

Anti-Corruption Regulation 2021

Contributing editors
James G Tillen and Leah Moushey



Publisher

Tom Barnes
tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

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© Law Business Research Ltd 2021
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First published 2007
Fifteenth edition
ISBN 978-1-83862-621-1

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



Anti-Corruption Regulation 2021

Contributing editors**James G Tillen and Leah Moushey****Miller & Chevalier Chartered**

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Anti-Corruption Regulation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, James G Tillen and Leah Moushey of Miller & Chevalier Chartered, for their continued assistance with this volume.



London
February 2021

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This article was first published in February 2021
For further information please contact editorial@gettingthedealthrough.com

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Portugal

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Cuatrecasas

RELEVANT INTERNATIONAL AND DOMESTIC LAW

International anti-corruption conventions

1 | To which international anti-corruption conventions is your country a signatory?

Portugal is a signatory to the following international conventions:

- the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the Civil Law Convention on Corruption;
- the Treaty of the European Union on the Fight against Corruption involving Officials of the European Communities or Officials of EU Member States;
- the Criminal Law Convention on Corruption and the Additional Protocol to the Criminal Law Convention on Corruption;
- the EU Convention on the Protection of the Financial Interests of the Communities and Protocols;
- the UN Convention against Transnational Organised Crime; and
- the UN Convention against Corruption.

Foreign and domestic bribery laws

2 | Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Bribery of foreign public officials is regulated by Law No. 20/2008, which concerns both bribery in international commerce and in the private sector.

While article 2 defines certain key terms (for example, foreign public official or foreign holder of political office) it is article 7 that provides for the crime of active corruption with loss to international commerce.

As for domestic bribery laws, the Portuguese Criminal Code sets out various forms of corruption offences regarding public officials, namely:

- bribery for either unlawful and lawful conducts;
- undue receipt of advantage;
- influence peddling;
- bribery of voters; and
- misappropriation of public funds and public property.

In addition, specific anti-corruption laws exist in relation to, among others:

- acts of bribery directed at political office holders and high-ranking public officials (Law 34/87);
- bribery in sports (Law 50/2007); and
- bribery in the military service (Law 100/2003).

Successor liability

3 | Can a successor entity be held liable for violations of foreign and domestic bribery laws by the target entity that occurred prior to the merger or acquisition?

Under Portuguese law, the merger or acquisition of an entity results in the extinction of the judicial person that existed beforehand. However, this does not imply that criminal liability is extinguished, for there may be criminal liability of the new *persona iuridica* that emerges out of the merger or acquisition. The Portuguese Criminal Code provides that a merger or acquisition shall not determine the extinction of the criminal liability of the legal person or equivalent entity, insofar as the legal person or equivalent entity in which the merger took place is responsible for any criminal action.

Civil and criminal enforcement

4 | Is there civil and criminal enforcement of your country's foreign and domestic bribery laws?

The criminal enforcement of foreign and domestic bribery laws is done by the Public Prosecutor's Office and the competent courts.

In addition to this, the Public Prosecutor's Office is assisted by the Portuguese criminal forces in the investigation of possible offences, including corruption crimes. Within the Portuguese criminal police, there is the National Anti-Corruption Unit, which specialises in matters relating to the investigation of corruption infractions.

Moreover, since November 2010, there has been an online platform where one may anonymously report suspicions of corruption, which are then taken into account (if rightly justified) by the Public Prosecutor's Office.

In regard to civil enforcement of bribery laws, as long as an illicit fact has been committed, the conduct is culpable and if it has caused damages to one's rights, there may be grounds for civil liability. If the illicit fact simultaneously constitutes a crime, the civil claim shall be demanded together with the criminal liability claim.

Dispute resolution and leniency

5 | Can enforcement matters involving foreign or domestic bribery be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial? Is there a mechanism for companies to disclose violations of domestic and foreign bribery laws in exchange for lesser penalties?

