



**DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

**PORTUGAL**

**REVIEW OF IMPLEMENTATION OF THE CONVENTION ON COMBATING  
BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS  
TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY  
IN INTERNATIONAL BUSINESS TRANSACTIONS**

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## PORTUGAL

### REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

#### A. IMPLEMENTATION OF THE CONVENTION

##### Formal Issues

Portugal signed the Convention on December 17, 1997, and deposited the instrument of ratification with the OECD Secretary-General on 23 November 2000 . On June 4, 2001, it enacted implementing legislation in the form of the *Law no. 13/2001 of 4 June*, which entered into force on June 9, 2001.

##### Convention as a Whole

The Portuguese Criminal Code as well as the Law no. 34/87 of 16 July penalises offences of passive and active bribery of domestic public officials. However, since these offences are defined as offences against the state, and hence relate only to Portuguese public officials, it was necessary to create a new offence of bribery of a foreign public official. In order to meet the requirements of the Convention, Portugal enacted the *Law no. 13/2001 of 4 June*, which establishes the offence of “*active corruption against international business*” by adding article 41-A to the Decree Law no. 28/84 of 20 January. The implementing legislation also addresses necessary amendments as regards money laundering and jurisdiction. The Portuguese authorities state that the existing provisions in the Criminal Code and elsewhere in the law apply to other obligations under the Convention<sup>1</sup>.

In addition, Portugal made an amendment to the Criminal Code and the Law no. 34/87 in the form of Law no. 108/2001<sup>2</sup>, in order to extend the scope of domestic public officials to include certain foreign public officials, for the purpose of the existing domestic bribery offences thereunder. The impact of this law is discussed under 3.1/3.2 “Criminal Penalties for Bribery of a Domestic and Foreign Official the sanctions”.

The preamble of the Decree Law no. 28/84 states that the offences therein constitute “secondary criminal legislation”. However, the Portuguese authorities confirm that the Decree Law has the same legal effect as ordinary national law and is a sufficient legal source for the imposition of criminal sanctions.

Article 8.2 of the Constitution of the Portuguese Republic states that, “rules provided for in international conventions that have been duly ratified or approved, shall apply in national law, following their official publication, so long as they remain internationally binding with respect to the Portuguese State”. Thus, the Convention became part of Portugal’s national legal system by its ratification, upon publication as of 31 March 2000. Moreover, the Portuguese authorities state that the Convention takes precedence over national laws. However, according to the explanation given by the Portuguese authorities, the Convention is not directly applicable where the domestic legislation conflicts or is deficient with respect to a standard of the Convention, but could be an interpretative tool for the court. Additionally, the Portuguese

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1. In addition, the Portuguese authorities state that legislative amendment procedures in respect of money laundering, bank secrecy and confiscation are now underway. According to them, the amendment would include reversing the burden of proof as to the legal origin of assets in respect of confiscation of goods for bribery, money laundering offences, etc.
  2. Law no. 108/2001 entered into force on 1 January 2002.

authorities state that the Commentaries on the Convention as well as the preparatory documents to the implementing legislation can be used for interpretative purposes by the courts.

### **In Portugal, the principle of *stare decisis* does not apply.**

In addition, as mentioned above under “Formal Issues”, the implementing legislation entered into force after the ratification of the Convention. The Portuguese authorities state that the Convention cannot be a legal basis for the investigation and prosecution of a foreign bribery offence or the application of the money laundering legislation in respect of an act of foreign bribery committed before the implementing legislation’s entry into force, regardless if the Convention was published and in force in Portugal. The Portuguese authorities do not believe that this time lag would cause any problem in practice.

Portugal has two “autonomous regions”: the Azores and Madeira. Portugal states that the Convention applies to both the Azores and Madeira, thus these regions are subject to the requirements of the Convention. Portugal further explains that all laws including decree laws that implement the requirements of the Convention (e.g. implementing legislation, Criminal Code, Decree Law no. 28/84, Code of Criminal Procedure, money laundering legislation, law lifting bank secrecy, laws relating to accounting and auditing standards, law on mutual legal assistance and extradition) apply to these regions.

Pursuant to the preamble of the Decree Law no. 28/84, its overall purpose appears to be to prevent and penalise offences against the national economy and public health. The Portuguese authorities state that the preamble carries interpretative weight in respect of the Decree Law. This raises the issue of whether bribery offences that do not also affect the domestic market would be prosecuted. Although the preamble of the Decree Law has not been amended, the Portuguese authorities state that this overall purpose of the Decree Law would “no longer” be a problem for prosecuting foreign bribery cases, since article 41-A clearly states that the offence applies to bribery in the conduct of “international business”.

## **1. ARTICLE 1. THE OFFENCE OF BRIBERY OF A FOREIGN PUBLIC OFFICIAL**

### ***General Description of the Offence***

Article 41-A of the Decree Law no. 28/84, which was added by the implementing legislation, sets out as follows:

#### *Article 41-A “Active corruption against international business”*

- 1. Whoever either directly or through an intermediary with the consent or ratification of the former, gives or promises to give to a national or foreign public or political official or with their knowledge to a third party any undue pecuniary or intangible advantage, in order to obtain or retain business, a contract or other improper advantage in the conduct of international business, shall be punished with a prison sentence of one up to eight years.*
- 2. For the purposes of the provisions laid down in the preceding paragraph, foreign public official means any person exercising a public function for a foreign country, whether that person holds a public office, in particular, an administrative or judicial office, whether appointed or elected, **or exercises** a function for an enterprise, a public organisation or a public services agency, from the national to local level, as well as any official or agent of a public international or supranational organisation.*
- 3. For the purposes of the provisions laid down in paragraph 1, foreign political officials are those qualified as such by the law of the State for which they exercise such functions.*

Article 41-A establishes offences for active bribery of both domestic and foreign public officials related to international transactions. However, the review and analysis of the elements of the offence is restricted in

content to those covered by the Convention, and thus, the elements of domestic bribery under article 41-A are not discussed in this review.

The title “*Active corruption against international business*” appears above the offence in article 41-A. Since this title appears to indicate that the offence must be to the detriment of international business, there arises a question of whether the case would be prosecuted where there are no victims (i.e. competitor). However, the Portuguese authorities state that this title does not add any requirements to the offence and the absence of a victim would not constitute an obstacle to prosecution.

Article 1 of the Decree Law no. 28/84 states that, offences under the decree law, including the offence of bribery of a foreign public official shall be subject to the Criminal Code, the Code of Criminal Procedure and complementary legislation. Thus, general provisions in the Criminal Code and the Code of Criminal Procedure would apply in respect of the foreign bribery offence.

The Portuguese authorities state that only the general defences in the Criminal Code apply to the foreign bribery offence. As general defences, “mistake of fact”, “mistake of law” or “necessity” may appear to be relevant to the foreign bribery offence. The Portuguese authorities confirm that these general defences could not be successfully invoked even where the defendant argues that his/her private lawyer wrongly advised him/her that the act (foreign bribery) would not constitute an offence, or that bribe was the only way possible to keep him/her in business.

## **1.1 The Elements of the Offence**

### **1.1.1 any person**

Article 41-A of the Decree Law no. 28/84 applies to “whoever” gives or promises a bribe to a foreign public official. The Portuguese authorities confirm that no category of natural person is excluded from this scope.

### **1.1.2 intentionally**

Article 41-A does not expressly provide for the *mens rea* elements of the offence. The Portuguese authorities state that the foreign bribery offence under article 41-A is an “intentional offence” and thus requires the intent for a “direct”, “necessary” or an “accidental” result of the offence, and does not cover the notion of negligence. They would appear to state that the result of the foreign bribery offence would be the offer, promise or gift.

### **1.1.3 to offer, promise, or give**

Article 41-A only refers to a person who “gives” or “promises to give” a bribe and does not expressly cover a person who “offers” a bribe. The Portuguese authorities state that the Portuguese legal term “*der*”, which is translated as “gives”, includes the notion of “offering”. They add that this is supported by jurisprudence in respect of the domestic bribery offence under the Criminal Code.

The Portuguese authorities confirm that article 41-A applies where the briber promises or gives a bribe in response to the solicitation by the foreign public official. However, such a situation could be a mitigating circumstance in determining the penalty.

#### **1.1.4 any undue pecuniary or other advantage**

Article 41-A applies to giving etc. of any “pecuniary or intangible advantage”. The Portuguese authorities confirm that it covers all types of advantages, pecuniary and non-pecuniary, tangible and intangible, real and personal.

In addition, the Portuguese authorities state that the advantage must be “undue”. The Portuguese authorities explain that “undue” advantage covers all advantages that cannot be justified by other purposes. They state that an anniversary gift would constitute a bribe as long as it is proved “undue”.

The Portuguese authorities confirm that it is not possible to take into account any considerations such as the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage, in accordance with Commentary 7. However, they state that regarding the “value” of the advantage, it would not constitute a bribe where the value of the bribe is so minor that it would not affect the public official’s act/omission in any way.

Furthermore, the Portuguese authorities state that where the advantage is undue, a bribe would be committed even where the advantage is permitted or required by the written law of the public official’s country.

#### **1.1.5 whether directly or through intermediaries**

Article 41-A applies where a person gives, etc. a bribe to a foreign public official, “directly or through an intermediary with the consent or ratification of the former”. The term “consent” and “ratification” may appear to imply that the intermediary is aware of the bribery act. However, the Portuguese authorities state that bribing acts through intermediaries are covered by the offence irrespective of whether the intermediary is aware of the briber’s intent.

Also, according to the Portuguese authorities, the condition of the briber’s consent or ratification only requires that the briber be aware that the intermediary is bribing a foreign public official on the briber’s behalf.

#### **1.1.6 to a foreign public official**

Article 41-A applies to bribes given, etc. to a (1) “foreign public official” and (2) “foreign political official”, as well as to a domestic public official and domestic “political” official.

