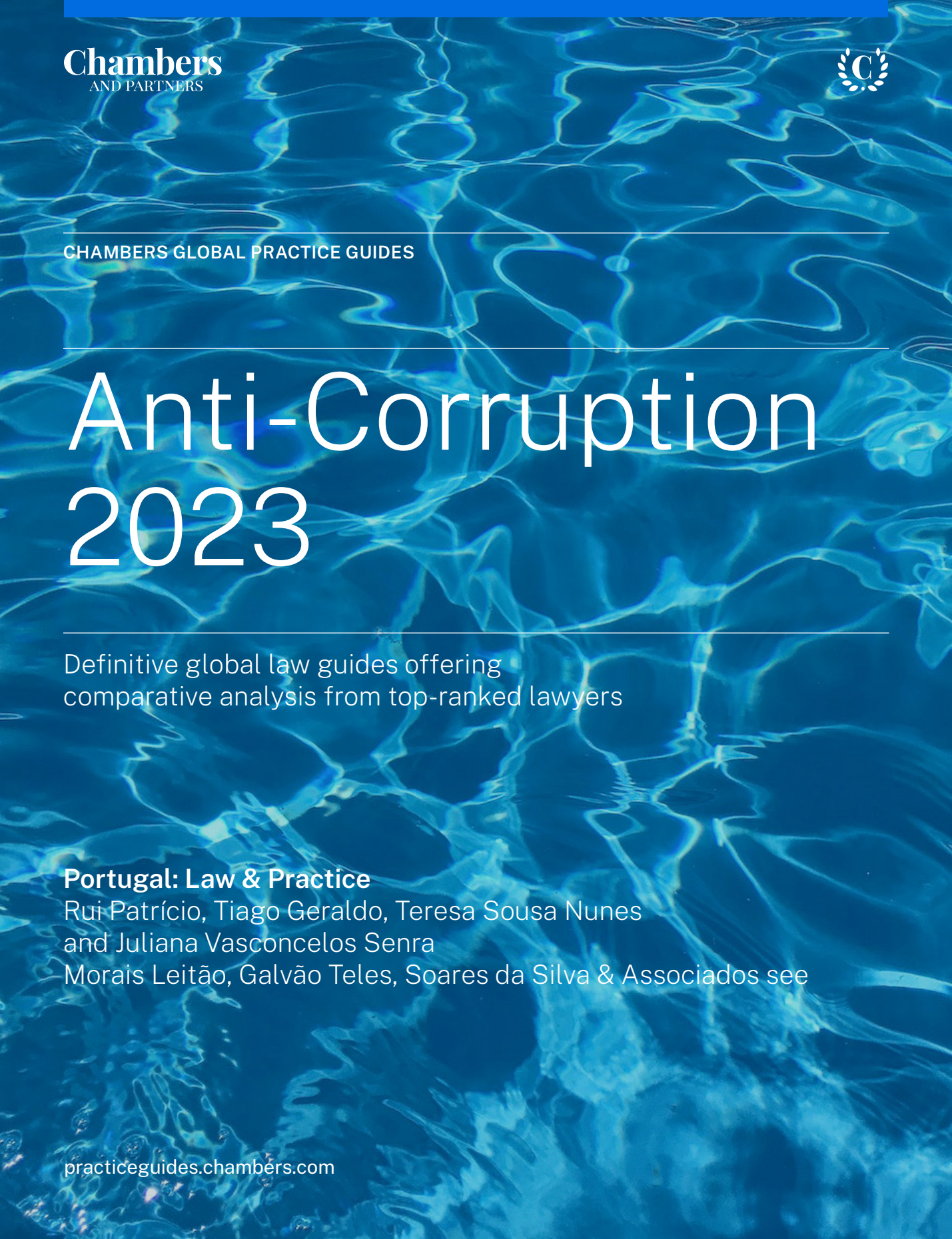

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Portugal: Law & Practice

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PORTUGAL

Law and Practice

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Contents

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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 criminal offences in the areas 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;
- influence-peddling, punishable under Article 335 of the Criminal Code;
- undue receipt of an advantage by a political or high public official, punishable under Article 16 of Law 34/87, of July 16th;
- passive and active corruption of political and high public officials, punishable under Articles 17 and 18 of Law 34/87, of July 16th;
- active corruption in international trade and passive and active corruption in the private sector, punishable under Articles 7, 8 and 9 of Law 20/2008 (29 January 2008), respectively;
- undue receipt of an advantage and passive and active corruption in the context of sport competitions, punishable under Articles 8, 9 and 10-A of Law 50/2007, of August 31st, respectively;
- 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, of November 15th;
- active corruption of an individual serving in the armed forces or other military forces, punishable under Article 37 of Law 100/2003, of November 15th; and
- submission of fraudulent accounts by the manager or administrator of a commercial company, punishable under Article 519-A of Law 262/86, of September 2nd.

Passive corruption can be defined as the request or acceptance of an undue advantage – patrimonial or not – conditional on the performance of a certain action or omission (quid pro quo). Active corruption is characterised by the offer or promise of an advantage of the same nature with the same purpose.