Plea bargaining with the court or the public prosecutor is not admissible in Portugal. However, the Portuguese criminal system allows for the suspension of the criminal proceedings under certain conditions (if the crime is punishable by up to five years' imprisonment, the suspect was not previously granted a suspension in a case involving

crimes of the same nature, the suspect was not previously convicted of a crime of the same nature, the level of guilt is not considered to be high and the suspect agrees to comply with a set of rules of conduct or obligations). If the prosecution understands that all these prerequisites are met, then the decision to suspend the criminal proceedings is presented to a pre-trial judge for confirmation, and the suspension period will begin, for a maximum of two years. At the end of that suspension period, if the suspect manages to fulfil all his or her obligations, the proceedings will be filed and the case will be terminated, without being subject to court.

As for the mechanism to disclose violations, in order to be exempted from a penalty the recipient of a bribe must:

- report the crime within 30 days of committing it and always before the proceedings begin, and provided that he or she has voluntarily returned the offer that he or she had previously accepted (or its value); or
- before performing the act that he or she was supposed to carry out, voluntarily renounce the offer or the promise that he or she had previously accepted (or its value);

With respect to active bribery, if the perpetrator withdraws the promise, refuses to make the offer or asks for its return, before committing the fact, he or she may be exempted from penalisation.

Otherwise, the penalty may be specially mitigated if the perpetrator:

- provides effective assistance in gathering decisive evidence for the purpose of identifying or catching other people responsible, up until the end of the proceedings in the lower court; or
- there is evidence that he or she offered the bribe in response to a demand by a public official.

FOREIGN BRIBERY

Legal framework

- 6 | Describe the elements of the law prohibiting bribery of a foreign public official.

There are many elements of the crime of active corruption with loss to international commerce.

In regard to the agent of the crime, the act may be committed by the perpetrator him or herself or through a third party. This third party must consent or ratify the act for it to involve criminal responsibility.

Moreover, for bribery to exist, there must be a promise of an undue advantage. This advantage may be pecuniary or not, and its purpose is to obtain or maintain a certain trade, contract or other undue advantage in international commerce.

The promise must be directed to a public official or to a holder of a political office, or to a third party, as long as there is consent of the public official or holder of office. The nationality of the public official or holder of office is not relevant, for the crime may be committed regardless of the receiver's nationality. The target of the promise may also belong to international organisations.

This behaviour is also considered a crime of corruption as prescribed by article 368-A of the Portuguese Penal Code.

Definition of a foreign public official

- 7 | How does your law define a foreign public official, and does that definition include employees of state-owned or state-controlled companies?

A foreign public official, under article 2, subparagraph a) of Law 20/2008, is any person who has been called upon to perform or to participate in an activity forming part of the public administrative or judicial service under the following circumstances:

- in service of a foreign country;
- as a public official, agent or in any other capacity;
- provisionally, temporarily or indefinitely;
- by compensation or free of charge; or
- voluntarily or compulsorily.

This definition also includes anyone who, under the same circumstances:

- exercises functions in a public utility body;
- participates in a public utility body; or
- performs functions as a manager, holder of supervisory bodies or employee of a public company, or of a concessionaire of public services.

Under this statute, a company is public if it is nationalised, contains public funds, or has a majority holding in public capital.

Lastly, it also includes any person who assumes and performs a public service function in a private undertaking under a public contract.

Gifts, travel and entertainment

- 8 | To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

In regard to providing foreign officials with such goods or means, a crime of undue receipt of advantage may be committed, in its active form (providing gifts, expenses, meals or entertainment, instead of receiving them). Since the receiving end is a foreign official, at least one of the acts must be performed in Portuguese territory for the statute to apply and for the Portuguese courts to be competent.

However, if the offering falls into a social norm or an act of social adequacy, that would constitute an exception to this prohibition, and there may be exemption from criminal liability.

Facilitating payments

- 9 | Do the laws and regulations permit facilitating or 'grease' payments to foreign officials?

