



PORTUGAL: PHASE 2

REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

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EXECUTIVE SUMMARY

The Phase 2 Report on Portugal by the Working Group on Bribery evaluates and makes recommendations on Portugal's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. Although Portugal has engaged in significant legislative efforts to implement the Convention, no investigation of foreign bribery has yet made it past the stage of preliminary investigation. The Report notes some problems and identifies areas where additional efforts are necessary. In particular, measures are urgently needed to raise awareness of foreign bribery among relevant actors in both the public and private sectors.

A more proactive and focused approach is also required in order to ensure that all credible indications of foreign bribery are detected and investigated. In this regard, Portugal should enhance reporting obligations within relevant agencies and organizations of the public service and the accounting and auditing professions so that suspicions of foreign bribery are channelled to appropriate authorities swiftly and systematically. Additional training, guidance and resources could also help. Regarding the corporate sector, Portugal needs to start reaching out to Portuguese companies exporting and investing abroad in order to encourage the development of strategies for the prevention and detection of foreign bribery.

The Report also stresses Portugal's obligation to provide for an autonomous definition of the notion of foreign officials in order to cover the full scope of the application of the Convention. In the same vein, the Working Group recommends that Portugal take remedial action to disallow and forbid confidential, undisclosed expenditures for the purpose of effective implementation of the prohibition of foreign bribery under Portuguese law. The tolerance granted by Portuguese law towards such confidential expenditures facilitates the non-disclosure of bribes paid abroad and the concealment of the illegal nature of the services contracted.

The Report also highlights a number of positive aspects in Portugal's fight against foreign bribery, including the existence of law enforcement units specialised in fighting corruption and other economic and financial crimes, the provision of a broad range of investigative techniques to law enforcement authorities, regular use of anonymously received information for triggering investigations into corruption offences, and a developed and responsive system to handle MLA and extradition requests. A wide variety of sanctions, including debarment from the right to bid in public tenders and confiscation, is also available for punishing natural and legal persons found guilty of foreign bribery, even though the effectiveness of these sanctions in practice remains to be tested.

The Report, which reflects findings of experts from Brazil and the Netherlands, was adopted in March 2007 by the OECD Working Group on Bribery along with recommendations, which appear in the last section of the report. The Report is based on the laws, regulations and other materials supplied by Portugal, and information obtained by the evaluation team during its on-site visit to Lisbon. During the five-day on-site visit on 2-6 October 2006, the evaluation team met with representatives of Portuguese government agencies, the private sector, civil society and the media. Within one year of the Group's approval of the Report, Portugal will report orally to the Working Group on the steps that it will have taken (or plans to take) to implement the Working Group's recommendations. A further report in writing to the Working Group within two years will give rise to a publicly-available evaluation by the Working Group of Portugal's implementation of the recommendations.

A. INTRODUCTION

1. The On-Site Visit

1. From 2 to 6 October 2006, Portugal underwent the Phase 2 on-site visit by a team from the OECD Working Group on Bribery in International Business Transactions (Working Group).¹ The purpose of the on-site visit, which was conducted pursuant to the procedure for the Phase 2 self and mutual evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereafter “the Convention”) and the 1997 Revised Recommendation (hereafter “the Revised Recommendation”), was to study the structures in place in Portugal to enforce the laws and rules implementing the Convention and to assess their application in practice as well as monitor Portugal’s compliance in practice with the Revised Recommendation.

2. The OECD team was composed of lead examiners from Brazil and the Netherlands, as well as representatives of the OECD Secretariat (see the composition of the examining team in Annex 1). During the on-site visit, interviews were conducted with over 100 government experts, representatives of the business community, lawyers, accounting professionals, financial intermediaries and representatives of civil society and the media (see the list of institutions encountered in Annex 1).

3. In preparation for the on-site visit, the Portuguese authorities provided the Working Group with responses to the Phase 2 Questionnaire and responses to a supplementary questionnaire, which contained specific questions about the implementation of the Convention and Revised Recommendation in Portugal. The Portuguese authorities also submitted relevant legislation and regulations, case law, statistical information and various government and non-government publications. The OECD team reviewed these materials and also performed extensive independent research to obtain non-government viewpoints.

4. The Portuguese authorities made commendable efforts to ensure the smooth running of the on-site visit through the preparation of a comprehensive agenda for the visit, and by making substantial efforts to provide access to all requested participants. Leading up to and following the on-site visit, the Portuguese authorities responded to all requests for information and documentation. Such cooperative spirit was conducive to constructive discussions concerning best practices and potential problem areas identified by the lead examiners regarding Portugal’s implementation of the Convention and Revised Recommendation.