#### ***“Foreign Public Official”***

Pursuant to paragraph 2 of article 41-A, the term “foreign public official” is defined as follows:

- any person holding a public office, in particular, those holding an administrative or judicial office for a foreign country, whether appointed or elected, from the national to local level;
- any person exercising a public function for an enterprise, a public organisation or a public services agency, for a foreign country, from the national to local level;
- any official or agent of a public international or supranational organisation.

The term “foreign public official” does not expressly cover a person holding a legislative office for a foreign country. However, the Portuguese authorities state that a foreign legislator would fall within the

scope of a “person holding a public office for a foreign country”, and thus be considered as a “foreign public official” as long as he/she holds an office for which he/she has been appointed or elected. They further explain that the express reference to a person holding an “administrative or judicial office” in paragraph 2 is intended to indicate examples of persons holding a “public mandate” and does not exclude other categories of persons holding a public office for a foreign country including foreign legislators.

Furthermore, the term “public office”, as well as other terms such as “foreign country”, “public function”, “public organisation”, “public services agency” and “public international or supranational organisation” are not defined in the Portuguese implementing legislation. However, the Portuguese authorities are of the opinion that these terms are clear enough in their meaning and do not need further definition. They also state that all categories of foreign public official enumerated in Article 1.4a of the Convention and Commentaries 12-18 would be covered under the term “foreign public official” as the Portuguese courts would refer to Article 1.4.a of the Convention and Commentaries 12-18 as the most important legal authorities for interpreting these terms .

Furthermore, Portugal states that the term “enterprise” does not include private enterprises but covers public enterprises directly and indirectly controlled by a foreign government(s), in conformity with Commentary 14.

### ***“Foreign Political Official”***

Under Portuguese law, Portuguese legislators are considered “political officials”. However, the Portuguese authorities state that Portugal intends to cover a broader scope of foreign public officials by the term “foreign political official” (article 41-A, paragraph 3). They state that, for instance, a person holding a high position in a foreign political party could be covered thereby according to the law of the country. However, they further state that the court could interpret the term “foreign political official” to include a foreign legislator if a legislator is considered a political official in that country.

Paragraph 3 states that “foreign political officials are those qualified as such by the law of the State for which they exercise such functions”. Thus, the definition of “foreign political official” is non-autonomous, in that it expressly refers to the definition in the law of the country of the foreign public official. However, the Portuguese authorities are of the opinion that the non-autonomous nature of the definition in paragraph 3 would not cause a problem since all the categories of foreign public officials enumerated in the Convention and Commentaries should be covered by paragraph 2 (i.e. “foreign public official”). Nevertheless, there remains concern that the provisions might be interpreted by the Portuguese courts as covering a foreign legislator only if defined as a “political official” by the law of the foreign public official. The Portuguese authorities do not share this concern.

### **1.1.7 for that official or for a third party**

Article 41-A applies to giving, etc. of a bribe to a foreign public official “or with their knowledge to a third party”. The Portuguese authorities state that the condition “with their knowledge” requires that where a third party beneficiary is involved, the foreign public official have “knowledge” that the benefit goes to the third party. However, they further state that this requirement is only necessary for punishing the public official concerned, and therefore, in order for the briber to be punished, it is not required that a foreign public official is aware of the fact that another person is the beneficiary of the bribe.

The Portuguese authorities confirm that article 41-A covers the case where the advantage goes directly to a third party. They also confirm that a “third party” includes natural and legal persons irrespective of the personal relationship between the party and the foreign public official.

### **1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties**

Article 41-A does not expressly require the presence of an intention to obtain an act or omission of the official in return for the promise, etc.

Portugal states that the offence covers the case where it is either the foreign public official's act or omission that the briber intends to obtain.

Moreover, the Portuguese authorities state that the foreign public official's act/omission which the briber intends to induce could be an act/omission irrespective of whether it is within his/her authorised competence. Thus, it would appear to cover the case where an executive of a company gives a bribe to a senior official of a government, in order that this official use his/her office –though acting outside his/her competence-- to make another official award a contract to that company, in conformity with Commentary 19.

### **1.1.9 in order to obtain or retain business or other improper advantage**

Article 41-A requires that the bribe be given, etc. to a foreign public official “in order to obtain or retain business, a contract or other improper advantage”. Portugal confirms that article 41-A applies regardless if the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business, in accordance with Commentary 4.

The Portuguese authorities confirm that there are no exceptions for facilitation payments.

### **1.1.10 in the conduct of international business**

Article 41-A applies to bribes given, etc. in order to obtain or retain an improper advantage, etc. “in the conduct of international business”. The Portuguese authorities state that this includes the bribe given, etc. to obtain/retain a license/permit that would enable the briber to engage in international business, and an unfair tax break or a favourable foreign exchange rate.

## **1.2 Complicity**

Article 1.2 of the Convention requires Parties to establish as a criminal offence the “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”.

Complicity in the bribery of a foreign public official is established as a criminal offence under the general provisions of the Criminal Code.

Article 26 states that “whoever executes a criminal act, directly or through an intermediary, or takes part directly in its execution, by agreement or in conjunction with one or more other persons, and anyone who intentionally induces another person to commit a crime, provided that the crime has been executed or begun, shall be deemed a principal to the crime.” Article 27.1 states that “any person who, with criminal intent, in any manner aids or abets another person in the commission of a crime is punishable as an accomplice”. The Portuguese authorities state that the notions of “incitement” and “authorisation” are covered by article 26 (i.e. “induces another person to commit a crime”).

Pursuant to article 27.2, an accomplice is punishable by the same penalty as in respect of the full offence, however, “duly attenuated”.

### 1.3 Attempt and Conspiracy

Article 1.2 of the Convention requires Parties to criminalise the attempt and conspiracy to bribe a foreign public official to the same extent as these acts are criminalised with respect to their own domestic officials.

#### *Attempt*

The Portuguese authorities state that an attempt to bribe a domestic or foreign public official is punishable under article 22 of the Criminal Code<sup>3</sup>. Pursuant to paragraph 1 of article 22, an attempt is deemed to occur where a person takes “actions to execute a crime”, but where the crime is not completed. Paragraph 2 states that:

*Actions to execute a crime include:*

- a) *Those that fulfil the conditions of a constituent element of a category of crime;*
- b) *Those intended to produce the typical result; or*
- c) *Those that, from common experience and in the absence of unforeseen circumstances, are such as to suggest that they will be followed by acts of the kind mentioned in the previous subparagraphs.*

The Portuguese authorities state that “typical result” (paragraph 2.b) covers the act of offering, promising or giving the bribe in respect of the bribery offences. They state that acts which fulfil the condition under paragraph 2.c are all “executing” acts that can be committed in advance of constituent elements (paragraph 2.a) or “typical result” (paragraph 2.b), or that have direct links therewith.

The Portuguese authorities state that cases where (i) the foreign public official refuses an offer or gift, or (ii) where he/she does not become aware of the gift/offer, are covered as full offences.

An attempt is punishable by the same penalty as the full offence. However, where there are special mitigating circumstances (e.g. committed under threat), the maximum and minimum terms of imprisonment are reduced, by one third, and to 1 month, respectively.

#### **Conspiracy**

Conspiracy is not punishable under Portuguese law.

## **2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS**

Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official”.

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3. In addition, article 4 of the Decree Law no. 28/84 states that an attempt to commit an offence under the decree law is always punishable.

## 2.1 Criminal responsibility

Article 3 of the Decree Law no. 28/84, which establishes criminal responsibility of legal persons for offences under the decree law including the bribery of a foreign public official, states as follows:

### *Article 3 Criminal liability of legal persons and similar*

- 1. Legal persons, companies and de facto associations are liable for the offences laid down in this Decree-Law when they are committed by their governing bodies or representatives on their behalf and in the collective interest.*
- 2. They are not liable if the offender has acted against express orders or instructions from authorised persons.*
- 3. The liability of the entities mentioned in no.1 does not exclude the individual liability of the offenders and no.3 of article 2 is applicable, with the necessary adaptations.*

### 2.1.1 Legal Entities

Pursuant to article 3.1, entities subject to criminal liability are “legal persons, companies and de facto associations”. The Portuguese authorities state that this covers all legal persons including corporations and unincorporated associations, and regardless if the entity has a legal personality. They also confirm that all state-owned and state-controlled legal persons are covered, as the law does not expressly exclude them. However, the Portuguese authorities state that there are no cases in respect of the offences under the same decree law that apply to state-owned or state-controlled legal persons<sup>4</sup>.

### 2.1.2 Standard of Liability

Pursuant to article 3.1, in order for a legal person to be liable, the offence must be committed (i) by its “governing body” or its representative, and (ii) on its behalf and in the “collective interest”. The Portuguese authorities state that, pursuant to the interpretation in the jurisprudence, article 3.1 covers a broader scope of persons than defined under commercial law, and includes any employee regardless of his/her position in the entity.

Identification of the natural person who committed the offence (i.e. “governing body” or “representative”) is required in order to trigger the liability of legal persons. However, the Portuguese authorities confirm that a conviction of the natural person is not a prerequisite for the liability of the legal person.

The Portuguese authorities state that the condition of “on their behalf and in the collective interest” would be fulfilled even if the offence were committed only in part for the benefit of the legal person, or only for the benefit of the legal person’s foreign subsidiary or foreign division.

However, if the offender acted “against expressed orders or instructions from authorised persons”, the legal person is exempted from liability (article 3.2). The Portuguese authorities state that “authorised persons” are persons from the administrative body of the entity or persons having decision-making or control powers therein.

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4. Portugal states that there are some cases applying criminal liability of legal persons for offences under the same decree law, which resulted in fines.

They state that this defence would not be successfully invoked where: (i) the statute or regulation of the company expressly prohibits an act of bribery or illegal acts; (ii) an “authorised person” expressly prohibited the act of bribery but failed to supervise the offender for preventing such an act; or (iii) the authorised person forbids bribery in general terms, but allowed the specific bribery transaction to occur.

Pursuant to article 3.3, liability of legal persons does not exclude the liability of natural persons who committed the offence.

In addition, the Portuguese authorities confirm that the principle of mandatory prosecution applies to legal persons.

