# THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

Sixth Edition

**Editor**
Mark F Mendelsohn

THE LAWREVIEWS

# THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

SIXTH EDITION

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# PREFACE

This sixth 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, including new chapters covering Argentina, Canada, Jersey and Sweden. The worldwide scope of this volume reflects the reality that anti-corruption enforcement has become an increasingly global endeavour.

Over the past year, the ripple effects from several ongoing high-profile global corruption scandals have continued to dominate the foreign and domestic bribery landscape. Most notably, in Brazil, Operation Car Wash, the wide-ranging investigation that uncovered a colossal bribery and embezzlement ring at state-owned oil company Petróleo Brasileiro SA (Petrobras), has implicated many domestic and multinational firms across a range of industries, and touched a growing number of foreign countries, leading to cross-border cooperation by enforcement agencies and one of the largest foreign bribery settlements in history. In December 2016, Odebrecht SA, the largest construction company in Latin America, and its subsidiary Braskem SA, a Brazilian petrochemical company, entered coordinated settlement agreements to pay approximately US$3.5 billion in fines and penalties to authorities in Brazil, the United States and Switzerland for making improper payments to government officials, including officials at Petrobras, Brazilian politicians and officials, and political parties through Odebrecht's off-book accounts in exchange for improper business advantages, including contracts with Petrobras. Additionally, J&F Investimentos SA, the parent company of the world's largest meatpacker JBS SA, entered a leniency agreement with Brazil's Federal Prosecutor's Office, agreeing to pay US$3.2 billion for its role in corrupting more than a thousand politicians over the course of a decade. Over the past year, Brazilian enforcement authorities have increasingly utilised plea bargains and leniency agreements both to secure cooperating witnesses and encourage companies to pay fines that ultimately reduce the financial and reputational impact from harsh sanctions.

Likewise, there have been further developments in the worldwide investigations into the misappropriation of more than US$3.5 billion in funds by senior government officials from state-owned strategic development company 1Malaysia Development Berhad (1MDB). The Swiss Office of the Attorney General has been pursuing a money laundering investigation into 1MDB and two Swiss private banks with the help of Singapore, Luxembourg, and the US Department of Justice (DOJ). In June 2017, the DOJ filed additional civil forfeiture complaints seeking recovery of assets valued at approximately US$540 million. Combined with the DOJ's June 2016 civil forfeiture complaints to recover more than US$1 billion in assets, this remains the largest civil forfeiture action ever brought under the DOJ's Kleptocracy Asset Recovery Initiative. The DOJ has also turned its focus to a criminal investigation into

1MDB, particularly in relation to funds used to acquire real estate and other assets in the United States.

Judicial and legislative developments over the past year have further clarified the breadth and scope of anti-corruption investigations and enforcement. For instance, in December 2016, the French parliament passed the Sapin II law, a corporate anti-corruption law that, among other things, established the French Anti-Corruption Agency and required companies with 500 or more employees to establish a compliance programme by mid 2017. In May 2017, the UK High Court in *Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd* reduced the scope of litigation privilege to communications created to obtain information when the litigation is in progress or reasonably imminent, is adversarial, and the communication's primary purpose is conducting the litigation. If upheld, this has an impact on how investigative internal investigations in the UK are structured so as to maintain legal privilege. Finally, in June 2017, the US Supreme Court held in a unanimous decision in *Kokesh v. SEC* that claims for disgorgement brought by the Securities and Exchange Commission (SEC) were subject to a five-year statute of limitations, thereby limiting the SEC's ability to seek monetary penalties for misconduct that occurred more than five years before the enforcement action.

Continuing a recent trend, the enforcement actions this year reflect cooperation between authorities all over the globe to investigate and charge companies involved in corruption scandals. For example, the successful investigation into Odebrecht SA and Braskem SA was a result of cooperation between the DOJ, the Brazilian Federal Prosecutor's Office and the Swiss Office of the Attorney General. Likewise, in January 2017, the DOJ, the UK's Serious Fraud Office and the Brazilian Federal Prosecutor's Office reached an US$800 million coordinated settlement agreement with Rolls-Royce Plc, a UK-based multinational engineering company that manufactures, designs and distributes power systems, for its role in a bribery scheme involving payments to foreign officials around the globe in exchange for government contracts. And recently in September 2017, in the only corporate Foreign Corrupt Practices Act (FCPA) enforcement action under the Trump administration to date, Swedish international telecommunications company Telia Company AB and its subsidiary entered coordinated settlement agreements with the DOJ, SEC and the Public Prosecution Service of the Netherlands, agreeing to pay US$965 million in fines and penalties for making bribe payments of over US$331 million to an Uzbek official in exchange for expansion into the Uzbek telecommunications market. This is the second settlement arising from the expansive collaborative investigation into bribe payments made to an Uzbek government official; Amsterdam-based telecommunications company VimpelCom Limited and its subsidiary entered a US$795 million global settlement last year to resolve similar allegations as a result of cooperation between enforcement agencies in, among others, Belgium, Bermuda, the British Virgin Islands, the Cayman Islands, Estonia, France, Ireland, the Netherlands, Norway, Spain, Sweden and Switzerland.

