The Anti-Bribery and Anti-Corruption Review

Fifth Edition

Editor
Mark F Mendelsohn

Law Business Research

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Mark F Mendelsohn

Law Business Research Ltd

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-910813-36-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALLEN & OVERY LLP

ANAGNOSTOPOULOS

AZB & PARTNERS

BCL SOLICITORS LLP

BONN STEICHEN & PARTNERS

DECHERT

FERRERE

HERBERT SMITH FREEHILLS CIS LLP

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PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

PINHEIRO NETO ADVOGADOS

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STETTER LEGAL

STUDIO LEGALE PISANO

VIEIRA DE ALMEIDA & ASSOCIADOS – SOCIEDADE DE ADVOGADOS, SP RL

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EDITOR'S PREFACE

This fifth edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning every region of the globe. The worldwide scope of this volume reflects the reality that anti-corruption enforcement has become an increasingly global endeavour.

Over the past year, the foreign bribery landscape has continued to grow increasingly complicated for multinational companies, particularly in light of the sweeping fallout from multiple high-profile corruption scandals. In Brazil, Operation Car Wash, the investigation that uncovered a sprawling embezzlement ring at state-owned oil company Petróleo Brasileiro SA (Petrobras), has ensnared politicians at the highest levels of the Brazilian government as well as numerous companies that engaged with Petrobras around the world. In March 2016, Brazilian authorities raided the home of former President Lula de Silva and detained him for questioning. Lula and his wife were subsequently indicted by Brazilian prosecutors on money laundering charges in September 2016. The Brazilian crackdown on corruption shows no signs of abating, and has expanded to include investigations related to Eletrobras, Brazil's state-owned utility.

In Malaysia, the misappropriation of more than US$3.5 billion in funds by senior government officials from state-owned strategic development company 1Malyasia Development Berhad (1MBD) has sparked worldwide investigations and asset tracing and recovery exercises. Authorities in several countries, including the United States, the United Kingdom, Switzerland, Singapore, Hong Kong and Australia have all launched probes into lenders and banks with ties to 1MDB. In July 2016, the US Department of Justice (DOJ) filed civil forfeiture complaints seeking the forfeiture and recovery of more than US$1 billion in assets associated with the laundering of misappropriated funds from 1MBD, the largest forfeiture action ever brought under the DOJ's Kleptocracy Asset Recovery Initiative.

Global efforts to combat corruption were further impacted by the massive leak in April 2016 of more than 11 million documents connected to Panama law firm Mossack Fonseca, dubbed the Panama Papers. Dating back over four decades, the Panama Papers revealed that, among other things, the law firm appears to have helped establish at least 214,000 secret shell companies and offshore accounts in known tax havens to shelter and hide the wealth of clients that included approximately 300,000 corporate entities, 12 current

and former world leaders, and at least 128 other public officials. While international law enforcement agencies have only begun to assess the contents and significance of the leaked documents, it is clear that prosecutors are looking to the Panama Papers as a road map for uncovering foreign bribery, among other offences, and furthering international corruption investigations.

In the United States, enforcement authorities continue to vigorously enforce the Foreign Corrupt Practices Act (FCPA), with the past year's cases showing a significant increase in the number of enforcement actions from 2015. The Securities and Exchange Commission (SEC) alone brought more FCPA enforcement actions within the first six months of 2016 than in any year since 2011. The investigation and enforcement focus has cut across a range of industries, including pharmaceutical and medical device companies, airlines, financial services and the telecommunications sector. While these cases continue to cover many regions, business activity in China has remained a major FCPA enforcement priority. As this edition of *The Anti-Bribery and Anti-Corruption Review* goes to print, 15 corporate enforcement actions have implicated multinationals' China operations, representing over half of all FCPA actions brought in 2016 to date.

