty of judicial injunction, under Article 90-A/5 of the CP. In fact, with regard to the cumulative application of paragraphs 5 and 6 of Article 90-A, it would appear, *prima facie*, that the *adoption (ex ante facto* or until the start of the penalty determination phase) of a compliance program "suitable for preventing the commission of the crime or crimes of the same type" (Article 90-A/6, in fine) does not *prevent* the legal *person from "not* yet having adopted and implemented" a legal-criminal compliance system with the same characteristics at the time referred to.-A/6, *in fine*), does not prevent the legal person from "not yet having *adopted and* implemented" a legal-criminal compliance system with the same characteristics at the time referred to, justifying the possible cumulative application of the accessory penalty of judicial injunction provided for in Article 90-G/1(*b)* of the CP. This penalty, although based on the censure of a past criminal offense, is

prospectively oriented towards mitigating the risks of future recidivism (not removed by the main or substitute penalty), through the adoption and implementation of appropriate control and surveillance measures to prevent crimes of the same nature or to significantly reduce the risk of their occurrence. It should be noted that this additional penalty can be combined with the additional penalties of publication of the conviction, prohibition from entering into contracts, and deprivation of the right t r subsidies (Articles 90-G/3 and 90-M/1, part 2, of the CP). This therefore constitutes a punitive accumulation that seriously infringes on the fundamental freedoms of legal persons (particularly in terms of organization, management, and economic initiative) and which, moreover, may involve a violation of the prohibition of excess and *ne bis in idem* in terms of the sanction[55] .

Article 90-A/6, *in fine*, is based on a retrospective assessment of the crime committed in relation to the compliance system adopted (*ex ante* or *ex post facto*) *or* implemented (*ex post facto*) by the legal person, until the start of the penalty determination phase (see Articles 90-A/5, *in fine*, of the CP, and 369 of the CPP), but a system always aimed at compliance with the rule underlying the criminal offense for which it is liable. The alternative penalty imposed will depend on the seriousness of the crime and the guilt attributed to the legal person and, above all, on the intensity of the specific requirements for positive general prevention of future preservation of the legal-criminal asset (already affected by the entity's conduct) and for special, positive, and/or negative prevention.

[56]In fact, the alternative penalty to the specific fine referred to in Article 90-A/6, in the case of the adoption *or* implementation of a compliance program adequate to prevent the commission of the crime or

[55] On this concept, see LEITE 2016, maxime §§54, 55, 131, 136-139, 145, 152-153, and 155.

[56] See what was written in the previous point about the characterization of punitive sanctions, with regard to good conduct bonds.

crimes of the same kind, *ex ante* or *ex post facto* but until the beginning of the penalty determination phase, is a hybrid penalty, both punitive and reward-based. The latter is "awarded on the basis of compliance with the same rule" whose violation the reward penalty aims to prevent; that is, the criminal law rule underlying the criminal offense for which the collective entity is liable, but which it has demonstrably endeavored to comply with *ex ante* or *ex post facto* but still during the criminal proceedings. However, as "rewards or compensation [presuppose] compliance with the same rule that they prevent from being violated, (...) they are sanctions that are strictly symmetrical to repressive sanctions and are also assessed on the basis of the past"[57] . Hence, when choosing the alternative punitive-reward penalty, the seriousness of the offense and the guilt attributed to the entity cannot be disregarded, which thus interferes with the "measure of the sanction." However, if the alternative provided for in Article 90-A/6, *in fine*, of the CP follows a reward logic, the specific alternative penalty also has a preventive or coercive nature, directed towards the future and the satisfaction of general and special prevention requirements. This preventive-coercive nature will be all the more intense the greater the "specific needs to protect the interest in question" and the "degree of coercion foreseeably necessary for that purpose"[58] , although always within the limits of the agent's guilt (Articles 40/2 and 71/1 of the CP).

Among the alternative penalties applicable under Article 90-A/6, the only one that may be favorable to the legal person is the good conduct bond (reserved for minor or medium-level crimes), as the respective amount will be refunded or the pledge, mortgage, or bank guarantee will be extinguished if the legal person is not convicted of a new crime during the period of application of this penalty (one to five years – Article 90-D/1). the mortgage, bail, or bank guarantee if the legal entity is not convicted of a

[57] Thus, as we already know, BRITO 1984, 165-166.
[58] LEITE 2016, 512.

