



CHAMBERS
Global Practice Guides

Anti-Corruption

Law and Practice – Portugal

Contributed by
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da Silva & Associados, RL

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PORTUGAL

LAW AND PRACTICE:

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

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PORTUGAL LAW AND PRACTICE

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Morais Leitão, Galvão Teles, Soares da Silva & Associados, RL is one of the leading law firms in Portugal. Independent and internationally recognised, the firm's reputation is based on the excellence and high level of the services provided to its clients, promptness of response, professionalism and expertise of its team, and the creativity and innovation of the solutions provided in each case. The specialised legal services in the main areas of law and in different sectors of the economy are also a guide mark of the firm that lead to its involvement in the most important operations in Portugal, as well as in high-value cross-border transactions and disputes. Our practice covers different areas of specialism, such as compliance, anti-bribery and corruption, money-laundering, tax crimes, market manipulation and insider trading, international co-operation in criminal matters,

data protection and is exercised in close conjunction with the other practice areas, such as banking and finance, insurance, regulation, tax, administrative, public procurement, construction and competition law. With a team comprising more than 200 lawyers, comprising six teams that are dedicated to Litigation and Arbitration, two teams dealing with compliance, AML and anti-corruption and a total of 63 counsel, MLGTS has its head office in Lisbon and additional offices in Porto and Funchal (Madeira Island). In addition, in view of the global assistance MLGTS provides to its clients, the firm has developed over the past years a consistent network of associations with local firms in Angola, Mozambique and Macau (China), which became part of the MLGTS Legal Circle.

Authors



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1. Offences

1.1 Legal framework for offences

The main anti-bribery legislation consists of the Portuguese Criminal Code (Decree-Law 400/82, 23 September), the Law on Crimes of the Responsibility of Political Officials (Law 34/87, 16 July), the General Regime on Tax Offences (Law 15/2001, 5 June), the Regime of Criminal Liability for Unsporting Behaviour (Law 50/2007, 31 August), the Criminal Regime for Corruption in the International Commerce and in Private Sector (Law 20/2008, 21 April) and the Military Justice Code (Law 100/2003, 15 November).

There are also procedural laws directly applicable to the fight against corruption, such as the Criminal Procedure Code (Decree-Law 78/87, 17 February), the Measures Applicable to the Fight Against Corruption and Financial and Economic Criminality (Law 36/94, 29 September), the Measures Applicable to the Fight against Organized and Financial and Economic Criminality (Law 5/2002, 11 January), the Measures Applicable to the Fight against Corruption which relate to reporting guarantees (Law 19/2008, 21 April), the Law of Witness Protection (Law 93/99, 14 July), the Legal Regime of Covert Actions (Law 101/2001, 25 August) and the Law on the Organization of the Criminal Investigation (Law 49/2008, 27 August).

Guidelines on interpretation and enforcement of the legislation

There are no specific guidelines regarding this matter. One should bear in mind case law and doctrine.

Following some controversy which arose in the media, the Portuguese Government recently issued its own Code of Conduct (approved by the Council of Ministers Resolution 53/2016, 21 September), establishing guidelines for the acceptance of gifts and invitations by members of the government and, among others, officials from their respective cabinets; as a benchmark, an offer is considered to condition their impartiality and integrity in the exercise of their duties if it has a value equal or superior to EUR150.00.

There are special provisions regarding invitations seen as consolidated social and political customs or invitations to events where the presence of a member of the government is of relevant public interest, or when it is a situation of official representation of the Portuguese State.

International conventions

Portugal has signed a number of conventions related to corruption, the most relevant ones being: the OECD Convention against bribery from foreign public officials (1997), the European Union Convention on the fight against corruption involving officials of the European Union or EU Member States (1997), the Council of Europe Criminal Law Conven-

tion on Corruption (1999), and the United Nations Convention against Corruption (2003).