2. General Observations

a) General context

5. Portugal is a medium-size State (92 391 sq. km, including the Azores and Madeira) occupying the west of the Iberian Peninsula and having a border only with Spain. It has a population of slightly over 10.5 million (July 2006 estimate). In 1974, a revolution triggered the transition to a democratic, market-oriented regime. Portugal is governed by a unicameral legislature. The country’s administrative structure consists of 18 districts and two autonomous regions (the Azores and Madeira, which host free trade zones – see below). Portugal’s legal and judicial system is based on civil law system. The judicial system consists of separate courts for civil, commercial, criminal, administrative, military, labour/social welfare and fiscal law. Within the Portuguese judicial system there are three levels of courts: first instance courts (district courts), Appeal Courts (there are Appeal Court in Coimbra, Évora, Guimarães, Lisboa and Porto) and two Supreme Courts (the Supreme Court of Justice and the Administrative Supreme Court).

¹ The Phase 1 examination of Portugal took place in May 2002. The purpose of the Phase 1 examination is to assess whether a Party’s laws for implementing the Convention and the Revised Recommendation comply with the standards there under.

6. The country experienced considerable economic growth in the wake of its accession to the European Community in 1985. Successive governments have substantially deregulated and privatised the economy. Up until 1990, Portugal was Europe's fastest-growing economy, with an average increase of 4.4% in GDP between 1985 and 1989. Real GDP growth in Portugal was 1.2% in 2004 and fell to 0.3% on average in 2005.² Over the past 25 years, services have gained increasing importance in the Portuguese economy, as they have in the economies of other EU countries. The service sector currently accounts for 56.8% of the Portuguese economy in terms of employment and 70.9% in gross value added (GVA). Agriculture accounts for 12.1% of employment and 3.5% of GVA. The manufacturing industry has undergone significant changes. In a sector that was highly dependent on traditional industries such as textiles, footwear, ceramics, cork, ship repair and food and drinks, new industries, including automobiles and auto components, electronics and pharmaceutical goods among others, have gained increasing importance. Services have become the most vigorous sector of the economy with distribution, transport and communications, tourism and financial services showing strong growth.³

b) The economic context

(i) Portugal, an open economy

7. Portugal is an open economy, a feature that has been accentuated over the last few years with the deepening of the European economic integration and the increasing internationalization of the Portuguese economy. In 2004, exports of goods and services accounted for 30.7% of GDP. EU countries have been the primary destination of Portuguese exports (80% of total Portuguese exports, with Spain, Germany, France and the UK being the primary destination of exports, accounting for 78% of total exports to EU countries in 2004), followed by the US (taking 6% of total), the PALOPs (Portuguese-speaking African countries) and EFTA countries (Iceland, Norway, Switzerland, and Liechtenstein). The level of concentration of exporting companies is high – of about 17 000 exporting companies, the 100 most important had been responsible, in 2001, for approximately half of total exports. Concerning the main types of goods exported per destination, in 2004 exports of transportation material, machinery and equipment and clothing accounted for 45% of the value of exports to EU countries, while exports of machinery and equipment, transportation material, textile materials and lumber and cork accounted for 51% of the value of exports to non-EU countries.⁴

8. Portuguese foreign direct investment (FDI) has increased substantially since the early 1990s, reflecting the growing involvement of Portuguese companies on the international market. Since 2001, FDI has been channelled mostly to EU countries (with Denmark, the Netherlands and Spain in the top three places in 2004, followed by Brazil); while there has been an increase in the importance of the countries of Central and Eastern Europe. Portuguese investment in PALOPs has accompanied the overall growth in outward FDI, maintaining its average share in these countries by some 2% to 3% of the total.⁵ In 2004, Portuguese FDI was focused on activities involving real estate and services to companies (87% of the total), followed by – with a vast gap – commerce, repairs, accommodation and catering (4.2%), financial activities (4.1%) and the processing industry (2.5%).⁶

² *OECD Economic Surveys: Portugal* (Paris: OECD, 2006)

³ Portuguese National Institute of Statistics

⁴ National Institute of Statistics; and EIU, *Portugal Country Profile 2005*, p.43

⁵ Bank of Portugal's statistics

⁶ All statistics from the Bank of Portugal

(ii) *The Autonomous Regions of Azores and Madeira*

9. The two Autonomous Regions of Azores and Madeira are non-continental territories with a population of around 200 000 each and located in the North Atlantic. They host “Free Trade Zones” (FTZ) which offer a special corporate tax regime. Conceived as programs of regional development fully approved and supported by the Portuguese State and the EU and integrated in the Portuguese and EU legal systems, the FTZs have been created to attract FDI in order to diversify and modernize the islands’ economy. The Convention – as well as all Portuguese laws and regulations that aim to implement the requirements of the Convention – apply to Azores and Madeira.