All payments and benefits are deemed to be illegitimate irrespectively of their value, insofar as they harm international commerce, unless they are socially adequate or compliant with social customs.

Payments through intermediaries or third parties

- 10 | In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

The law equates the situation of payment by the agent with payment through an intermediary or third party who acts on his or her behalf. For both parties to be liable there must be intent and acknowledgment of the act of bribery by the acting parties.

Individual and corporate liability

- 11 | Can both individuals and companies be held liable for bribery of a foreign official?

Article 4 of Law 20/2008 states that companies may also be held liable for the crimes set out in the Law. In Portugal, for companies to be held criminally liable, the offence must have been carried out either by someone who holds a position of leadership, acting under the company's name and on its behalf (ie, members of its corporate bodies, legal representatives or individuals who hold control over the company's activity), or by someone else who acts under their supervision, considering that a breach of supervision or control duties has occurred. However, if there

is evidence that the individual in question acted against express orders or instructions, then the company's liability may be excluded.

Private commercial bribery

12 | To what extent do your foreign anti-bribery laws also prohibit private commercial bribery?

Law No. 20/2008 regulates both active and passive bribery in the private sector.

A crime of passive bribery in the private sector will be committed if a private sector worker requests or accepts an undue advantage in exchange for an act or omission that constitutes a violation of his or her functional duties. This offence may be carried out:

- by him or herself or through an intermediary (with his or her consent or ratification); or
 - benefiting him or herself or a third party.
- The undue advantage may be:
- pecuniary;
 - non-pecuniary; or
 - the simple promise of an undue advantage.

The crime of active bribery in the private sector is set out in the same terms, but the agent gives or promises the undue advantage instead of requesting or accepting it. The main difference is that the mere attempt of committing a crime of active bribery in the private sector is punishable, whereas the mere attempt of a crime of passive bribery is not punishable.

Defences

13 | What defences and exemptions are available to those accused of foreign bribery violations?

There are no specific defences to a corruption allegation that need to be countered on a case-by-case basis.

However, article 5 of Law No. 20/2008 determines that a sentence may be particularly mitigated if the agent assists in gathering decisive evidence for the identification or capture of other perpetrators, or if he or she otherwise contributes decisively to the discovery of the truth.

The perpetrator may also be exempted from criminal liability if, prior to acting, he or she:

- voluntarily refuses the offer or promise that he or she had accepted;
- returns the advantage he or she had received; or
- in the case of fungible valuables, he or she returns their value.

Furthermore, given that the Portuguese Criminal Code provides for an exemption to the criminal liability of companies whenever the individual has acted against express orders or instructions, it is important to resort to internal compliance programmes and documents when acting in defence of the company.

Agency enforcement

14 | What government agencies enforce the foreign bribery laws and regulations?

In Portugal, bribery and corruption are investigated by the Public Prosecutor's Office (more specifically, the Central Department for Investigation and Penal Action), assisted by the Judiciary Police. Within the Judiciary Police, there is a special unit created for combating crimes of corruption, the National Unity Against Corruption.

Patterns in enforcement

15 | Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

As of 2017, and, at least, until 2019, the Public Prosecutor's Office issued a directive classifying the crime of active corruption with loss to international commerce as a crime of prioritised investigation. Since then, many cases involving public companies or former holders of public offices have been investigated (*TAP/Sonair* case, the fall of BES bank, Operation Marquês, etc).

Furthermore, in September 2020, the Portuguese government approved the National Strategy Against Corruption, which suggested (in regard to the acts of bribery directed at public officials in general and at political office holders and high-ranking public officials, bribery in international commerce and in the private sector and bribery in sports) the standardisation of the referred regimes concerning the exemption and reduction of sentences, in conjunction with the Portuguese Penal Code.

Prosecution of foreign companies

16 | In what circumstances can foreign companies be prosecuted for foreign bribery?