Corruption provisions apply, regardless of the actual rendition of the undue advantage by the corruptor or of its acceptance by the public official, politician, private worker, sportsperson, or military official. The undue advantage may also

be granted through an intermediary if there is consent or ratification by the passive agent. The intended recipient of the undue advantage is irrelevant. The provisions apply, regardless of whether that advantage is intended for the public official, politician, private worker, sportsperson, military official or for a third party, by indication of the former or with their knowledge.

Corruption provisions are also applicable whether the action or omission contemplated by the corruptor is lawful – aligned with the passive agent's official duties – or unlawful – contrary to those duties. The penalty is, however, more severe in the latter case.

Criminal offences of undue receipt of advantage and corruption, whether active or passive, display a unilateral and instantaneous structure, meaning that the crime is performed merely by the action of each individual, regardless of the recipient's acceptance. Along the same lines, when it comes to crimes of corruption, consummation is not dependent on the occurrence of the action or omission intended by the corruptor, deriving solely from the offer or promise of an advantage – active corruption – or from the solicitation or acceptance of that advantage – passive corruption.

These conclusions derive from Articles 372, 373 and 374 of the Criminal Code, Articles 16, 17 and 18 of the law on corruption of political and high public officials and Articles 8, 9 and 10-A of Law 50/2007, of August 31st, regarding bribery in the context of sport competitions.

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

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

Article 372, paragraph 3, of the Criminal Code and Article 16 of the Law 34/87, of July 16th, establishes that the provisions are not applicable when the conduct is socially adequate or in conformity with common customs and habits.

Even though there is no formal definition of what conduct is socially adequate, it is possible to identify a growing quantification of the offered advantages or invitations allowed in some sectors of activity.

Following some extent of media debate, the Portuguese government issued its own Code of Conduct – approved by Resolution 53/2016, of September 21st, and updated by Resolution 184/2019, of December 3rd, both from the Ministers' Council – establishing guidelines for the acceptance of gifts and invitations by members of government and of their respective cabinets, among others. According to these guidelines, an offer or invitation is considered capable of affecting the impartiality and integrity required in the exercise of official duties if it has a value equal or superior to a benchmark figure of EUR150, regarding one calendar year.

Law 52/2019, of July 31st, regulating the conduct of political and high public officials, establishes similar guidelines regarding institutional offers and hospitalities.

Notwithstanding, guidelines include special provisions in respect of invitations seen as consolidated, normal social and political 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.

Another example of quantifications can be found in the Code of Conduct of the Portuguese Football Federation's Arbitration Council, which prevents referees and other members of the national arbitration structure from accepting offers equal to or greater than EUR150 in national championships, or EUR300 in international ones.

1.4 Recent Key Amendments to National Legislation

As a result of the work of the Parliamentary Commission for Transparency, Law 52/2019, of July 31st, put forward an exclusivity obligation while in public office which applies to political or high public officials. This same law also established a duty to present, in a single document to be accessible online, a declaration of all income, assets and liabilities, including every act and activity that could lead to incompatibilities and impediments.

Law 58/2021, of August 31st, the recently altered Law 52/2019, of July 31st, add to the list of mandatory revelations for individuals on the affiliation or any sort of participation in entities of an associative nature, as long as that announcement does not imply the divulgement of constitutionally protected data, namely, related to the political or high public official's health, sexual orientation, union membership and religious or political convictions (circumstances in which the revelation is merely voluntary).

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

Recently, Article 5 of Decree 167/XIV, approved by Parliament, was deemed unconstitutional by the Constitutional Court. This decree, by altering the Cybercrime Law – Law 109/2009, of September 15th – aimed to transpose the Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment. Article 5 would modify the current Article 17 of that law, by granting the Public Prosecution powers to seize email messages in the course of investigations. Following the request of a preemptive constitutional review by the President, grounded notably on the lack of judicial intervention, the Constitutional Court deemed that norm to be unconstitutional, due to the violation of the fundamental right of confidentiality of correspondence and of the right to privacy, in articulation of the proportionality principle and the constitutional guarantees of defence in criminal proceedings. Furthermore, after a lengthy formulation process, the Portuguese Council of Ministers has recently approved the National Anti-corruption Strategy 2020–2024 (*Estratégia Nacional de Combate à Corrupção* 2020–2024) Resolution 37/2021, of April 6th. The document provides a set of programmatic preventative and repressive measures that aim to ensure a more uniform and efficient application of anti-corruption mechanisms, anticipating the publication of several and significant legislative alterations. It has now been transposed into legislation through the approval and entry into force of Law 94/2021, of December 21st, which revises and amends several laws relevant to the anti-corruption regime.