10. Madeira has experienced significant economic development in the last decade. In 2004, goods exported from Madeira accounted for 9% of total Portuguese exports. The international trade profile of Madeira is also strikingly different from that of the rest of the country. It is the only Portuguese region having the majority of its exports (52%) destined to non-EU countries, including 29% to the PALOPs (industrial goods, fuel and oils, machinery and transport materials account for 66% of these exports to non-EU countries).⁷ The Portuguese off-shores also clearly stand out regarding FDI, with frequent and sizeable operations carried out by companies with head offices in the free trade zones of Madeira and Santa Maria (Azores): the Autonomous Regions account for 40.1% of total Portuguese investments abroad, and 26.5% of total foreign investments in Portugal.⁸

11. The Madeira FTZ includes an Industrial Free Trade Zone (49 licensed firms), a Financial Services Centre (42 licensed bank branches), an International Services Centre (4 793 licensed firms) and an International Shipping register (255 licensed firms). Madeira offers generous tax exemptions for companies through the year 2011, and various customs duties exemptions. Most other aspects of the regions’ economic life are regulated by Portuguese laws and regulations, although the rules and procedures for company formation and registration in Madeira are different from elsewhere in Portugal. For example, unlike the rest of Portugal, Madeira recognises trusts⁹ and trust corporations. Trusts corporations specialize in being trustees to which assets are transferred to be administered according to the wish of the settler. More commonly found in Common Law jurisdictions, trusts do not exist as such in Portugal but legal provisions were enacted for allowing their creation in the Madeira FTZ (the trustee is located in Madeira, while the settler and the beneficiary of the trust cannot be residents of Portugal).

12. Offices of the Judiciary Police and of the Public Prosecutor in the two FTZs are organised under the exact same structures as if they were situated in any other of the country’s administrative districts. In 2006, the Criminal Investigation Department of Funchal (Madeira) created the Surveillance Team of Madeira’s International Business Centre (within its brigade responsible for the investigation of economic and financial crime). The lead examiners welcome the creation of this Surveillance Team, and encourage the Portuguese authorities to grant it adequate means and support in order to further facilitate prevention, detection and investigation of transnational bribery offences.

⁷ 2004 figures (National Institute of Statistics)

⁸ OECD. *Economic Survey of Portugal* (April 2006), p.33 and Banco de Portugal, *Boletim Estatístico*, September 2006.

⁹ The identities of the settler and the beneficial owner of the trust can only be divulged by the trustee following a court order, and a breach of this confidentiality requirement is criminally sanctioned the same way as a breach of bank secrecy (art. 11 of DL 352-A/88). However, the identity of the settler and the beneficiary must be provided to the bank when opening a bank account or performing any other banking or financial operation (Law 11/2004, Bank of Portugal Notice 11/2005, Bank of Portugal instruction 26/2005, and ISP Regulatory Standard 10/2005); and financial entities are obliged to provide this information to the authorities as appropriate. Registration with the Conservatory of the Commercial Registry (located in Madeira) of the basic acts of constitution of the trust (not the names of beneficiaries and settler) is compulsory if the duration of the trust is more than one year (art. 9.1, DL 352-A/88).

c) *Implementation of the Convention and Revised Recommendation*

13. In compliance with the Convention and the Revised Recommendation, Portugal has enacted laws which often display solid and clear provisions to combat bribery of foreign public officials in international business transactions. Law 13/2001, which made the necessary amendments to Portuguese legislation in order to criminalise the bribery of foreign public officials, entered into force on 9 June 2001. It introduced the offence of “Active Corruption against International Business” in Decree Law 28/84 (art. 41-A). This offence has the particularity of covering bribes to both national and foreign officials in the conduct of international business.¹⁰ As will be discussed further below, the lead examiners have formed the view that the changes to Portuguese law are in overall accordance with the standards established under the Convention. That said, this report does identify some key areas related to the legal framework that require further attention, including issues related to the treatment of certain elements of the offence of foreign bribery in practice.

14. It is evident from the Phase 2 examination that the level of awareness of domestic corruption issues, and efforts by the authorities to combat it, is significantly high. In relation to foreign bribery, however, the lead examiners detected limited evidence to suggest that there have been concerted efforts by the authorities to uncover and combat bribery of foreign public officials in international business transactions. Although the lead examiners do acknowledge that Portugal is a rather small open economy (Portugal accounts for only 0.4% of world exports and 0.5% of outward FDI originating from OECD countries), it was their view that a more proactive approach to disclosing, investigating and prosecuting this type of crime is required. Addressing this issue forms an important component of this Report.

d) *Cases involving the bribery of foreign public officials*

15. At the time of the on-site visit, Portugal had not recorded any prosecutions or convictions for the offence of bribery of foreign public official. An encouraging development was that there had been ten cases investigated in the last five years involving suspicions of corruption in international business transactions. However, out of these ten cases, eight related to acts of bribery of Portuguese civil servants by foreign companies (of which seven were still under investigation at the time of the on-site visit). Only two cases related to foreign public officials. Both investigations had been initiated following the reception of a MLA request.

