

Chambers

GLOBAL PRACTICE GUIDES

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Anti-Corruption

Portugal

Rui Patrício, Tiago Geraldo and Edgar Palma

Morais Leitão, Galvão Teles, Soares da Silva & Associados

practiceguides.chambers.com

2021

PORTUGAL

Law and Practice

Contributed by:

Rui Patrício, Tiago Geraldo and Edgar Palma

Morais Leitão, Galvão Teles, Soares da Silva & Associados see p.13



Contents

1. Legal Framework for Offences	p.3	6. Compliance and Disclosure	p.9
1.1 International Conventions	p.3	6.1 National Legislation and Duties to Prevent Corruption	p.9
1.2 National Legislation	p.3	6.2 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions	p.9
1.3 Guidelines for the Interpretation and Enforcement of National Legislation	p.3	6.3 Protection Afforded to Whistle-Blowers	p.9
1.4 Recent Key Amendments to National Legislation	p.4	6.4 Incentives for Whistle-Blowers	p.9
2. Classification and Constituent Elements	p.4	6.5 Location of Relevant Provisions Regarding Whistle-Blowing	p.10
2.1 Bribery	p.4	7. Enforcement	p.10
2.2 Influence-Peddling	p.5	7.1 Enforcement of Anti-bribery and Anti-corruption Laws	p.10
2.3 Financial Record-Keeping	p.5	7.2 Enforcement Body	p.10
2.4 Public Officials	p.5	7.3 Process of Application for Documentation	p.10
2.5 Intermediaries	p.5	7.4 Discretion for Mitigation	p.10
3. Scope	p.6	7.5 Jurisdictional Reach of the Body/Bodies	p.11
3.1 Limitation Period	p.6	7.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption	p.11
3.2 Geographical Reach of Applicable Legislation	p.6	7.7 Level of Sanctions Imposed	p.11
3.3 Corporate Liability	p.6	8. Review and Trends	p.11
4. Defences and Exceptions	p.6	8.1 Assessment of the Applicable Enforced Legislation	p.11
4.1 Defences	p.6	8.2 Likely Future Changes to the Applicable Legislation of the Enforcement Body	p.11
4.2 Exceptions	p.7		
4.3 De Minimis Exceptions	p.7		
4.4 Exempt Sectors/Industries	p.7		
4.5 Safe Harbour or Amnesty Programme	p.7		
5. Penalties	p.7		
5.1 Penalties on Conviction	p.7		
5.2 Guidelines Applicable to the Assessment of Penalties	p.9		

1. Legal Framework for Offences

1.1 International Conventions

Portugal has signed a number of conventions related to corruption and bribery, the most relevant being:

- the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997);
- the European Union Convention on the fight against corruption involving officials of the EU or EU Member States (1997);
- the European Union Convention on the Protection of the Financial Interests of the Communities and Protocols;
- the Council of Europe Criminal Law Convention on Corruption (1999);
- the United Nations Convention against Transnational Organized Crime (2000); and
- the United Nations Convention against Corruption (2003).

Since 1 January 2002, Portugal has been a member of the Council of Europe's Group of States against Corruption (GRECO).

1.2 National Legislation

Portuguese legislation recognises the following basic 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 (16 July 1987);
- passive and active corruption of political and high public officials, punishable under Articles 17 and 18 of Law 34/87 (16 July 1987);
- 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 2008);
- undue receipt of an advantage, passive and active corruption in the context of sports competitions, punishable under Articles 8, 9 and 10-A of Law 50/2007 (31 August 2007);
- passive corruption of an individual serving in the armed forces or other military forces for the performance of an illicit action, punishable under Article 36 of Law 100/2003 (15 November 2003); 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 2003).

Passive corruption can be defined as the request or acceptance of an undue advantage in order to perform an action or an omission (*quid pro quo*) and active corruption as the offer of or promise to offer an advantage of the same kind with that purpose.

Corruption provisions apply regardless of the undue advantage is offered or accepted by a public official, politician, private worker, sports person, 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/sports person/military official or for a third party, by indication or with the knowledge of the public official, politician, or private worker.