new crime during the period of application of this penalty (one to five years – Article 90-D/1 to 3 of the Penal Code), thus fulfilling the obligation that the substitute coercive penalty is intended to ensure[59] . However, in order to benefit from the application of this substitute coercive penalty, which is in itself favorable, the collective entity had to bear the high economic, organizational, and human costs inherent in the adoption (*ex ante* or *ex post facto*) or implementation (*ex post facto*) of a particularly demanding compliance system, *i.e.*, one that is "adequate to prevent the commission of the crime or crimes of the same kind." A compliance system from which the State will be the first to benefit, if effectively implemented, thanks to the assistance it thus obtains from legal persons in the performance of public functions of prevention, detection, investigation, and repression of criminal acts. Furthermore, it should be noted that the alternative penalty of good conduct bond may be combined with the additional penalty of publicity of the conviction (Article 90-M/1, part 2), *or* prohibition from entering into contracts *or* deprivation of the right to subsidies, grants, or incentives (Article 90-A/5 of the Penal Code).

The mandatory combination of the alternative penalty of admonishment (reserved for minor offenses) with the additional penalty of publicizing the conviction (Articles 90-C and 90-M/1, part 1, of the CP) – both "*shame* sanctions" – may cause significant reputational and, consequently, economic damage (depending on the economic value of the reputation for the entity concerned) to the latter, its legal representative or manager (to whom the solemn oral censure consisting of the admonition applied to the entity is addressed), its shareholders, partners or associates, and employees. In addition to the reputational damage, which may be connected with such "*shame sanctions*," there are the high economic, organizational, and human costs inherent in adopting or implementing a

[59] LEITE 2016, 514.

compliance system "adequate to prevent the commission of the crime or crimes of the same kind."

In turn, judicial supervision is the most coercive of the alternative penalties applicable under Article 90-A/6 of the Penal Code, due to the level of intrusion it presupposes in the exercise of the fundamental freedoms of private legal persons (of economic initiative, organization, and management); a level that, moreover, varies according to the length of time that penalty is applied. This is the case despite the absence of management powers on the part of the judicial representative because, although the role of this representative is essentially to prevent future recidivism[60] , the collective entity is bound to actively comply with, adopt, and implement a *compliance* system designed and geared towards preventing the crime committed or crimes of the same kind. Furthermore, the legal entity "benefits" from such an intrusion into its fundamental freedoms thanks to the prior assumption of the costs associated with the adoption or implementation of a *Criminal Compliance* program with such demanding characteristics (see Article 90-A/6, *in fine*, of the CP).

All things considered, one idea stands out regarding the substantive relevance of regulatory compliance programs: "what seems to be is not."

Sometimes, the State grants small punitive benefits to legal entities that adopt and/or implement (*ex ante* or *ex post facto* but still pending proceedings) *Criminal Compliance* programs that are so broad and comprehensive that they enable them to comply, to the fullest extent possible, with the vast array of legal and criminal requirements addressed to them (Article 90-A/4 and 6), or, at least, that they are/have been designed or implemented in accordance with the crime committed and aimed at preventing future crimes of the same kind (Articles 90-A/6 or 90-B/4 of the CP). This means that, in reality, legal persons "buy" these small punitive

[60] LEITE 2022, 231.

benefits at the cost of huge expenses, the primary beneficiary of which will be the State itself. Thanks to criminal compliance systems, the State obtains the collaboration of collective entities in the performance of public functions (prevention, detection, investigation, and repression of punishable acts).

At other times, the State disguises substitute-coercive criminal sanctions (including those that can be combined with additional penalties) as "punitive benefits," which ultimately prove to be highly restrictive of the fundamental freedoms of private legal entities, or which can cause them serious reputational and, consequently, economic damage. These sanctions were also "purchased" by pre-supporting the high costs involved in adopting or implementing criminal compliance systems that meet the requirements of the Criminal Code for this purpose.

The option, in terms of the substantive relevance of compliance programs, to grant small or supposed punitive benefits to legal persons who adopt and/or implement them, *ex ante* or *ex post facto* but, at the latest, until the start of the penalty determination phase, entails a potential expansion of the criminal procedural effects of *Criminal Compliance*. Not only as a way for the State to "reward" legal persons for the substantial expenses associated with legal-criminal compliance systems, but above all as an inevitable consequence of those entities assuming public functions of prevention, detection, investigation, collection of information and/or evidence, and repression of punishable acts. This assumption is, after all, inherent in the adoption and implementation of criminal *compliance* programs *or, simply, in the obligation to implement internal reporting channels* (see Article 11/2 of Law No. 93/2021).