Foreign companies can be prosecuted for acts of corruption before the Portuguese courts, as long as at least one of the acts that constitute the criminal offence has been committed on Portuguese territory.

In addition, if the result of the crime takes place within Portuguese territory, Portuguese law is also applicable.

Sanctions

17 | What are the sanctions for individuals and companies violating the foreign bribery rules?

The crime of active corruption with loss to international commerce is punishable with a term of imprisonment of one to eight years.

The penalty for the crime of passive bribery in the private sector may be a term of imprisonment of up to five years or a penalty with a fine of up to 600 days.

This penalty can be aggravated if said act or omission referred to can distort competition or damage property of third parties. In such cases, the penalty is a term of imprisonment of one to eight years.

As for the crime of active bribery in the private sector, the penalty is the same and the aggravation takes place in the same terms.

Besides being penalised with fines, under Portuguese law, companies may be subject to accessory penalties, such as judiciary injunctions, prohibition of exercising activities, prohibition of concluding certain contracts or contracts with certain entities, deprivation of the right to grants, benefits or incentives, closure of the establishment and disclosure of the conviction, among others (set out in article 90-A and following the Portuguese Criminal Code).

Recent decisions and investigations

18 | Identify and summarise recent landmark decisions or investigations involving foreign bribery.

Given that the crime of active corruption with loss to international commerce has only very recently been implemented in Portugal, there are not yet any no landmark decisions to take into account.

FINANCIAL RECORD-KEEPING AND REPORTING

Laws and regulations

19 | What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The Commercial Code, the Corporate Income Tax Code, Law 83/2017 and Law 89/2017 outline a number of preventive provisions specifically related to record-keeping.

According to articles 29, 31 and 40 of the Portuguese Commercial Code, companies are obliged to keep all documents relating to their commercial activity for a period of 10 years. These documents may be kept in a digital record.

Tax documents, by contrast, should be kept for a period of 12 years. Electronic filing of invoices issued by electronic means is permitted, provided that full online access to the data and integrity of its origin, content and legibility is ensured.

Law 83/2017 imposes several duties on financial institutions, some non-financial institutions and specific professions potentially vulnerable to suspicious transactions (eg, real estate companies) – namely, the duty of keeping records of the performed transactions for seven years.

Companies must keep copies, records or electronic data extracted from all documents obtained or made available to them by their clients or any other persons, in accordance with the identification and due diligence procedures provided for by law. These elements must be kept on a durable medium, preferably in electronic form, and be properly stored and easily located, as well as readily accessible upon request by the Financial Intelligence Unit, the judicial authorities and the tax and customs authorities.

Lastly, Law 89/2017 obligates companies to maintain an up-to-date internal registry of the identification details of:

- shareholders, with a breakdown of their holdings;
- natural persons with holdings, even if held indirectly or through third parties; and
- those who have effective control thereof, in any way.

Companies must also submit this information in digital form, disclosing their share capital structure and full identification of their legal representatives and managers, as well as full identification of their ultimate beneficial owners.

Disclosure of violations or irregularities

20 | To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Generally, private companies are under no obligation to report potential violations of anti-corruption regulations.

However, internal auditors and members of the audit committee of private companies limited by shares are required to do so.

Prosecution under financial record-keeping legislation

21 | Are such laws used to prosecute domestic or foreign bribery?

These laws are aimed at fighting money-laundering and the financing of terrorism as a whole. Whether directly or indirectly, these laws are useful and relevant in the prosecution of possible infractions regarding crimes of corruption altogether.

Sanctions for accounting violations

22 | What are the sanctions for violations of the accounting rules associated with the payment of bribes?

If there is no compliance with the duty imposed by Law 83/2017, the administrative offence may be punishable with a fine of up to €5 million.

Failure to comply with the duty imposed by Law 89/2017 constitutes an administrative offence, which is punishable by a fine of up to €50,000.