Corruption crimes can be punishable whether the conduct expected in return for the undue advantage is an unlawful (contrary to the duties exercised) or a lawful (not contrary to the duties exercised) action or omission, although the penalty will be more severe if it is unlawful.

Finally, Article 372 of the Criminal Law, Article 16 of the Law on corruption of political and high public officials and Article 10-A of Law 50/2007 (31 August 2007), regarding bribery in the context of sports competitions, assert that the acceptance or offer of an undue advantage by or to a public official, political or high public official or a sports agent constitutes a criminal offence, without the requirement of an action or omission being performed in return.

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

There are no specific guidelines regarding the interpretation and enforcement of the national legislation. Case law and doctrine should be borne in mind.

Following some degree of media controversy, the Portuguese Government issued its own code of conduct (approved by the Council of Ministers Resolution 53/2016, 21 September 2016), establishing guidelines for the acceptance of gifts and invitations by members of the government and, among others, officials from their respective cabinets. According to these guidelines, an offer is considered to affect their impartiality and integrity in the exercise of their duties if it has a value equal or superior to a benchmark figure of EUR150. The guidelines include special provisions regarding invitations seen as consolidated social and political normal practices, invitations to events where the presence of a member of the government is of relevant public interest, and occasions involving official representation of the Portuguese state.

The entity responsible for organising the Portuguese football league approved a code of conduct which prevents referees from accepting offers equal to or greater than EUR150 in national championships.

1.4 Recent Key Amendments to National Legislation

As a result of the work of the parliamentary commission on transparency, Law 52/2019, of July 31st, introduced the exclusivity obligation in the exercise of public office and the obligation to present, in a single document to be accessible online, all the income and asset declarations issued by holders of political positions and high public offices. This declaration shall also include every act and activity that may lead to incompatibilities and impediments of the holder of a political position or high public office.

Under the Organic Law 4/2019, of September 13th, the Entity of Transparency of Holders of Political Positions and High Public Offices was officially created as the body responsible for, among others, the monitoring and assessment of the truthfulness of the income and asset declarations issued by public officers.

The Portuguese Council of Ministers recently approved the National Strategy to Fight Corruption (“Estratégia Nacional de Combate à Corrupção 2020-2024”). The document provides for a set of measures to be taken that shall introduce significant changes to the current criminal procedure panorama, particularly in the area of criminal compliance, corporate criminal liability and plea-bargaining mechanisms.

2. Classification and Constituent Elements

2.1 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 any legal ground or justification. The advantage may be given to a public official, politician or private worker, but it can also be given to a third party, where requested or consented to by any of the above-mentioned groups of individuals. In all cases, the bribe can also be executed by means of an intermediary.

As described in **1.2 National Legislation**, the receipt of a bribe is deemed to be passive corruption.

When a public official is involved, bribery may qualify as an undue receipt of an advantage, defined as a crime in Article 372 of the Criminal Code and Article 16 of the Law on Crimes of

the Responsibility of Political Officials, without any requirement that the results expected by the perpetrators actually occur.

Hospitality and promotional expenditures, as well as facilitation payments, may fall within the category of a bribe, particularly in contexts where they may be regarded as consideration for the action or omission to be performed. They may also encompass criminal risks under 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 specific consideration.

However, certain types of conduct are excluded from the criminal legal framework if they are considered to be socially adequate and in line with habits and normal practices. Each situation must be evaluated under a “reasonableness” standard, considering the specific case: ie, the sector in question, the context and the parties involved.

Failure to prevent a bribe is not a criminal offence per se, but if an individual provides material or moral aid to the perpetrator of the offence, he or she may be criminally liable for bribery and corruption as an accomplice. In addition, companies may be held responsible for bribery-related offences if such offences occurred within their organisation (ie, if they did not have appropriate mechanisms in place to prevent such an offence from occurring).