16. The first investigation was closed almost immediately as extensive investigations were already under way for active bribery in the jurisdictions of other Parties to the Convention, and that the Portuguese elements of the case were considered unsubstantial. The second investigation was on-going at the time of the on-site. It was initiated after the reception of a MLA request from another EU Member State and concerned alleged passive bribery or embezzlement by a public official of that country. Procedures had been developed in Portugal in order to identify the assets and the amount of money deposited in Portuguese banks in name of the foreign suspects. On the basis of the information submitted to the lead examiners, it was not clear whether this case actually involved possible misconducts by Portuguese nationals and companies. On-site discussions also revealed that in one specific case of alleged foreign bribery, no investigative activities had been initiated despite the fact that numerous sources outside of Portugal, including an international organisation, foreign public institutions, civil society and the media, had echoed the allegations.¹¹ The Portuguese authorities are encouraged to ensure that they can accurately report to the

¹⁰ Throughout this Report, unless stipulated otherwise, references to the “offence of foreign bribery” should be understood as referring back to the elements of art. 41-A dealing with active bribery of foreign, and not domestic, officials; as only the offence of active bribery of foreign public officials is the object of the Convention and Revised Recommendation.

¹¹ After the on-site visit, Portugal indicated that the specific case addressed by the examining team was being looked into by the law enforcement authorities.

Working Group on a regular basis about investigations and prosecutions of alleged acts of bribery of foreign public officials committed by Portuguese individuals and companies. Issues related to allegations in relation to the irregularities detected in the UN Iraq Oil-for-Food Program are dealt with in section C.1.e of the Report.

3. Outline of Report

17. This report is structured in four parts. Part A provides background information on the Portuguese economic, legal, and political system. Part B examines prevention, detection and awareness of foreign bribery in Portugal. Part C develops issues related to the investigation, prosecution and sanctioning of foreign bribery and related offences. Part D sets out the recommendations of the Working Group and identifies issues for follow-up.

B. PREVENTION, DETECTION AND AWARENESS OF FOREIGN BRIBERY

1. General Efforts to Raise Awareness

18. In recent years, corruption has become an important topic of public debate in Portugal, in the media and on the political scene. Integrity of Portuguese public officials has been the focus of growing public attention and perceived breach of integrity has sparked increased indignation in the Portuguese society. The press has given these concerns extensive coverage.

a) Government initiatives to raise awareness

(i) Awareness raising and training for civil servants and public agencies

19. The legislative, organizational and other reforms undertaken during the past decade bear witness to the attention the Portuguese government has devoted to fighting corruption. The importance attached to it is clearly reflected, for example, in Portuguese legislators' continuous effort to adopt new repressive measures to combat corruption or in the creation of a special department of the public prosecution service, the Central Criminal Investigation and Prosecution Department (DCIAP) and of a special department of the judicial police, the Central Directorate for Combating Corruption and Economic and Financial Crime (DCICCEF) - to handle complex corruption cases. The fact that Portugal has registered an overall increase in the number of convictions for corruption offences from the end of the 1990s to the mid-2000s (with punctual declines registered in 2001 and 2003), with an average level of 50 convictions per year since 2001, demonstrate the sensitivity of police officials and magistrates to this type of crime.

20. Yet, the focus of the approach has been on the public interest of the Portuguese State, the probity of its civil servants and the integrity of its public contracts. There are several examples to support this observation. Initial training provided to all public officials by the National Institute of Administration (INA) only contains modules on the ethical principles and social responsibility of government. Additional training undertaken by the general directorates of various sectors of government primarily aims at familiarizing officials with potential risks of domestic corruption. The guide containing police recommendations to all public officials published in 2005 by the DCICCEF and available on the web only identifies situations where there is a risk of domestic corruption and makes recommendations to officials concerning the conduct expected from them under such circumstances. Training at the Criminal Police

Academy includes courses on domestic corruption, but no formal training exists with regard to the foreign bribery offence. A final example is the fact that the analysis of corruption crimes conducted by the Judicial Police in 2006 only pays attention to domestic corruption.