### **3. ARTICLE 3. SANCTIONS**

The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are “subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions”. The Convention also mandates that for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

#### **3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Official**

Portuguese law already contained several offences of bribing domestic public officials under the Criminal Code and the Law no. 34/87 of 16 July before article 41-A was added to the Decree Law no. 28/84 for the purpose of implementing the Convention. As indicated earlier, this provision establishes new offences of bribing domestic and foreign public officials in the conduct of international transactions. Portugal confirms that, with respect of domestic bribery, all three laws (i.e. article 374 of the Criminal Code, article 18 of the Law no. 34/87 and article 41-A of the amended Decree Law no. 28/84) are applicable in the case of overlapping offences.

#### ***Penalties for Domestic Bribery under the Criminal Code and the Law no. 34/87 of 16 July***

Pursuant to article 374 of the Criminal Code and article 18 of the Law no. 34/87 of 16 July amended by the Law no. 108/2001, a natural person is liable for active domestic bribery as follows<sup>5</sup>:

1. 6 months-5 years of imprisonment for bribing a public official (including a “political official”) for obtaining an act/ omission which is contrary to his/her duties;
2. up to 6 months of imprisonment or a fine up to 60 days for bribing a public official (including a “political official”) for obtaining an act/omission which is not contrary to his/her duties.

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5. Penalties are as follows in consequence of the reverse application of the passive bribery offences (articles 372 and 373 of the Criminal Code and articles 16 and 17 of the Law no.34/87) to active bribery.

The minimum of imprisonment term/number of day-fines is provided in the general provisions of the Criminal Code as 1 month (article 41) and 10 days (article 47), respectively.

3. 2-8 years of imprisonment for bribing a “political official” for obtaining an act/omission which is contrary to his/her duties and where the briber is a “political official”;

Fines in addition to imprisonment sentence are not available.

Fines under the Criminal Code and the Law no. 34/87 are calculated on the basis of a day-fine system. Under the general provision of the Criminal Code, which applies to the domestic bribery offences under the Criminal Code and the Law no. 34/87, the range of the daily amount of fine is PTE 200-100,000<sup>6</sup>. Consequently, the ranges of day-fines are, PTE 2,000-6,000,000 (approximately, 10-29,940 Euro) for the offence under article 374 of the Criminal Code and article 18 of the Law no. 34/87, where the act/omission of the public official is not contrary to his/her duties. The number of day-fines is determined on grounds such as the degree of culpability of the offender, circumstances of the offence, etc., and the daily amount of the fine is determined according to the financial situation of the offender (articles 47 and 71 of the Criminal Code).

Legal persons are not criminally liable for the domestic bribery offences under the Criminal Code and the Law no. 34/87. Also, there are no criminal accessory penalties applicable thereto.

#### ***Penalties for Domestic and Foreign Bribery under Article 41-A of the Decree Law no. 28/84***

The penalties are identical for domestic and foreign bribery under article 41-A. Pursuant thereto, a natural person is liable for 1-8 years of imprisonment<sup>7</sup>. In addition, article 5 states that sentences of imprisonment may not be replaced by fines where the offence is committed under certain circumstances provided for in article 6. Thus, it appears that, for natural persons, in general, imprisonment sentences are imposed for the domestic and foreign bribery offences under article 41-A, but the courts have the discretion to impose a fine in lieu unless any of the circumstances enumerated in article 6 applies. Subject to the general provisions in the Criminal Code, the ranges of the daily amount and number of days of such fines (day-fines) are PTE 200-100,000 and 10-360 days, respectively. Thus, the range of the fine is PTE 2,000-36,000,000 (approximately, 10-161,640 Euro). Fines in addition to imprisonment sentence are not available.

Article 6 of the decree law provides for sentencing guidelines specific to offences under the decree law, including domestic and foreign bribery under article 41-A. Pursuant thereto, circumstances including the following shall be taken into “special consideration” in determining the penalty:

- the offence enabled the offender to obtain “excessive profits” or was committed with an intent to obtain them (paragraph g) ;
- the good or service involved in the offence represented the dominant part of the company’s gross turnover in the previous year (paragraph h);

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6. As of September 2001, 1,000 Portuguese Escudos (PTE) were valued at 4.42 U.S. dollars/4.49 Euro.

7. The imprisonment sanctions for financial offences such as robbery, embezzlement and extortion are comparable to the sanctions for the foreign bribery offence. In addition, Portugal states that sanctions under article 41-A of the Decree Law are higher than those of domestic bribery offences since the offence under the Decree Law harms not only the impartiality of the decision of the State, but also various interests such as economy .

- the offender favoured foreign interests to the detriment of the national economy (paragraph i).

The court's discretion to impose a fine in lieu in respect of the domestic and foreign bribery offences under article 41-A would appear to be broader than that in respect of the domestic bribery offence under the Criminal Code (i.e. a fine in lieu is available only where the purpose of the bribe is to obtain the public official's act/omission that does not constitute a breach of his/her duties).

In addition, since "special consideration" is given where the national economy is affected, this raises the question of whether the penalties for foreign bribery cases that only affect foreign markets or that are committed by Portuguese companies harming foreign competitors might not result in sufficiently effective, proportionate and dissuasive penalties. The Portuguese authorities state that the circumstance under paragraph i does not apply to article 41-A, although the law does not expressly exclude its application to the foreign bribery offence. They further state that since non-existence of circumstances under article 6 does not reduce the range of penalties (other than the exclusion of possibility of a fine in lieu), the penalties for foreign bribery cases will be sufficiently effective, proportionate and dissuasive.

Pursuant to article 7.1 of the decree law, penalties (i.e. principal penalty) for legal persons for the domestic and foreign bribery offences under article 41-A are: (1) "reprimand", (2) fine, and (3) dissolution.

Fines for legal persons are calculated on the basis of a day-fine system. Pursuant to article 7.4, the court shall fix the daily amount of fine between PTE 1,000-1,000,000 . According to the Portuguese authorities, the range of the number of day fines is identical to that of the applicable imprisonment term for the offence, namely, 1-8 years (i.e. 365-2,920 days) for the domestic and foreign bribery offences under article 41-A. Consequently, the range of the fine is PTE 365,000-2,920,000,000 (approximately, 1639-13,110,800 Euro).

The daily amount of day fines is determined on the basis of the economic and financial situation of the legal person and the number of day fines is determined by factors such as the degree of culpability of the offender and circumstances of the offence. Additionally, the Portuguese authorities state that the court would sanction a legal person with a "reprimand" in accordance with the guidelines under general provisions in the Criminal Code, if such a penalty is sufficient for the purpose of preventing the perpetrator's further commission of the offence.

Pursuant to article 7.6, dissolution shall be imposed on legal persons only if: (i) the founders of the entity had an "exclusive or predominant intention" to use the entity to commit the offence; or (ii) the repeated commission of the offence shows that the member or the management uses the entity for the purpose of committing the offence.

Furthermore, with respect to natural and legal persons, several criminal accessory penalties under article 8 may be imposed, including confiscation, temporary prohibition from exercising certain activities/professions<sup>8</sup>, temporary disqualification from bidding in public tenders, disqualification for subsidies from public bodies, temporary/permanent closure of the establishment and publication of the conviction<sup>9</sup>.

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8. The preamble of the decree law states that accessory penalties including the prohibition from exercising certain professions, etc. are "never laid down as a necessary effect of the main penalty", and thus, reconcile with article 30.4 of the Constitution which requires that no sentence may involve the loss of any civil, occupational or political rights.
  9. Where the sanction of publication of the conviction is imposed, the convicted natural/legal person must pay the cost of the publication.

Additionally, pursuant to articles 2.3 and 3.3 of the decree law, legal persons are jointly and severally liable, under civil law, for the payments of fines, indemnities and other penalties imposed on natural persons (i.e. perpetrators) for offences committed on their behalf, and vice versa. Portugal confirms that this rule applies to all kinds of payments including criminal fines, confiscation and civil compensation. Moreover, the Portuguese authorities confirm that, under corporate tax law, fines paid by legal persons for offences committed by natural persons cannot be tax deductible.

Aggravating/mitigating circumstances which result in increases/reduction of penalties are provided in the general provisions of the Criminal Code. Pursuant thereto, the minimum term of imprisonment increases by one third in the case of recidivism, and the maximum and minimum terms of imprisonment are reduced, by one third, and to 1 month, respectively, if there are special mitigating circumstances (e.g. offence was committed under the influence of serious threat).

### ***Discrepancy of Penalties between the Amendments under the Law no. 108/2001 and the Decree Law no. 28/84***

Law no. 108/2001 extends the scope of domestic “public official” and “political official” (i.e. a person holding a legislative function) to include certain foreign public officials for the purpose of domestic bribery offences under the Criminal Code (article 374) and Law no. 34/87 (article 18). Pursuant thereto, acts of bribing the following foreign public officials constitute offences:

- 1) EU public officials (persons exercising legislative, administrative or judicial functions including magistrates), EU agents and the assimilate;
- 2) Domestic public officials (persons exercising legislative, administrative or judicial functions) of other EU states if the offence was committed in whole or in part in Portugal;
- 3) Persons exercising administrative or judicial functions in any international organisation of which Portugal is a member, if the offence was committed in whole or in part in Portugal.

Also, it appears that where the case satisfies the conditions for the foreign bribery offence and where the foreign public official concerned is one enumerated above, the elements of the domestic offences under the Criminal Code or the Law no. 34/87 are fulfilled.

Thus, it appears that a person who bribes one of these foreign public officials could be punished either by the domestic bribery offence under the Criminal Code/Law no. 34/87 (as amended by the Law no. 108/2001) or the foreign bribery offence under the Decree Law no. 28/84. As mentioned above, since penalties for the foreign bribery offence are more onerous than the domestic offences, there arises a question, in the case of overlapping offences, whether the court might apply the domestic offence in favour of the defendant, thus resulting in discriminatory punishments. However, the Portuguese authorities confirm that, in the case of overlapping offences, article 41-A of the Decree Law no. 28/84 would override the others as long as the case is proved to be committed “in the conduct of international business” in accordance with the general interpretation rule that the special provision derogates from the general provisions. The Portuguese authorities explain that article 41-A is considered a special provision of the aforementioned bribery offences under the Criminal Code/Law no. 34/87, in that article 41-A protects not only the impartiality of the decision of the State (as is the case for the offences under the Criminal Code/Law no. 34/87), but also various interests such as economy.

