



 Herbert Smith Gleiss Lutz Stibbe

Guide to anti-corruption legislation/ investigation in Europe

2009

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European anti-corruption guide 2009

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Portugal

Gonçalves Pereira, Castelo Branco & Associados, RL

1 Which are the main bodies responsible for investigating and combating corruption and money laundering in Portugal?

These are the Public Prosecutor's Office ("*Ministério Público*") and the Judiciary Police ("*Polícia Judiciária*"). Within the Judiciary Police there are two relevant divisions: the Anti-Corruption, Fraud and Financial Infringements Central Department, dealing with corruption, and the Financial Information Unit, dealing with money laundering activities and tax crimes.

2 What do each of these bodies investigate?

Corruption, in Portugal, is handled as a "public crime", which means that the afore-mentioned authorities are obliged to investigate any suspicion as soon as they learn about its existence, whether by direct knowledge or transmission by third parties in the form of denunciation. As soon as the Judiciary Police become aware of any confirmed suspicion of corruption, the Judiciary Police must inform the Public Prosecutor's Office of the case.

The Public Prosecutor's Office receives notices and denunciations, runs the investigation, drafts and files the formal accusation or terminates the proceedings (depending upon the evidence), files appeals and recommends the execution of appropriate sanctions.

The Judicial Police cooperate with the investigation, to assist in developing and promoting the prevention and investigation of criminal offences, namely corruption and money laundering – for which it has the sole investigatory competency – thereby assisting the judiciary authorities, ie, the Public Prosecutor's Office and the Court. The Public Prosecutor's Office, which is responsible for investigations in Portugal and overseas, may only delegate responsibility for investigations to the Judiciary Police.

3 What is the anti-corruption legislation in Portugal?

There are a number of different legislative schemes prohibiting corruption in Portugal. These include the Penal Code, the Penal Procedural Code, the Anti-Corruption and Economic and Financial Criminality laws, the Political Office-holders Criminal Offences' law, the Corruption in Sports decree-law, the Anti-Economic and Against Public Health Infringements' law and the Office-holders' Disciplinary Statute.

The Office-Holders' Disciplinary Statute is applicable, in general, to all office-holders and agents of the central, regional and local Portuguese administration who are not already subject to a special statute. Such individuals are prohibited from taking advantage of their functions either for themselves or for third parties (individuals or corporations) or acting in any way against the public interest, and they must not obey orders that involve committing a criminal offence. The acceptance of a bribe by officials shall always be punishable, whether or not they carry out an act which goes against their public duties.

Bribery in the private sector is also criminalised. Any corrupt conduct which harms international commerce or is carried out in the private sector and which prejudices competition or any third party is a criminal offence.

Under Portuguese law, both the act of paying the bribe, to obtain an illegitimate benefit, and the act of receiving a bribe, either on your own behalf or on behalf of a third person, are punishable as acts of bribery.

Portuguese penal law may apply extra-territorially in certain circumstances. In relation to corruption, the same offences as set out above will apply if committed anywhere in the territory of Portugal or, if abroad, when carried out by (i) Portuguese nationals who habitually reside in Portugal and are found therein, (ii) foreign nationals who are found in Portugal, or (iii) companies with head offices in Portugal.

Corruption is a predicate offence for money laundering and in certain circumstances companies may be obliged to report suspected corruption to the authorities (see further below).

4 What powers of investigation do these bodies have?

The Judiciary Police aim to prevent corruption either of their own initiative or by order of the Public Prosecutor's Office, by monitoring certain locations and activities, gathering relevant information and denunciations, and by suggesting measures to try and prevent corruption.

In terms of investigatory powers, the Judiciary Police can monitor events by taking sound and image recordings, carrying out searches of both individuals and premises, accessing cellular phone information, intercepting communications, seizing or protecting evidence, interviewing individuals, confiscating assets and undertaking certain types of expert examinations, etc. Some of these powers can only be exercised after being authorised by a judge, and some only in a judge's presence, or only in relation to certain types of criminal offences.

5 What powers of arrest and detention do these bodies have?

Police officers can ordinarily only detain a person if they have sufficient grounds to suspect a person is guilty of a criminal offence that is taking or has just taken place. Outside of these circumstances a person can only be detained, pursuant to an order of the judge or the Public Prosecutor's Office, (i) if it is likely this person will not appear as requested to do so, or (ii) where the offence is punishable with a penalty of imprisonment of more than five years, (iii) if he is likely to escape and there is no time to get a competent order of detention.