The potential for expansion of the criminal procedural effects of *Criminal Compliance*, inherent in its adoption and implementation, and the procedural collaboration of legal persons associated with the mere

implementation of internal reporting channels (mandatory *ex ante facto*[61] or *ex post facto*[62])[63] will imply the replacement of a "logic of punishment of the act" imputed to the entity with a "logic of reward or diversion"[64] , which may go as far as negotiating the criminal liability of the legal entity and/or initiating criminal proceedings against it. All depending on the "degree of opportunity (*versus* legality) recognized to the procedural initiative of the public prosecutor's office"[65] in each legal system, in general or specifically in proceedings against legal entities.

2. Adverse effects on the legal entity

2.1. Application of additional penalties under criminal liability

Criminal compliance programs can also have a substantial impact in terms that are undoubtedly unfavorable to legal entities. Thus, if, at the beginning of the penalty determination phase (Article 369 of the CPP), the legal person has not yet adopted and implemented a compliance program "adequate to prevent the commission of the crime or crimes of the same

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[61] *Objectively*, with regard to crimes and administrative offenses provided for in the areas referred to in Article 2 of Law No. 93/2021 (General Regime for the Protection of Whistleblowers) and also with regard to crimes of corruption and related crimes, *pursuant to* Article 8 of the RGPC; *subjectively*, with regard to the entities referred to in Article 8 of Law No. 93/2021, and, in addition, those covered by the RGPC, *pursuant to* Article 8 of Decree-Law No. 109-E/2021.

[62] As a minimum element of regulatory compliance programs (see Articles 5/1 and 8 of the RGPC).

[63] Channels through which the entities concerned must follow up on complaints received in a secure, thorough, and complete manner, taking "the appropriate internal measures to verify the allegations contained therein and, where appropriate, to the cessation of the reported infringement, *including by opening an internal investigation or notifying the competent authority to investigate the infringement*" (Articles 9(1) and 11(2) of Law No. 93/2021).

[64] RUGGIERO 2018. 95.

[65] SOUSA 2019, 17.

kind," an additional penalty is mandatorily applied ("the court applies") together with the main or substitute penalty (Article 90-A/5 of the Criminal Code).

The additional penalty specifically targeted (although not exclusively, considering the wide range provided for in Article 90-A/2 and the possibility of combining some additional penalties with each other – see Articles 90-G/3 and 90-M/1 of the CP) will be a *court order* to *adopt and implement*, within the judicially defined period, a regulatory compliance program "with appropriate control and surveillance measures to prevent crimes of the same nature or significantly reduce the risk of their occurrence" (Article 90-G/1(*b)* of the Penal Code).

If the legal person fails to comply with any accessory penalty or penalties, it commits the crime provided for in Article 353 of the Penal Code (violation of impositions, prohibitions, and interdictions), which is included in the list in Article 11/2 of the same law, and is therefore one of the crimes provided for in the Penal Code that can be attributed to legal persons. Therefore, the accessory penalty is applied under threat of criminal liability in the event of non-compliance. This gives the penalty provided for in Article 353 of the CP a "mixed nature or dual function," which is both punitive for non-compliance with the accessory penalty and coercive in terms of compliance with it, but predominantly punitive in nature[66] .

[66] In a similar vein LEITE 2016, 513, giving the example of substitute imprisonment, applicable as a reaction to non-compliance with the main penalty of a fine (Article 49 of the Penal Code). However, unlike substitute imprisonment for non-compliance with a fine, punishment for the crime of violating impositions, prohibitions, or interdictions cannot be avoided by untimely compliance with the accessory penalty (see Article 49/2 of the Penal Code); the determination of the penalty in view of the untimely partial fulfillment of the accessory penalty shall comply with the general rules of Articles 71/2(*e)* and 72/2(*c)* of the Penal Code; and the possible impossibility of attributing non-compliance with the additional penalty to the legal person will certainly follow a different regime from that provided for in Article 49/3 of the CP, which may imply, for example, the exclusion of its liability under Article 11/2 and 6 of the CP for the crime provided for in Article 353. All