21. Clearly the importance given to the problem of domestic corruption can have an impact on whether or not the organs of public administration take notice of the bribery of foreign public officials. For example, there is a risk for the way in which investigations are carried out: it is not unlikely that the judicial police and the prosecution service may be inclined to focus first and foremost on the corruption of Portuguese public servants at the expense of foreign bribery. In this regard, on-site discussions revealed that certain public prosecutors considered that the overall purpose of the offence of active corruption harmful to international business as introduced under art. 41-A of Decree Law 28/84 was to combat bribery of *Portuguese* public officials by foreign companies. This article (which implements Article 1 of the Convention) has the particularity of establishing offences for acts of bribery of both domestic and foreign officials. Many representatives of major ministries, including the Ministry of Finance and the Ministry of Economy and Innovation, as well as senior representatives of the DCIAP, downplayed the importance of the issue of foreign bribery for Portuguese companies, claiming that the main issue at stake was foreign companies bribing in Portugal.

22. Downplaying the importance of the issue of foreign bribery for Portuguese companies and low awareness of the problem can have serious impacts on the fight against foreign bribery. In addition to the police services which have a duty to report all offences that come to their knowledge to the prosecution service, there is a whole series of parties in the chain of public authority in Portugal that could potentially trigger a criminal proceeding. These include the tax authorities and, in general, all civil servants who, pursuant to art. 242.1.b CCP, have a duty to report to prosecutors any offences that come to their notice in the course of their duties. Yet, if government personnel who are in the position to prevent and detect acts associated with foreign bribery are not sufficiently informed that the offence exists, it is likely that such illegal activities will remain undetected. In the view of the lead examiners, stepping up the campaign of awareness-raising in these government sectors should, from now on, be among the top priorities of Portugal. In order to remedy, at least partly, to this problem, the NIA expressed its willingness, during the on-site visit, to introduce the topic of foreign bribery in the school's curricula, whereas DCIAP senior representatives told the examining team that the Department will soon conduct an analysis of corruption, including foreign bribery, in Portugal and that the results of this survey will be widely disseminated among not only public prosecutors, police officers and judges but also, via internet, the public at large.

(ii) *Awareness raising and training for the private sector*

23. At the time of the Phase 2 evaluation of Portugal, no awareness campaign had been launched in Portugal to inform exporting businesses and relevant professionals (accountants, auditors, lawyers) about the offence of bribing a foreign public official specifically, or to encourage businesses to establish internal mechanisms of surveillance and prevention, as proposed in the Revised Recommendation. The Portuguese Agency for Economic Promotion (ICEP), Portugal's main export agency in charge of developing and executing programs and policies for the internationalisation of Portuguese businesses and for stimulating exports, and responsible for Portugal's National Contact Point for the promotion of the OECD Guidelines for Multinational Enterprises (MNE Guidelines), had not taken any specific steps to inform Portuguese businesses operating abroad about the risks and consequences of bribing foreign officials.¹²

¹² After the on-site visit, Portugal indicated that ICEP's role had primarily focussed on keeping the major business associations in Portugal and its offices abroad informed about the work in progress, at the OECD, on certain corruption-related issues, notably whistleblower protection.

24. During the on-site visit, the lead examiners heard various participants downplay the importance of the Convention for Portugal, a claim justified by an alleged “weak presence” of Portugal in world trade: Portugal was presented as lacking competitiveness in foreign trade and as being chiefly concerned with bribery of domestic officials by foreign firms. A closer look at the facts reveals a different picture. Indeed, lack of competitiveness – even if considered genuine – should not be seen as factor preventing companies from committing bribery abroad; on the contrary, it may be considered as an incentive to bribe in order to secure contracts which would otherwise be lost. Portugal figures among the top countries exporting to some countries with fragile public institutions or that have just recently emerged from damaging armed conflicts such as Angola (2nd), Chad (5th), Guinea-Bissau (3rd), and Sao Tome and Principe (2nd); the importance of Portugal as an important exporter to these countries often being due to its position as the former colonising country. Although European countries remain the primary destination of Portuguese FDI, Latin America is playing an important role, accounting for about 30% (EUR 9 billion) of total Portuguese FDI positioned abroad, notably due to massive investments in the telecom sector.

25. In the view of the lead examiners, downplaying the relevance of the enforcement of the Convention on the basis of the alleged unimportance of the Portuguese economy could prove hazardous: Portugal has a key role in providing incentives and structured guidance to Portuguese firms so that they embrace the highest ethical standards when conducting business abroad. In this regard, business sector participants indicated that when faced with bribery solicitation – or with bribery committed by competitors – Portuguese companies choosing not to remain silent would turn to ICEP in first instance for assistance and guidance on the best strategy to adopt. As no clear guidance exists for ICEP staff on the matter, such assistance has so far only been provided on an *ad hoc* basis.