### **3.3 Penalties and Mutual Legal Assistance**

Under Portuguese law, the provision of mutual legal assistance (MLA) is not conditional upon the length of the term of imprisonment provided for in the criminal law of either Portugal or the requesting state.

However, dual criminality is required in order for Portugal to provide MLA involving coercive measures (article 147 of the Law no. 144/99 of 31 August).

### 3.4 Penalties and Extradition

Under the Law no. 144/99, the offence for which extradition is requested must constitute an offence for which the maximum term of imprisonment is at least 1 year under the law of both Portugal and the requesting state (article 31.2). In addition, if the request is for an execution of a sentence, the sentence to be served shall be imprisonment of no less than 4 months (article 31.4). Furthermore, it is possible to lower the requirement of a particular imprisonment term by treaty or convention (article 31.6).

### 3.6 Seizure and Confiscation of the Bribe and its Proceeds

Article 3.3 of the Convention requires each Party to take necessary measures to provide that “the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable”.

#### *Confiscation*

With respect to confiscation upon conviction<sup>10</sup>, the Portuguese authorities state that articles 109, 110 and 111 of the Criminal Code and article 9 of the Decree Law no. 28/84 are applicable to the bribery of a foreign public official. Article 9 of the decree law complements the provisions under the Criminal Code, as article 9.1 states that “the confiscation of goods, declared by virtue of the provisions of this law and of the Criminal Code, includes any illicit profits obtained by the perpetrator of the crime”.

Article 109 provides for “*confiscation of instruments and proceeds*”. Pursuant thereto, “objects” that were used or intended to be used in the commission of an offence, or that represent the proceeds of an offence shall be confiscated, if “by their nature **or** the circumstances of the case, they constitute a threat to personal safety, morals or public order, or pose a serious risk of being used to commit further offences”. The Portuguese authorities state that this provision could apply to the confiscation of bribes and their proceeds, as they would constitute a threat to “morals or public order”.

Article 111 provides for the “*confiscation of advantages*”. Pursuant thereto, the following advantages shall be confiscated:

- any “compensation” given or promised to the offender for himself/herself or another (paragraph 1);
- any “things, rights or advantages” of any nature directly obtained by the offender through an offence for himself/herself or another (paragraph 2);
- any “things or rights” obtained through a transaction or an exchange with the “things or rights” obtained directly through an offence (paragraph 3). This would appear to enable confiscation of assets that the offender obtained by selling, converting, etc. the proceeds of an offence. The Portuguese authorities state that the competent authority can trace “things”, etc. as the result of any subsequent transactions as long as the link to the proceeds could be

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10. Confiscation upon conviction is ordered in the course of the criminal proceedings against the alleged offender (i.e. criminal trial).

proved. Thus, even where certain proceeds cannot be confiscated due to their possession by a bona fide third party, it would appear that the assets of their corresponding value could be confiscated under this provision by tracing the subsequent transactions, as long as the requirement under article 110 is satisfied. (see the discussion below).

Article 9 of the Decree Law no. 28/84 states that any “illicit profits” obtained by the offender as well as “goods” obtained with the proceeds of the offence shall be included as those that shall be confiscated. The Portuguese authorities explain that “illicit profits” include all illicit profits resulting from an illicit act. They further state that in respect of foreign bribery, they include bribes and profits resulting from the obtained or retained business, contract, etc. in return for the bribe.

In addition, they state that the proceeds which were obtained directly by a third party beneficiary (e.g. proceeds obtained directly by the company which arise from the contract obtained in exchange of a bribe given by the offender) would be confiscated.

Furthermore, it appears that “objects” or “things, rights or advantages”, together with “illicit profits” would cover all types of pecuniary assets including those in an intangible form.

Article 110 of the Criminal Code provides for circumstances under which confiscation shall not proceed. The Portuguese authorities confirm that this rule applies to confiscation under article 109 and 111 of the Criminal Code and article 9 of the decree law. Pursuant to article 110.1, confiscation shall not proceed where one of the following situations exists:

- if at the time of the commission of the offence, the “object” did not belong to an offender or a third party who was involved in the offence or was aware thereof;
- if at the time of the offence, the “object” belonged to an offender or a third party who was involved in the offence or was aware thereof, but at the time of the confiscation order, it belongs to a bona fide third party.

The Portuguese authorities state that under Portuguese jurisprudence, the condition of “at the time of the commission of the offence” is interpreted broadly enough in respect of the bribery offences to cover the time when the briber actually obtains the proceeds which arise from the public official’s act/omission that occurs after the completion of the offence itself (i.e. the offer/promise/gift).

Pursuant to article 111.4 (“*confiscation of advantages*”), if the “compensation, rights, things or advantages” cannot be confiscated “in kind”, confiscation will be replaced by payment to the state of their respective value. The Portuguese authorities confirm that this applies where confiscation is unavailable due to the fact that the bribes and/or the proceeds, belong/belonged to a bona fide third party, were destroyed or cannot be found.

In addition, Portugal confirms that confiscation under these provisions is available in respect of legal persons either as those suspected of committing an offence or as third party beneficiaries unless the defence under article 3.2 of the Decree Law no.28/84 (i.e. the offence was committed against express orders or instructions from authorised persons) is successfully invoked.

### ***Provisional Seizure***

According to the Portuguese authorities, with respect to the seizure of bribes and the proceeds of bribery, articles 46 and 49 of the Decree Law no. 28/84 and article 178 of the Code of Criminal Procedure are applicable. Portugal further states that since articles 46 and 49 of the Decree Law are special norms for the offences thereunder, these articles prevail where they contradict article 178 of the Code of Criminal Procedure.

Pursuant to article 178 of the Code of Criminal Procedure: (i) “objects” used or intended to be used in the commission of a crime or representing the proceeds, profit or prior compensation; (ii) all “objects” left by the offender at the scene of the crime; and (iii) any other “object” that might serve as a proof, shall be seized. Seizures of “goods” or “objects” are authorised, ordered or validated<sup>11</sup> by judicial authorities.

It would appear that under the Code of Criminal Procedure, both bribes and the proceeds of bribery of a foreign public official (i.e. active bribery) would be seized. It would also appear that provisional seizure for the purpose of ensuring future confiscation or a fine is not addressed therein. However, article 49 of the Decree Law no. 28/84 covers provisional seizures for this purpose. Pursuant thereto, where there is a “justified fear” that the offender would become insolvent or that the “goods” would be concealed, and if the fine is likely to be no less than PTE 300,000, the public prosecutor shall, during the “arraignment” or a similar procedure, request the preventive seizure of “goods” belonging to the offender in order to ensure his/her payment of any monetary obligation. Preventive seizure may also be requested during the preliminary hearing if in addition to the conditions for the preventive seizure during the arraignment, etc., there exist certain “unusual circumstances”<sup>12</sup>.

Moreover, pursuant to article 46, during the criminal proceedings, “goods” may be seized if they are necessary for the investigation or preliminary hearing, or for discontinuing illegal activities, or if it appears that they would be subject to confiscation.

With respect to these provisions, Portugal explains that “goods” cover all movable and immovable goods while “objects” only cover movable goods. Thus, “objects” would not appear to cover intangible assets. However, since seizure of “goods” is available under both articles 46 and 49 of the Decree Law, with respect to the foreign bribery offence, bribes and their proceeds would appear to be covered regardless of their nature.

In addition, the Portuguese authorities confirm that seizure under these provisions is available in respect of legal persons suspected of committing an offence.

### **3.8 Civil Penalties and Administrative Sanctions**

As mentioned above under 3.1/3.2 “Criminal Penalties for Bribery of a Domestic and Foreign Official”, there are several additional criminal penalties for the foreign bribery offence (e.g. temporary disqualification from bidding in public tenders).

## **4. ARTICLE 4. JURISDICTION**

### **4.1 Territorial Jurisdiction**

Article 4.1 of the Convention requires each Party to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory”. Commentary 25 on the Convention clarifies that “an extensive physical connection to the bribery act” is not required.

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11. The police may perform a seizure during a search, in case of emergency or where there is a risk of delaying proceedings, in which case, the seizure must be validated by judicial authorities within 72 hours.
  12. Such circumstances include those showing that by the time of the conviction, it is highly likely that whereabouts of the accused is unknown, the accused abandons his/her business, etc.

The Portuguese authorities confirm that article 3 of the implementing legislation (*Law no. 13/2001*) applies to the foreign bribery offence without prejudice to the general provisions of the Criminal Code governing jurisdiction rules.

Article 4 of the Criminal Code states as follows:

*The Portuguese Penal Law, applies, unless otherwise stated in International Treaties or Conventions to acts committed:*

- a) within the Portuguese territory, regardless of the nationality of the actor,*
- b) on Portuguese ships or aircraft.*

Pursuant to article 7.1, an “act” is considered to have been committed at the place where: (i) totally or partially, and under any form of complicity, the perpetrator acted (or should have acted, in the case of an omission), or (ii) the “typical result” or the “result not comprehended in a particular type of crime” should have been produced. The Portuguese authorities state that “typical result” would be the offering, promising and giving of a bribe in respect of bribery offences. Thus, where an offence was committed in whole or in part in Portugal or on board a Portuguese ship/aircraft, or where its results were produced in Portugal or on board a Portuguese ship/aircraft, territorial jurisdiction is triggered. The Portuguese authorities confirm that a telephone call, fax, or e-mail emanating from Portugal is sufficient to trigger territorial jurisdiction.