Offences

The Portuguese jurisdiction recognises at least the following offences in the area of bribery and corruption:

- undue receipt of an advantage by a public official, punishable under article 372 of the Criminal Code;
- passive and active corruption in the public sector, punishable under articles 373 and 374 of the Criminal Code;
- undue receipt of an advantage by a political or high public official, punishable under article 16 of Law 34/87, 16th July;
- passive and active corruption of political and high public officials, punishable under articles 17 and 18 of Law 34/87, 16 July;
- active corruption in international commerce and passive and active corruption in the private sector, punishable under articles 8 and 9 of Law 20/2008, 29 January;
- passive and active corruption in the context of sports competitions, punishable under articles 8 and 9 of Law 50/2007, 31 August;
- passive corruption of an individual serving in the Armed Forces or other military forces for the practice of an illicit action, punishable under article 36 of Law 100/2003, 15 November; and
- active corruption of an individual serving in the Armed Forces or other military forces, punishable under article 37 of Law 100/2003, 15 November.

Passive corruption can be defined as the request or acceptance of an undue advantage, and active corruption as the offer or promise to offer an undue advantage. The corruption provisions will apply regardless of whether the undue advantage is offered or accepted by a public official/politician/private worker/sportsperson/military official or through an intermediary (if there is consent or ratification), and also regardless of whether the undue advantage is intended for the public official/politician/private worker/sportsperson/military official or for a third party, by indication or with knowledge of the public official/politician/private worker.

The crimes of corruption can be punishable whether the conduct expected in return for the undue advantage is an illicit (contrary to the duties exercised) or a licit (not contrary to the duties exercised) action or omission.

Finally, both article 372 of the Criminal Law and article 16 of the law on corruption of political and high public officials prescribe a criminal offence founded on the acceptance or offer of an undue advantage by or to a public official or a political or high public official, without the requirement of an action or omission being practised in return.

1.2 Bribery

A bribe* (“undue advantage”) can be defined as a monetary or non-monetary advantage which benefits the individual who receives it in any way, without there being a legal ground or justification for such benefit. The advantage may be given to a public official/politician/private worker, but it can also be given to a third party, where requested or consented by any of the abovementioned categories of individuals. In all cases, the bribe can also be executed by means of an intermediary. (* Note: one should be cautious when making direct translations of these terms. Under Portuguese Jurisdiction, the crime of bribery (or “suborno”) is specific to the situation where and individual convinces, or at least attempts to convince, without success, another person to make a false statement in court, or to render a false testimony, expert opinion, interpretation or translation in court. Such a crime is punishable with a prison sentence of up to two years or with a fine of up to 240 days. For the purpose of this discussion, the term “bribery” will be used as the “undue advantage” mentioned above.)

Hospitality and promotional expenditures, as well as facilitation payments, may fall within the category of a bribe, in particular in the context where they may be considered a counterpart for the action/omission to be performed. In addition, one must pay special attention to article 372 of the Criminal Code and Article 16 of the Law on Crimes of the Responsibility of Political Officials, both of which establish the crime of undue receipt of an advantage, regardless of the existence of a counterpart.

However, certain conducts are excluded from the criminal legal framework if they are considered to be socially adequate and in line with habits and customs. Each situation ought to be evaluated under a “reasonableness” standard, considering the specific case, namely, the sector in question, the context and the involved parties.

In relation to holders of political positions, see **1.1 Legal Framework For Others** above.

Under Portuguese law, the receipt of a bribe is also an offence. Failure to prevent a bribe is not a criminal offence per se, but if an individual provides material or moral aide to the agent of the offence, he /she may be criminally liable for bribery and corruption as an accomplice. In addition, companies may be held responsible for bribery-related offences if they occurred within the organisation (and, in that sense, if they were capable of preventing such offence).

Public and private parties

Under article 7 of Law 20/2008, active corruption in the context of international commerce is punishable where an individual, by himself or through an intermediary, gives or promises to give an undue advantage to a public official, national or foreign, or to an official from an international

organisation, or to a third party with consent or ratification from any of the previously mentioned categories of individuals, as a means to obtain or maintain a business, a contract or another undue advantage in the international commerce.