A person may only be remanded in custody for more than 48 hours by a judge where:

- the offence is punishable with a penalty of imprisonment of more than five years, or of more than three years regarding terrorism or other highly violent or organised crime; or
- if the person is illegally in Portugal or about to be extradited or expelled; and
- in all cases, there is a real danger of the person escaping, of continuing the crimes, of threatening the public peace, or damaging the gathering and conserving of evidence. The suspect can be put under "house arrest" where the offence is punishable with a penalty of imprisonment of more than three years and no other measures are considered sufficient.

6 Are there any provisions requiring investigations or information disclosed during the course of investigations to be kept confidential?

Every investigation may be subject to judicial secrecy if so requested by any of the parties and where authorised by a judge. Whenever secrecy is so ordered, anyone having direct contact with the proceedings must keep matters secret or else he will commit a criminal offence punishable with imprisonment for up to two years.

Until criminal proceedings are formally started, or alternatively where a case is closed without the opening of formal criminal proceedings, those working for the authorities are obliged to keep secret any facts (including the identity of the accuser) that come to their attention in their professional capacity. Also, any office-holder that reveals a secret to obtain an advantage or harms the public interest will commit a criminal offence with a penalty of up to three years imprisonment.

There is no specific offence regarding tipping off in the money laundering context.

7 Are there protections available when responding to investigations by these bodies eg, right to legal representation at interviews, privilege against self-incrimination and legal professional privilege?

All investigation proceedings carried out by the Public Prosecutor's Office and Judiciary Police have to be documented, they cannot breach an individual's constitutional rights and guarantees and are almost always subject to judicial secrecy.

In conducting such investigations, the authorities in question may choose to interview any individuals deemed to be in the possession of any relevant evidence and information, and such individuals are compelled to attend such questioning (they are named "witnesses").

Regarding suspects, in order to interview them, the Portuguese authorities must first formally constitute them as formal suspects ("*arguido*") and inform them of their rights. This includes the right to be assisted and represented by an attorney at all times, the right to choose whether to answer any questions or not without it being held against them, the right to present any evidence in their defence or any pleas at any time, and the right to file appeals in relation to any rulings against their interests.

Witnesses also have the right for an attorney to be present at their interviews, provided that the attorney does not represent the suspect as well. Witnesses may only refuse to answer questions where the same are liable to incriminate them, or if the witness is a close relative of the suspect, the suspect. If the witness is an office-holder, they may not be questioned about any secret matters related to their functions, namely state secrets. Witnesses requiring protection also have special rights.

Religious ministers, attorneys, physicians, journalists, members of banks and other individuals with a professional duty to keep matters confidential may refuse to answer any questions related to such matters. The Court, however, may override such legal privilege.

In the specific case of attorneys (legal advisors who are registered in the Portuguese Lawyer's Bar), they are entitled to maintain legal privilege in relation to any matters that have come to their knowledge in connection with their activity, whatever the cause, and if the Court intends to override such privilege, the Portuguese Lawyer's Bar must first be consulted. This also applies to in-house lawyers (if registered at the Bar).

8 Do the relevant anti-corruption measures relate only to the bribery of "public" individuals and/or bodies?

No, private sector bribery is also criminalised. Private companies and businessmen must also combat corruption by adopting codes of ethics and conduct, require employees to inform them of any issues, keep records of all income and expenses, co-operate promptly with any public authority if asked to do so and inform the latter of any suspicion involving corruption that may arise, regardless of the fact that the law does not provide a penalty for failing to do so. Any corrupt conduct which harms international commerce or is carried out in the private sector and which prejudices competition or any third party is also criminalised.

9 Can prosecutions be brought against a corporate entity?

In certain cases prosecutions can be brought against a corporate entity (except the State and public corporations). This includes offences of corruption and money laundering, provided the offence has been carried out in the corporate entity's name and in its interests by someone with leadership powers (directors, managers, etc) or someone under a leader's authority who is acting with a lack of vigilance, unless such persons acted against express orders to the contrary. Such liability does not exclude the liability of the agent himself, nor is it dependent on his being held responsible. Those "leaders" may be deemed, in some cases, subsidiarily liable for the payment of fines and indemnities.

As regards money laundering, prosecutions against a corporate entity are also possible where the offence has been carried out by any director or employee exercising his official functions or by the corporate entity's representative (acting in its name and interest). The liability of the corporate entity does not prevent the individual who acted as a member of its statutory body or as its director or manager from being individually liable as well.