Some relevant examples of the measures included in the National Anti-corruption Strategy are:

• Preventative measures:

(a) the implementation of educational programmes for active citizenship, through the introduction of the subject in primary and secondary school curriculums;
(b) the adoption of maintained and continued programmes of public compliance within the public administration, including the establishment of reporting channels;
(c) the creation of the Preventative Mechanism of Corruption and related offences (*Mecanismo de Prevenção da Corrupção e da Criminalidade Conexa*), an independent entity with monitoring and sanctioning faculties, destined to assure the efficiency of the national preventative anti-corruption policies. Law 109-E/2021, of December 9th created and established the general regime of this mechanism; and
(d) reinforcement of the powers granted to the Court of Auditors (*Tribunal de Contas*), namely, through the expansion of its jurisdiction before entities whose activities are mainly financed by public funding.

• Repressive measures:
(a) the creation of specific procedural regulations for legal persons, namely, regarding enforcement measures;
(b) definition of the criminal liability of legal persons for the crimes of undue receipt of advantage, and active and passive corruption committed by political or high public officials, punishable under Law 34/87, of July 16th;
(c) the uniformisation of the general regime of criminal liability of legal persons;
(d) extension of the statute of limitation for some criminal offences;
(e) extension of the scope of the provisional suspension of criminal procedures, provided for by Article 9 of Law 36/94, of September 29th, in order to include the crimes of undue receipt of advantage and corruption;
(f) implementation of a plea-bargaining mechanism during the trial stage, rooted in a free, global and unreserved confession of the facts for which the defendant was charged;
(g) the uniformisation of the possibilities of waiving the penalty, making it mandatory when the crime is denounced before the beginning of the criminal procedure;
(h) the uniformisation of the instances of penalty mitigation, applicable to the accused who decisively co-operates in the discovery of the truth;
(i) amendment of the Cybercrime Law (*Lei do Cibercrime*) with the intention of regulating investigative methods in a digital setting, namely, online searches; and
(j) transposition of the Directive (EU) 2019/1153 of the European Parliament and of the Council, of 20 June 2019, that aims to facilitate the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences.

As depicted by the foregoing list, the implementation of the aforementioned strategy has introduced significant changes to the current criminal procedure panorama, and will continue to do so, particularly in the field of criminal compliance, corporate criminal liability and plea-bargaining mechanisms.

As forecasted by the National Anti-corruption Strategy and as required by EU law, the rightful legislative process of transposition of the Directive (EU) 2019/1937 on the protection of persons who report breaches of EU law – the so-called "whistle-blowers" – has taken place, through Law 93/2021, of December 20th, which has recently come into force in June 2022. It entails

several innovative duties for legal persons based in Portugal with over 50 employees, including, inter alia, the duty to develop and implement an internal code of conduct, a training programme and reporting channels.

2. Classification and Constituent Elements

2.1 Bribery

A bribe – an undue advantage – can be defined as a patrimonial or non-patrimonial advantage, regardless of its nature, that aims to benefit the one who receives it without any legal ground or justification.

As noted in **1.2 National Legislation**, the undue advantage may be offered or given by the corruptor, or an intermediary, directly to the person intended to be corrupted – the public official, politician or private worker. However, it can also be entrusted to a third party, when requested or consented by the corrupted person.

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

When public officials or political figures are involved, bribery may qualify as an undue receipt of an advantage, punishable under Article 372 of the Criminal Code and Article 16 of the Law on Crimes of the Responsibility of Political Officials. In this scenario, the criminalised behaviour is always unilateral and instantaneous; it is not a condition that the promise or offer, solicitation or acceptance be predetermined to the attainment of a certain action or omission on behalf of the public official.

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 compensation for the action or omission to be performed.

In **1.3 Guidelines for the Interpretation and Enforcement of National Legislation**, some remarks were made about the demand of social inadequacy of the undue advantage. As previously noted, certain types of conduct are excluded from criminal relevance if they are considered to be socially adequate and in line with habits and normal practices. Each advantage must be analysed in a case-by-case assessment, under a "reasonableness" standard, bearing in mind the concrete circumstances of the case, namely, 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, they may be criminally liable for undue receipt of advantage or corruption as an accomplice. In addition, as established by Article 11, paragraph 2 of the Criminal Code, companies may be held responsible for bribery-related offences if those offences occurred within their organisation (ie, if they did not have appropriate mechanisms in place to prevent such an offence from occurring).

While there had existed a disconnection between the Criminal Code and Law 34/87, of July 16th, which prevented legal persons from being criminally liable in cases when the undue receipt or acceptance of advantage is solicited or accepted by a political or high public official, an amendment by Law 94/2021, of December 21st, has solved this incongruity.

Article 6-A of this law prescribes that legal persons may be held liable for receiving or offering unlawful advantages, applied in conjunction with Article 16 which criminalises bribes in this context (as well as for crimes of active corruption, in conjunction with Article 18). This change was brought about by the implementation of the National Anti-corruption Strategy 2020-2024.

It is important to add that bribery of foreign public officials is also criminalised. Under Article 7 of Law 20/2008, of April 21st, active corruption is punishable in the context of international commerce whenever an individual, acting on their own behalf or through an intermediary, gives or promises an undue advantage to a national or foreign public official, to an official from an international organisation, or to a third party with consent or ratification from the corrupted person themselves, as a means to obtain or maintain a business, a contract or another undue advantage in international commerce. However, it should be noted that Transparency International has identified the enforcement of foreign bribery legislation as one of the weaknesses of Portugal's anti-corruption legislation, in their report titled Exporting Corruption 2022.