Under Article 8 of the same law, passive corruption is punishable where a private sector worker, by himself or through an intermediary, solicits or accepts, for himself or for a third person, an undue advantage, or the promise thereof, to practise an action or omission constituting a violation of his/her professional duties.

Under Article 9 of the same law, active corruption is punishable where an individual by himself or through an intermediary, gives or promises to give an undue advantage to a private sector worker, or to a third party with his/her consent or ratification, to obtain an action or omission constituting a violation of the private worker’s professional duties. Attempted corruption is punishable in this situation.

Where the action or the omission practiced by the private sector worker constituting the counterpart of the undue advantage is capable of causing a distortion of competition or economic losses for third parties, the maximum penalty abstractly applicable is compounded.

1.3 Accounting provisions

There are no specific criminal offences related to accounting or book keeping linked to the payment of bribes. However, the lack of accuracy in company’s accounting or records may give rise to criminal or administrative liability.

1.4 Intermediaries

See **1.2 Bribery** above.

1.5 Corruption

The crimes of corruption are not punishable in terms of negligent behaviour, they are all crimes which require wilful intent from the subject who commits the offence. The legal definition of conduct as constituting a crime of corruption requires a certain conduct to be performed as a counterpart to the undue advantage.

1.6 Scope

The limitation period for corruption crimes is 15 years.

As a general rule, Portuguese criminal law is applicable to all acts committed in Portuguese territory, regardless of the offender’s nationality. Portuguese criminal law may also be applicable, under certain circumstances, to acts committed outside of Portugal by/against a company whose headquarters is located in Portuguese territory.

Law 20/2008, which created the Criminal Regime for Corruption in the International Commerce and in Private Sector, is also applicable:

- for the crime of active corruption in detriment of international commerce, to acts committed by Portuguese or foreign citizens who are found in Portugal, regardless of where the action took place; and
- for the crimes of passive and active corruption in the private sector, regardless of where the action took place, when the agent who gives, promises, solicits or accepts the bribe or promise of a bribe is a public official or a political official or, if of Portuguese nationality, is an official of an international organisation.

Liability for corruption offences follows the same regime as all other criminal offences under Portuguese law: the agent may be punished as the author of the crime or as an accomplice.

A legal person can also be liable for the crimes of corruption and undue receipt of an advantage if such crimes are committed:

- in its name and in the collective interest by individuals who occupy a position of leadership; or
- by an individual who acts under the authority of someone occupying a position of leadership due to a violation of the monitoring and control duties pertaining to them.

The criminal liability of the state, of legal persons exercising public power prerogatives and of public international law entities is excluded.

2. Defences & Exceptions

2.1 Defences

A legal person's criminal liability may be excluded where the agent of the offence has acted against express orders or instructions from proper authority.

The company can avoid liability if it can demonstrate that the criminally relevant act or omission was not perpetrated on its behalf or collective interest and that there were no violations of any duties of due vigilance or control by the person with a leadership position responsible for these duties.

2.2 Exceptions

There are no exceptions to the defences stated above (2.1 Defences).

2.3 De minimis exceptions

There are no de minimis exceptions to the above offences.

2.4 Exempt industries/sectors

There are no sectors or industries exempt from the above offences (apart from what has been previously detailed relating to the state and public legal persons).

2.5 Safe harbour or amnesty programme

There are no specific safe harbour or amnesty programs relating to corruption and bribery, but in some cases penalties can be waived or mitigated where certain conditions are fulfilled. See 4.1 below.

Although there are also no specific provisions regarding what comprises adequate compliance procedures, considering that companies may have its criminal liability excluded when the agent of the offence has acted against express orders or instructions from proper authority, the existence of such procedures may be used as an argument of defence in order to try to demonstrate that the agent acted against such orders or instructions.