André Lamas Leite[67] rightly warns of the material unconstitutionality of Article 90-G/2 of the Penal Code, for violating the constitutional prohibition on penalties of unlimited or indefinite duration (Article 30/1 of the CRP), insofar as that provision does not define a maximum legal term for compliance with the judicial injunction, so that the collective entity may, in the extreme, be obliged to comply with it until its extinction. Maria João Antunes[68] would consider the legal establishment of a maximum period for compliance with the judicial injunction to be insufficient to ensure the constitutionality of Article 90-G/2 of the Penal Code, since accessory penalties are true penalties and must be determined specifically according to the general criteria defined in Article 71 of the Penal Code, "based on a framework that establishes their limits (minimum and maximum) in terms of duration"[69] . Jorge De Figueiredo Dias[70] sees the lack of a legal minimum and maximum duration for what the law refers to as an "accessory penalty" as an indication that this is in fact a criminal effect, albeit not automatic (Articles 30/4 of the CRP and 65 of the CP), of a conviction for a certain crime or a given penalty. This effect lacks "the

these aspects show that, unlike the subsidiary imprisonment for non-payment of a fine, the penalty provided for in Article 353 of the CP is predominantly punitive, being preventive only insofar as it aims to compel the legal entity to comply with a general preventive and/or special preventive accessory penalty, under threat of criminal liability.

[67] 2022, 124.

[68] 2017, 35.

[69] CUNHA 2022, 275: if accessory penalties are considered to be true penalties, they should be non-transferable, connected to "the material content of criminal offenses," "the personal culpability of the agent" and "the existence of minimum and maximum limits for their duration, clearly determined by law." However, the author (*idem*, pp. 310-311) admits that some "accessory penalties" are essentially security measures, as they relate "more to the dangerousness of the agent and the protection of society and specific victims than to the reprehensibility of the agent." Nevertheless, even these can only remain in force as long as the dangerousness of the offender persists, and must always be subject to maximum legal limits.

[70] 2009, Chapter 6, §§227-228.

meaning, justification, purposes, and limits" of penalties[71] , which translates into a "purely preventive instrument" aimed at "intimidating the general public" and "defending against individual danger"[72]. Furthermore, Jorge De Figueiredo Dias asserts[73] that the *absence of a legal definition of the framework of the "additional penalty"* makes it impossible for the judge "to individualize and measure the additional 'penalty' according to the general criteria for determining the penalty, among which guilt stands out," *completely breaking* "*the link between guilt and additional penalty*" .

It could be said that the penalty of judicial injunction is not only generally dissociated from the guilt of the legal person, but also, in the case provided for in Article 90-G/1(*b*), is disconnected from the seriousness of the offense itself, thus allowing its "overall seriousness" to exceed "the intrinsic importance of the [legal-criminal] interest ultimately protected," with the consequent violation of the "criteria of proportionality" to which preventive or coercive sanctions themselves are subject[74] . In fact, the judicial injunction described in Article 90-G/1(*b)* appears to be a hybrid sanction, both punitive and coercive-preventive.

It is a punitive sanction *only* because it is "set [as a punitive reaction] at a time when it is no longer possible or effective to achieve the protected interest"[75] by the criminal offense for which the collective entity was convicted. However, this is predominantly a preventive-coercive sanction, since "its determination is not [at all, it should be added] based on the offense committed"[76] and aims above all to " ly ensure the cooperation" of

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[71] DIAS 2009, Chapter 3, §85.
[72] DIAS 2009, Chapter 3, §90.
[73] DIAS 2009, Chapter 6, §228.
[74] The expressions in quotation marks are, it should be noted, from LEITE 2016, 515-516.
[75] This, as mentioned, is the characterization made by LEITE 2016, 514, of punitive sanctions under the guise of (only) coercive sanctions.
[76] The characterization of the coercive sanction proposed by LEITE 2016, 512, in line with BRITO 1984, 163, continues to apply. This author succinctly explains, as reported, that in preventive or coercive sanctions, "past wrongdoing is merely a prerequisite and never a

the legal entity with the State[77] , as it is the only one "in a position to prevent (...) a [future] deterioration in the conditions for protecting the legal right"[78] , already definitively affected by the crime committed, by adopting and implementing a regulatory compliance program with control and surveillance measures suitable for preventing crimes of the same nature or significantly reducing the risk of their occurrence; a risk precisely associated with the activity, organization, and mode of operation of the legal entity in question. Hence, the deadline for compliance with the judicial injunction is determined by the court solely on the basis of the "specific needs for [future] protection of the interest in question," through the adoption and implementation by the legal entity of the appropriate organizational, functional, and operational changes for this purpose[79] , and the specific

raison d'être, much less a measure of the sanction"; they are merely a consequence of the prior wrongdoing, with which they have no "relationship of justice"; they are governed by a future-oriented "justice of prevention"; as for the unlawful act they presuppose, it can only be said that such sanctions aim to prevent the "repetition of acts of the same type." This would explain the essentially prospective orientation of the judicial injunction described in Article 90-G/1(*b)* of the CP.