Under Article 8 of the same law, passive corruption is punishable whenever 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 an omission constituting a violation of their professional duties.

Bribery between private parties in a commercial setting, or any other, is also covered under Article 9 of the same law. Active corruption is punishable whenever an individual, acting on their own or through an intermediary, gives or promises an undue advantage to a private-sector worker, or to a third party with their consent or ratification in order to obtain an action or omission constituting a violation of the private worker's professional duties. Attempted corruption is punishable in this situation. When the action or omission performed by the private-sector worker in return for the undue advantage is liable to distort competition or cause economic losses for third parties, the maximum penalty is applicable.

2.2 Influence-Peddling

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

This crime is committed by the subject who, directly or through an intermediary, promises to offer to, or offers, an advantage to a third person – the "peddler" – so that they abuse their influence, actual or supposed, before any public entity. The crime is equally committed by the subject who, directly or through an intermediary, solicits or accepts such an advantage as compensation for the abuse of their actual or supposed influence before any public entity.

Law 94/2021, of December 21st, has broadened the scope of this criminal offence by clarifying that public entities, either national or international, are included, as well as by further criminalising the giving or promising of such advantages, whether these constitute patrimonial assets or not.

2.3 Financial Record-Keeping

Other than the crime of document forgery, provided for in Article 256 of the Criminal Code and punishable by imprisonment for a period of 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 it 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 lack of organised accounting, as well as the breach of the applicable accounting rules determined by law or by the Bank of Portugal.

The Commercial Societies Code has also included an amendment, through Law 94/2021, of December 21st, introducing the crime of submission of fraudulent accounts by the manager or administrator of a commercial company, now provided for in Article 519-A.

2.4 Public Officials

Article 386 of the Criminal Code provides a very broad definition of "public official" for crime-related purposes, even more so than in the previous version, now amended by Law 94/2021, of December 21st.

This vast concept encompasses not only politicians, civil servants, administrative agents, arbitrators, jurors and experts, but also members of managing or supervisory bodies or workers of state-owned or state-related companies – including private companies whose capital is mainly held by the state or state-owned entities. Furthermore, with the recent amendment in the context of the National Anti-corruption Strategy 2020-2024, the concept was extended to those serving in the military, those fulfilling a public role due to a special bond, judiciary professionals and those working in its supervisory organs, arbiters, interpreters and others working in the context of the justice system. Also included in this definition are workers of 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 who is employed temporarily by a public administrative or jurisdictional authority.

It is crucial to be aware of the leading role played by public officials in some relevant crimes.

- Embezzlement (*peculato*) is a specific crime (ie, a crime which can only be punished by an author of certain characteristics), punishable by up to eight years of imprisonment under Article 375 of the Criminal Code. This offence may be committed by public officials who unlawfully appropriate, for their own or someone else's gain, money or any movable or immovable property or animal, either public or private, that is in their possession or is accessible to them due to their public functions.
- Extortion by a public official (*concussão*), provided for in Article 379 of the Criminal Code, is punishable by up to two years of imprisonment.
  - (a) This crime is committed by a public official who, while performing their duties or exercising powers deriving therefrom, by themselves or through an intermediary, receives any undue compensation for themselves, for the state or for a third party, by inducement of error or exploitation of a victim's mistake.
  - (b) Article 377 of the Criminal Code criminalises the conduct of taking an economic advantage while in public office, punish-

ing it by up to five years of imprisonment. This crime may be committed by a public official who, during a legal transaction, and with the intention of obtaining an unlawful economic participation for themselves or a third party, wholly or partially damages the public interest that they have the duty to manage, supervise, defend or carry out.

- 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 for 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 damage another, is to be punished by up to three years of imprisonment (if no other more severe penalty is applicable under other provisions).

2.5 Intermediaries

According to the general principles that govern Portuguese criminal law, provided for 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, in which case the maximum and minimum limits of the sentence 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 15 years. These limitation periods are, however, subject to normal suspension and interruption clauses.

There has been some recent controversy, catalysed by the media coverage of highly publicised cases, regarding the beginning of the running of the limitation period in relation to crimes of corruption. Briefly put, some public prosecutors and courts have interpreted the Criminal Code as providing that the limitation period in crimes of corruption only starts to run from the moment of the rendition of the undue advantage to the corrupted agent, and not from the moment of the promise of that rendition; ie, when that promise occurs. The Portuguese Constitutional Court, in the context of a concrete constitutional review, has deemed the relevant legal norms, when subject to this second interpretation, as unconstitutional, for violating the constitutional principle of criminal legality. Nonetheless, any such decision does not have a general binding effect.

3.2 Geographical Reach of Applicable Legislation

As a rule, Portuguese criminal law is applicable to all acts committed in Portuguese territory, regardless of the offender's nationality, according to Article 4 of the Criminal Code.