3. Penalties

3.1 Penalties on conviction

Public sector

Undue Advantage in the Public Sector

- Individuals who ask for or accept an undue advantage – prison sentence of up to five years or a fine of up to 600 days;
- legal persons who ask for or accept an undue advantage – fine of up to 600 days*;
- individuals who give or promise to give an undue advantage – prison sentence of up to three years or fine of up to 360 days;
- legal persons who give or promise to give an undue advantage – fine of up to 360 days.

There are provisions aggravating the penalties in certain cases.

Passive Corruption Crime in the Public Sector

If the undue advantage constitutes the counterpart for an illicit act or omission to be performed by the public official:

- individuals – prison sentence between one and eight years;
- legal persons – fine between 120 and 960 days.

If the undue advantage constitutes the counterpart for a licit act or omission by the public official:

- individuals – prison sentence between one and five years;
- legal persons – fine between 120 and 600 days.

There are provisions aggravating the penalties in certain cases.

Active Corruption Crime in the Public Sector

If the undue advantage constitutes the counterpart for an illicit act or omission to be performed by the public official:

- individuals – prison sentence between one and five years;
- legal persons – fine between 120 and 600 days.

If the offer of an undue advantage or its promise intend for the public official to practise a licit act or omission:

- individuals – prison sentence of up to three years or a fine of up to 360 days;
- legal persons – fine of up to 360 days.

Attempted active corruption is punishable. There are provisions aggravating the penalties in certain cases.

Private sector

Passive Corruption Crime in the Private Sector

If the undue advantage constitutes the counterpart for an act or omission to be performed against professional duties:

- individuals – prison sentence of up to five years or a fine of up to 600 days;
- legal persons – fine of up to 600 days.

If the previous behaviour is liable to cause a distortion on competition or economic losses for third parties:

- individuals – prison sentence between one and eight years;
- legal persons – fine between 120 and 960 days.

Active Corruption Crime in the Private Sector

If the undue advantage constitutes the counterpart for an act or omission to be performed against professional duties:

- individuals – prison sentence up to three years or fine up to 360 days;
- legal persons – fine of up to 360 days.

If the previous behaviour is liable to cause a distortion on competition or economic losses for third parties:

- individuals – prison sentence up to five years or fine up to 600 days;
- legal persons – fine of up to 600 days.

Attempted active corruption is punishable.

International commerce

Active Corruption Crime in International Commerce

- Individuals – prison sentence between one and eight years;
- legal persons – fine between 120 and 960 days.

Political or high public official

Undue Advantage by a political or high public official

- Soliciting or accepting an undue advantage is punishable with prison sentence between one and five years;
- offering or promising to offer an undue advantage is punishable with prison sentence of up to five years or with a fine of up to 600 days.

Passive Corruption Crime by a political or high public official

- Soliciting or accepting an undue advantage for the practice of an illicit act or omission is punishable with a prison sentence between two and eight years;
- soliciting or accepting an undue advantage for the practice of a licit act or omission is punishable with a prison sentence between two and five years.

Active Corruption Crime by a political or high public official

- The offer or promise of offer of an undue advantage for the practice of an illicit act or omission is punishable with a prison sentence between two and five years;
- the offer or promise of offer of an undue advantage for the practice of a licit act or omission is punishable with a prison sentence of up to five years;
- the crime of active corruption committed by a political or high public official is punishable with the same penalties as the ones ascribed to the crime of passive corruption.

Armed Forces and military official

Passive corruption by an Armed Forces or a military official

- Soliciting or accepting an undue advantage for the practice of an act or omission contrary to military duties and resulting in peril to national security is punishable with a prison sentence between two and ten years;
- if the agent, before practising the act or omission, voluntarily rejects the offer or its promise or returns it then the penalty will be waived.

Active corruption of an Armed Forces or a military official

- The offer or promise of offer of an undue advantage is punishable with a prison sentence between one and six years;
- if the corrupting agent is an official of superior rank to the official being corrupted, or an official who hierarchically exercises a position of command over the corrupted official, the minimum limit of the applicable penalty will be compounded to double the prison time.

Sports

Passive corruption in sports

- Punishable with a prison sentence between one and five years;

- the penalties will be compounded by one-third in their minimum and maximum limit if the agent is a sport's director, a referee, a sport's agent or a legal person.