Importantly, the past year's FCPA cases have demonstrated that the DOJ and SEC will continue to actively and aggressively pursue large-scale corporate bribery cases. In February 2016, the DOJ and SEC, together with the Public Prosecution Service of the Netherlands, entered into a US$795 million global settlement with the world's sixth-largest telecommunications company, Amsterdam-based VimpelCom Limited, a foreign issuer of publicly traded securities in the United States, and its wholly owned Uzbek subsidiary, Unitel LLC. The settlement, which resolved allegations that VimpelCom and Unitel violated the FCPA and certain Dutch laws by funnelling over US$114 million in bribe payments to a shell company beneficially owned by a government official in Uzbekistan, represents the second-largest global FCPA resolution to date and the sixth-largest in terms of penalty payments made to US regulators. The VimpelCom settlement was the culmination of significant collaboration between US regulators and international law enforcement agencies, with the DOJ proclaiming it 'one of the most significant coordinated international and multi-agency resolutions in the history of the FCPA'. In September 2016, Och-Ziff Capital Management Group agreed to pay the DOJ and SEC US$412 million for FCPA violations stemming from the hedge fund's use of third-party intermediaries, agents and business partners to pay bribes to senior government officials in Africa. The settlement represents the fourth-largest FCPA enforcement action to date.

Though not uncontroversial, self-reporting and cooperation by companies has continued to be a theme in the United States. In April 2016, the DOJ launched a one-year pilot programme to provide greater transparency on how business organisations can obtain full mitigation credit in connection with FCPA prosecutions through voluntary self-disclosures, cooperation with DOJ investigations and remediation of internal controls and compliance programmes. The DOJ memorandum announcing the initiative makes clear that any mitigation credit offered through the Pilot Program is separate from, and in addition to, any mitigation credit already available under the US Sentencing Guidelines. The DOJ further emphasised that voluntary self-reporting is the central aim of the Pilot Program, and is therefore an essential requirement for receiving maximum mitigation credit. Whether companies participating in the programme truly benefit, and whether the promise of greater transparency is realised, remains to be seen.

I wish to thank all of the contributors for their support in producing this volume. I appreciate that they have taken time from their practices to prepare chapters that will assist practitioners and their clients in navigating the corruption minefield that exists when conducting foreign and transnational business.

Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Washington, DC
November 2016

Chapter 18

PORTUGAL

Sofia Ribeiro Branco and Joana Bernardo[1]

I INTRODUCTION

Over the past few years, the fight against white-collar crime has led Portugal to align parts of its legal framework with EU Directives, UN Conventions and Group of States against Corruption (GRECO) recommendations.

Until 2007, only individuals could be criminally liable for corruption and associated crimes and only a few cases of corruption led to accusations and condemnation. Since 2007 a lot has changed, in respect of not only the applicable legal framework, but also the growing number of cases.

By creating new legislation that is more stringent, along with the strengthening of authorities' investigative powers and improved cooperation with the authorities of other countries, Portugal has seen a continued increase in the fight against corruption in both the public and private sectors.

Despite these efforts, the perception levels regarding corruption in Portuguese society have remained relatively static since 2012.[2] GRECO recommendations contained in the report published in 2016 regarding 'corruption prevention in respect of members of parliament, judges and prosecutors'[3] highlight the need to promote transparency, independence and awareness of standards of conduct in relation to these three groups of professionals.

1 Sofia Ribeiro Branco is a partner and Joana Bernardo is a senior associate at Vieira de Almeida & Associados – Sociedade de Advogados, SP RL.

2 On Transparency International's Corruption Perception Index, Portugal scored 63 in 2015 (see www.transparency.org/cpi2015#results-table).

3 www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4Rep%282015%295_Portugal_eng.pdf.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

Although the Portuguese Criminal Code (PCC) of 1886 already provided for the crime of corruption, the distinction between active and passive corruption in the public sector was only introduced to the PCC in 1982, and is currently in force. The 1995 reform substantially changed the legal approach towards such crimes. During the past 20 years, these legal provisions on corruption have been amended several times and a significant number of autonomous laws and regulations have been approved. Combining all the applicable laws related to corruption is sometimes difficult and is made more complicated by the fact that they are often changed.

As of 1 September 2015, the PCC had been amended 40 times, with various amendments having an impact on the crime of corruption and related offences.