Companies must also submit this information in digital form, disclosing their share capital structure and full identification of their legal representatives and managers, as well as full identification of their ultimate beneficial owners.

Tax-deductibility of domestic or foreign bribes

23 | Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Under Portuguese tax law, any expenses arising from infringing Portuguese criminal law (even if the expense originates from outside of the territorial scope of application) are not deductible for purposes of determining taxable income. This applies both to companies and to individuals.

DOMESTIC BRIBERY

Legal framework

24 | Describe the individual elements of the law prohibiting bribery of a domestic public official.

There are different elements that must be fulfilled for the act of bribery to be punishable, depending on the form of corruption, be it passive bribery, active bribery or undue receipt of an advantage.

With respect to passive bribery, the perpetrator must first possess some specific personal or professional qualities (ie, he or she must be a public official, holder of political office, private-sector worker or sports agent).

Second, an 'undue advantage' or promise of such an advantage (the bribe) must be requested or in some way accepted, either directly by the beneficiary or through an intermediary. It is irrelevant whether such an advantage consists of pecuniary or non-pecuniary benefits. The main point is that it represents a sort of benefit that cannot otherwise be justified.

The third condition is that the 'undue advantage' be requested or accepted for the purposes of performing any acts (or omissions) consistent (or inconsistent) with the beneficiary's duties, whether or not such acts or omissions actually precede the request or acceptance. Such consistency with the beneficiary's duties is relevant for the sole purpose of determining the applicable penalty.

On the other hand, whoever gives or promises to give to such individuals any undue pecuniary or non-pecuniary advantage for the purposes of getting them to perform prohibited acts or omissions, as outlined above, commits the crime of active bribery.

With regard to bribery in sports, 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. In relation to active bribery harmful to international commerce, the aim of the bribery is to obtain or retain a business, contract or other undue advantage in the conduct of international commerce by giving or promising to give any advantages to national or foreign public officials, public officials of international organisations or political office-holders.

Finally, the crime of undue receipt of advantage may be committed by public officials, holders of political office or high public office who,

in the course of their duties, solicit or accept any advantages that are deemed to be undue.

In any of these cases, however, proper social conduct complying with social conventions and customs is not punishable.

We note that both active and passive bribery may be committed even where it is not possible to demonstrate that the bribe's solicitation, acceptance or offer was not aimed at the performance of a specific act, or even if the goal of the briber, for any reason, does not occur, and finally whether or not the beneficiary even received the solicited or promised advantage in the first place.

Furthermore, after the most recent form of corruption designated as undue receipt of advantage, it is no longer necessary to demonstrate the existence of a connection between the 'undue advantage' and the beneficiary's act or omission is to charge for such an offence. As previously mentioned, the bribe will always be deemed to have been completed whenever the beneficiary solicits or accepts any 'undue pecuniary or intangible advantages', with the exception of advantages complying with social conventions and customs, depending on the situation.

Scope of prohibitions

25 Does the law prohibit both the paying and receiving of a bribe?

Under Portuguese law, the following acts (whether performed directly or by a third party) are both punishable as criminal offences:

- offering or promising to offer a bribe to obtain a lawful or unlawful advantage (active bribery); and
- receiving a bribe or the promise of a bribe (passive bribery).

Definition of a domestic public official

26 How does your law define a domestic public official, and does that definition include employees of state-owned or state-controlled companies?

The term public official includes civil servants, public agents and all individuals who are called upon to perform or participate in activities relating to public, administrative or judicial affairs, or that belong to public utility organisations, including:

- managers, members of corporate bodies and employees of state or state-held companies, as well as public concessionaires;
- magistrates, agents and EU office holders;
- public officials of other EU member states;
- those who perform their duties in any international public organisation of which Portugal is part; and
- those who perform their duties in extrajudicial conflict resolution proceedings.

In this respect, holders of political offices (ie, 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 in the local enterprise sector, 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 in Law No. 34/87.