26. The situation might change for the better in the near future: during the on-site visit it was indicated that ICEP was seriously considering becoming more actively involved in awareness raising campaign and targeted assistance provided to companies, notably through the promotion of the use of the Business Anti-corruption Portal of the Danish Ministry of Foreign Affairs among major Portuguese business associations, Portuguese embassies and commercial offices throughout the world¹³ and, in light of the fact that the countries covered by the Portal did not include yet major export partners of Portugal, through ICEP’s possible involvement in the development of additional country profiles for the Portal. A decision to provide funding and priority status to ICEP anti-bribery initiatives was expected to be soon discussed at the level of the Council of Ministers. While acknowledging that sharing information about the existence of the Portal is a good start, the lead examiners noted that the development of additional promotion tools was needed to inform Portuguese businesses operating abroad and embassies and commercial offices about the risks and consequences of bribing foreign public officials; and about bribery prevention strategies.

b) *Private sector and non-governmental initiatives to raise awareness*

27. Likely reflecting the lack of action on the part of the Portuguese authorities in informing businesses and professionals, the private and non-governmental sector has invested very little effort in organising and disciplining businesses pursuant to Law 13/2001 of 4 June 2001 transposing the Convention. Neither businesses nor their representative associations had taken any initiatives for awareness-raising and prevention at the time of the Phase 2 Evaluation of Portugal. A likely symptom of this inaction, only two medium-sized enterprises (one fully private and the other one with State ownership) responded to the examining team’s invitation to discuss preventive measures with respect to foreign

¹³ <www.business-anti-corruption.com>. After the on-site visit, Portugal indicated that some information about the Portal had now been sent to the major Portuguese business associations, Portuguese embassies and commercial offices throughout the world; and that it had circulated information on the Convention and on the risks and consequences of bribing foreign officials to all diplomatic and commercial missions abroad, as well as to business associations, major enterprises and certain governmental agencies.

bribery, despite continuous efforts by the Portuguese authorities to get additional representatives from the private sector to attend the on-site discussions. As the examining team began to build-up an overall picture, during the panel discussions with representatives of the private and non-governmental sector, on the way in which the Portuguese businesses respond to the anti-bribery law, it became apparent that businesses and their associations had not yet grasped the full dimensions of the problem.

(i) *Business associations*

28. Portuguese business federations have so far played a very limited role, if any, in the fight against bribery of foreign public officials. In fact, representatives of the Association of Portuguese Businesses, the Association of Portuguese Industries, and the Association of Micro, Small and Medium-sized Businesses interviewed by the examining team admitted that, although their respective associations were all engaged in promoting internationalisation, exports and social responsibility of Portuguese enterprises, none of them had engaged in awareness raising activities on bribery-prevention or extortion-prevention issues.

(ii) *Major enterprises*

29. Discussions with Portuguese companies, with the Portuguese National Contact Point for the MNE Guidelines and with representatives of civil society produced several findings. First, although the two companies that the examining team met with in Lisbon had substantial dealings in sensitive markets and sectors; none presented foreign bribery as a relevant issue for their firm. Similarly, their representatives considered that their internal control systems were adequate enough to prevent and detect foreign bribery, even though such bribery had apparently never been detected. The two companies did not appear to be alert to the importance of preventing foreign bribery committed by foreign agents, subsidiaries and partners (*e.g.* by introducing diligence procedures to assess their integrity). On the contrary, employing only local staff and agents was presented as one of the reasons for not giving more serious consideration to foreign bribery risks. The review team also found that familiarity with the criminal liability of legal persons for the offence of bribery in international business transactions was very limited, if not inexistent.

30. On-site discussions also revealed that company codes of conducts – whether targeting employees or suppliers – are not common in Portugal. Codes of conducts dealing with issues related to foreign bribery are even rarer (only found in a few companies either listed on stock exchanges or subsidiaries of large foreign firm). Companies with important state-ownership and operating in sensitive markets abroad had not taken any specific action to become trend setters in Portugal for the prevention of foreign bribery.¹⁴ During the on-site visit, the Portuguese National Contact Point for the MNE Guidelines indicated that the promotion of corporate social responsibility among Portuguese firms – including bribery prevention – has had so far very limited success (there was not yet one concrete case of implementation of the MNE Guidelines by a Portuguese company). This was explained by the lack of interest of Portuguese firms and the absence of sufficient pressure from stakeholders generally, and civil society in particular.

(iii) *Small and medium-sized enterprises*

31. The prevention practices of other businesses have proved even more muted. A characteristic of the commercial and industrial sector in Portugal is that SMEs represent about 90% of the total number of firms registered in Portugal; about 11% of them (2003 figures) are involved in international transactions.¹⁵ In general, the SMEs in Portugal appear to have a low level of awareness of the actual problem of

¹⁴ For example, the Portuguese authorities have apparently not yet made use of their influence on relevant Portuguese companies in order that they join, support or abide by initiatives such as the Extractive Industries Transparency Initiative (EITI) or the Water Integrity Network (WIN).