As far as the Portuguese legal framework on corruption is concerned, two major types of domestic corruption should be considered: that which occurs in the public sector and corruption in the private sector. Foreign corruption is also considered a crime in Portugal and will be addressed in Section IV, *infra*.

i Corruption in the public sector

Articles 372 to 374 of the PCC contain different criminal offences with respect to corruption related to public officials. In general terms, these Articles may be described as follows:

a Article 372 No. 1 criminalises the conduct of a public official who, while performing his or her duties, or because of those duties, requests or receives (by himself or herself or through a third party with his or her consent or approval) a financial or other advantage (for himself or herself or a third party). This crime is punishable by imprisonment for up to five years or a fine of up to €300,000 for individuals, and up to €6 million for companies.

b Article 372 No. 2 of the PCC provides that it is a crime if any person gives or promises (even if through a third party) an undue financial or other advantage to a public official while he or she is performing his or her duties or because of those duties, or to a third party with the public official's knowledge. This crime is punishable by imprisonment for up to three years or a fine of up to €180,000 for individuals, and up to €3.6 million for companies.

c Article 373 of the PCC contains two criminal offences of passive corruption: (1) Article 373 No. 1 outlines a penalty of up to eight years' imprisonment for individuals and a fine of up to €9.6 million for companies when a public official requests, receives or agrees to receive (by himself or herself or through a third party with his or her consent or approval) a financial or other advantage (for himself or herself or through a third party), to act or omit to act (or as a 'reward' for a previous act or omission) when it is in breach of his or her duties; and (2) Article 373 No. 2 punishes the same conduct with imprisonment of up to five years for individuals and a fine of up to €6 million for companies, when the act or omission is not in breach of the public official's duties but the advantage is not due.

d Article 374 of the PCC provides for the offence of active corruption and, like Article 373, two crimes must be considered: (1) Article 374 No. 1 outlines a penalty of up to five years' imprisonment for individuals or a fine of €6 million for companies, for any person who gives or promises (by himself or herself or through a third party with his or her consent or approval) a financial or other advantage to a public official or to

a third party with the public official's knowledge, to lead the public official to act or omit to act (or as a 'reward' for a previous act or omission) when it is in breach of his or her duties; and (2) Article 374 No. 2 punishes the same conduct with imprisonment for up to three years or a fine of up to €180,000 for individuals, and €3.6 million for companies, when the act or omission does not breach the public official's duties but the advantage is not due.

Criminal offences of corruption related to political office holders and high-ranking public officials are incorporated in a specific law – Law No. 34/87 of 16 July (recently amended by Law No. 30/2015 of 22 April) – that is not part of the PCC. This Law provides for the same forms of corruption established in the PCC.

In addition, Law No. 100/2003 of 15 November is relevant as it contains the legal provisions applicable to criminal offences with respect to military officials.

Article 386 of the PCC provides for a broad concept of public official, including those who perform functions in public utility entities.

For the purposes of criminal law, the definition of public official encompasses civil servants, administrative agents, arbitrators, jurors and experts and whoever has been called to perform or participate in the development of an activity within administrative or jurisdictional public service, even if it is on a provisional or temporary basis or in return for payment or free of charge, or anyone who, under the same circumstances, perform functions at public utility bodies or participates in them. Any person who carries out functions identical to those described above within any international organisation of public law of which Portugal is a member, shall also be considered as a public official when the infraction has been wholly or partially committed in Portuguese territory.

Managers, holders of positions in supervisory bodies and workers in public or nationalised companies, public capital companies or companies with a majority shareholding of public capital and also concessionary companies of public services, shall also be treated as public officials.

For the purposes of Articles 372 to 374 of the PCC the following shall also be considered equivalent to public officials:

a the prosecutors, employees, agents or equivalent of the European Union, regardless of their nationality or residence; and

b the magistrates and officers of international courts, as long as Portugal declares acceptance of the courts' competence.