Article 386 of the Criminal Code provides a very broad definition of “public official” for crime-related purposes. According to this definition, public officials include politicians, civil servants, administrative agents, arbitrators, jurors and experts, members of managing or supervisory bodies or workers of state-owned or state-related companies (including private companies with a majority of capital held by the state or state-owned entities, and also companies operating public services under a concession agreement), of regulatory entities, of other states and of international organisations governed by public international law, regardless of their nationality, as well as anyone who holds office temporarily or is employed temporarily by a public administrative or jurisdictional authority or who temporarily carries out official functions.

Bribery of foreign public officials is also criminalised. Under Article 7 of Law 20/2008, active corruption in the context of international commerce is punishable where an individual, acting on their own behalf 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 groups of individuals, as a means

to obtain or maintain a business, a contract or another undue advantage in international commerce.

Under Article 8 of the same law, passive corruption is punishable where a private-sector worker, acting on their own behalf or through an intermediary, demands or accepts, for themselves or for a third person, an undue advantage, or the promise thereof, to perform an action or make an omission constituting a violation of his or her professional duties.

Bribery between private parties in a commercial setting, or any other, is covered under Article 9 of the same law: active corruption is punishable where an individual acting on their own behalf or through an intermediary, gives or promises to give an undue advantage to a private-sector worker, or to a third party with his or 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 performed or omission made by the private-sector worker in return for the undue advantage is capable of distorting competition or causing economic losses for third parties, the maximum possible penalty is applied.

2.2 Influence-Peddling

Influence-peddling, provided in Article 335 of the Criminal Code, is in fact a criminal offence of a general nature for which any person – public official or not – may be held liable.

2.3 Financial Record-Keeping

Aside from the crime of document forgery, provided in Article 256 of the Criminal Code and punishable by imprisonment for up to five years, Article 379-E of the Portuguese Securities Code currently includes the crime of capital investment fraud, which encompasses the use of false or wrongful information in capital investment operations launched by public companies (ie, companies whose shares are listed and traded on a stock exchange market). The maximum penalty amounts to eight years. Negligent behaviour is also punishable, although this leads to a reduction of the applicable penalty by half.

The General Regime for Credit Institutions and Financial Companies establishes as a regulatory offence (Article 211 (1-g)) the forgery of accounting and the non-existence of organised accounting, as well as the breach of the applicable accounting rules determined by law or by the Bank of Portugal.

2.4 Public Officials

Embezzlement of public funds by public officials is defined as a specific crime (*peculato*) under Article 375 of the Criminal Code and is punishable by imprisonment for up to eight years. This offence applies to public officials who unlawfully appropriate, for their own or another person's benefit, money or any

movable or immovable property or public or private property that has been in their possession or is accessible to them on account of their functions.

Extortion by public officials, provided (as *concessão*) in Article 379 of the Criminal Code and punishable by imprisonment for up to two years, is also a crime under which any public official who, within the performance of their duties or exercising powers deriving therefrom, by themselves or by a person with their consent or ratification, receives for themselves, for the state or for a third party, by inducement of error or exploitation of an error of the victim, charges fees, compensation or fines which they know are not due.

Article 377 of the Portuguese Criminal Code includes the crime of taking economic advantage in public office, which is punishable by imprisonment for up to five years and applicable to any public official who, in the course of a legal transaction, and intending to obtain an unlawful economic participation for themselves or a third party, damages in whole or in part the public interest that they have the duty to manage, supervise, defend or carry out.

Portuguese law explicitly provides for offences relating to embezzlement of public funds by a public official, as previously explained.

Although there is no specific offence addressing the issue of favouritism on behalf of public officials, the general crime of abuse of power, as provided in Article 382 of the Criminal Code, determines that any public official who abuses their official powers in order to secure an unlawful advantage for themselves or a third party, or to cause prejudice to another, is liable to imprisonment for up to three years (if they are not already subject to a more severe penalty under other provisions).

2.5 Intermediaries

According to the general principles that govern Portuguese criminal law, reflected in Articles 26 and 27 of the Criminal Code, intermediaries may qualify as joint principals (subject to the same maximum penalty provided for the perpetrator) or accomplices (the maximum and minimum limits of whose sentence, based on the penalty provided for the principal, shall be reduced by one third), depending on their level of involvement in the commission of the offence.