¹⁵ European Commission, “Internationalisation of SMEs”, *Observatory of European SMEs*, 2003(4), p.16

corruption in foreign markets, of its consequences for their business and strategies to avoid it. A representative from the Association of Micro, Small and Medium-sized Businesses indicated that Portuguese SMEs often “have to bribe to obtain business” in sensitive markets, while admitting that the association had not yet taken action on corruption prevention issues. Similarly, the Institute for assistance to SMEs and investment (IAPMEI) – organised under the Ministry of Economy and Innovation – has developed a programme to promote SME social responsibility, but at the time of the on-site visit this programme did not include corruption prevention as a topic. Reflecting perhaps, among possibly other reasons, their lack of awareness of the OECD anti-bribery Convention, no SME responded positively to the examining team’s invitation to attend the on-site discussions.

(iv) *Civil society*

32. At the time of the Phase 2 Evaluation, Portugal did not have any non governmental organisation (NGO) directly involved in fighting corruption. One expert on issues of corporate social responsibility met during the on-site visit indicated that Portuguese NGOs – compared with their counterparts in other OECD countries – were not particularly active in scrutinising the manner with which Portuguese businesses behave abroad and in pushing for higher business ethics standards. This could have a negative impact on the fight against foreign bribery, as part of the impetus for greater corporate social responsibility often comes from the benefits expected from a better reputation in the public.

Commentary

With a view to promoting the effective implementation of the anti-bribery legislation, the lead examiners recommend that Portugal take necessary measures to raise the level of awareness among officials in government agencies and the judiciary that can play a role in detecting, reporting, investigating or prosecuting the offence of bribery of foreign public officials. The lead examiners also recommend that Portugal act with urgency and vigour – in association with civil society and representatives of the business community – to induce Portuguese companies to raise their ethical standards in fighting foreign bribery (including for the development of strategies and management tools that can help detect and prevent bribery). Steps should also be taken by Portugal to encourage large Portuguese companies conducting business abroad – notably the ones with significant State shareholding – to be at the forefront of a movement to raise the ethical standards of Portuguese companies, and assistance to SMEs should also be provided as they often lack the resources to address these issues on their own.

2. Reporting, Whistleblowing and Witness Protection

33. Portugal’s law enforcement authorities heavily rely on official reporting, with about one third of the investigations into corruption cases triggered by such reporting in 2005, information from individuals (about 30% of the investigations into corruption cases in 2005), and on anonymous complains (one third of the investigations in 2005).¹⁶ Portuguese media also play a part, when detailed information falls into their hands, in triggering inquiries into corruption cases: over the period 2002-2005, press articles and other media disclosures of alleged corruption cases have accounted each year for 2 to 3% of the investigations into domestic corruption cases: the fact that Portuguese press law and the journalism law of 1999 provide protection for journalists’ sources may explain this.¹⁷ According to various authorities met during the on-site visit, any of the competent authorities for receiving reports of corruption or fraud would act promptly on complaints and denounces of corruption.

¹⁶ *The Crime of Corruption: Evaluation of Organized Crime by the Judicial Police 2002-05.*

¹⁷ In a recent case, a journalist refused to identify the story about misuse of the public finances, citing professional ethics as his reason; the court recognized the legitimacy of his refusal and did not compel him to divulge the name.

a) *Duty to report crimes*

34. Quite a large number of professional groups is required to cooperate with Portugal's law enforcement authorities in the detection of irregularities, financial malpractice, crimes, etc. which might be linked to foreign bribery. Aside from the police, these include Portugal's 600,000 civil servants who, pursuant to art. 242.1.b CCP, have a duty to report to the public prosecutor any offences that come to their notice in the course of their duties; chartered accountants and auditors pursuant to their respective statutes as well as pursuant to money-laundering legislation; and employees of all the financial institutions and other bodies subject to the reporting mechanisms established under Portugal's anti-money laundering legislation.

