



Bribery & Corruption

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Portugal

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Brief overview of the law and enforcement regime

The Portuguese legal framework has a large range of provisions prohibiting *corruption*. First and foremost, the Portuguese Criminal Code sets out various forms of *corruption* as offences, namely *passive bribery of a public official*, *active bribery* and *undue receipt of advantage*. There are also a number of other crimes that we generally treat as *corruption (bribery)* offences in Portugal: *trading in influence*; *voter bribery*; *misappropriation of public funds by a public official*; *embezzlement of public funds*; and *misappropriation of public property*. *Corruption* is among the preceding offences of *money laundering*. This means that *corruption* is one of the offences included in the *money laundering* legal frame, but both offences are punishable simultaneously.

Additionally, some specific sectors have their own legislative anti-corruption frameworks, such as politicians (Law no. 34/87, of 16 July), international commerce and the private sector (Law no. 20/2008, of 21 April) and sports (Law no. 50/2007, of 31 August) (all last amended by Law no. 30/2015, of 22 April).

Furthermore, Law no. 36/94, of 29 September (last amended by Law no. 32/2010, of 2 September) and Law no. 5/2002, of 11 January (last amended by Law 55/2015, of 23 June) set out measures to fight *corruption* and to prevent other forms of economic and financial crimes, the latter being applicable whenever *bribery* is conducted in a criminally organised fashion.

Under Portuguese law, both the act of paying the bribe in order to obtain a lawful or unlawful benefit, and the act of receiving a bribe oneself, either on his own behalf or on behalf of a third party, are punishable as acts of *bribery* with a penalty of up to eight years' imprisonment. The exact penalty for these crimes may be increased by a quarter if the bribe amounts to a high value (approximately €5,100), or by one third if the bribe amounts to a considerably high value (approximately €20,400), or if the perpetrator acted in his capacity as a representative of a corporate entity or individual.

In case of *money laundering*, the penalty may rise to a maximum of 12 years' imprisonment, which can also be increased by one third if the offences are carried out on a regular basis.

Based on a conversion of imprisonment penalties determined by Portuguese law, corporate entities charged with *bribery* may be sentenced to pay fines in the maximum amount of €12,800,000 (or €19,200,000 for *money laundering*) and may also be sentenced to further penalties such as a formal warning by the court, payment of a good-conduct security, prohibition to enter into agreements or to receive state subsidies, prohibition to exercise activity, dissolution, etc.

Concerning the Portuguese Criminal Code, *passive bribery* may only be committed by public officials, *i.e.*, agents or employees working in the public sector, in the judicial administration

or for public companies. This also includes, namely: i) judges, prosecutors, officials and staff of public international organisations, regardless of their nationality or place of residence; ii) foreign public officials, should the offence be committed wholly or partly in Portuguese territory; iii) judges, prosecutors and officials of international courts; and iv) foreign jurors and arbitrators, should the offence be committed wholly or partly in Portuguese territory.

In this respect, holders of political offices (*i.e.*, President of the Republic and President of the Portuguese Parliament, members of the Portuguese Parliament or of the European Parliament, members of the Government or of a representative body of local government), as well as “high public offices” (such as public managers, holders of decision-making bodies of semi-public companies, whenever appointed by the Government, members of executive bodies of companies of local enterprise sectors, members of governing bodies of public institutes, members of independent public entities and holders of first-degree high executive bodies or equivalent) are not included in this definition, since they are covered by special provisions set out by Law no. 34/87, of 16 July. For the purposes of these statutes, political office-holders of public international organisations, as well as political office-holders of foreign countries regardless of their nationality or place of residence, should the offence be committed wholly or partly in Portuguese territory, are also treated as national holders of political offices.

In relation to *bribery harmful to international commerce*, such offence (*active corruption*) may be committed by anyone who offers or promises to offer any undue advantages to a Portuguese national or a foreign public official or a public official of an international organisation, as well as a political office-holder, whether Portuguese or not, in order to obtain or retain a business, contract or other undue advantage in the conduct of international commerce.

Portuguese law also sets out the crime of *bribery in the private sector*, which may be committed by a private-sector employee, empowered with managing or supervising a private entity, even if temporarily or unpaid, and whether working under an individual employment contract, a services’ supply agreement or other form of agreement, or by anyone who offers or promises to offer him any undue advantage (the law provides for passive and active *corruption* in the private sector).

Concerning *bribery in sports*, it may be committed by any sports agent, such as sports managers, coaches, trainers, fitness coaches, doctors, referees, as well as public limited sports companies, sports associations, clubs, federations or professional leagues, or by anyone who offers or promises to offer this person any undue advantage. The briber’s goal must be to cause the sports agent to perform an act or omission aimed at misrepresenting or distorting the result of an incoming sporting event (the law provides for passive and active *corruption* in sports, as well as *trading in influence*).

Overview of enforcement activity and policy during the last year

In the last few years, Portuguese Governments have implemented several legal and institutional measures to combat *corruption*.