3. Scope

3.1 Limitation Period

The crimes referred to in **1.2 National Legislation** have a general limitation period of five years (except for the crimes provided in Law 100/2003, which have a ten-year limitation period).

These limitation periods are, however, subject to normal suspension and interruption clauses.

3.2 Geographical Reach of Applicable Legislation

As a general rule, Portuguese criminal law is applicable to all acts committed in Portuguese territory, regardless of the offender's nationality.

Law 20/2008, which created the criminal regime for corruption in international commerce and in the private sector, is also applicable for:

- the crime of active corruption to the 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
- the crimes of passive and active corruption in the private sector, regardless of where the action took place, when the perpetrator who gives, promises, demands 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.

Aside from the specific rules that govern Portuguese legislation on the bribery of foreign public officials within international commerce (which only require the active perpetrator to be of Portuguese nationality), Portuguese law shall apply also, notably, when the relevant crime:

- is perpetrated by Portuguese citizens against other Portuguese citizens who live in Portugal;
- is perpetrated by Portuguese citizens or by foreigners against Portuguese citizens, if the perpetrator is to be found in Portugal and if the facts are punishable in the territory where they took place (unless the punitive power is not carried out in that place) and the extradition cannot be performed or if it is decided not to surrender the offender as result of a European arrest warrant or other international agreement binding Portugal; or
- is perpetrated by or against a legal person with its headquarters in Portuguese territory.

Portuguese criminal law is also applicable to acts committed abroad in cases affected by international conventions to which Portugal is bound.

3.3 Corporate Liability

Under Portuguese law, the liability of legal persons, such as corporations, is currently assumed to be an exception to the general rule that only individuals are criminally responsible (Article 11 of the Criminal Code). For this reason, corporations can only be held responsible when expressly provided for by law.

When this liability is provided in abstract terms, corporate liability may co-exist with individual liability for these offences, considering exactly the same set of facts. A legal person may be held liable (without excluding individual liability) if the relevant offence is committed in its name and 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 the latter.

Irrespective of its former or current owners or shareholders, corporate liability remains with the same legal person by which (and relating to the activity of which) an offence has been committed. This liability may not be transmitted to another entity, due to the constitutional principle that states that punitive liability is absolutely personal and non-transferable. In some cases, however, the directors of the relevant company may be asked in subsidiary terms to pay the fine for which the company was convicted, if the latter does not have the financial capacity to do so.

In the event of merger or spin-off, the resulting legal person is liable for criminal offences performed by the pre-existing entity or entities.

4. Defences and Exceptions

4.1 Defences

A defendant charged with corruption under the Criminal Procedure Code has the same rights as another defendant in criminal proceedings, based on the fundamental principle of the presumption of innocence and its interplay in *dubio pro reo*.

In the case of legal persons, their criminal liability may be excluded where the material perpetrator has acted against express orders or instructions given by people with proper authority within the organisation.

A company can also avoid liability if it is able to 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.

As mentioned in **2.1 Bribery**, a conduct is excluded from criminal legal relevance if it is considered to be socially adequate and in line with habits and normal practices.

4.2 Exceptions

There are no exceptions to the defences stated in **4.1 Defences**.

4.3 De Minimis Exceptions

There are no exceptions to the defences stated in **4.1 Defences**.

4.4 Exempt Sectors/Industries

There are no sectors or industries exempt from the aforementioned offences, apart from that which has been previously detailed relating to the state and public legal persons (eg, in **1.3 Guidelines for the Interpretation and Enforcement of National Legislation**).

4.5 Safe Harbour or Amnesty Programme

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

5. Penalties

5.1 Penalties on Conviction

Public Sector

Undue advantage in the public sector

- For individuals who ask for or accept an undue advantage – imprisonment for up to five years or a fine of up to 600 days (see note at the end of this section);
- for legal persons who ask for or accept an undue advantage – a fine of up to 600 days;
- for individuals who give or promise to give an undue advantage – imprisonment for up to three years or a fine of up to 360 days;
- for legal persons who give or promise to give an undue advantage – a fine of up to 360 days.

There are provisions aggravating these penalties in certain cases.