In addition, article 3 of the Law no. 13/2001 provides a jurisdictional rule specifically applicable to the foreign bribery offence. It establishes jurisdiction over Portuguese nationals and foreigners regardless of the place of the commission of the offence where the alleged offender is found in Portugal (see below 4.2 “Nationality Jurisdiction”). This provision does not cover certain foreign bribery cases committed in Portugal (i.e. where the offender committed the foreign bribery offence in Portugal but left Portugal afterwards and cannot be found in Portugal). Thus, article 4 of the Criminal Code covers a broader scope of jurisdiction than that under article 3 of the Law no. 13/2001 as regards territorial jurisdiction. However, the Portuguese authorities confirm that the principle of territoriality under article 4 of the Criminal Code would apply to the foreign bribery offence to complement article 3 of the Law no. 13/2001 in this regard, and thus, whether or not the offender is found in Portugal is irrelevant for establishing jurisdiction as long as the offence is committed in Portugal.

#### **4.2 Nationality Jurisdiction and Extraterritorial Jurisdiction**

Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”. Commentary 26 on the Convention clarifies that where a Party’s principles include the requirement of dual criminality, it “should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute”.

With respect to offences committed outside of Portugal, articles 5 to 6 of the Criminal Code provide the conditions for establishing jurisdiction. The conditions vary according to the type of offences under article 5. Pursuant thereto, extraterritorial jurisdiction is established over those offences enumerated in paragraph 1.a (i.e. offences relate to terrorism). With respect to the offences enumerated in paragraph 1.b (e.g. abduction, human trafficking, sex offences against children, genocide), jurisdiction is established if the offender is found in Portugal and cannot be extradited.

With respect to other offences, including bribery offences in general, the jurisdiction is established where one of the following conditions are fulfilled: (1) the offender is a Portuguese national or the offence was

committed against a Portuguese national, the offender is found in Portugal, dual criminality, and the act constitutes an extraditable offence and extradition of the person cannot be granted (paragraph 1.c); (2) the offence was committed against a Portuguese national by a Portuguese national regularly residing in Portugal at the time of the commission of the offence and found in Portugal (paragraph 1.d); or (3) the offender is a Portuguese national found in Portugal, the act constitutes an extraditable offence, and extradition is requested for the person but cannot be granted (subparagraph 1.e).

With respect to the foreign bribery offence (article 41-A of the Decree Law no. 28/84, added by article 1 of the Law no. 13/2001), article 3 of the implementing legislation (Law no. 13/2001) applies. Article 3 states as follows:

*Without prejudice to the general framework governing the territorial application of criminal law and the provisions set forth regarding international judicial co-operation, the provisions laid down in Article 1 of this Law shall be applicable to the acts committed by Portuguese citizens as well as to acts committed by foreigners found in Portugal, regardless of the place where such acts were committed.*

The Portuguese authorities confirm that under article 3, Portugal can establish extraterritorial jurisdiction over (1) its citizens found in Portugal and (2) foreigners found in Portugal. The Portuguese authorities state that the condition of “found in Portugal” could be fulfilled where the alleged offender is found in Portugal irrespective of whether he/she is found as a resident, when stopped while in transit through, or when temporarily staying in, Portugal. Thus, extraterritorial jurisdiction appears to be established under more restrictive conditions under article 5.1, subparagraphs c to e of the Criminal Code, which are applicable to most offences including bribery offences. The Portuguese authorities state that article 3 overrides article 5 in respect of the foreign bribery offence. The Portuguese authorities further state that since the application of the jurisdictional rules for the foreign bribery offence should result in the broadest jurisdiction possible for Portugal, article 4 of the Criminal Code applies to complement article 3 of the Law no. 13/2001, but article 5 of the Criminal Code does not apply. They add that under Portuguese law, extraterritorial jurisdiction is an exceptional rule to the general rule of territoriality.

Pursuant to article 6.2 of the Criminal Code, where extraterritorial jurisdiction is established under the Criminal Code, the offence should be sentenced in accordance with the law of the country in which the offence was committed, “if that law is considered concretely more favourable”. The Portuguese authorities state that this provision does not apply to the foreign bribery offence.

### ***Legal persons***

The Portuguese authorities state that jurisdiction is established over legal persons under the same rule for natural persons in respect of the foreign bribery offence. They further state that jurisdiction is established over legal persons where one of the following conditions is fulfilled: (i) the jurisdiction over the natural person (i.e. the alleged offender who is a “representative” or “governing body” of the legal person) could be established; or (ii) the legal person is “found in Portugal”. The Portuguese authorities state that the condition of “found in Portugal” would be fulfilled where the legal person has a link in the Portuguese territory. They state that such a link would exist where, for instance, the legal person is organised under the laws of Portugal or has a branch office in Portugal.

## **4.3 Consultation Procedures**

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

Consultation procedures may take place at the request to/from the Minister of Justice in accordance with provisions in the Law no.144/99 of 31 August (Part III “Transfer of Criminal Proceedings”). For instance,

a transfer of proceedings to a foreign state may be possible if the case fulfils certain conditions (e.g. the offender is a national/resident of the foreign state).

#### **4.4 Review of Current Basis for Jurisdiction**

The Portuguese authorities are of the opinion that it is not yet possible to assess whether the basis for jurisdiction is effective in the fight against the bribery of a foreign public official since the implementing legislation entered into force recently.

### **5. ARTICLE 5. ENFORCEMENT**

Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be “subject to the applicable rules and principles of each Party”. It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official “shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”.

#### **5.1 Rules and Principles Regarding Investigations and Prosecutions**

The Portuguese authorities state that the investigation and prosecution of the foreign bribery offence are initiated, suspended and terminated in the general circumstances provided for in the Criminal Code and the Criminal Procedure Code. They also state that natural and legal persons are investigated and prosecuted under same rules and proceedings.

The principle of mandatory prosecution prevails in Portugal.

Under the Code of Criminal Procedure, the Public Prosecutor’s Office is competent to investigate and prosecute every offence including the foreign bribery offence. The Public Prosecutor’s Office directly instructs the police which assist the Public Prosecutor’s Office with the investigation (article 263). In addition, the Portuguese authorities state that the Judicial Police may also investigate corruption offences including bribery of a foreign public official, under the supervision of the Public Prosecutor’s Office in “particular cases”.

The Public Prosecutor’s Office initiates the investigation on its own initiative after having being informed of the alleged offence through the making of an “accusation” by the police or another source. Where the police become aware of an offence, they are obliged to report it to the Public Prosecutor’s Office regardless if the offender is identified (articles 241-243). During the investigation, the Public Prosecutor’s Office undertakes necessary measures for identifying the offender and obtaining evidence, etc. However, certain coercive measures must be performed/authorised by an examining judge (articles 267-269).

The Public Prosecutor’s Office shall prosecute the case as long as the existence of the alleged offence is proved. The Portuguese authorities confirm that, with respect to the foreign bribery offence, there is no additional requirement such as consent of the Attorney-General or a complaint by a victim. They also state that the Superior Council of the Public Prosecutor’s Office, a disciplinary body for public prosecutors, is forbidden to interfere with prosecutions.

A decision not to prosecute a case is not appealable. The Portuguese authorities explain that since prosecutors are obliged to prosecute the case as long as there is sufficient evidence, there need not be remedial measures such as an appeal<sup>13</sup>.

Article 276 provides for time limits for concluding the investigation (this is discussed more in detail under 6 “Time-Limits for Investigation”).

Articles 281-282 provide for suspension of the proceedings applicable to offences punishable by certain penalties. However, they do not apply to the foreign bribery offence.

The Portuguese authorities state that, with respect to the foreign bribery offence, a competitor is entitled to participate in the criminal proceedings as an assistant. He/she is also entitled to file a complaint to the Public Prosecutor’s Office upon which the Public Prosecutor’s Office is obliged to initiate the investigation and the prosecution. However, he/she cannot prosecute a case on his/her own initiative (i.e. private prosecution).

Under article 161.f of the Constitution, the Assembly has powers to grant amnesties and general pardons. The Portuguese authorities state that this power is exercised upon the initiative of the Minister of Justice. They further state that amnesties/general pardons by the Assembly are not used often.

The Portuguese authorities state that out-of-court settlements are unavailable under Portuguese law in respect of the foreign bribery offence.

## **5.2 Considerations such as National Economic Interest**

The Portuguese authorities state that the public interest, which means the interest of Portugal, is always taken into account in criminal proceedings. However, they confirm that, subject to the “principle of legality”, any considerations of the factors listed in Article 5 of the Convention are excluded in the investigation and the prosecution of cases of bribery.

## **6. ARTICLE 6. STATUTE OF LIMITATIONS**

Article 6 of the Convention requires that any statute of limitations with respect to the bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution” of the offence.

### ***Statute of Limitations***

The Criminal Code provides limitations periods for every offence, including bribery, and the length of the periods is related to the penalty provided for each offence. Pursuant to article 118, the limitations period for the foreign bribery offence is 10 years (i.e. period for an offence for which maximum term of imprisonment is not less than 5 years but not exceeding 10 years). Portugal confirms that this limitations period applies to both natural and legal persons. Pursuant to article 119, the period starts running from the

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13. However, if the prosecutor wrongly terminated the case, a disciplinary procedure against the prosecutor could be initiated by the Superior Council of the Public Prosecutor’s Office. Moreover, a prosecutor who unduly does not prosecute the case is liable for an offence of failure of justice and prevarication under the Criminal Code.

date of the “accomplishment of the act”<sup>14</sup>. The Portuguese authorities state that this would be the date of offering, promising or giving in respect of the foreign bribery offence.

The limitations period is suspended, where one of the events, including the following, enumerated in article 120.1 occurs: the criminal procedure cannot be legally initiated or continued due to the lack of legal authorisation, etc. (subparagraph a), the criminal procedure is pending after the notification of the prosecution or the “*decisão instrutória*”<sup>15</sup>, etc. (subparagraph b), the “contumacy” regime is in force (subparagraph c), and the decision of the court cannot be notified to the accused sentenced in his/her absence (subparagraph d). However, suspension under subparagraph b (i.e. the pending of the criminal procedure after prosecution, etc.) cannot exceed 3 years (article 120.2).