[77] In a similar way, FAVEIRO 1948, .78-79 *apud* LEITE 2016, 512, under note 5993, regarding the difference between punishment and coercive sanction.

[78] LEITE 2016, 514.

[79] The question arises: as with the judicial injunction provided for in Article 90-G/1(*a*), should the organizational, functional, and operational changes referred to in subparagraph *(b)* of the same provision be defined immediately by the judge, possibly assisted by an expert, in the conviction, in an unequivocal and serious interference with the freedoms of organization, management, and economic initiative of private legal persons? Or is their individualization left to the convicted legal entity, given that these are changes suitable for preventing crimes of the same nature or significantly reducing the risk of their occurrence? However, in the latter case, which entity will be responsible for assessing the suitability *ex ante* of the measures proposed by the convicted legal person and, *ex* post, the effective enforcement of the accessory penalty of judicial injunction? The court (perhaps through a judicial representative, under Article 90-E/2 of the CP, thanks to the cumulative application of the substitute penalty of judicial supervision), or a certified external auditor,

"degree of coercion [of the same] that is likely to be necessary for this purpose"[80] .

The judicial injunction described in Article 90-G/1(*b)* therefore takes on a punitive but essentially coercive-preventive nature, intended to intimidate potential collective offenders and, above all, to compel the legal person concerned to preserve in future the legal right protected by the criminal offense for which it was convicted, by imposing the adoption and implementation of the organizational, operational, and functional changes necessary and appropriate for that purpose. This imposition is justified by the fact that, at the beginning of the penalty determination phase (Article 369 of the CPP), the legal person "has not yet adopted and implemented an adequate regulatory compliance program to prevent the commission of the crime [that occurred] or crimes of the same kind." This circumstance, if properly assessed, constitutes the material prerequisite for the application of the judicial injunction provided for in Article 90-G/1(*b)* of the CP. This links the latter accessory penalty umbilically to the provisions of Article 90-A/5, *in fine*.

This means that, in cases where the court applies an "alternative" penalty to the collective entity for having adopted *or* implemented, *ex ante* or *ex post facto* but until the beginning of the penalty determination phase, a regulatory compliance program "suitable for preventing the commission of the crime or crimes of the same kind" (Article 90-A/6), can the first part of Article 90-A(5) never be invoked to allow the "alternative penalty" to be combined with an additional penalty?

The answer must be no.

As we have seen, Article 90-A/6, *in fine*, of the CP provides, from a political-criminal point of view, for the application of a substitute penalty as

chosen by the convicted legal person and subject to judicial approval? All these issues were not regulated by Law No. 94/2021.

[80] The words in quotation marks are still from LEITE 2016, 512.

the main penalty, *i.e.*, simultaneously with the determination of the main penalty of a fine, obeying the same criteria and final purposes , although viewed from the historical and criminal-political *ratio* of substitute penalties (combating the criminogenic and desocializing effects of prison sentences, giving priority to positive special prevention of socialization). In this case, it is a substitute penalty that also has a reward purpose, due to the proven effort made by the legal entity to satisfy, *ex ante* or *ex post facto* but pending the proceedings, the concretely relevant legal-criminal duty. Since this is always a substitute penalty (although not conditional on the autonomous pre-setting of a specific fine, much less one that does not exceed a certain number of days), there seems to be no obstacle to the possibility of combining the "alternative penalty" (applied under Article 90/6) with an accessory penalty.

Cumulation is rightly authorized by the first part of Article 90-A(5), provided that it is necessary because the purposes of the punishment are not adequately and sufficiently satisfied by the mere imposition of the alternative penalty[81] . However, this does not mean that any additional penalty can be combined with an "alternative" penalty imposed under Article 90-A/6, *in fine*, taking into account, on the one hand, the assumptions, meaning, and content of each additional penalty and, on the other hand, the basis and political-criminal objectives of the provisions in the final part of that provision.

Thus, if properly assessed, the "alternative" penalty (punitive, reward-based, and coercive) applied to a legal person on the basis of the adoption *or* implementation, *ex ante* or *ex post facto* but until the beginning of

[81] In fact, in DIAS 2009, Chapter 6, §§228 and 232), accessory penalties, from a political-criminal and dogmatic point of view, play an auxiliary role to the main (or substitute) penalty, reinforcing and diversifying "the punitive content of the conviction." Therefore, they must be linked "to the act committed and the guilt of the perpetrator," perhaps through the material assumptions of their respective application, be "endowed with a specific criminal framework," thus allowing "the judicial task of determining their specific measure in each case," in light of the general criteria of the current Article 71 of the CP.

the penalty determination phase (Article 369./2, of the CPP), of a compliance system adequate to prevent the commission of the crime that occurred or crimes of the same kind is logical, teleological, and materially incompatible with the application of an accessory penalty because, at that moment, the collective entity has not yet adopted and implemented a regulatory compliance program with identical characteristics and requirements (Article 90-A/5, *in fine*). *This being*, as we have seen, *the material prerequisite for the application of the judicial injunction in the form provided for in Article 90-G/1(b),* it must be concluded that *this additional penalty cannot be combined with an "alternative" penalty imposed on that basis*.