Law 20/2008, of April 21st, which created the criminal regime for corruption in international commerce and in the private sector, is also applicable to:

- 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 the location where the punishable action took place; and
- the crimes of passive and active corruption in the private sector, regardless of the location where the action took place, when the

perpetrator who gives, promises, demands or accepts the bribe or the promise of a bribe is a public official or a political official or, if of Portuguese nationality, is an official of an international organisation.

Other than 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, notably, when the 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 a 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

While the general regime, despite exceptions, used to provide that only individuals would be criminally responsible, the recent amendment introduced by Law 94/2021 of December 21st has established the regime of criminal responsibility of legal persons, and thus has clarified and broadened the scope of the norms on corporate liability. Article 6-A of Law 34/87 of July 16th now states that legal persons and similar entities may be liable for the offences of receiving or offering an undue advantage, as well as the crime of passive corruption.

Article 11 of the Criminal Code remains the core disposition when it comes to the criminal responsibility of legal persons. It has been through several amendments in the past years, including that of Law 34/87. It includes an extended list of crimes for which legal persons may be liable. This list must be completed with provisions included in separate legislation.

In these offences, corporate liability may coexist with individual criminal responsibility, applied to exactly the same set of facts. A legal person may be held liable (without excluding the individual liability of the material perpetrators) if the relevant offence is committed in their name and according to 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 the latter.

Irrespective of its former or current owners or shareholders, corporate liability is held by the same legal entity through which an offence has been committed. This liability may not be transmitted to another entity, due to the constitutional principle according to which punitive liability is personal and non-transferable. Nonetheless, the division or fusion of the criminally liable legal person does not determine the extinction of that liability, which is transferred to the resulting legal person.

It is also relevant to note that in some circumstances the people occupying a leadership posi-

tion in the relevant company may be asked to pay the fine for which the company was convicted, in subsidiary terms, if the latter does not have the financial capacity to do so.

Despite these amendments, Transparency International's report "Exporting Corruption 2022 – Assessing Enforcement of the OECD Anti-Bribery Convention" still identifies deficiencies in the law on the liability of legal persons as one of the main handicaps of national legislation when it comes to the anti-bribery regime.

4. Defences and Exceptions

4.1 Defences

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

However, as further explained in **6.5 Incentives for Whistle-Blowers**, Article 374-B of the Criminal Code, regarding crimes of undue receipt of an advantage and corruption in the public sector, establishes that, under certain conditions, penalties can be mitigated or waived altogether. Law 93/2021 has furthermore transposed the EU Whistleblower Protection Directive into national law, as will be explored further below.

The criminal liability of legal persons may be excluded when the material perpetrator has acted against express orders or instructions given by people with proper authority within the organisation. Legal persons may also mitigate the penalties they will incur if they demonstrate that they have adopted an internal compliance programme, according to Article 90-B of the Criminal Code.

A company may also avoid liability if it is able to demonstrate that the criminally relevant act or omission was not perpetrated in its name or according to collective interest and that there were no violations of any duties of due vigilance or control by the people with responsible leadership positions.

As mentioned in **1.3 Guidelines for the Interpretation and Enforcement of National Legislation** and **2.1 Bribery**, 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

Law 93/2021 of December 20th introduces one exception to the defence of whistle-blowers, clarifying that they may be criminally liable upon divulging an infraction, if they have obtained or accessed the information on the matter through criminal means, as stated by Article 24.

When it comes to members of parliament, as well as regional government members of parliament and government members, their detention or imprisonment for these crimes is dependent on permission from the competent Parliamentary body.

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 those which have 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 those which have 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 solicit or accept an undue advantage – imprisonment for up to five years, in the case of political office holders, or a fine of up to 600 days.
- For legal persons who solicit 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 political officeholders who give or promise to give other political office holders an undue advantage – imprisonment for up to five years.
- For legal persons who give or promise to give an undue advantage – a fine of up to 360 days.
- For individuals who cause harm to a matter they are in charge of managing or overseeing in the context of their public duties – imprisonment for up to five years.

There are provisions aggravating these penalties in certain circumstances.

Additionally, public officials may also be banned from public office from two to eight years, if they commit a crime which has a penalty of over three years of imprisonment, and other aggravating circumstances are present.

Passive corruption crime in the public sector

If the undue advantage is conditional on the obtainment of an illicit act or omission by the public official:

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

If the undue advantage is conditional on the obtainment of an act or omission which is not illicit by the public official:

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

There are provisions aggravating these penalties in certain circumstances.

Active corruption crime in the public sector

If the undue advantage is conditional on the obtainment of an illicit act or omission by the public official:

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

If the undue advantage is conditional on the obtainment of an act or omission which is not illicit by the public official:

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

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

Private Sector

Passive corruption crime in the private sector

If the undue advantage is conditional on the obtainment of an act or omission against professional duties:

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

If the action or omission on which the advantage is conditional is suitable to cause a distortion of competition or an economic loss for third parties:

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

For legal persons, an additional penalty enforcing the adoption of a compliance programme may be determined.