The following shall also be considered equivalent to public officials, providing the infraction has been wholly or partially committed in Portugal:

a the national officials or employees of other Member States of the EU;

b whoever performs any role within proceedings of extrajudicial resolution of the conflicts regardless of their nationality or residence; and

c the juries and national arbitrators from other states.

ii Corruption in the private sector

Law No. 50/2007 of 31 August (recently amended by Law No. 30/2015 of 22 April) establishes criminal liability for unsporting conduct and Law No. 20/2008 of 21 April (recently amended by Law No. 30/2015 of 22 April 22) establishes offences of corruption in international trade and in the private sector.

Law No. 50/2007 criminalises active corruption when someone gives or promises (by himself or herself or through a third party, with that person's consent or approval) a sports agent or a third party with the sports agent's knowledge an undue financial or other advantage to commit an act or omission meant to modify or manipulate the outcome of a sports competition. The same applies to passive corruption when the sports agent requests, receives or agrees to receive a bribe.

Law No. 20/2008 establishes passive and active corruption in the private sector. Both crimes occur when an act is undertaken that deliberately manipulates competition or causes economic loss to third parties. If the offence has the effect of distorting competition or causes loss to third parties, more serious penalties may be applied.

Both individuals and companies may be prosecuted for the criminal offences contained in Articles 372 to 374 of the PCC, in Law No. 50/2007 and in Law No. 20/2008.

III ENFORCEMENT: DOMESTIC BRIBERY

Domestic bribery laws are pursued by both the competent public prosecutor's office and the courts.

However, the investigation of corruption tends to be centralised in the Central Department of Investigation and Prosecution (DCIAP), an agency that specialises in the prosecution and prevention of bribery and corruption and has been leading relevant investigations on corruption in recent years. The National Anti-Corruption Unit is also important as it is a specific unit of the Portuguese criminal police force created to assist the public prosecutors in the investigation of corruption and related offences. The National Anti-Corruption Unit is entitled, under Law No. 36/94, to conduct preventive actions, prior to any criminal proceedings, in the context of which the police are allowed to collect information related to facts that may reveal that a corruption crime is being prepared or committed.

The DCIAP created an online reporting form called 'Corruption: report here', through which any person may anonymously report corruption and subsequently be informed on the course of the proceedings. Although there is no specific provision in law for this reporting channel, it has become very popular.[4]

Following its Fourth Round Evaluation Reports, in 2015, GRECO set the deadline of 30 June 2017 for the submission of Portugal's Situation Report on measures taken to implement the recommendations contained in the reports, namely:

a ensuring that members of parliament's reporting of private interests is subject to substantive and regular checks by an impartial oversight body;

b ensuring periodic evaluation of first instance court judges and inspections or assessments of second instance court judges to ascertain, in a fair, objective and timely manner, their integrity and compliance with standards of judicial conduct; and

c ensuring that periodic evaluation of prosecutors attached to first instance courts and inspections or assessment of prosecutors attached to second instance courts ascertain, in a fair, objective and timely manner, their integrity and compliance with standards of professional conduct.

4 According to the press, up to 2015, 9,038 reports had been submitted through the online form, although only 121 of them resulted in criminal proceedings.

Other internal legislative measures are also to be undertaken, namely to transpose the obligations arising from Directive 2014/95/EU of the European Parliament and of the Council, which imposes on certain large undertakings the duty to prepare a non-financial statement containing information relating to environmental matters, social and employee-related matters, respect for human rights, and anti-corruption and bribery matters, to enhance the consistency and comparability of non-financial information disclosed throughout the EU.

In Operation Marquês, a high-profile corruption investigation that received extensive media coverage, the former Portuguese Prime Minister was placed in police custody for his alleged involvement in a corruption, money laundering and tax fraud scandal, which is still pending. The 'golden visa' investigation also received a lot of media coverage as it involves a former interior minister accused of several crimes, including influence peddling.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

Bribery of a foreign public official falls under the criminal offence of active corruption damaging international trade, as provided for in Law No. 20/2008.