Passive corruption crime in the public sector

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

- for individuals – imprisonment for between one and eight years;
- for legal persons – a fine of between 120 and 960 days.

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

- for individuals – imprisonment of between one and five years;
- for legal persons – a fine of between 120 and 600 days.

There are provisions aggravating these penalties in certain cases.

Active corruption crime in the public sector

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

- for individuals – imprisonment for between one and five years;
- for legal persons – a fine of between 120 and 600 days.

If the offer or promise of an undue advantage constitutes consideration for a licit act or omission to be performed by the public official:

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

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

Private Sector

Passive corruption crime in the private sector

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

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

If this behaviour is designed to distort competition or cause economic losses for third parties:

- for individuals – imprisonment for between one and eight years;
- for legal persons – a fine of between 120 and 960 days.

Active corruption crime in the private sector

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

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

If this behaviour is designed to distort competition or cause economic losses for third parties:

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

Attempted active corruption is punishable.

International Commerce

Active corruption crime in international commerce

- For individuals – imprisonment for between one and eight years;
- for legal persons – a fine of between 120 and 960 days.

Political or High Public Officials

Undue advantage to a political or high public official

- Demanding or accepting an undue advantage is punishable by imprisonment for between one and five years;
- offering or promising to offer an undue advantage is punishable by imprisonment for up to five years or with a fine of up to 600 days.

Passive corruption crime by a political or high public official

- Demanding or accepting an undue advantage for the practice of an illicit act or omission is punishable by imprisonment for between two and eight years;
- demanding or accepting an undue advantage for the practice of a licit act or omission is punishable by imprisonment for between two and five years.

Active corruption crime by a political or high public official

- Offering or promising to offer an undue advantage for the practice of an illicit act or omission is punishable by imprisonment for between two and five years;
- offering or promising to offer an undue advantage for the practice of a licit act or omission is punishable by imprisonment for up to five years;
- the crime of active corruption committed by a political or high public official is punishable by the same penalties as those ascribed to the crime of passive corruption.

Armed Forces and Military Officials

Passive corruption by a member of the armed forces or a military official

- Demanding 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 by imprisonment for between two and ten years;
- if the perpetrator, before performing the act or omission, voluntarily rejects the offer or its promise or returns it, the penalty will be waived.

Active corruption by a member of the armed forces or a military official

- Offering or promising to offer an undue advantage is punishable by imprisonment for 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 of the applicable penalty will be doubled.

Sports

Undue advantage in sports

- For a sports agent who asks for or accepts an undue advantage – imprisonment for up to five years or a fine of up to 600 days;
- for legal persons, qualified as sports agents, who ask for or accept an undue advantage – a fine of up to 600 days;
- for individuals who give or promise to give an undue advantage – imprisonment for up to three years or a fine of up to 360 days;
- for legal persons who give or promise to give an undue advantage – a fine of up to 360 days.

Passive corruption in sports

- Punishable with imprisonment for between one and five years;
- the minimum and maximum limits of the penalties will be aggravated by a third if the perpetrator is a sports director, referee, sports agent or legal person.

Active corruption in sports

- Punishable with imprisonment for up to three years or with a fine;
- the limits of the penalties will be aggravated by a third if the undue advantage is intended for a sports director, referee, sports agent or legal person.

(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. 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 cases where the criminal provision does not contemplate days of fine, but solely imprisonment, the rule regarding legal persons is that one month of a prison sentence corresponds to ten days of a fine.)

5.2 Guidelines Applicable to the Assessment of Penalties

The minimum and maximum limits of penalties may be aggravated 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 the note on Article 47 of the Criminal Code in **5.1 Penalties on Conviction**.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

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

However, in the near future and assuming the implementation of the national strategy to combat corruption referred to in **1.4 Recent Key Amendments to National Legislation** and **8.2 Likely Future Changes to the Applicable Legislation of the Enforcement Body**, it is expected that incoming pieces of legislation will impose strict duties to prevent corruption, namely, through mandatory compliance programmes.