Active corruption crime in the private sector

If the undue advantage is conditional on the obtainment of an act or omission contrary to professional duties:

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

If the action or omission on which the advantage is conditional is suitable to cause a distortion of competition or an economic loss for third parties:

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

Attempted active corruption is punishable.

For legal persons, an additional penalty enforcing the adoption of a compliance programme may be determined.

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

- Soliciting or accepting an undue advantage is punishable by imprisonment for between one and five years.
- Offering or promising to offer an undue advantage to a political or high public official 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

- Soliciting or accepting an undue advantage intended as compensation for the practice of an illicit action or omission is punishable by imprisonment for between two and eight years.
- Soliciting or accepting an undue advantage conditional on the obtainment of an action or omission that is not illicit 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 to a political or high public official conditional on the obtainment of an illicit action or omission is punishable by imprisonment for between two and five years.
- Offering or promising to offer an undue advantage conditional on the obtainment of an action or omission which is not illicit is punishable by imprisonment for up to five years.
- The crime of active corruption committed by a political or high public official is punishable with 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

- Soliciting or accepting an undue advantage conditional on the practice of an action 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 corrupted agent, before performing the targetted action or omission, voluntarily rejects the offer of advantage 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 to a person in the armed forces, conditional on the obtainment of an action or omission contrary to military duties and resulting in peril to national security is punishable by imprisonment for between one and six years.
- If the corrupting agent is an official of superior rank to the official who they attempted to corrupt or who they have corrupted, or an official who hierarchically exercises a position of command, the minimum of the applicable penalty will be doubled.

Sports

Undue advantage in sports

- For a sports agent who, in the exercise of its tasks or because of them, solicits or accepts an undue advantage or its promise – imprisonment for up to five years or a fine of up to 600 days.
- For legal persons, qualified as sports agents, who solicit or accept an undue advantage – a fine of up to 600 days.
- For individuals who offer or promise to offer an undue advantage to a sports agent – imprisonment for up to three years or a fine of up to 360 days.
- For legal persons who offer or promise to give an undue advantage to a sports agent – a fine of up to 360 days.

Passive corruption in sports

- For a sports agent who solicits or accepts and undue advantage or its promise conditional on the obtainment of an action or omission intended to secure the alteration or falsification of a result in a sport competition – imprisonment for between one and eight years.
- The minimum and maximum limits of the penalties is aggravated by a third if the perpetrator is a sports director, referee, sports businessperson or legal person.

Active corruption in sports

- Offering or promising to offer an undue advantage to a sports agent conditional on the obtainment of an action or omission intended to secure the alteration or falsifi-

cation of a result in a sports competition – imprisonment for between one and five years.
- The limits of the penalties are aggravated by a third if the undue advantage is intended for a sports director, referee, sports businessperson or legal person.

(For individual perpetrators, under Article 47 of the Criminal Code, each day of the fine may correspond 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.

For instance, regarding the crimes of undue receipt of advantage and passive or active corruption of public officials, the criminal code provides that the sentence may be waived when the perpetrator denounces the crime within 30 days of its occurrence, before the opening of criminal procedures, as long as they voluntarily return the advantage given to them.

For more on this matter, 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

With the implementation of the National Anti-corruption Strategy 2020-2024 in Law 94/2021 of December 21st, several provisions altering various legislative pieces highlight the importance of implementing internal compliance programmes in companies, both as deterrents to criminal activity and as means to diminish the risk of repeated criminal activity, when it has occurred, thus arising as a particularly important preventative measure. The existence of such programmes may, for instance, serve as a mitigating circumstance for the penalties to be applied to the legal person.

6.2 Regulation of Lobbying Activities

Lobbying activities have historically not been regulated in Portugal, with the discussion considering the topic politically relevant recently gaining traction. In 2021, three legislative projects were introduced in Parliament as suggestions for a lobbying regulation. Due to the end of the legislative term and the new elections for Parliament, these projects did not see the end of the legislative lifecycle. Another project was introduced in 2022 that attempts to regulate lobbying.

A Commission on Transparency and the Statute of Members of Parliament has been created in 2019 with the incumbency of, among other tasks, preventing conflicts of interest when private entities wish to participate in defining and implementing public policies and legislation – ie,

lobbying. The Commission terminated its mandate in March 2022, with no legislation on lobbying having yet been issued.

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

Portuguese law does not provide a general duty to report or denunciate private entities or individuals. Nevertheless, the failure to report imminent bribery or corruption practices by those who assume a leading position within organisations, and who are therefore bound by law to prevent such unlawful outputs, may lead to the liability of the company itself and/or of 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 of companies with limited liability by shares, must disclose before the Public Prosecution office any criminal suspicions which have come to their knowledge that may have relevance as crimes of a procedural public nature, such as corruption.

In some circumstances, the disclosure of criminal suspicions to relevant authorities and/or internal supervisory bodies may be construed as the essential content of the duty to act that discharges agents of possible criminal liability for their omissions.