For the purposes of these statutes, political office holders of public international organisations, as well as political office holders of foreign countries (irrespective of their nationality or place of residence) are also treated as national holders of political offices if the offence is committed wholly or partly in Portuguese territory.

Gifts, travel and entertainment

27 Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and the receiving of such benefits?

Providing domestic officials with such goods or means may constitute a crime of undue receipt of advantage in its active form.

Just like in the case of offerings to foreign officials, if the act abides by the norms of social adequacy, there is an exemption from criminal liability.

Regarding receipt of offerings, the law states that the only exception to the unlawfulness of the act of receiving or requesting an advantage resides in its social adequacy or compliance with social customs.

In accordance with Resolution No. 184/2019 of the Council of Ministers, which approved the government's Code of Conduct, members of the government may not receive any gifts that could compromise their impartiality or integrity. Gifts (consumables or durable) valued at or above €150 are presumed to have this effect and must be rejected.

Members of the government and cabinet members must also not accept invitations or any other immaterial benefits that may affect their impartiality or integrity. Invitations or other benefits with an estimated value higher than €150 are presumed to affect the recipient's impartiality and integrity, with the following exceptions:

- invitations or similar benefits pertaining to attendance at 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 that cannot be provided by third parties; and
- 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.

In addition, similarly to the government's code, Parliament's Resolution No. 210/2019, which approved the members of the Parliament's Code of Conduct, regulates, among other things, the acceptance of gifts that may have implications for the impartiality or integrity of the representatives. Gifts with a value of €150 or more are presumed to constitute such implications and must, therefore, be rejected.

Facilitating payments

28 Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

All payments and benefits are deemed to be illegitimate irrespectively of their value, insofar as they harm international commerce, unless they are socially adequate or compliant with social customs.

Public official participation in commercial activities

29 What are the restrictions on a domestic public official participating in commercial activities while in office?

Law 35/2014 regulates labour law in public functions. As a general rule, public officials are not allowed to perform functions while in office that concur, conflict or are similar to public functions, regardless of the type of work (subordinate work or independent work, with or without remuneration, etc).

However, it is possible to perform functions if they:

- are not considered incompatible with public functions according to law;
- are not carried out at overlapping times, even if only partially, with the public functions;
- do not compromise the impartiality required for the performance of the public functions; and
- are not contrary to the public interest or the legally protected rights or interests of citizens.

Yet, this possibility requires prior authorisation by the competent authorities.

Payments through intermediaries or third parties

30 | In what circumstances do the laws prohibit payments through intermediaries or third parties to domestic public officials?

The law equates the situation of payment by the agent with payment through an intermediary or third party who acts on his or her behalf. For both parties to be liable there must be intent and acknowledgment of the act of bribery by the acting parties.

Individual and corporate liability

31 | Can both individuals and companies be held liable for violating the domestic bribery rules?

Yes, both individuals and companies can be held liable under anti-corruption rules in Portugal. Article 4 of Law 20/2008 states that companies may also be held liable for the crimes set out in the law. In Portugal, for companies to be held criminally liable the offence must have been carried out either by someone who holds a position of leadership, acting under the company's name and on its behalf (ie, members of its corporate bodies, legal representatives or individuals who hold control over the company's activity), or by someone else who acts under their supervision, considering that a breach of supervision or control duties has occurred. However, if there is evidence that the individual in question acted against express orders or instructions, then the company's liability may be excluded.

Private commercial bribery

32 | To what extent does your country's domestic anti-bribery law also prohibit private commercial bribery?

The Portuguese law sets out the crime of bribery in the private sector, which can be committed by private-sector employees in breach of their professional duties, or by someone who offers them any undue advantages for such purposes (or promises to).

In addition, acts of bribery harmful to international commerce may be committed by anyone who offers any undue advantages to a Portuguese national or foreign public official, or a public official of an international organisation, as well as a political office holder, whether Portuguese or otherwise, with the purpose of obtaining or retaining a business, contract or some undue benefit in the course of international commerce.