Pursuant to Article 7 of this Law, the crime of 'active corruption with loss to international commerce' may be committed by anyone who gives or promises (even if through a third party, with that person's consent or approval) to a public official (domestic, foreign or of an international organisation) or to a political office holder (domestic or foreign) or to a third party with the knowledge of one of those persons any undue financial or other advantage to obtain or maintain an agreement, a contract or any other undue advantage in international trade.

Without prejudice to any international judicial cooperation, Article 7 shall apply in cases of incrimination for all acts committed by Portuguese citizens and foreigners found in Portugal, regardless of the place where the acts in question occurred.

The aforementioned criminalisation is applicable to national and foreign public officials as well as to officials of international organisations and to national and foreign holders of political office.

The definition of public official provided in Section II.i, *supra*, and contained in the PCC applies.

A foreign public official is a person who, in the service of a foreign country, as a civil servant, administrative agent or person who has been called to perform or participate in the development of an activity within administrative or jurisdictional public service, even if on a provisional or temporary basis, whether in return for payment or free of charge, or under the same circumstances carries out functions at public utility bodies or participates in them.

Foreign managers, holders of positions in supervisory bodies and workers of public or nationalised companies, public capital companies or companies with a majority shareholding of public capital and also concessionary companies of public services shall also be treated as foreign public officials. The same shall apply to people who carry out a public service function in a private company under the terms of a public contract.

Officials of international organisations are those who serve as civil servants, administrative agents and any person who has been called to perform or participate in the development of an activity in a public law international organisation, even if provisionally or temporarily, in return for payment or for free.

A foreign political office holder can be defined as a person who is at the service of a foreign country performing a jurisdictional, judicial or executive public service at national, regional or local level.

Both national and foreign individuals and companies can be prosecuted under Law No. 20/2008 for having committed a crime of 'active corruption with loss to international commerce'. Individuals may be punished by imprisonment for up to eight years, while companies may be punished with a fine of up to €9.6 million.

Cooperation may be considered a mitigating factor and the penalty may therefore be reduced if a defendant provides concrete assistance in gathering decisive evidence to identify or capture other suspects or when, to some extent, he or she makes a decisive contribution to uncovering the truth. On the other hand, a person may be discharged if, voluntarily and before the offence is committed, he or she rejects the offer or the assumed promise, returns the advantage if already received or, if it is a fungible thing, its equivalent value, withdraws what he or she has given, or requests that the advantage that has been offered be returned.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping

Every company is required to keep accurate corporate books and to submit financial statements on an annual basis.

Notwithstanding the above, only companies limited by shares are required to have an audit committee or a statutory auditor and must be certified by an external or statutory auditor. In fact, this obligation only applies to other types of company in specific cases.

In some instances, the company's accounts must be disclosed to regulatory authorities supervising the specific sector in which the company operates, and who may scrutinise the accounts. For example, financial institutions are subject to the supervision of the Bank of Portugal, insurance companies are subject to the supervision of the Portuguese Insurance Authority and listed companies are overseen by the Securities Market Commission. The lack of accuracy in a company's accounts may lead to criminal or administrative liability. However, the laws on financial record-keeping requirements do not specifically provide for corruption infractions.

In any case, if the receiving of a bribe is evidenced by the company's accounts or financial statements, the above-mentioned bodies should communicate it to the competent criminal authority.

Additionally, internal auditors and the members of the appointed audit committee (if such a committee exists) must report any infraction corresponding to a 'public crime' (i.e., a criminal offence for which the authorities' investigation does not depend on a specific complaint being filed). As corruption is a public crime, auditing bodies and regulatory authorities must communicate any evidence or suspicions of bribery arising from the company's accounts. To effectively implement this kind of communication, whistle-blowers are granted a few guarantees and rights.

No specific criminal sanctions are set forth in Portuguese law for violations of accounting laws linked to the payment of bribes, but forgery may be imputed to those liable for false information contained in the accounts.

ii Money laundering

In Portugal, money laundering constitutes a crime pursuant to Article 368-A of the PCC. This legal provision states that anyone who converts, transfers, aids or facilitates any operation of conversion or transfer of advantages, obtained by him or her or a third party, with the aim of either dissimulating the illegal origin of the advantage, or avoiding the criminal punishment of the principal or accomplice, may be punished by imprisonment for up to 12 years.