GRECO, UN and OECD have addressed recommendations to Portugal regarding *corruption*, because of evaluations conducted within the framework of conventions that Portugal has entered into. As a consequence of such recommendations, the Portuguese Parliament enacted Law no. 30/2015, of 22 April, which amended the Criminal Code, the law on crimes of responsibility of political offices and high public offices, the law regarding bribery harmful to international commerce and in the private sector, the law regarding

bribery in sports and the law regarding support to whistle-blowers in corruption-related matters (Law no. 19/2008, of 21 April).

In this regard, we note that the previous Government tried to criminalise *illicit enrichment*. In 2012, the Portuguese Parliament set forth an amendment to the Portuguese Criminal Code, by virtue of which it would be deemed as unlawful and punishable with a penalty of up to three years' imprisonment the act of acquiring or holding wealth which was not compatible with the suspect's legitimate income and assets, based on the information which was presented to the tax authorities, should the origin of the wealth under investigation be undetermined. However, the Constitutional Court considered the law to be unconstitutional, deciding that this formulation of the new type of crime of *illicit enrichment* infringed the principle of the presumption of innocence (innocent until proven guilty) and the defendant's right to silence.

In 2015, the previous Government once again attempted to legislate on this issue. The Parliament approved a new amendment to the Criminal Code criminalising *unjustified enrichment*, with a different name and a different wording, but, once again, the Constitutional Court rejected it on the same basis and for the same reasons.

On the other hand, investigations of high-level corruption have increased, namely in public procurement, defence procurement and the financing of political parties.

Several criminal proceedings for *corruption* crimes, allegedly committed by high-ranking officials, are currently ongoing, such as, among others, the proceedings against Portugal's former Prime Minister, José Socrates, suspected of *bribery*, *tax fraud* and *money laundering*. Another important pending case pertains to granting resident permits to wealthy non-Europeans (golden visas) – in this case, the head of Portugal's border enforcement agency (*Serviço de Estrangeiros e Fronteiras*), the president of the country's registration and notary institute and the former interior minister of the current Government have been charged with various *corruption* crimes, which are currently under trial.

Law and policy relating to issues such as facilitation payments and hospitality

Portuguese legislation does not expressly establish what might be deemed as a bribe. In fact, within certain strict boundaries, all gifts, entertainment, hospitality and advantages may be acceptable and there is no quantitative limit to their permissible value.

It is generally accepted that a crime of *bribery* occurs whenever the value of the bribe or bonus is not insignificant, or is not in accordance with the habits and customs of each economic sector. In this respect, it is also not necessary that the "undue advantage" is proportional to the value or importance of the action that is intended to be performed. Even mere endowments, which cannot be in any other way justified, according to common experience, for their frequency or high value, may be punishable as bribes.

In any case, the general rule to identify legitimate conducts remains within the boundaries of what may or may not be understood as pertaining to "*proper social conducts complying with social conventions and customs*".

In this regard, according to the Portuguese Committee for the Prevention of Corruption, public officials, holders of political offices and even private-sector employees are allowed to accept only "institutional offers", deemed to be those which are offered or accepted in the course of their duties, based on a designated "committee relationship", and the acceptance of such offers must be reported to the beneficiary's superior or competent bodies. Nonetheless, said "institutional offers" are deemed as illegitimate if granted or promised in exchange for

any act or omission consistent or inconsistent with the duties of the official, regardless of their value, importance or inadequacy.

Key issues relating to investigation, decision-making and enforcement procedures

Portuguese Criminal Investigation has several specialised services responsible for investigating *corruption* cases – the Central Bureau of Investigation and Prosecution of the Central Public Prosecutor’s Office (DCIAP), the National Unity Against Corruption of the Judiciary Policy and, also, the Court of Auditors.

Concerning investigation, we note that the Portuguese Criminal Procedural Code provides that public officers be obliged to report *corruption* crimes that come to their knowledge in the course of their duties.

To prevent retaliation and to guarantee freedom of speech for public (and also private sector) employees, Law no. 19/2008, of 21 April, provides for some protection mechanisms for whistle-blowers – the right to remain anonymous until the suspect is formally charged, the right to be transferred after the suspect is formally charged, and the right to benefit from witness protection programmes.

Moreover, since 2010 any Portuguese citizen may submit anonymous complaints reporting *corruption* and *bribery* crimes, through either the Public Prosecutor’s official website or the website of TIAC – Civic Association for Transparency and Integrity. Between 2010 and 2016, almost 10,000 anonymous complaints have been filed through these channels.

The procedure to investigate *corruption* has special rules regarding the collection of evidence, breach of professional secrecy and seizure of assets. This special regime was set out by Law no. 5/2002, of 11 January, which determines the lifting of professional secrecy for tax, credit institutions and financial companies’ employees, as well as the monitoring of bank accounts, which requires banks to report, within 24 hours, any suspicious movement. This ruling also provides that, in the event of a conviction, the court may order seizure of the defendant’s assets which are considered to be incompatible with his income.