Defences

33 | What defences and exemptions are available to those accused of domestic bribery violations?

There are no specific defences to a corruption allegation that need to be countered on a case-by-case basis.

Nevertheless, given that the Portuguese Criminal Code provides for an exemption to the criminal liability of companies whenever an individual has acted against express orders or instructions, it is important

to resort to internal compliance programmes and documents when acting in defence of the company.

Agency enforcement

34 | What government agencies enforce the domestic bribery laws and regulations?

The criminal enforcement of foreign and domestic bribery laws is done by the Public Prosecutor's Office and the competent courts.

In addition to this, the Public Prosecutor's Office is assisted by the Portuguese criminal forces in the investigation of possible offences, including corruption crimes. Within the Portuguese criminal police, there is the National Anti-Corruption Unit, which specialises in matters relating to the investigation of corruption infractions.

Moreover, since November 2010, there has been an online platform where one may anonymously report suspicions of corruption, which are then taken into account (if rightly justified) by the Public Prosecutor's Office.

In regard to civil enforcement of bribery laws, as long as an illicit fact has been committed, the conduct is culpable and if it has caused damages to one's rights, there may be grounds for civil liability. If the illicit fact simultaneously constitutes a crime, the civil claim shall be demanded together with the criminal liability claim.

Patterns in enforcement

35 | Describe any recent shifts in the patterns of enforcement of the domestic bribery rules.

There have been many emblematic cases in recent years – the *Freeport* case, the *Golden Visas* case, *BES* case, corruption allegations against a former minister and a former administrator of EDP, and, more recently, the investigation of the former prime minister. In 2018, it was reported that corruption costs Portugal around €18.2 billion a year.

Yet, more than ever, the Public Prosecutor's Office is focused on fighting and preventing these infractions. In 2018, the Public Prosecutor's Office initiated a total of 3,432 investigations related to corruption crimes. Although there are reports that only 6 per cent of the investigations related to corruption that are initiated actually make it to trial (as most of the cases are filed due to lack of resources of the Public Prosecutor's office) there still is a growing movement to combat corruption in Portugal.

Prosecution of foreign companies

36 | In what circumstances can foreign companies be prosecuted for domestic bribery?

Foreign companies can be prosecuted for acts of corruption before the Portuguese courts, as long as at least one of the acts that constitute the criminal offence has been committed on Portuguese territory.

In addition, if the result of the crime takes place within Portuguese territory, Portuguese law is also applicable.

Sanctions

37 | What are the sanctions for individuals and companies that violate the domestic bribery rules?

Depending on whether the bribe was directed at obtaining an unlawful or lawful act, passive bribery is punishable by a penalty of one to eight years' imprisonment or, alternatively (in the case of a lawful act), by a penalty of one to five years' imprisonment.

Active bribery for an unlawful act is punishable by a penalty of one to five years' imprisonment or, alternatively (in the case of bribery for a lawful act), by a penalty of up to three years' imprisonment or a fine of up to 360 days.

Undue receipt of advantage is punishable by up to five years' imprisonment or a fine up to 600 days (on the passive side), while the (active) perpetrator will be punished by up to three years' imprisonment or a fine of up to 360 days.

On the passive side, influence peddling is punishable by one to five years' imprisonment if the purpose was to obtain an illegitimate favourable decision, or a penalty of up to three years' imprisonment or a fine if the purpose was to obtain a legitimate favourable decision. On the active side, influence peddling is punishable by a penalty of up to three years' imprisonment or a fine.

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 or her capacity as a representative of a corporate entity or individual.

Corporate entities charged with bribery may be sentenced to pay fines only. In regard to bribery for an illegal act, companies are liable for the payment of a fine of 60 to 600 days, each day ranging from €100 to €10,000, depending on their financial situation. In the case of influence peddling, the fine may amount to a maximum of 360 days, with each day ranging from €100 to €10,000.