Concealing or disguising the nature, origin, location, disposition, movement or ownership of the advantages or rights related to the advantages is also a criminal offence, punishable by imprisonment for up to 12 years for individuals and with a fine of up to €14.4 million for companies.

For the purposes of the crime in question, an advantage is any asset resulting from the commission of certain types of offences, including corruption. Therefore, money laundering is used as a basis for the prosecution of corruption-related conduct.

The applicable penalties are aggravated when the agent commonly performs the illicit conduct that falls under money laundering, but these can be reduced under certain circumstances; for example, if the damage caused by the crime is remedied or if the person in question assists in the gathering of evidence that proves to be essential in identifying or capturing any other person liable for the commission of the offence.

Money laundering may be prosecuted as a crime in the terms described above, irrespective of whether it has been committed in Portugal or abroad. This crime is usually investigated by the DCIAP, with support from Portugal's financial intelligence unit, the Financial Information Unit, which is a division of the Portuguese Judicial Police.

Preventive and repressive measures to fight the laundering of benefits of illicit origin are stated in Law No. 25/2008 of 5 June (most recently amended by Law No. 62/2015 of 24 June and by Law No. 118/2015 of 31 August), which adopts Directive 2005/60/EC of the European Parliament and Council of 26 October 2005 and Directive 2006/70/EC of the Commission of 1 August 2006. Law No. 25/2008 applies to both financial and non-financial entities, with different duties being applicable to each type of entity. The entities subject to this Law are obliged to comply with the general duties of identification, due diligence, accurate document and record-keeping and confidentiality, and control and training of all employees to be aware of the duties set out in the money laundering legislation. These entities must also refuse to conduct illicit operations or carry out illicit transactions, scrutinise any operations that may appear to be illicit and cooperate with the authorities.

After Law No. 25/2008 entered into force, the Bank of Portugal introduced Regulation No. 5/2013, as amended, which sets out best practices to be implemented by financial institutions in relation to the avoidance of money laundering.

Finally, suspicious financial transactions must be disclosed in certain circumstances, which is very pertinent for financial entities as the failure to comply with this obligation could result in a fine of up to €5 million. If twice the economic advantage of the crime amounts to more than €5 million, then this total will constitute the fine. The same applies if 10 per cent of the total turnover is more than €5 million.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

Cross-border investigations have substantially increased, mostly because of the adoption and enforcement of cooperation measures between states, enabling direct cross-border

contact. The 'Car Wash' scandal in Brazil (involving Petrobras and a number of companies in the private sector) continues to be an example of a high-profile case of corruption being investigated outside Portugal where Portuguese authorities have been called to assist the authorities of another country, in this case Brazil, in collecting evidence.

Additionally, the 'Panama Papers' data leak, an international scandal involving more than 200,000 offshore companies, in more than 200 countries and territories, has also thrown up links to Portugal, notably in relation to companies implicated in recent banking and economic scandals in the country.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Portugal is a signatory to a wide range of international organisations and agreements related to corruption, the most relevant being:

a the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed on 26 May 1997 and ratified on 10 March 2000;

b the Council of Europe Civil Law Convention on Corruption, ratified on 20 September 2001;

c the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the EU, adopted by the Member States on 26 May 1997 and ratified on 3 December 2001;

d the Council of Europe Criminal Law Convention on Corruption, ratified by Portugal on 7 May 2002 and the Additional Protocol to the Criminal Law Convention on Corruption, ratified by Portugal on 12 March 2015, which entered into force on 1 April 2015;

e the EU Convention on the Protection of the Financial Interests of the Communities and Protocols, ratified by all Member States and entered into force on 17 October 2002;

f the UN Convention against Transnational Organized Crime, signed in December 2000 and ratified on 10 May 2004; and

g the UN Convention against Corruption, signed on 7 December 2007 and ratified on 12 September 2007.