Active corruption in sports

- Punishable with a prison sentence of up to three years or with a fine;
- the penalties will be compounded by one-third of its limits if the undue advantage is intended for a sport's director, a referee, a sport's agent or a legal person.

Attempted active corruption is punishable.

(* For individuals, under the terms of Article 47 of the Criminal Code, each day of the fine corresponds to an amount between EUR5 and EUR500, which the court determines according to the economic and financial situation and personal expenses of the convicted individual. As for legal persons, article 90-B of the Criminal Code establishes that each day of the fine corresponds to an amount between EUR100 and EUR10,000, which the court determines according to the economic and financial situation of the convicted legal person and its expenses with workers. In the cases where the criminal provision does not contemplate days of fine but solely a prison sentence, the rule regarding legal persons is that one month of prison corresponds to ten days of fine.)

3.2 Guidelines applicable to the assessment of penalties

Penalties may be compounded in their minimum and maximum abstract limits if the bribe or undue advantage offered is of a high or considerably high value. In certain circumstances, penalties may also be mitigated. See also note on Article 47 of the Criminal Code in **3.1 Penalties on Conviction** above.

4. Whistle-blowing

4.1 Protection afforded to whistle-blowers

There is not a specific regime affording special protection to whistle-blowers, but there are several legal provisions granting a waiver or mitigating the penalty of the agent who, under certain conditions, reports the crime (under limited timeframes) or who has decisively contributed to the gathering of evidence which allows the identification and capture of others criminally liable.

In general terms, Law 93/99, 14 July, establishes special measures for the protection of witnesses under criminal procedure.

Article 4 of Law 19/2008, 21 April establishes that workers of the Public Administration and of state-owned companies, as well as private sector workers, who report on offences that

they become aware of in the course of their work or because of the exercise of their duties cannot, under any form, including non-voluntary transfer or dismissal, be jeopardised. These workers also have the right to remain anonymous, until a charge is brought. After the charge, they also have the right to request a transfer for a different position, which cannot be refused.

4.2 Incentives for whistle-blowers

Article 8 of Law 36/94 establishes a mitigation of penalty for corruption cases where the defendant aides the investigation in the gathering of evidence or in the identification and capture of others criminally liable.

Article 374-B of the Criminal Code is applicable to the crimes of corruption in the public sector and undue receipt of an advantage and, under certain conditions, establishes that penalties can be mitigated or waived altogether.

Waiving of the penalty under this article requires the agent of the crime to: (i) report the crime in 30 days after it occurred, assuming criminal proceedings have not been already initiated, and as long as the agent voluntarily returns the undue advantage or its value; (ii) before the practice of the act or omission, the agent voluntarily repudiates the undue advantage previously accepted or returns it; (iii) before the act or omission is practised, the agent withdraws the promise or refuses its offering or requests its return.

On the other hand, the penalty may be mitigated if the agent (i) specifically aides the investigation in acquiring and gathering decisive evidence or capturing others responsible, or (ii) practised the criminal facts by request from the public official, either directly or by means of an intermediary.

4.3 Location of provisions

Of the aforementioned provisions relating to waiver or penalty mitigation, the following are worth mentioning: Article 374-B of the Criminal Code; Article 8 of Law 36/94, 29 September; Article 5 of Law 20/2008, 21 April; Article 19-A of Law 34/87, 16 July.

The Data Protection Enforcement Agency (CNPd) has issued a resolution (765/2009) whereby it grants special protection to whistle-blowers, relating to all sorts of criminal offences, not just bribery and corruption.

5. Enforcement

5.1 Enforcement body

Criminal offences are enforced in the courts of law. The Public Prosecution's Office is the competent body to investigate any suspected corruption or bribery offences, aided by the Judiciary Police (in particular the National Anti-Corruption

Unit). There is no particular enforcement body or entity specialising in these types of crime. Public Prosecutors have the powers attributed to them by law to investigate any facts which may constitute a criminal offence in Portuguese territory. In any case, and depending on the concrete cases, usually the investigation of most relevant cases is carried out by the Central Department of Investigation and Prosecution.