6.2 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

Portuguese law does not provide a general duty of report or denunciation vis-à-vis private entities or individuals. Nevertheless, the failure to report imminent bribery or corruption practices by those who assume a leading position within the organisation, and who are therefore bound by law to prevent unlawful outputs, may result in the liability of the company itself and the omitting agent.

The Portuguese Companies Code provides that the company's statutory auditor and the members of its supervisory board, as well as the chairman of the audit committee on limited liability company by shares, must disclose before the Public Prosecution Office any criminal suspicions which have come to their knowledge and which may have relevance as a crime of procedural public nature, as it is the case with corruption.

In certain specific circumstances, and on the basis of criminal liability for omissions, the disclosure of criminal suspicions to the relevant authorities and/or internal supervisory bodies may

also be construed as the essential content of the duty to act that discharges any such omissive liability.

6.3 Protection Afforded to Whistle-Blowers

There is no specific regime affording special protection to whistle-blowers, but there are several legal provisions granting a waiver or mitigating the penalty of the perpetrator 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 who are criminally liable.

In general terms, Law 93/99 (14 July 1999) establishes special measures for the protection of witnesses under criminal procedure.

Article 4 of Law 19/2008 (21 April 2008) establishes that workers of the public administration and of state-owned companies, as well as private-sector workers, who report on offences of which they become aware in the course of their work or because of the exercise of their duties cannot be jeopardised in any way, including by means of non-voluntary transfer or dismissal. These workers also have the right to remain anonymous until a charge is brought. After the charge has been brought, they have the right to request a transfer to a different position, which cannot be refused.

An important toll created is the Digital Platform of the Central Department for Investigation and Penal Action which allows the filing of anonymous criminal complains regarding suspect of bribery.

6.4 Incentives for Whistle-Blowers

Article 8 of Law 36/94, about measures to combat corruption and economic and financial crime, establishes a mitigation of penalty for corruption cases where a defendant aids the investigation, either in terms of the gathering of evidence or the identification and capture of others who are 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. It establishes that, under certain conditions, penalties can be mitigated or waived altogether.

The waiving of a penalty under this Article requires the perpetrator of the crime to:

- report the crime within 30 days of its occurrence, assuming criminal proceedings have not been already initiated, and as long as the perpetrator voluntarily returns the undue advantage or its value;

- voluntarily repudiate the undue advantage previously accepted or return it before the act or omission takes place; or
- withdraw the promise, refuse its offering or request its return before the act or omission is takes place.

However, the penalty may be mitigated if the perpetrator:

- specifically aids the investigation in acquiring and gathering decisive evidence or capturing others responsible; or
- performed the criminal acts at the request of a public official, either directly or by means of an intermediary.

6.5 Location of Relevant Provisions Regarding Whistle-Blowing

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 1994); Article 5 of Law 20/2008 (21 April 2008); Article 19-A of Law 34/87 (16 July 1987).

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

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

Anti-bribery and anti-corruption are subject to criminal enforcement only. There is, however, an independent administrative entity called the Council for the Prevention of Bribery, created under the umbrella of the Court of Auditors, the purpose of which is to develop measures in the field of the prevention of bribery and related offences. The Council, entitled with soft-law powers only, has issued several instructions and recommendations, namely, asking public entities to prepare, apply and publicise bribery prevention plans, as well as on how they should assess potential conflicts of interest.

7.2 Enforcement Body

Punishments of criminal offences are enforced in the courts of law. The Public Prosecutor'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 acts which may constitute a criminal offence in Portuguese terri-

tory, without prejudice of the rules that govern extra-territorial jurisdiction of Portuguese law.

Usually, the investigation of most relevant cases is carried out by the Central Department of Investigation and Prosecution, which has nationwide jurisdiction to co-ordinate and direct the investigation and prevention of some specific criminal offences, namely, those which are of a violent nature, of particular complexity or highly organised, the latter category including bribery and related offences.

The national anti-corruption strategy referred to in **1.4 Recent Key Amendments to National Legislation** and **8.2 Likely Future Changes to the Applicable Legislation of the Enforcement Body** aims to establish a Corruption Prevention Mechanism (or Agency) to be responsible for the implementation of a General Regime for the Prevention of Corruption (RGPC) that shall be created and other preventive functions.