The limitation period is interrupted where one of the events, including the following, enumerated in article 121.1 occurs: proceedings against the defendant have been initiated (subparagraph a), the notification of prosecution, the “*decisão instrutória*” aimed at the prosecution of the accused, etc. (subparagraph b), and the “contumacy”<sup>16</sup> declaration (subparagraph c). A new limitation period starts running after each interruption (article 121.2). However, if in total, one and a half of the prescribed limitation period, (i.e. 15 years for the foreign bribery offence) in addition to the suspension term, have passed from the date of the commission of the offence, the limitation period shall expire (article 121.3).

### ***Time-Limits for Investigation***

Pursuant to article 276 of the Code of Criminal Procedure, paragraphs 1 and 3, where an accused is under detention or “house detention”, the Public Prosecutor’s Office concludes the investigation within 6 months from the time when investigation was initiated against a specific person or when the person was accused. The time limit is 8 months in other cases (i.e. where no one is under detention or house detention). Pursuant to paragraph 2, the time limit of 6 months can be extended to 8 months in respect of certain offences including corruption offences. If the proceedings become “especially complex” due to, *inter alia*, the number of accused/victims and highly organised nature of the case, it can be extended to 10 months irrespective of the type of the offence, and to 12 months for certain offences including corruption offences.

The Portuguese authorities state that when this time-limit expires, the Public Prosecutor’s Office decides whether to prosecute the case or terminate the proceedings, depending upon whether there is sufficient evidence to proceed to trial. However, they further state that the Public Prosecutor’s Office can re-open the terminated proceedings if new evidence proving the alleged offence is obtained.

Moreover, the Portuguese authorities state that, due to the complex nature of the cases, there is an obligatory preliminary investigative stage for financial crimes including the foreign bribery offence, in advance of the initiation of the investigation. They also state that this investigative stage should be performed under the control of public prosecutors and examining judges.

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14. Also, pursuant to article 119.4, whenever a “result that is not included in a particular type of crime is relevant”, the limitation period starts running from the date when the result occurs. However, Portugal states that this is not relevant to the foreign bribery offence.

15. The “*decisão instrutória*” is a final decision issued by an examining judge at the end of an optional investigative procedure, which may take place after the obligatory investigative procedure (“*inquérito*”). This optional investigative procedure is objected to reanalyse the case and give the accused the opportunity to produce proofs.

16. The “contumacy” regime is a solution under Portuguese law to try the case in the absence of the accused, although the overall goal is that the accused is heard by the court.

## 7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where a Party has made bribery of a domestic public official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

### *Money Laundering Offences*

The Decree Law no. 325/95 of 2 December contains the relevant provisions on money laundering. Article 2.1, which penalises acts of money laundering, enumerates a number of predicate offences including “corruption”. Pursuant to article 2 of the Law no. 13/2001 (i.e. the implementing legislation), the foreign bribery offence qualifies as a crime of “corruption” for the purpose of the money laundering legislation. The Portuguese authorities state that the domestic bribery offences under article 374 of the Criminal Code also qualify as predicate offences.

Article 2.1 of the Decree Law no. 325/95 states as follows:

*Any person who, knowing that certain goods and products proceed from criminal offences amounting to terrorism, arms trafficking, extortion, kidnapping, qualified procuring, corruption or any other offence mentioned in paragraph 1 of Article 1 of Law No 36/94, of 29 September:*

- (a) directly or indirectly converts, transfers, assists in or facilitates any conversion or transfer of all or part of such goods or products, in order, either to conceal or dissimulate its illegal origin, or to assist any person involved in committing any such offences to avoid the legal consequences of his or her behaviour, shall be liable to imprisonment for a term of 4 to 12 years;*
- (b) conceals or dissimulates the true nature, origin, whereabouts, layout, movement or ownership of such goods or products, or rights pertaining thereto, shall be liable to imprisonment for a term of 2 to 10 years;*
- (c) acquires or receives such goods or products, whichever the legal title, and uses, holds or keeps them, shall be liable to imprisonment for a term of 1 to 5 years.*

Article 2.1 applies to an act of converting, transferring, etc. certain goods and products derived from a predicate offence. The Portuguese authorities state that the laundering of both the instrumentality and proceeds (i.e. bribes and their proceeds in respect of active bribery) is covered.

The offence requires that the person in question knew that the “goods and products” proceeded from an offence. The Portuguese authorities state that such knowledge should be of any of the enumerated predicate offence but need not be of the specific offence (i.e. the offence of bribing a foreign public official). Moreover, they confirm that it is sufficient if the person believed that the “goods”, etc. proceeded from such an offence even if he/she did not know it.

The Portuguese authorities confirm that “goods and products” cover all types of pecuniary and non-pecuniary advantages.

In addition, the Portuguese authorities state that article 2.1 applies to acts of self-laundering.

With respect to subparagraph (a) of article 2.1, Portugal explains that the condition of “to avoid the legal consequences” cover the avoidance of criminal, administrative and civil liabilities.

Despite the sanctions provided for in article 2.1, article 2.2 states that the sanction for a person who committed an offence under article 2.1 “shall comply with such maximum and minimum levels of sanctions” for the predicate offence. Portugal explains that where the predicate offence is the foreign bribery offence, the sanction for the money laundering offence under article 2.1 should not exceed the level of 1-8 years of imprisonment, which is the sanction for the foreign bribery offence. Thus, it is imprisonment for 1-8 years for acts under article 2.1, subparagraphs (a) and (b), and is imprisonment for 1-5 years for acts under article 2.1, subparagraph (c).

Pursuant to article 2.3, the money laundering provisions apply regardless if the predicate offence of bribing a foreign public official takes place in Portugal or abroad. The Portuguese authorities confirm that the condition of dual criminality is not required where the predicate offence is committed abroad. They also state that a prior conviction of the predicate offence is not required.

### ***Reporting Requirements for Financial Institutions, etc.***

Under article 3 of the Decree Law no. 325/95, the reporting requirement of the suspected money laundering transactions under article 10 of the Decree Law no. 313/93 of 15 September applies to “financial institutions”. The Portugal authorities state that “financial institutions” are defined in Decree Law no. 298/92 and include banking and non-banking financial institutions. A breach of this duty is subject to the following pecuniary sanctions: 1,000,000-5,000,000 PTE for financial institutions or members of financial institutions, and 5,000,000-2,000,000,000 PTE for members of the board or those who gives directions in the institution. The Portuguese authorities state that a breach of duty by negligence is also punishable.

In addition, under the Decree Law no. 325/95, certain non-financial institutions performing activities linked to games or to the trade of goods of high value or immovable property (e.g. casinos, real estate agents) are obliged to identify the person involved in transactions exceeding a certain amount, retain the evidence for identification, report suspected money laundering transactions to the competent judicial authorities, etc. A breach of duty concerning identification, record-keeping, etc. is subject to a pecuniary sanction (“*coima*”) for 500,000-50,000,000 PTE (article 12). A breach of duty for reporting suspicious transactions is subject to a pecuniary sanction (“*coima*”) for 1,000,000-100,000,000 PTE (article 13). A breach of any of these duties by negligence may also be punished.

## **8. ARTICLE 8. ACCOUNTING**

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

## **8.1/8.2 Accounting and Auditing Requirements/Companies Subject to Requirements**

### ***Accounting***

Pursuant to article 2.1 of the Decree Law no. 410/89 of 21 November, the Official Plan of Accounts, which provides for accounting standards, applies to entities which include: national and foreign companies regulated by the Companies Act, individual companies regulated by the Commercial Code, individual limited-liability establishments, public companies, co-operatives, and other entities contemplated by law approving the Official Plan of Accounts. However, pursuant to article 2.2 of the Decree Law, the Official Plan of Accounts does not apply to banks, insurance companies and other financial entities that are subject to specific “plans of accounts”. The Portuguese authorities confirm that all legal entities are subject to the Official Plan of Accounts or specific plans of accounts.

The Portuguese authorities state that the Official Plan of Accounts and specific plans of accounts for financial institutions require that accounting information respect the characteristics of meaningfulness, reliability and comparability. They further state that it is understood that they also provide for the principles of continuity, consistency, specialisation and materiality, historical cost accounting and substance over form, thus prohibiting the establishment of off-the-book accounts, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, and the use of false documents. They add that the principles of clarity and rigor between business records and transactions are also required.

In addition, article 29 of the Commercial Code 1888 states that all “traders” are obliged to keep books, that easily, clearly and precisely reveal their business operations and their wealth. The Portuguese authorities state that “traders” include all businesses and corporations. Pursuant to article 30, the number and types of books and the manner in which the books are organised shall be at the trader’s entire discretion as long as the books are kept in the manner which the law specifies “as indispensable”. For instance, the books must be correctly used and kept indicating all the operations performed by “traders” and companies in accordance with the principle of continuity and integrity. In addition, under the Commercial Code, commercial companies are obliged to keep books and justification of payments for 10 years. Under the Decree Law no. 313/93, financial institutions are obliged to keep records on realised transactions for 10 years and on identification of the customers for 5 years.

### ***Auditing***

The Decree Law no. 487/99 of 16 November governs the activities of statutory auditors. It requires that corporate accounts be audited by independent professional auditors. Pursuant to article 1 of the Decree Law, professional auditors are subject to the supervision of the Institute of Chartered Accountants of Portugal<sup>17</sup> and follow the standards set by the Institute, which respect the international auditing standards.

The Portuguese authorities state that joint stock companies and limited companies (ltd) , which are subject to Portuguese law (i.e. have a principal and effective or statutory seat in Portugal), and fulfil two of the three following conditions for 2 consecutive years, are obliged to have external audits<sup>18</sup>: (1) the balance sheet total exceeds 1,500,000 Euro; (2) annual net sales or profits exceed 3,000,000 Euro; (3) have more

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17. The Institute of Chartered Accountants of Portugal is a public corporate body and professional auditors are its memberships.