In the United States, the DOJ has continued to emphasise the importance of an effective compliance programme and self-reporting. In February 2017, the DOJ Fraud Section released a guidance document, 'Evaluation of Corporate Compliance Programs', identifying a list of 119 common questions that the Fraud Section may ask in evaluating corporate compliance programmes in the context of a criminal investigation. Relatedly, April 2017 marked the one-year anniversary of the DOJ's Pilot Program, aimed at providing 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 Pilot Program remains in effect under the current administration, but its future remains uncertain as the DOJ continues to assess its utility and efficacy. To date, the DOJ has issued seven declinations to companies that self-reported and disgorged profits under the Pilot Program, with no monitorship requirements.

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 2017

**Chapter 21**

# 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 recommendations of the Group of States against Corruption.

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's fight against corruption has continued in both the public and private sectors. There has been an increase in the number of laws and decree laws aimed at punishing corrupt behaviours more severely as well as the rate at which such laws are enforced to achieve a more effective criminal investigation and justice system.

## 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 far as the Portuguese legal framework on corruption is concerned, domestic corruption occurs in the public sector and in the private sector, which are the two main forms to consider. Foreign corruption is also considered a crime in Portugal and is addressed in Section IV.

1 Sofia Ribeiro Branco is a partner and Joana Bernardo is a senior associate at Vieira de Almeida.

### 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), except when this advantage is qualified as socially appropriate or provided in accordance with normal customs. 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, except when this advantage is qualified as socially appropriate or provided in accordance with normal customs. 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.

According to Resolution No. 53/2016 of the Council of Ministers, which approved a Code of Conduct that applies to members of the government, cabinet members and senior public servants, covered officials and public servants are prohibited from receiving benefits (including gifts and entertainment) that would affect his or her impartiality or integrity in exercising public office. The above-mentioned Code of Conduct further provides that benefits of more than €150 are presumed to affect the recipient's impartiality or integrity in exercising public office. In essence, this means that gifts that exceed €150 in value presumptively violate the Code of Conduct, unless they qualify for one of two exceptions set out in the Code, while gifts below that amount are presumptively permitted if there is no intention from the giver

to affect the recipient's impartiality or integrity. This amount may be used as a criterion to determine, for instance, what advantages and benefits shall be qualified as socially appropriate or provided in accordance with normal customs.

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 (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. 13/2017 of 2 May) establishes criminal liability for unsporting conduct.

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. The recent amendment made by Law No. 13/2017 increases the penalties that apply to these crimes.

Also, and as per the recent amendment, it is a crime when a sports agent, 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, or its promise (for himself or herself or a third party), from someone that might have or have had, or is expected to have, a claim related to his or her functions, except when such advantage is qualified as socially appropriate or provided in accordance with normal customs. It is also a crime if any person gives or promises (even if through a third party) an undue financial or other advantage to a sports agent while he or she is performing his or her duties or because of those duties, or to a third party with the sports agent's knowledge, except when such advantage is qualified as socially appropriate or provided in accordance with normal customs.

Law No. 20/2008 of 21 April (amended by Law No. 30/2015 of 22 April) establishes offences of corruption in international trade and in the private sector. This law 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.[2]

In 2016, the judicial results from the effort made in enforcement against corruption were very positive: 80.7 per cent of the cases brought to trial ended with a condemnation decision (in 2015, only 49.3 per cent of the cases were closed this way).

Probably as a result of this, the authorities are being particularly combative regarding corruption crimes. In fact, in the first half of 2017, 432 new criminal proceedings regarding alleged cases of corruption and bribery crimes were launched in the Lisbon courts alone (compared with 194 cases in the same period in 2016, which represents an increase of 123

2 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.

per cent). Also during the first half of 2017, the Public Prosecutor claimed compensation for the damages caused to Portugal by crimes of corruption under investigation in the amount of €5,338,503.93.