Investigation of *corruption* cases can last 14 months, but this time limit shall be extended to 18 months whenever the special complexity of the proceedings is declared. However, the duration of investigations has gradually been decreasing, as major investigations of banks such as Banco Português de Negócios (BPN) and Banco Privado Português (BPP) have demonstrated, since, in some cases, they took less than two years to investigate.

Portuguese law does not acknowledge a process for plea-bargaining. In 2013, the Portuguese Supreme Court ruled that an agreement entered into between the prosecution and the defendant, further to which the latter agrees to plead guilty to the crimes charged by the prosecution in exchange for a sentence reduction (or the definition of a threshold), qualifies as a promise of a legally inadmissible advantage, and therefore is deemed invalid. According to the statistics provided by the Ministry of Justice, between 2007 and 2013, investigations of *corruption* crimes have been decreasing. The number of such crimes has been reduced by more than a half, from 122 (in 2007) to 58 (2013). Concerning *corruption* crimes subject to trial, the numbers also show a significant decrease (59 to 37). Nonetheless, Portuguese statistics show that the number of defendants convicted for *corruption* crimes has slightly increased. In 2007, Portuguese Courts sentenced 52 defendants and, in 2013, 55.

Overview of cross-border issues

As referred to above, Portuguese criminal law may apply extraterritorially 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; (ii) foreign nationals who reside in Portugal; or (iii) companies with headquarters in Portugal.

This also applies to political office-holders of the European Union, irrespective of their nationality or place of residence, as well as political office-holders of other Member States of the European Union, should the offence be committed wholly or partly in the Portuguese territory.

The elimination of borders between European Union Member States facilitates, among other things, the activities of criminal organisations in Europe. The scourge of organised crime has developed, in particular, thanks to technological advances, but also due to freedom of movement within the European Union.

Therefore, it is important that the Portuguese competent bodies against *bribery* and *corruption* cooperate with foreign entities. The Judiciary Police cooperates with foreign entities, under various international police cooperation instruments, and also cooperates with INTERPOL and EUROPOL. Under the law for International Judiciary Cooperation 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 cooperation includes, subject to certain limits, extradition requests, exchange of criminal proceedings and sentences, transfers of convicted individuals, monitoring of 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.

Corporate liability for bribery and corruption offences

Private sector bribery is also criminalised, as indicated above. Private companies and businessmen must also prevent *corruption* by adopting codes of ethics and conduct, requiring employees to inform them of any issues, keeping records of all income and expenses, cooperating promptly with any public authority if asked to do so and informing the latter of any suspicion involving *corruption* that may arise, regardless of the fact that the law does not provide a penalty for failure to do so. Any active corrupt conduct that harms international commerce, or any sort of *corruption* that is carried out in the private sector, is also criminalised.

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

Prosecutions against a corporate entity are also possible for *money laundering* 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.

Corporate entities may, in addition, be sentenced to further penalties, such as a prohibition from entering into agreements, receiving subsidies, carrying on its business, etc.

Moreover, according to the Portuguese law, there is no transfer of responsibility between companies in the same group. This means that the liability of a parent company does not follow a subsidiary company and *vice versa*. Each individual company will be charged individually provided that, as stated above, each of the offences has been committed by their respective governing bodies or representatives acting on their behalf.

Proposed reforms / The year ahead

In this respect, the development of Portuguese reforms of anti-corruption and bribery has not been enlightening due to some events occurring in recent years, in particular the fact that the Constitutional Court considered the criminalisation of *illicit enrichment* unconstitutional, and the recent amendments to the Criminal Code (none of them related to anti-corruption and bribery).

Following the amendments to the Public Contracts Code carried out by the previous Government, the former Minister of Justice intended to approve a Code of Ethics of the Public Administration. However, this initiative never materialised. In September 2016, the Portuguese Government approved the Government's Code of Conduct, with the purpose of establishing clear and strict criteria in order to prevent any suspicion of misconduct and to provide transparency in the formation and decision-making procedures of public office-holders. This new legal framework sets forth the guidelines of conduct for Government officials and Government cabinet officials and, indirectly, for the remaining high public offices of the Public Administration.

In the performance of their duties, Government officials and Government cabinet officials shall comply with certain general principles of conduct, such as pursuit of the public interest, transparency, impartiality, probity, integrity and honesty, urbanity, institutional respect and confidentiality.

According to the Government's Code of Conduct, Government officials shall not accept any gifts or offers with an estimated value equal or higher than €150, since the same are deemed as an impairment to impartiality and integrity in the exercise of governmental functions. Similarly, they shall abstain from accepting any invitations or similar benefits with an estimated value higher than €150, with the following two exceptions: (i) invitations or similar benefits pertaining to attendance of official ceremonies, conferences, congresses, seminars, exhibitions or other similar events, where they correspond to consolidated political and social customs, where there is a relevant public interest in said attendance or where the Government officials are expressly invited in that capacity, therefore ensuring an official representation function which cannot be provided by third parties; and (ii) invitations or other similar benefits from foreign States, international organisations or other public entities, regarding participation in summits, ceremonies or reunions, either formal or informal, and if the Government officials and the Government cabinet officials are expressly and officially invited in that capacity.



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