18. In addition, Portugal states that unipersonal limited companies are subject to statutory audits. Also, listed companies are subject to additional requirements under the Code of Stock Exchange.

than 50 employees. Moreover, they state that all limited companies may have a supervisory body according to the statute of the company and are subject to internal audits.

Under article 54, audit service contracts with corporations are non-transferrable and valid for 4 years in order to strengthen the independence of auditors. Furthermore, under the Decree Law, certain persons are prohibited from performing an audit by virtue of their relationship to the company (e.g. shareholders including spouses or children of shareholders and members of management or the Board of Directors).

Pursuant to article 72 of the decree law, auditors are subject to professional secrecy. However, according to the Portuguese authorities, the reporting obligation for officials under article 242 of the Code of Criminal Procedure applies to auditors, and, thus, they are required to report to the Attorney-General, through the Institute, any facts that they discover in the course of their duties indicating the commission of an offence including foreign bribery. A violation of such obligation constitutes a disciplinary offence under the Decree Law no. 487/99. The applicable penalties include warning and exclusion from the Institute.

According to the explanation given by the Portuguese authorities, it would appear that under the Code of Commercial Registers and Companies and the Code of Stock Exchange, the auditor's reports should be publicly available.

### **8.3 Penalties**

The General Regime of Tax Infractions (Law no.15/2001 of 5 June) provides for offences that penalise falsification of books, etc. in relation to tax purposes. Pursuant to article 103, concealment or alteration of facts or values in books of account and bookkeeping for the purpose of obtaining illegitimate tax benefits (not less than 7,500 Euro), etc. constitutes the offence of tax fraud, which is punishable by imprisonment up to 3 years or a fine up to 360 days. Where a certain aggravating circumstance (e.g. the offender is a public official) exists, penalties increase to imprisonment for 1-5 years for natural persons and a fine for 240-1,200 days for legal persons under article 104. Pursuant to article 118, intentionally falsifying, vitiating, concealing, destroying, etc. elements relevant for tax purposes (not constituting tax fraud) is punishable by a fine for 500-25,000 Euro. Pursuant to article 119, an omission or error in the books of account and bookkeeping, etc. concerning the tax situation (not constituting any of the aforementioned offences) is punishable by a fine for 250-15,000 Euro. The Portuguese authorities confirm that these sanctions apply to both natural and legal persons.

In addition, pursuant to article 256.1 of the Criminal Code, a person is liable for imprisonment up to 3 years or a fine of 10-360 days if he/she, with the intent to cause a damage to others or to the state, or to obtain for himself/ herself or others an illegitimate benefit, produces a false document, forges a document, uses the signature of other person to produce a false document, uses such falsified documents, etc.

## **9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE**

Article 9.1 of the Convention mandates that each Party cooperate with each other to the fullest extent possible in providing "prompt and effective legal assistance" with respect to criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention.

In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is

within the scope of the Convention. And pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

## **9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance**

### **9.1.1 Criminal Matters**

Portugal may provide mutual legal assistance on criminal matters on the basis of bilateral and multilateral treaties<sup>19</sup> to which Portugal is a party. In the absence of a treaty (or relevant provisions in the treaty), MLA may be provided in accordance with the Law no. 144/99 of 31 August, which provides for conditions and procedures for MLA and extradition. In principle, reciprocity is required for the provision of MLA (article 4). However, pursuant to paragraph 3 of article 4, MLA is possible in the absence of reciprocity under certain circumstances<sup>20</sup>.

The types of assistance that are available in respect of natural and legal persons include search and seizure, expert examination, service of writs, hearing of suspects and witnesses, procuring evidence, handing over property and documents and providing information.

Requests for assistance in the form of letters rogatory may be transmitted directly between the competent judicial authorities, in which cases, judges and/or prosecutors decide and execute the requests. Requests in other forms are received by the Attorney-General's Office and forwarded with its opinion to the Minister of Justice who decides whether to grant the request. A decision of the court/prosecutor/Minister of Justice to refuse assistance is not appealable.

The request shall be refused on grounds provided in articles 6 to 8, which include:

- the request is for the purpose of prosecuting/sanctioning a person on account of race, religion, sex, nationality, etc.;
- the offence concerned is subject to the death penalty, life imprisonment, etc. and no assurances have been provided that such penalties will not be imposed;
- the offence concerned is a political offence, an offence connected with a political offence, or a military offence that does not constitute an offence under ordinary criminal law. The Portuguese authorities state that the case of bribery of a foreign public official who holds a political office or the bribery of a foreign public official intended for political motives/purposes (e.g. a contribution to a foreign political party) do not seem to be considered a political offence or an offence connected with a political offence;
- criminal proceedings in respect of the same fact resulted in a final sentence carried out or an acquittal or were definitely discontinued in Portugal or another country;

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19. Portugal is a party to the European Convention on Mutual Assistance in Criminal Matters, its additional protocol, etc. In addition, Portugal has concluded bilateral treaties on MLA with Argentina, Australia, Brazil, Canada, Mexico and Spain.

20. For instance, assistance is possible where the request is “seen to be advisable ... in view of the need to combat certain serious forms of criminality” (article 4.3 subparagraph a). The Portuguese authorities state that this exception (i.e. the need to combat certain serious forms of criminality) could be relevant to a request for assistance in respect of the foreign bribery offence.

- reciprocity is not ensured and none of the exceptional conditions under article 4.3 are fulfilled.

In addition, assistance shall be refused under the circumstances provided in article 152, which include: (i) the measures sought are forbidden by law or contrary to the public order, and (ii) the execution of assistance violates the sovereignty or the security of Portugal.

Moreover, assistance may be refused where “the minor importance of the offence does not justify it” (article 10). The Portuguese authorities confirm that this ground is relevant where the offence is punishable only by a low fine, and, thus, would not apply to requests for the foreign bribery offence.

### **9.1.2 Non-criminal Matters**

The Portuguese authorities state that MLA can be provided to other Parties in relation to non-criminal proceedings against a legal person for the purpose of establishing its liability or imposing on it sanctions for the bribery of a foreign public official by virtue of article 1.3 of the Law no. 144/99, which states that the provisions in the law shall apply as subsidiary provisions in respect of administrative offences subject to a review before the court of law.

## **9.2 Dual Criminality**

As a principle, dual criminality is not required for the provision of MLA. However, pursuant to article 147 of the Law no. 144/99, where the request is for MLA involving coercive measures, the provision of assistance is conditional upon dual criminality unless these measures are requested for the purpose of proving a person’s innocence. The Portuguese authorities are of the opinion that the exception where the purpose of the request is proving a person’s innocence is not relevant to requests in respect of the foreign bribery offence.

The Portuguese authorities confirm that where the condition of dual criminality is required, it shall be deemed to exist if the offence for which the assistance is sought is within the scope of the Convention. Furthermore, the Portuguese authorities state that the condition of dual criminality is required at the time of the commission of the alleged act of foreign bribery. However, they confirm that the requirement of dual criminality for the purpose of providing MLA is interpreted so broadly that it is deemed to be fulfilled even where the foreign bribery act was committed before the implementing legislation’s entry into force, as the domestic bribery offence was punishable in Portugal at that time.

## **9.3 Bank Secrecy**

Pursuant to article 5 of the Law no. 36/94 of 29 September<sup>21</sup>, the professional secrecy of credit institutions, financial corporations, their employees and persons providing services to them is lifted if there are grounds to believe that the information and documentation in question would be “of interest in establishing the truth” during the investigation, etc. related to certain offences including the foreign bribery offence. The Portuguese authorities confirm that this covers proceedings for providing mutual legal assistance. In contrast, bank secrecy would not be lifted for the purpose of providing MLA in relation to non-criminal

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21. This law was amended by the Law no. 90/99 of 10 July. It was also amended by the Law no. 5/2002 of 11 January [article 2 (lifting secrecy)].

proceedings against a legal person for bribery of a foreign public official. Also, the Portuguese authorities state that the requirement of “ interest in establishing the truth” is fulfilled where the competent investigative authorities of the requesting state consider that the information which the financial institution is believed to possess is necessary, relevant and meaningful for the purpose of investigating the offence, perpetrators or participants.

The secrecy is lifted by the issuance of a judicial authorisation or a court order whereby the credit institutions, etc. are obliged to supply the information to the relevant judicial authority or the police. The Portuguese authorities confirm that there are no other additional conditions. The Portuguese authorities state that the refusal of financial institutions, etc. to provide information constitutes an offence punishable by imprisonment for 6 months-3 years or a fine not less than 60 days.

Portugal states that the process to provide bank information does not differ from the one used for other types of requests for MLA.

## **10. ARTICLE 10. EXTRADITION**

### **10.1/10.2 Extradition for Bribery of a Foreign Public Official/Legal Basis for Extradition**

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them. Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official”.

Portugal may grant extradition in relation to the offence of bribing a foreign public official on the basis of bilateral or multilateral treaties<sup>22</sup>, or in accordance with the Law no. 144/99. In addition, the Portuguese authorities confirm that they consider the Convention to be a legal basis for extradition in respect of the foreign bribery offence.

Requests for extradition are received by the Attorney-General’s Office and forwarded to the Minister of Justice, following which the following two stages are taken:

1. The Minister of Justice decides whether to grant extradition on the basis of political reasons or on discretionary grounds (the administrative stage). The Portuguese authorities state that the discretion would be exercised on account of the purpose of the Law (article 2) stating that the enforcement of the law shall be subject to the protection of the interests of sovereignty, security, public order, interests of the state, etc. A decision to refuse extradition is not appealable. However, the Portuguese authorities state that where extradition is refused at this stage, the principle of *aut dedere aut judicare* applies, and the criminal proceedings against the person in question shall be initiated in Portugal;
2. The competent court (i.e. the Tribunal da Relação ) makes the final decision pursuant to the conditions under law (the judicial stage). The public prosecutor and the person for whom extradition is sought can appeal this decision to the Supreme Court of Justice.

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22. Portugal is a party to the European Convention on Extradition, its additional protocols, the Convention on Simplified Extradition Procedure between the Member States of the European Union, etc. In addition, Portugal has concluded bilateral treaties on extradition with Argentina, Australia, Brazil, Mexico and U.S.A.