This conclusion is further confirmed by: (i) the content of the additional penalty in question, which consists of the imposition of adopting and implementing a compliance system with appropriate measures to prevent crimes of the same nature or significantly reduce the risk of their occurrence (measures already necessarily included in a regulatory compliance program appropriate to prevent the crime that occurred or crimes of the same kind); and (ii) by the punitive but above all preventive-coercive nature of this accessory penalty, predominantly intended to "ensure the cooperation" of the (recalcitrant) legal person with the State, as it is the only one "in a position to prevent future deterioration of the conditions for protecting the legal right" protected by the criminal offense for which it was convicted, by introducing the necessary and appropriate organizational, functional, and operational changes for this purpose.

On the contrary, the behavior of the legal entity described in Article 90-A/6, *in fine*, points to the determination of the "alternative" penalty at a time when it may still be "effective to realize [by that entity] the legal-criminal interest" protected by the incriminating type for which it was convicted[82] . *This gives the "alternative" penalty imposed on that basis a more reward-coercive than punitive character.* Therefore, any *additional penalties* that may *be*

[82] The proposal by LEITE 2016, 513-514, characterizing coercive or preventive sanctions and distinguishing them from punitive sanctions, continues to apply.

cumulative with such an "alternative" penalty, under Article 90-A/5, 1st part, of the CP, must perform a *preventive function* that is *adjuvant and diversifying to the aforementioned reward-coercive tendency*. This is the case, for example, with the additional penalties of publicizing the conviction (Article 90-M/1) and the judicial injunction to adopt and implement certain measures necessary to avoid the consequences of the illegal activity (Article 90-G/1, subparagraph *a)*, of the CP).

However, in the latter case, the judicial injunction should not be cumulative, under paragraph 3 of the same provision, with the additional penalties of prohibition from entering into contracts and deprivation of the right to subsidies, grants, or incentives, as these are predominantly punitive and coercive-preventive in nature. On the contrary, such accumulation of accessory penalties may already take place when the judicial injunction applied is that provided for in Article 90-G/1(*b)*, which also has a predominantly coercive-preventive and punitive purpose (including the failure to adopt and implement an adequate compliance system to prevent the commission of the crime that occurred or crimes of the same kind).

At this point, it also seems possible to conclude that the only form of judicial supervision whose premise and content is compatible with the basis and meaning of the punitive alternative described in Article 90-A/6, *in fine*, is that set out in Article 90-E/2 of the CP. Therefore, the latter, if necessary and appropriate, may be applied even if the specific fine to be imposed on the entity is less than, equal to, or greater than 600 days.

This leaves us with another problem to solve: what is the meaning and scope of application of Article 90-E/1 of the CP? This provision undoubtedly describes a substitute penalty for a specific fine not exceeding 600 days. If it is understood that, contrary to what happens with substitute penalties applicable to natural persons[83] , Article 90-A/6 of the CP

[83] This circumstance is addressed by DIAS 2009, Chapter 10, §§ 495-496. However, in the author's opinion (*idem*, §§497-502), the diversity of the political-criminal content, the field

establishes, for legal persons, a criterion or general clause for the substitution of the fine, then that provision constitutes the legal basis for the application of any of the substitute penalties provided for in the Penal Code for legal persons, including, of course, the judicial supervision described in Article 90-E/1[84] . However, the content of this substitute penalty ("supervision of the activity that led to the conviction" or "supervision of effective compliance with a regulatory compliance program *with surveillance and control measures suitable for preventing crimes of the same nature or significantly reducing the risk of their occurrence*") is logical, teleological, and substantially incompatible with *the prior adoption or implementation*, *ex ante or ex post facto* but until the start of the penalty determination phase (Article 369/2 of the CPP), of a compliance system *suitable for preventing the crime that occurred or crimes of the same kind*. In fact, a program with these requirements necessarily includes surveillance and control measures suitable for preventing crimes of the same nature or significantly reducing the risk of their occurrence. This makes the content of the substitute penalty of judicial supervision provided for in Article 90-E/1 totally incompatible with an alternative based on Article 90-A/6, *in fine*. In the latter case, the alternative penalty may already be, among others, the judicial supervision described in Article 90-E/2 of the CP, whose content (preventive-coercive) is precisely in line with the behavior of the collective entity described in Article 90-A/6, *in fine*.