VIII LEGISLATIVE DEVELOPMENTS

During 2015, several laws related to corruption were amended to bring them into line with GRECO recommendations for Portugal, such as the PCC, Law No. 34/87 (corruption related to political office holders and high-ranking public officials), Law No. 50/2007 (corruption in sports), Law No. 20/2008 (corruption in the private sector and affecting international trade) and Law No. 25/2008 (money laundering).

The recent Law No. 36/2015, approved on 4 May 2015, may have an impact in the transnational prosecution of corruption. This Law came into force on 2 August 2015 and states that corruption (among other offences), being punishable in the issuing state by a custodial sentence or a measure involving deprivation of liberty for a maximum period of at least three years, shall, under the terms of this Law, and without verification of the double criminality of the act, give rise to recognition of the decision on supervision measures.

There has been a lot of discussion in the political discourse regarding the legal concept of 'unjustified enrichment', but a proposal to introduce such a crime into Portuguese legislation was rejected for constitutional reasons.

More recently, discussions have been held over the government's proposal to establish a mechanism between the banks and the tax authorities for the automatic exchange of information subject to banking secrecy to fight tax evasion, money laundering and corruption.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

Criminal investigation in Portugal is constrained by the fundamental rights and principles applicable to defendants in criminal proceedings as established in the Portuguese constitution, as well as by the applicable international instruments. An example of this is the Cybercrime Law (Law No. 109/2009 of 15 September), according to which the interception and recording of transmissions of computer data are only allowed during an investigation on the authority of the reasoned decision of the judge, or at the request of the prosecution service, if there are reasons to believe that this is essential to establish the truth, or that gathering the evidence would otherwise be impossible or very difficult by other means. This may be considered as a hindrance when investigating corruption. However, the investigation of a crime is sometimes considered as prevailing over personal data protection laws.

Additionally, Law No. 5/2002 of 11 January (as amended by Law No. 55/2015 of 23 June) establishes a special regime for the collection of evidence, breach of professional secrecy and confiscation of property relating to several criminal offences, including corruption, which enables the authorities to carry out investigations more effectively. According to this Law, professional secrecy (like banking and tax secrecy) is not upheld if there are sufficient grounds to believe that the information concerned is of importance to an investigation of the facts. It also allows criminal authorities to record image and sound by any means without the consent of the person being investigated.

The aim of approving laws like those mentioned above is to respond to the need to combat corruption more thoroughly and effectively. The extension of the limitation period for corruption to 15 years serves the same purpose.

X COMPLIANCE

Portuguese law does not require companies to implement compliance programmes. However, the existence and enforcement of such programmes can help to reduce companies' criminal liability, or eliminate it entirely.

It is only recently that Portuguese criminal law has effectively provided for companies' or legal entities' liability, when Article 11 of the PCC was amended in 2007.

All corporations may be criminally liable for corruption except for state legal entities acting in the exercise of public authority and public international organisations. Liability of corporations may occur when corruption is committed by persons occupying leadership positions on behalf of the company, and also in the event that corruption is committed by persons working under the authority of those leaders when they have breached their duties of care or control. However, a corporation will not be liable for acts of corruption carried out by its representatives or employees if they have acted against the orders or express instructions of the relevant body within the company.

When considering the legal boundaries of corporations' liability, effective compliance plays an important role in successfully invoking the exemption of criminal liability described above or at least in mitigating responsibility.

As such, more and more Portuguese companies are adopting compliance programmes. In public sector companies, the adoption of anti-corruption and anti-bribery plans is expressly recommended by the Council for the Prevention of Corruption (CPC), created by Law No. 54/2008. The CPC is an independent administrative institution with a nationwide mandate for the prevention of corruption and related infractions, and is headed by the President of the Portuguese Court of Auditors. The CPC recommended the adoption of anti-corruption and anti-bribery plans by all public authorities, and a significant number of public (and also private) authorities have done so.[5]

A well-designed and adequate compliance programme is recommended for every type of company and should involve an initial assessment of the legal framework applicable to the company's activity (as regulated sectors are subject to legal and regulatory constraints, which must be carefully addressed); specific policies to prevent corruption and bribery are also recommended, ensuring that at least high-risk areas are assessed and audited. Companies should also implement a disciplinary system and anti-corruption training to reduce their exposure to corruption and bribery.