10 What are the sanctions/sentences for corruption and money laundering offences?

The maximum sentence for a corruption offence is eight years imprisonment (twelve for money laundering, or more in certain cases) or, regarding corporate entities, a fine of up to €6,000,000 (up to €14,400,000 for money laundering) or even a dissolution penalty. Corporate entities may, in addition, be sentenced to further penalties, such as a prohibition from entering into agreements, receiving subsidies, performing its activities, etc.

11 Can the assets of a corporate entity be confiscated?

Any assets or payments, whatever the amount, related to corrupt activities may be seized by the Portuguese criminal authorities, provided that they are deemed necessary for the purposes of the investigation, and can even be considered lost in favour of the State under certain circumstances (the owner of such assets, however, must be heard prior to the decision to carry out the seizure and have the right to oppose the same).

12 Is it possible to enter into a settlement to resolve any enforcement action/prosecution by these bodies?

If the penalty for the offence is equal to or lower than five years, for example active corruption or corruption for a lawful act, suspension of proceedings is possible for up to two years, if the judge, the Public Prosecutor's Office and the suspect all agree. This will generally involve certain obligations being imposed on the suspect.

In addition, for some criminal offences there can be different forms of sentencing, eg, in cases of corruption involving political office-holders, the sentence can be mitigated or avoided if the person does not accept what has been wrongly offered, returns it, retracts the offer and helps the investigation or, in other corruption cases, reports the criminal offence to the authorities prior to any proceedings being commenced, or denounces the crime and helps the investigation, etc. It is also possible to mitigate the punishment for money laundering offences.

13 Are there provisions for persons to appeal against any enforcement action/prosecution?

Generally there is a right to appeal, provided the appellant is a legitimate and interested party in the proceedings and his interests are at stake.

14 Do any other regulators/law enforcement agencies assist these bodies in relation to anti-corruption investigations?

The Bank of Portugal, the Portuguese Securities and Exchange Commission and the Portuguese Insurance Institute supervise the national financial system and are competent to determine administrative offences, etc. For instance, it is possible to exclude an individual from being registered as a company's manager, director or qualified participant if he has been convicted of a corruption or money laundering offence.

15 How do these bodies interact with overseas authorities?

The Judiciary Police co-operate with foreign entities, under various international police co-operation instruments and also co-operate with INTERPOL and EUROPOL. Under the law for International Judiciary Co-operation in Criminal Matters, the Attorney General is the central authority for all communications, although in urgent matters there can be direct contact between authorities. This reciprocal co-operation includes, subject to certain limits, extradition requests, exchange of criminal proceedings and sentences, transfers of convicted individuals, monitoring convicted or paroled persons, and mutual assistance which includes taking testimony from witnesses, suspects or experts, detention and other preventive measures, sending documents or objects, obtaining evidence, conducting searches, arresting individuals and conducting interviews, providing information about foreign law and criminal records, receiving foreign investigators, receiving denunciations and intercepting communications, etc.

16 Are there any laws or regulations imposing obligations on persons to "whistleblow" or disclose suspected corruption or money laundering within an organisation?

Portuguese legislation imposes rigid obligations regarding the monitoring of money laundering activities, namely the duty of demanding identification, examining the origin of funds, and even refusing to accept transactions, if certain conditions have been met.

These obligations are applicable to public office-holders, banks, financial institutions, insurance agencies and pension companies and real estate companies in general, but also to private companies, lawyers, solicitors, official accountants and notaries, provided that they intervene or assist in operations or transactions relating to:

- i) the purchase and sale of real estate;
- ii) the management of funds, equities or assets belonging to clients;
- iii) the opening and management of bank accounts and equities;
- iv) the incorporation and management of companies, funds or similar structures; and
- v) in general, any financial or real estate operations, conducted on behalf of clients.

Should these entities become aware of any unlawful activities, they are bound to report them to the judiciary or police authorities; except for lawyers and solicitors, who only have to give notice of their suspicions to the president of either the Lawyers or Solicitors Bar. Should the latter decide that the information constitutes money laundering, the president of such bar will then proceed to inform the authorities. In any case, lawyers and solicitors may never disclose information which has been obtained, following an initial approach, in relation to the evaluation of the legal situation of the client, or in relation to the performance of the legal defence of the client, either in or out of specific judicial proceedings, and whether such information was obtained before, during or after such proceedings.

None of these entities must, under any circumstances, inform the client or any third parties that the information in question has been disclosed, or that a criminal investigation is underway.

In cases of suspected corrupt behaviour by State office-holders and agents, the report must be made to a superior in the administrative body where the conduct has taken place so that appropriate disciplinary action can be taken.

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