In view of this, it must be concluded that the alternative penalty of judicial supervision, provided for in Article 90-E/1 of the Penal Code, can only be applied when the fine replaced does not exceed 600 days, provided

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of application, and even the non-compliance regime of each substitute penalty applicable to individuals does not prevent the identification of a general criterion or clause for substitution and for choosing the type of substitute penalty to be applied in a specific case. Next, ANTUNES 2013, 70-73 and ANTUNES 2017, 76-79.

[84] It has already been said that the mission of Article 90-A/6 seems to be broader, representing, as regards collective entities, the criminal policy option of treating the alternative penalties to fines provided for in Article 90-A/3 of the CP as main penalties.

that it is appropriate and sufficient to ensure the purposes of punishment in the specific case and that the alternative is not based on the behavior of the collective entity described in Article 90-A/6, *in fine*.

In turn, Article 90-A/5 of the CP allows, whenever appropriate and necessary, the substitute penalty of judicial supervision described in Article 90-E/1 of the CP to be combined with *an* additional penalty, namely a judicial injunction consisting of the adoption and implementation of "certain measures necessary to cease the unlawful activity" [Article 90-G/1(*a)*] or that provided for in subparagraph *(b)* of this provision, the material prerequisite for which is precisely described in Article 90-A/5, *in fine*. For the reasons already given, since there is no alternative based on the provision of Article 90-A/6, *in fine*, the additional penalty of a judicial injunction (especially that provided for in Article 90-G/1, subparagraph *b)*, of the CP) may still be combined with additional penalties (of a predominantly punitive and coercive-preventive nature) of prohibition from entering into certain contracts or contracts with certain entities and deprivation of the right to subsidies, grants, or incentives (Article 90-G/3).

2.1. Conclusive summary of the unfavorable effects of compliance

If, at the beginning of the penalty determination phase (Article 369 of the CCP), the legal person has not yet brought itself back into criminal legality by adopting and implementing an appropriate regulatory compliance program to prevent the crime that occurred or crimes of the same kind, an additional penalty will be imposed on that basis, together with the main or substitute penalty (Article 90/5, *in fine*).

In this case, the accessory penalty specifically targeted (although not the only one) is a judicial injunction to adopt and implement a compliance system with control and surveillance measures suitable for preventing crimes of the same nature or significantly reducing the risk of their occurrence (Article 90-G/1(*b)* of the CP). However, this additional penalty may only be applied in conjunction with the alternative penalty of judicial supervision provided for in Article 90-E/1 (undoubtedly designed to

monitor compliance with that type of judicial injunction[85]), *if the replaced fine does not exceed 600 days*. This is also the case with all other substitute penalties applicable to legal persons, with the exception of judicial supervision described in Article 90-E/2. This is not subject to any maximum limit on the specific fine replaced, but presupposes an alternative based on the behavior of the collective entity described in Article 90/6, *in fine* (adoption or implementation, *ex* ante or *ex post facto* but still pending criminal proceedings, of a regulatory compliance program appropriate to prevent the crime that occurred or crimes of the same kind), *aimed at controlling its effectiveness*.

Although the judicial injunction provided for in Article 90-G/1*(b)* can only be applied in conjunction with a substitute fine of no more than 600 days (Articles 90-A/5 and 90E/1, of the CP), it can always be combined with additional penalties prohibiting the conclusion of certain contracts or contracts with certain entities, deprivation of the right to subsidies, grants, or incentives, and even publicity of the conviction (Articles 90-G/3 and 90-M/1, 2nd part, of the CP).

This entire regulatory framework shows that *Criminal Compliance* has become *a duty for any collective entity that is charged*, regardless of its size and in relation to any of the crimes for which it may be liable. This duty *must be fulfilled no later than the beginning of the penalty determination phase* (Article 369 of the CPP)*,* under penalty of an additional penalty being applied.

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[85] In this situation, the minimum and maximum limits of the term of enforcement of the accessory penalty of judicial supervision will be indirectly set by the legal framework provided for the alternative penalty of judicial supervision (1 to 5 years). This will strictly apply in all cases where judicial supervision is applied together with judicial surveillance, under Article 90-A/5, part 1, of the CP. However, this indirect establishment of a legal framework for the penalty of judicial injunction will not attempt to avoid or remedy the material unconstitutionality of Article 90-G of the CP, due to violation of the unconstitutional prohibition of penalties of unlimited or indefinite duration (Article 30/4 of the CRP).