As is for MLA, under article 4, reciprocity is required for granting extradition in principle. In addition, as mentioned above (see 3.4 “Penalties and Extradition”), the offence for which the extradition is requested must constitute an offence for which the maximum term of imprisonment is at least 1 year under the law of both Portugal and the requesting state (dual criminality). If the request is for an execution of a sentence, the sentence to be served shall be imprisonment of no less than 4 months. The requirement of a particular length of imprisonment might be relaxed under certain bilateral or multilateral treaties.

Moreover, under the Law no. 144/99, extradition shall be or may be refused under circumstances provided in articles 6-8 or article 10, respectively, which also constitute grounds for refusal in respect of MLA (see 9.1.1 “Criminal Matters”). Furthermore, pursuant to article 32, extradition shall be refused where the offence for which extradition is sought was committed in Portugal<sup>23</sup> or where the person in question is a Portuguese national<sup>24</sup>. Pursuant to article 33, where the offence for which extradition is sought is committed outside of the requesting state, extradition may be granted only if: (i) under Portuguese law, Portugal can establish jurisdiction under identical circumstances, or (ii) the requesting state proves that the country in which the offence was committed will not request extradition of the person in question.

### **10.3/10.4 Extradition of Nationals**

Article 10.3 of the Convention requires Parties to ensure that they can either extradite their nationals or prosecute them for the bribery of a foreign public official. And where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities.

Pursuant to article 32 of the Law no. 144/99, Portuguese nationals shall not be extradited unless the applicable treaty or agreement provides otherwise, the offence in question relates to terrorism or to international organised crime, or the legal system of the requesting state guarantees a fair trial<sup>25</sup>. Pursuant to paragraph 5 of article 32, where extradition is declined solely on the ground that the person is a Portuguese national, criminal proceedings against him/her shall be initiated (i.e. the principle of *aut dedere aut judicare*)<sup>26</sup>.

### **10.5 Dual Criminality**

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

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23. However, pursuant to article 32.5, where extradition is refused solely on this ground, criminal proceedings shall be instituted in Portugal (see also the discussion under 10.3/10.4 “Extradition of Nationals”).

24. However, there are some exceptions which enables extradition of Portuguese nationals. See the discussion under 10.3/10.4 “Extradition of Nationals”.

25. In addition to these conditions, extradition of nationals may be granted only where it is sought for a criminal prosecution, and on the condition that the sentence be served in Portugal after its reviewing and confirmation according to Portuguese law and that the requesting state return the person to Portugal for this purpose after sentencing him/her unless he/she refuses it.

26. In addition, under the same provision (article 32.5), criminal proceeding shall be initiated where extradition was refused on certain other grounds including the possibility that death penalty may be imposed on the person in the requesting state, etc.

As mentioned above, dual criminality is required for extradition. The Portuguese authorities confirm that dual criminality is deemed to be fulfilled if the offence for which extradition is sought is within the scope of the Convention. Furthermore, the Portuguese authorities state that the condition of dual criminality is required at the time of the commission of the alleged act of foreign bribery. However, they confirm that the requirement of dual criminality for the purpose of providing extradition is interpreted so broadly that it is deemed to be fulfilled even where the foreign bribery act was committed before the implementing legislation's entry into force, as the domestic bribery offence was punishable in Portugal at that time.

## **11. ARTICLE 11. RESPONSIBLE AUTHORITIES**

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

Portugal has notified the Secretary-General of the OECD that the responsible authority for the making and receiving of requests for consultation, mutual legal assistance and extradition is the Minister of Justice.

## **B. IMPLEMENTATION OF THE REVISED RECOMMENDATION**

### **3. TAX DEDUCTIBILITY**

Article 26.9 of the Decree Law no. 127-B/97 of 20 December<sup>27</sup>, which provides for personal income tax, states as follows:

*Article 26 Income derived from freelance work: deductions*

*9 - Illicit expenses, namely, those expenses that arose in the course of conduct for which there are reasonable grounds indicating a violation of Portuguese criminal legislation shall not be deductible, even if these occurred outside the territorial reach of its application.*

Article 23.2, which provides for corporate income tax, states as follows:

*Article 23 Costs or losses*

*2 - Illicit expenditures, namely, those expenses that arose in the course of conduct for which there are reasonable grounds indicating a violation of Portuguese criminal legislation shall not be accepted as costs, even if these were incurred outside the territorial reach of its respective application.*

The Portuguese authorities state that bribes are non-tax deductible as giving a bribe constitutes a violation of "Portuguese criminal legislation". The Portuguese authorities confirm that a "violation of Portuguese criminal legislation" covers offences under the Criminal Code and other secondary criminal laws including the Decree Law no.28/84, which establishes the foreign bribery offence. They confirm that expenses such as introduction fees or facilitation fees paid to a foreign public official, which are clearly made for the purpose of obtaining business, etc., but are not treated as illegal in the foreign public official's country are not deductible since they constitute an offence under Portuguese law.

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27. This law came into force on 1 January, 1998. According to the information provided by the OCED Committee on Fiscal Affairs, before the law's entry into force, the deductions for bribes paid to foreign public officials were allowed if they were documented and the bribe was shown to have contributed directly to the realisation of the income.

Article 26 is entitled “income derived from freelance work”. However, the Portuguese authorities confirm that article 26.9 is relevant to the tax treatment of incomes that arose from any sources in respect of all natural persons who have their own independent income. Moreover, they confirm that article 23.2 applies to all legal persons.

With respect to legal persons, article 23.2 only states that expenditures that arose from a violation of criminal law “shall not be accepted as costs”. The Portuguese authorities confirm that “illicit expenditures” including bribes cannot be deducted under any other categories of allowable expenses.

The Portuguese authorities confirm that the deduction of bribes is denied in respect of a legal person where its employee paid a bribe to a foreign public official from the assets of the legal person. They further confirm that it should be denied even in the case where the conditions for establishing criminal liability of the legal person are not fulfilled (e.g. the employee is not a governing body or a representative, the employee acted against expressed orders or instructions from an authorised person). However, in such a case, the legal person can sue the offender for the caused loss.

The Portuguese authorities are of the opinion that a criminal conviction of the natural/legal person is not required in order for tax authorities to deny tax deduction of bribes. They also state that it is the tax payer who has to prove that the payment constitutes a deductible expense under Portuguese tax law.

The Portuguese authorities state that pursuant to article 242 of the Code of Criminal Procedure, tax authorities are obliged to inform the prosecutorial authorities of tax evasion or tax fraud that relates to a bribery act. The Portuguese authorities state that claiming a bribe payment as an expense for avoiding tax payments would constitute tax fraud/tax evasion punishable by imprisonment up to 3 years or a fine up to 360 days.

Under the Portuguese Constitution, the Azores and Madeira have powers of taxation within the framework of the Portuguese tax legislation. The Portuguese authorities confirm that articles 23.2 and 26.9 of the Decree Law no. 127-B/97, which prohibits tax deductibility of bribes apply to these regions.

## EVALUATION OF PORTUGAL

### General comments

The Working Group appreciates the high level of co-operation of the Portuguese authorities throughout the examination process; in particular, the openness of their responses and timeliness in providing translations of all requested legislative provisions.

Portugal implemented the Convention by establishing the offence of bribing a foreign public official through an amendment to the Decree Law no. 28/84, a secondary criminal legislation penalising offences against the national economy and public health. The Working Group is of the opinion that overall the relevant Portuguese laws, including the implementing legislation, conform to the standards of the Convention. However, some aspects of the Portuguese legislation might benefit from follow-up during Phase 2 of the evaluation process.

### Specific Issues

#### 1. Bribery through intermediaries

The offence expressly requires a “consent” or “ratification” of the briber where an intermediary is involved.

The Portuguese authorities state this only requires that the briber be aware that the intermediary is bribing a foreign public official on the briber’s behalf and neither requires specific intention nor that the briber be aware of, and give a consent or ratification, on the detail of the intermediary’s act, such as the name or position of the foreign public official or the amount of the bribe.

The Working Group took note of the explanation given by the Portuguese authorities and recommends that this issue be followed up in Phase 2.

#### 2. Definition of Foreign Public Official

In defining a foreign public official, Portugal’s implementing legislation makes a distinction between a “foreign public official” and a “foreign political official”. The definition of “foreign public official” uses certain terms which are not defined in the implementing legislation, such as “public function”, “public organisation”, “public services agency” and “public international or supranational organisation”. The definition of “foreign political official” is non-autonomous, in that it expressly refers to the definition in the law of the country of the foreign public official.

The Portuguese authorities state that regarding the non-defined terms in the definition of “foreign public official”, the court would consider the definition of foreign public official in the Convention and Commentaries as most important interpretative tools in determining whether a particular person is a foreign public official.

Furthermore, the Portuguese authorities indicate that, for the purpose of article 41-A of the decree law n° 28/84 a foreign legislator would be considered as a “foreign public official” as long as he/she holds an office for which he/she has been appointed or elected (paragraph 2). It is however possible that in certain countries a legislator is considered a “political official” and as such he/she will be covered by paragraph 3.

The Working Group took note of the explanation given by the Portuguese authorities but is of the opinion that there is a risk that the text might be interpreted by the Portuguese courts as covering only a foreign legislator defined as a “political official” by the law of the foreign public official. It recommends that this issue be followed up in Phase 2 in order to see how this definition is applied in practice.

### **3. Criminal liability of legal persons**

The Decree Law no. 28/84 establishes criminal liability of legal persons. Furthermore, it contains a broad range of principal and complementary sanctions.

Under the Decree Law, state-owned and state-controlled legal persons are not excluded from entities subject to criminal liability for the foreign bribery offence. The Portuguese authorities state that although Portugal has had experience in punishing legal persons under the same decree law, there are no cases that apply to state-owned or state-controlled legal persons.

The Working Group agrees that the liability of state-owned and state-controlled legal persons for the foreign bribery offence is a horizontal issue that should be followed in Phase 2.