6.4 Protection Afforded to Whistle-Blowers

There are several legal provisions granting a waiver or mitigating the penalty for perpetrators who, under certain conditions, report the crime, under limited timeframes, or who have decisively contributed to the gathering of evidence which allows for the identification and capture of others who are criminally liable.

Furthermore, recent Law 93/2021, of December 20th, has transposed the EU's Whistleblower Protection Directive into national law, which entered into force in June 2022. This new regime encompasses all persons who, in the context of their professional activity, regardless of nature, sector or remuneration, pass on criminally relevant information to the authorities.

Measures for the development and implementation of reporting channels, internal to companies or external, are further specified in the new regime. External reporting channels must be made available by the criminal police forces, the Bank of Portugal, municipalities, the public prosecution office, and other obliged entities.

Law 93/99, of July 14th, establishes generic special measures for the protection of witnesses under criminal procedure that may be applicable to those acting as whistle-blowers.

Article 4 of Law 19/2008, of April 21st, determines that workers of the public administration and of state-owned companies, as well as private-sector workers, who report offences they become aware of 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 have the right to remain anonymous until a charge is brought and to request an irrefusable transfer to a different position once a charge is brought.

The Central Department for Investigation and Penal Action (*Departamento Central de Investigação e Acção Penal*) has created a digital platform that allows the filing of anonymous complaints of crimes of fraud or corruption.

6.5 Incentives for Whistle-Blowers

New Law 93/2021 of December 20th entails several protective measures which aim to incentivise the use of reporting channels. The identity of the whistle-blower is anonymised, protection against retaliation is provided and, if retaliation occurs, it is deemed as a punishable offence. Whistle-blowers may also benefit from witness protection measures, in general terms.

Article 8 of Law 36/94, of September 29th, regarding measures to combat corruption and economic and financial crime, establishes a mitigation of penalty for corruption cases where a defendant aids the investigation, gathering decisive evidence for the identification and capture of others who are criminally liable.

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

The penalty may be waived when the perpetrator:

- in the crime of passive corruption, has not practised acts or omissions contrary to the duties of the office they have solicited the advantage to, and voluntarily returns the advantage or restores its value;
- in the crime of unlawful receiving or giving of advantage, voluntarily returns the advantage or restores its value;
- voluntarily renounces the undue advantage previously accepted or returns it before the act or omission intended by the corruptor takes place;
- withdraws their promise, refuses its offering or requests its restitution before the act or omission intended by the corruptor takes place; or
- as a political office holder, committing the crimes provided for in Law 34/87, of July 17th, reports the crime before criminal proceedings are initiated, according to Article 19-A.

The penalty is specially mitigated when the perpetrator:

- until the conclusion of the court hearing, specifically aids the investigation in gathering or producing decisive evidence for the identification or capture of others responsible;
- had performed the criminal act at the request of a public official, either directly or by means of an intermediary; or
- is a legal person that has implemented an internal compliance programme.

6.6 Location of Relevant Provisions Regarding Whistle-Blowing

Law 93/2021 has transposed the EU Whistleblower Protection Directive into national law.

Of the previously referred provisions relating to the waiver or penalty mitigation, the following are worth mentioning: Article 374-B of the Criminal Code, Article 8 of Law 36/94, of September 29th, Article 5 of Law 20/2008, of April 21st 2008, and Article 19-A of Law 34/87, of July 16th, 1987.

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

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

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

According to data from Directorate-General of Justice Policies, between 2017 and 2021 there was a 42% increase in investigations of corruption.

7.2 Enforcement Body

By their nature, criminal laws against corruption 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, particularly by the National Anti-Corruption Unit.

Currently, there is no specific enforcement body or entity specialised in these types of crime. Public Prosecutors bear the general powers attributed to them by law to investigate any acts that may constitute a criminal offence in Portuguese territory, without compromising the application of rules that govern extraterritorial jurisdiction of Portuguese law.

Usually, the investigation of crimes of a violent nature, particularly complex or highly organised, including bribery and corruption-related offences, is carried out by the Central Department of Investigation and Prosecution (*Departamento Central de Investigação e Ação Penal*), which has nationwide jurisdiction to co-ordinate and direct the investigation.

National Anti-corruption Strategy 2020-2024 has anticipated the creation of the Preventative Mechanism of Corruption and Related Offences (*Mecanismo de Prevenção da Corrupção e da Criminalidade Conexa*), an independent entity with monitoring and sanctioning faculties, designed to assure the efficiency of the national preventative anti-corruption policies, working in co-operation with investigative units. It has, however, not yet been specifically legislated on or started its activity.

7.3 Process of Application for Documentation

In addition to the powers generally endowed to the Public Prosecutor's office in any criminal investigation, there are special provisions regarding the investigation entailing the breach of secrecy of financial institutions, warranting a more effective collection of evidence by means of requesting documentation and information (Law 5/2002, of January 11th). Under Law 5/2002, of January 11th, 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 specify the information and documents to be surrendered, even if generically. The request may also be made with reference to the accounts or transactions in relation to which information is needed.