The judicial injunction provided for in Article 90-G/1(*b)* is punitive in nature (including for failure to adopt and implement an adequate regulatory compliance program to prevent the crime that occurred or crimes of the same kind), but predominantly coercive-preventive, since the recalcitrant legal person is the only one in a position to "prevent a deterioration of the conditions of protection" in the future of the legal right protected by the criminal offense for which it was convicted, precisely because of its specific (and criminogenic) mode of organization, operation, and pursuit of the collective or institutionalized purpose in the exercise of a certain activity. Such an accessory penalty is totally disconnected from the seriousness of the crime and the guilt of the collective entity, and is therefore difficult to limit by the latter (Article 40/2 of the CP); it is (exceptionally) cumulative with other accessory penalties, always with an essentially coercive-preventive purpose; and all these accessory penalties are also applied under the threat of liability for the crime of violation of impositions, prohibitions, or interdictions (Article 353 of the Penal Code).

Therefore, "reactive" *Criminal Compliance* has *not only* become mandatory for all accused legal entities (with regard to any of the facts for which they may be held criminally liable), under threat of application of an accessory penalty with that content, *but* this accessory penalty has been strengthened with the (exceptional) possibility of accumulation with other accessory penalties (all of a coercive-preventive nature), the non-compliance with which will also imply the liability of the legal person convicted of the crime provided for in Article 353 of the CP. In this way, the legislator wanted to ensure that the collective entity convicted of adopting and implementing a "reactive" legal-criminal compliance program had no alternative but to comply with this duty.

The obligation of the accused legal entity to adopt and implement a "reactive" legal-criminal compliance program, tailored to the crime committed and aimed at reducing the risk of its repetition, does not arise solely as a "consequence of the conviction intended to prevent the future commission of new crimes," but also as a "condition for negotiating the criminal proceedings themselves and, consequently, as a condition for

procedural diversion"[86] . This brings us to the adjectival relevance of *criminal compliance* programs and highlights the deep and reciprocal intertwining between Criminal Policy (supposedly based on, but not subordinate to, studies in Criminology and Sociology of organizations), Criminal Law, and Criminal Procedural Law.

Among the procedural manifestations of the mandatory nature of *Criminal Compliance*, included in the Code of Criminal Procedure by Law No. 94/2021, we highlight the subordination of the provisional suspension of proceedings against legal persons to the duty to adopt, implement, or amend "a regulatory compliance program, *with judicial oversight*, adequate to prevent the practice" of crimes of corruption, improper receipt or offering of advantages, or crimes that can be traced back to "economic and financial crime," or "with control and surveillance measures suitable for preventing crimes of the same nature or significantly reducing the risk of their occurrence" (Articles 281/3 and 11 of the CPP). Although the provisional suspension of proceedings is formally conditional on the agreement of the defendant legal entity (Article 281/1(*a)* of the CPP), the truth is that if it

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[86] The expressions in quotation marks are from SOUSA 2019, 15-16, referring to subsequent and reactive *compliance* with the practice of the criminal act and the "change in the nature and purposes recognized in compliance programs." While "*ex ante*" (preventive) *compliance* "meant exclusion or reduction of liability, *ex post* compliance (...) is recognized as having a rewarding and diversionary effect as a condition for resolving the conflict outside the criminal justice system."
However, as has been attempted to be demonstrated, from a substantive point of view, "reactive *compliance*," contemporary with the pendency of criminal proceedings (Article 90-A/6, *in fine*, of the CP), is far from having a truly rewarding effect, given the seriously intrusive nature of the fundamental freedoms and/or damage to the reputation of the legal person assumed by the "alternative" and accessory penalties that may then be applied to it (Articles 90-C, 90-D, 90-E/2 to 5, and 90-M/1, of the CP); from a procedural point of view, as will be seen below in the text on the provisional suspension of proceedings against the collective entity, "reactive *compliance*" is not a real option for the latter.

does not accept this condition, not only will it not benefit from this procedural diversion measure, but it may also be sentenced (at least) to the additional penalty of adopting and implementing a compliance program with appropriate control and surveillance measures to prevent crimes of the same nature or to significantly reduce the risk of their occurrence, if they have not done so by the time the penalty is determined (Articles 90-A/5 and 90-G/1(*b)* of the CP, and 369/2 of the CPP).

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