5.2 Guidance for enforcement bodies

There is no particular guidance available as to how an enforcement body should act.

5.3 Jurisdiction for the enforcement body/bodies

The investigation of the Public Prosecution's Office (and the trial by the court) will have geographical jurisdiction. However, depending on the concrete cases, usually the investigation of most relevant cases is carried out by the Central Department of Investigation and Prosecution with the assistance of the judiciary police.

5.4 General powers and limitations of the enforcement body/bodies

In principle, the powers and limitations of the enforcement bodies are the same as in any criminal case. However, in the investigation of corruption crimes there are some particular laws that allow the authorities to investigate in a more effective way, such as Law 5/2002, of 11 January (establishing a special regime for the collection of evidence, breach of professional secrecy and confiscation of property).

5.5 Powers of the enforcement bodies to require documentation

Besides the powers generally allowed in any criminal investigation, there are special provisions regarding the breach of secrecy of financial institutions, allowing a more effective evidence collection by means of requesting documentation and information (Law 5/2002, of 11 January).

5.6 Process of application for documentation

Under Law 5/2002, breach of banking and professional secrecy must be ordered by the judiciary authority conducting the procedure. The order must identify the individuals within its scope and it must specify the information and documents to be surrendered, even if generically. The request may also be made by reference to the accounts or transactions in relation to which the information needs to be obtained. The enforcement body also has complete access to the tax administration database.

The financial institutions are required to provide the information requested in a period of five days (when the information is available as computer data), or 30 days (when the information is not available as computer data); this time frame is reduced to 15 days if there are suspects detained

under custody. All documents not voluntarily rendered can be apprehended by court order.

5.7 Discretion for mitigation

Portuguese law comprises a mechanism of provisional suspension of the procedure, under Article 281 and 282 of the Criminal Procedure Code and Article 9 of Law 36/94 (Measures applicable to the Fight Against Corruption and Financial and Economic Criminality).

This mechanism is agreed between the Public Prosecutor and the defendant, with the accordance of a judge, and it determines that the procedure will be suspended upon the defendant adhering to an injunction and certain rules of conduct. The conditions for such an agreement to be offered are: (i) the crime must be punishable with a prison sentence not higher than five years or with a penalty different from a prison sentence; (ii) agreement of both the defendant and the offended party (when the offended party is part of the procedure); (iii) absence of previous conviction for a crime of the same nature; (iv) absence of previous provisional suspension for a crime of the same nature; (v) absence of institutionalisation as a safety measure; (vi) absence of a high level of guilt; and (vii) it has to be foreseeable that compliance with the injunction and the rules of conduct is deterrent enough to fulfil the prevention demands in the concrete case.

In the cases of an active corruption crime in the public sector, Article 9 of Law 36/94 establishes that the provisional suspension of the procedure may be offered to a defendant where he/she has reported the crime or the Public Prosecutor considers him/her to have made a decisive contribution for the unveiling of the truth. The suspension in such cases requires less conditions: apart from the defendant's contribution, it is only necessary that he is in agreement with the suspension and that it is foreseeable that compliance with the injunction and the rules of conduct will be deterrent enough to fulfil the prevention demands in the concrete case.

The suspension of the procedure can last as long as two years, during which the limitation period is also suspended. If the defendant complies with the set of injunctions and rules of conduct prescribed, the Public Prosecutor dismisses the proceedings. In contrast, failure to comply with the terms agreed or recidivism cause the process to resume its course.

5.8 Jurisdictional reach of the body/bodies

See 5.3 Jurisdiction for the Enforcement Body/Bodies above.

6. Future changes

6.1 Likely changes to the applicable legislation or the enforcement body

There were some changes to the applicable legislation in 2015. Looking forward, there has been intense media coverage of a few criminal corruption cases but there is no public discussion of new legislation currently underway.

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