7.3 Process of Application for Documentation

Aside from the powers generally endowed to the Public Prosecutor's Office in any criminal investigation, there are special provisions regarding the breach of secrecy of financial institutions, allowing a more effective collection of evidence by means of requesting documentation and information (Law 5/2002, 11 January 2002). Under Law 5/2002, any breach of banking and professional secrecy must be ordered by the judiciary authority conducting the proceedings. This order must identify the envisaged individuals 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. Financial institutions are required to provide the information requested within a period of five days (if the information is available as computer data), or 30 days (if the information is not available as computer data); the latter timeframe is reduced to 15 days if there are suspects detained under custody. All documents not voluntarily rendered can be apprehended by court order.

7.4 Discretion for Mitigation

Portuguese law provides a mechanism of provisional suspension of the enforcement procedure, under Articles 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, in accordance with a judge, and it determines that the procedure will be suspended upon the defendant adher-

ing to an injunction and certain rules of conduct. The conditions that must be met in order for such an agreement to be offered are:

- the crime must be punishable by imprisonment for not more than five years, or with a penalty other than imprisonment;
- the agreement of both the defendant and the offended party (when the offended party is part of the procedure);
- the absence of a previous conviction for a crime of the same nature;
- the absence of previous provisional suspension for a crime of the same nature;
- the absence of institutionalisation as a safety measure;
- the absence of a high level of guilt; and
- 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 cases involving 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 or she has reported the crime or the Public Prosecutor considers him or her to have made a decisive contribution towards the unveiling of the truth. The suspension in such cases requires fewer conditions: apart from the defendant's contribution, it is only necessary that he or she 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 time 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, causes the process to resume its course.

7.5 Jurisdictional Reach of the Body/Bodies

See 7.2 Enforcement Body.

7.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption

In recent years, there have been several prominent and high-profile cases of bribery or corruption prosecuted and tried in Portuguese courts, three of them with significant impact:

- the “Marquês” operation, considered by many to be the biggest corruption case in Portugal's modern history, in which a former Prime Minister and the former CEO of one of the largest Portuguese private banks (among other corporate elites, namely, former chief executives of Portugal Telecom)

were formally charged with several counts of corruption, money laundering, document forgery and tax fraud;

- the “E-Toupeira” operation, related to alleged corruption practices in sports, which in the beginning involved a major Portuguese football club that was entirely dismissed from any liability in the pre-trial stage;
- the “Lex” operation, related to alleged corruption practices in the judicial system, where two former judges of the Lisbon Court of Appeals were formally indicted;
- the “CMEC” case, related to alleged corruption practices in the energy sector, involving top managers from major Portuguese companies operating in the energy sector and former ministers and secretaries of state from the Portuguese government.

7.7 Level of Sanctions Imposed

Final decisions have not yet been reached in the cases referred to in 7.6 **Recent Landmark Investigations or Decisions Involving Bribery or Corruption**. In another relevant and landmark case, “Face Oculta”, already closed, and which related to an alleged corruption ring designed to favour a private business group linked to business waste and waste-management (also with relevant public officials involved), the most severe penalty imposed was imprisonment for 13 years.

8. Review and Trends

8.1 Assessment of the Applicable Enforced Legislation

GRECO (the Group of States against Corruption, which is the Council of Europe anti-corruption body) published on 28 June 2019 a compliance report on Portugal assessing the implementation of the 15 recommendations it issued to the country in a report adopted in December 2015 concerning measures to prevent and combat corruption in respect of members of parliaments, judges and prosecutors.

GRECO concluded in that report that minor improvements have been demonstrated by Portugal; only one of the 15 recommendations has been implemented satisfactorily or dealt with in a satisfactory manner. GRECO therefore concluded that the current very low level of compliance with the recommendations remains “globally unsatisfactory”.

8.2 Likely Future Changes to the Applicable Legislation of the Enforcement Body

The Portuguese Parliament have created a commission for the specific purpose of dealing with anti-corruption regulations and transparency in the exercise of public functions.