The enforcement body 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 the suspects are detained in 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, of September 29th.

This mechanism is agreed between the Public Prosecutor and the defendant, with a judge's concurrence, and it determines that the procedure will be suspended upon the defendant adhering to injunctions and specific rules of conduct. The conditions that must be met in order to achieve that agreement are:

- the crime must be punishable with imprisonment for less 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 must be foreseeable that the compliance with the injunctions and the rules of conduct imposed is sufficiently deterrent to achieve the prevention demanded in the concrete case.

In cases involving active corruption crimes in the public sector, Article 9 of Law 36/94, of September 29th, establishes that the provisional suspension of the procedure may be offered to a defendant when they have reported the crime or when the Public Prosecutor considers them to have made a decisive contribution towards the unveiling of the truth. The suspension in such cases requires fewer conditions; other than the defendant's contribution, it is necessary only that they are in agreement with that suspension and that it is foreseeable that the compliance with the injunction and the rules of conduct imposed will be sufficiently deterrent to achieve the prevention demands in the concrete case.

The suspension of the procedure can last up to two years, during which time the running of 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.

- In "Operation Marquês", considered by many to be the biggest corruption case in Portugal's modern history, 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, which were the charges significantly reduced in the pre-trial decision.
- The "E-Toupeira" operation, related to alleged corruption practices in sports, began with the involvement of a major Portuguese football club that was later entirely dismissed from any liability in the pre-trial stage.
- In the "Lex" operation, related to alleged corruption practices in the judicial system, two former judges of the Lisbon Court of Appeals were formally indicted.
- The "CMEC" case, related to alleged corruption practices in the energy sector, involved top managers from major Portuguese companies operating in the energy sector and former ministers and secretaries of state from the Portuguese government.
- The "Tutti-Frutti" investigation encompassed many alleged crimes, such as corruption, influence-peddling, abuse of power and embezzlement, involving various Portuguese central and municipal political figures, several companies and a known university professor.

7.7 Level of Sanctions Imposed

Final decisions – with a res judicata effect – have not yet been reached in the cases referred to in **7.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption**. Another relevant and landmark case, "Face Oculta", already concluded, concerned an alleged corruption ring designed to favour a private business group linked to waste management, also involving relevant public officials, where the most severe penalty imposed was imprisonment for 13 years.

8. Review

8.1 Assessment of the Applicable Enforced Legislation

On 28 June 2019, the GRECO, which is the Council of Europe's anti-corruption body, published a compliance report on Portugal, assessing the implementation of the 15 recommendations it issued in a report adopted in December 2015. The GRECO concluded that minor improvements had been made by Portugal and that only one of the 15 recommendations had been implemented satisfactorily. The GRECO therefore concluded that the low level of compliance with the recommendations remained "globally unsatisfactory".

The Second GRECO Interim Compliance Report, assessing the measures taken by the authorities of Portugal to implement the recommendations issued in the Fourth Evaluation Report on that country, was published on 12 April 2021. In that report, it was once again concluded that Portugal had achieved only minor progress in the fulfilment of recommendations previously offered; only three of the 15 recommendations had been implemented satisfactorily and, of the remaining recommendations, seven had now been partly implemented and five remained not implemented. The GRECO therefore concluded that the current slightly improved level of compliance with the recommendations is no longer "globally unsatisfactory".

A Second Compliance Report by GRECO, issued in June 2022, assesses the measures taken by the authorities of Portugal to implement the recommendations made in the Fourth Round Evaluation Report on Portugal, regarding corruption prevention in respect of members of parliament, judges and prosecutors. The report addresses 15 recommendations made to Portugal. It notes that the Committee for Transparency

and the Statute of Members of Parliament has made progress in ensuring the independence of members of parliament, as well as on other aspects under the oversight of the Council of Europe, while some recommendations are only partly implemented, or not implemented at all.

8.2 Likely Changes to the Applicable Legislation of the Enforcement Body

The National Anti-corruption Strategy 2020–2024 will continue to be implemented as, for instance, the Preventative Mechanism of Corruption and related offences (*Mecanismo de Prevenção da Corrupção e da Criminalidade Conexa*) is expected to come into force.

The European Commission has sent a letter of formal notice to Portugal for incorrectly transposing the fourth EU Anti-Money Laundering Directive in 2021. It is to be expected that the Directive will be duly transposed, and it must also be taken into account that the EU's Anti-Money Laundering Package is expected to be published soon, which will need to be reflected in national legislation. The standstill on lobbying regulation will likely continue to be discussed, after a commission, which was created for the purpose of developing standards on handling matters related to the independence of members of parliament and of the Parliament, has terminated its mandate without having issued any legislation or guidelines to regulate lobbying activities. At least one legislative project, already presented, will be discussed in Parliament within the current legislative session.

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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 referred to in several branches and sectors of the law at 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 approach and cutting-edge solutions that often challenge some of the most conventional practices. With a team of 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), Cape Verde (VPQ Advogados) and Mozambique (MDR Advogados).

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