Some corruption cases have been brought to the media's attention this year, such as Galpgate and Huaweigate, involving the alleged payment by private companies of travel and personal expenses of members of the parliament, government and other public officials.

## 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, 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, recently amended by Law No. 83/2017 of 18 August, 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, unless, according to the law applicable in the location, the facts are lawful and the PCC shall not apply. This crime is usually investigated by the DCIAP, with support from Portugal's 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. 83/2017 of 18 August (which revoked Law No. 25/2008 of 5 June), which adopts Directive 2015/849/EU of the European Parliament and Council of 20 May 2015 and Directive 2016/2258/EU of the Council of 6 December 2016. Law No. 83/2017 applies to both financial and non-financial entities (the subjective scope of the Law has been widened), 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 control, identification, due diligence, training of their employees and communication of any suspicious operation to the authorities, and keep such communication under secrecy. These entities are also obliged to refuse to conduct illicit operations or carry out illicit transactions.

Under this new legal framework, the rules of compliance with these obligations are very detailed and strict. For instance, the entities – despite their size or the type of organisation – are obliged to appoint a person to be responsible for compliance with their duties. In addition, whistle-blowing channels, specifically designed for the report of money laundering suspicions, are previewed and their functioning detailed in the Law.

The breach of the duty not to reveal to clients or third parties any information or analysis provided to the authorities may be punished as a criminal offence. Also, the breach of other duties and obligations detailed in the Law may be punished with a fine in the context of misdemeanour proceedings.

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. It is expected that the Bank of Portugal will revise Regulation No. 5/2013 under this new legal framework.

## 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. Operation Car Wash 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 Organisation for Economic Co-operation and Development 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

Several laws related to corruption have been amended in 2017, including the PCC, Law No. 50/2007 (corruption in sports), amended by Law No. 13/2017, which increased the penalties applicable to corruption crimes, and the Commercial Companies Code, amended by Decree Law No. 89/2017 of 28 July, which imposed new obligations to disclose non-financial information.

Also, new laws have been approved that have an impact on the prosecution of corruption and its effects, such as: Law No. 30/2017 of 30 May, which transposes to Portuguese law Directive 2014/42/EU of the European Parliament and Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union; Law No. 83/2017 of 18 August (money laundering), which revoked Law No. 25/2008 and established more stringent and rigorous obligations; and Law No. 89/2017 of 21 August, which created the Central Registry of the ultimate beneficial owner.

## 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. 30/2017 of 30 May) establishes a special regime for the collection of evidence, breach of professional secrecy and confiscation of property relating to several criminal offences, including corruption (including the crimes of corruption in the private sector, established in Law No. 20/2008 of 21 April and in Law No. 50/2007, in the context of sports), 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

In general, 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.[3]

In the context of Law No. 83/2017, and taking into account the compliance with the duty of control set therein, it is expected that the companies will adopt compliance programmes for anti-money laundering matters.

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, having adopted European standards and regulations. The European (and therefore Portuguese) instruments related to fighting corruption have some restrictions to fundamental rights in favour of efficiency of the investigation. These instruments should, therefore, be used carefully and fairly, in a way that ensures that due process rules and principles are observed.

Cooperation with the authorities of other jurisdictions has also been strengthened, which has made it easier to collect evidence. The investigation authorities now have more means of pursuing their activities and the courts are now more prepared to understand the technical features of some corruption schemes.

However, there are very high-profile cases that are still pending and have not led to accusation or to trial.

In addition, the investigation of tax fraud cases in Portugal has benefited from the improved cooperation with other jurisdictions, 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.

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

**Appendix 1**

# ABOUT THE AUTHORS

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*Vieira de Almeida*

Sofia Ribeiro Branco joined VdA 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 a number of articles and publications including: 'The representation of minority shareholders on the board of directors', *O Direito* (2004); *Shareholders' Right to Information*, Livraria Almedina (2008); 'White Collar Crime Report 2014: Global perspective on crime', *Iberian Lawyer*; the Portugal chapter in the 2015 edition of *The Anti-Bribery and Anti-Corruption Review*; *Corporate crimes and related infractions*, Livraria Almedina (2016); and 'Delegation of powers within corporations: a way to mitigate criminal liability for corruption offences', Newsletter of the IBA Legal Practice Division (September 2016). 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 VdA 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, 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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