The commission has been working on new anti-bribery legislation for several years, including the regulation of the lobbying activity. The statute approved by the Portuguese Parliament on this subject in July 2019 was vetoed by the Portuguese President for having some insufficiencies, which have yet to be rectified. The discussion on the regulation of the lobbying activity, notably in what concerns the rules of transparency applicable to private entities that carry out legitimate representation of interests before public entities, is expected to proceed during the following months.

Within the commission there have been other important discussions related with transparency. To date, the work carried out by this Commission has led to the creation of the Code of Conduct for the Members of the Assembly of the Republic and Entity dedicated to the Transparency in the Exercise of Public Functions (which implemented a scrutiny of the earnings of political and high public office-holders).

There are still proposals that have been presented and remain under discussion regarding the creation of a Registry for Private Entities that Represent Interests and a Mediation Professional Activity Regime in the Representation of Interests.

As mentioned in **1.4 Recent Key Amendments to National Legislation**, the Portuguese Government has recently approved a national strategy to combat corruption that provides several measures which, if actually implemented, will amend the applicable legislation in material terms and create a new Enforcement Body. The envisaged changes comprise, inter alia:

- the creation of a General Legal Regime for the Prevention of Corruption;
- the establishment of a Corruption Prevention Mechanism or Agency;
- the obligation to create compliance programmes in the public and private sectors;
- the reform of the corporate criminal liability regime, assigning legal relevance to the adoption and implementation of compliance programmes;
- extension of the relevant limitation periods;
- revision and extension of the concept of public official; and
- widening the plea-bargaining mechanisms available and improvement of procedural institutes and research methods, adapting to current realities, notably on cybercrime.

PORTUGAL LAW AND PRACTICE

Contributed by: Rui Patrício, Tiago Geraldo and Edgar Palma, *Morais Leitão, Galvão Teles, Soares da Silva & Associados*

Morais Leitão, Galvão Teles, Soares da Silva & Associados is a leading full-service law firm in Portugal, with a solid background of decades of experience. Broadly recognised, *Morais Leitão* is a reference in several branches and sectors of the law on a national and international level. The firm's reputation amongst both peers and clients stems from the excellence of the legal services provided. The firm's work is characterised by its unique technical expertise, combined with a distinctive ap-

proach and cutting-edge solutions that often challenge some of the most conventional practices. With a team comprising over 250 lawyers at a client's disposal, *Morais Leitão* is headquartered in Lisbon and has additional offices in Porto and Funchal. Due to its network of associations and alliances with local firms and the creation of the *Morais Leitão* Legal Circle in 2010, the firm can also offer support through offices in Angola (ALC Advogados) and Mozambique (HRA Advogados).

Authors



Rui Patrício is a partner and head of the criminal, misdemeanour and compliance practice areas. He has extensive trial experience and is one of the firm's most experienced lawyers in criminal and regulatory litigation and compliance, acting on behalf of companies and

individuals on complex and publicly relevant cases related to white-collar defence, regulatory enforcement and compliance. He is also a regular speaker in seminars and conferences, predominantly on criminal and regulatory legal themes, and collaborates with the media on matters related to justice.



Tiago Geraldo is a senior associate in the criminal, misdemeanour and compliance practice group. He focuses his activity on criminal litigation, specifically white-collar defence and corporate crime, where he has substantial experience in representing and advising companies and individuals, both

in and out of court. He is also actively engaged with regulatory disputes in sectors such as energy, banking, capital markets, telecommunications and media. He teaches criminal law as an assistant teacher at the University of Lisbon School of Law and often lectures in seminars and conferences on criminal law issues.



Edgar Palma joined the firm in September 2020. He is a member of the litigation and criminal, misdemeanour and compliance team.

Morais Leitão, Galvão Teles, Soares da Silva & Associados

Rua Castilho, 165
1070-050
Lisbon
Portugal

Tel: +351 21 381 7400
Fax: +351 213 817 499
Email: mlgtslisboa@mlgts.pt
Web: www.mlgts.pt

MORAIS LEITÃO
GALVÃO TELES, SOARES DA SILVA
& ASSOCIADOS