If a corruption case emerges, corporations may be held liable for the crime. In such a case, it would be in the corporation's interests to demonstrate that it had done all it could to prevent corruption by implementing the correct measures or that, having acknowledged the facts of the case, it subsequently adopted such measures.

XI OUTLOOK AND CONCLUSIONS

Recent legislation and ongoing investigations show that Portugal is highly committed to fighting corruption. Nevertheless, new legislation governing corruption and related crimes is anticipated.

Cooperation with the authorities of other jurisdictions has also been strengthened and therefore collection of evidence is becoming easier. In particular, the investigation of tax fraud cases in Portugal has benefited from this, as a large amount of evidence has been collected through the enforcement of requests by the Portuguese authorities addressed to the authorities of foreign countries. The same kind of cooperation is also leading to the opening of investigations into corruption and other crimes such as money laundering and tax fraud. For example, after receiving a request from Brazil for cooperation in relation to the Car Wash scandal, the Portuguese Attorney General's Office announced that it would open autonomous investigations in Portugal to uncover all facts with criminal relevance for the case, by making requests for international cooperation where necessary.

5 In 2015, more than 1,000 entities had communicated to the CPC their anti-corruption plans, which had been designed following the CPC's recommendations.

Appendix 1

ABOUT THE AUTHORS

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Sofia Ribeiro Branco joined Vieira de Almeida & Associados in 1999 and was made partner in January 2014. An experienced litigation lawyer, she has developed the firm's criminal, regulatory and misdemeanours litigation practice, including compliance and private enforcement matters. Sofia is head of the fraud and white-collar crime practice and leads a team of lawyers dealing with cases of the utmost complexity. She directs major investigations and advises clients on internal measures to ensure integrity and compliance. Sofia has extensive experience in the growing field of cross-border investigations and represents clients in private enforcement cases resulting from claims arising from investigations conducted by regulatory authorities.

Sofia graduated in 1999 and has a master's degree in law in juridical sciences, as well as a postgraduate specialisation in the misdemeanours and administrative offences regulated by regulatory authorities; she also publishes regularly on criminal law and corporate integrity matters.

Sofia has been admitted to the Portuguese Bar Association and the Timor-Leste Bar Association, and is a member of the European Criminal Bar Association, the International Bar Association and the Union Internationale des Avocats.

Sofia is vice president of the board of the Portuguese Criminal Forum (the only association of criminal lawyers in Portugal, and which is composed of the country's most renowned criminal professionals).

Sofia Ribeiro Branco is the author of 'The representation of minority shareholders on the board of directors', *O Direito* (2004); *Shareholders' Right to Information*, Livraria Almedina (2008), 'The new Arbitration Law' (2013); co-author of 'New Package of Criminal Legislation 2013' (2013); and she was the Portugal contributor to the 2015 edition of *The Anti-Bribery and Anti-Corruption Review*. Sofia is also regularly quoted in domestic and international publications, such as *Observador* and *Iberian Lawyer*, and speaks at conferences on matters related to fraud, white-collar crime and the legal regime governing insurance and reinsurance activity.

JOANA BERNARDO

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Joana Bernardo joined Vieira de Almeida & Associados in 2010 and is now a senior associate in the litigation and arbitration department, where she has been actively involved in several litigation cases, mainly focused on criminal and misdemeanour litigation.

Before joining Vieira de Almeida & Associados, Joana worked as member of the executive board at the Commission for the Efficiency of Enforcement Procedures.

Joana graduated in 2008 and, among other courses, attended the postgraduate course in law enforcement, compliance and criminal law in the banking, finance and economic areas at the University of Lisbon School of Law.

Joana is member of the Portuguese Criminal Forum (the only association of criminal lawyers in Portugal, and which is composed of the country's most renowned criminal professionals) and has been admitted to the Portuguese Bar Association.

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