Additionally, companies may also be sentenced to further penalties, such as the prohibition to enter into agreements or to receive state subsidies, among others.

Recent decisions and investigations

38 Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

In June 2019, in relation to the *Golden Visas* case, the former president of the National Registry Institute was convicted of committing crimes of active and passive corruption, with a penalty of four years and seven months of a suspended prison sentence, having been considered the mastermind behind the scheme that allowed Chinese investors to evade taxes when purchasing property in Portugal. These criminal proceedings are currently under appeal.

In October 2019, a former engineer of Brisa, responsible for determining the value of property subject to expropriation for the creation of motorways, was sentenced to 10 years of imprisonment after causing a loss of almost €10 million to Brisa.

Currently, the proceedings of the accusations of corruption by the former Prime Minister José Sócrates are under way (under pretrial judgement), this being the highest-profile case in the history of prosecution of corruption in Portugal to date.

Other highly mediatic bribery cases currently under investigation involve three judges from high courts and the president of Portugal's biggest football team, all indicted (among others); in another file, a former Minister of Economy and the CEO and directors of EDP and of Banco Espírito Santo, all still waiting to learn if they will be indicted; and the *Banco Espírito Santo's* case, where the CEO Ricardo Salgado and other members of the board, among others, were indicted for bribery crimes.

UPDATE AND TRENDS

Key developments of the past year

39 Please highlight any recent significant events or trends related to your national anti-corruption laws.

The Entity for Transparency was constituted, which is responsible for analysing and inspecting the income, assets and interests of holders of political offices and high-ranking political offices.



CUATRECASAS

Paulo de Sá e Cunha

paulo.sa.cunha@cuatrecasas.com

Miguel Pereira Coutinho

miguel.coutinho@cuatrecasas.com

Marta Saramago de Almeida

marta.saramago.almeida@cuatrecasas.com

Praça Marquês de Pombal, 2
1250-160 Lisbon
Portugal
Tel: +351 21355 3800
www.cuatrecasas.com

Alongside this, in September 2020, the Portuguese government approved the National Strategy Against Corruption, which establishes priorities and measures aimed at the prevention and reduction of corruption in Portugal, notably:

- improvement of the knowledge, training and institutional practices in what regards transparency and integrity;
- prevent and detect corruption risks in the public sector;
- engagement of the private sector in the prevention, tracing and repression of the corruption phenomenon;
- reinforcement of the collaboration between public and private institutions;
- ensure an effective and standard application of the legal mechanisms in what regards corruption repression, improve the response of courts and ensure that the applicable penalties are adequate and effective;
- periodically produce and disclose reliable information concerning the corruption phenomenon; and
- cooperate on an international basis against corruption.

Coronavirus

40 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

At the beginning of the pandemic, Law No. 1-A/2020, of 19 March ruled the interruption of statute of limitations' periods regarding all types of proceedings, including the criminal proceedings. This provision was later revoked by Law No. 16/2020, of 29 May.

Furthermore, to prevent and mitigate the risk of transmission of the SARS-CoV-2 virus in prisons, Law No. 9/2020, issued on 10 April, established a flexible regime as regards the enforcement of prison sentences and security measures. The referred law provided for the following exceptional and extraordinary measures:

- the partial pardon of prison sentences;
- a special regime regarding the pardon of sentences;
- an extraordinary regime regarding the licence for administrative leaves of convicted prisoners; and

- the extraordinary anticipation of conditional releases.

Nevertheless, Law No. 9/2020 was not applicable to prisoners who, for instance, had committed heinous crimes or the crimes of undue receipt of advantage and corruption, among others.

In what regards the extraordinary and temporary legislation that is being issued (practically on a daily basis) due to the current pandemic, albeit we do not foresee any further legal or regulatory changes in the Portuguese jurisdiction that may directly impact our clients, we strongly recommend all clients seek further legal advice for specific cases.

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