35. Representatives of most government departments, including Finance, declared in their discussions with the examining team that they were fully aware of their obligations to report any offences pursuant to art. 242.1.b CCP; according to the representative of the National Institute of Administration, all new government employees are made aware of their reporting obligations during the induction training that the Institute provides new civil servants on their rights and duties. Yet, if government personnel who are in the position, in the course of their duties, to detect acts associated with foreign bribery are not sufficiently informed that the offence exists, it is unlikely that such activities will be reported. DCIAP statistical data suggest that so far it has been first and foremost foreign magistrates that have triggered foreign bribery investigations by Portuguese authorities, after these foreign magistrates have launched investigations associated with the offence and extended them to Portugal.

b) *Whistleblowing and whistleblower protection*

36. As indicated above, Portuguese officials have an obligation under art. 242.1.b CCP to report to the prosecutor any offences that come to their notice in the course of their duties. In addition, pursuant to the Disciplinary Statute of the Public Service, public officials have the legal duty to inform their principal of any criminal offence of which they are aware or of anything which they consider would amount to a crime unless the latter is the alleged offender, in which case, they ought to report to the General Inspectorate for the Public Administration (IGAP), the Attorney General or the Judicial Police.¹⁸ Although public officials have a duty of obedience and secrecy, which requires them to report corruption internally before seeking external help, this duty must be breached in cases of corruption or any other illicit practices and conducts of their knowledge. Failure to report the occurrence of such illicit practices of which they are aware to the competent authorities is punishable with a disciplinary fine (for civil servants) or by a suspension from the public official's duties (for senior appointed officials).¹⁹

37. In the financial and private sectors, several professional groups are required to cooperate with Portugal's law enforcement authorities in the detection of irregularities which might be linked to foreign bribery. In addition to all the financial institutions and other bodies which are subject to reporting obligations under Portugal's anti-money laundering legislation (see below section on money laundering), chartered accountants and auditors are also subject to an obligation to report illicit practices. Pursuant to their respective statutes, chartered accountants and auditors failing to report an occurrence of illicit practices of which they are aware to the competent authorities are subject to sanctions (see below section on accounting and auditing). By contrast, private sector employees not subject to any reporting obligation and wishing to alert the competent authorities after becoming aware of legal violations committed within the company for which they work do not benefit from any established whistleblower protection procedures

¹⁸ When the principal is informed of a case of corruption, he/she will first assess the evidence brought before him/her and, if necessary, instruct an internal inquiry. As to the attorney general and the IGAP, following a complaint about corruption, both can initiate an investigation of the entities within their intervention scope.

¹⁹ Articles 10.5, 23.2.c, 27.1.b. and 32.2.e. of the Disciplinary Statute (Decree Law 24/84 of 16 January 1984).

(under the 1969 Employment Law, private sector employees are subject to a general duty of loyalty towards their employer). Nevertheless, nothing would prevent private sector employees from anonymously reporting information about offences to the competent authorities, since – as indicated above – in Portugal much attention is paid to information reported anonymously, with about one third of the investigations into corruption cases triggered by anonymous informants in 2005.

38. Where an employee only wants to report on accounting or other irregularities (that might be related to bribery, fraud, etc.), he or she can also decide to report this to a designated body within the company's structure, when such a mechanism exists. The *Comissão do Mercado de Valores Mobiliários* (CMVM), Portugal's Securities Market Commission, has issued some standards and recommendations, one of these (Recommendation 10-A) insisting on the establishment of mechanisms for the internal reporting of irregularities.²⁰ As the regulation, built on the comply or explain principle, has been adopted only since November 2005, only 28.8% of Portugal's listed companies complied with it at the time of the on-site visit according to statistical data provided to the examining team. As to other companies – SMEs and large non-listed companies – the examining team was told by business representatives that most of them were not likely to have in place reporting mechanisms and guarantees to whistleblowers. While the two medium-sized enterprises that spoke to the examining team emphasized the importance of ethics in carrying out their business, none of them had put internal mechanisms in place to enable an employee who has witnessed fraudulent or unlawful transactions to alert the company to what is going on: their representatives insisted on the fact that the employee could speak to his/her direct manager about fraudulent activities.

c) Witness protection

39. To allay a witness' fear of reprisals, Portugal has established a system intended to preserve his or her anonymity. Law 93/99 of 14 July on the Enforcement of Measures on the Protection of Witnesses in Criminal Proceedings, supplemented by Decree Law 190/2003, has introduced the concept of "protected" witnesses. A witness can be accorded this status and heard by the public authorities in any proceedings in respect of certain crimes, including the crime of bribing foreign public officials, when knowledge of the identity of the witness giving evidence is likely to seriously endanger the life, physical integrity, or freedom of this person, members of his family or close relations (art. 16.b of Law 93/99). In the absence of much practice, due to the fact that the implementing decree was adopted only recently, the effectiveness of the system is difficult to evaluate.²¹

Commentary

The lead examiners consider the legal obligation on Portuguese civil servants to report to the prosecuting authorities any offence, including bribery of foreign officials, which come to their knowledge, to be an important measure in combating transnational bribery. They recommend that Portugal make any public employee subject to art. 242.1.b CCP more aware of the importance of its application in cases of foreign bribery. The lead examiners also consider the attention paid by the Portuguese law enforcement authorities to information associated with corruption and bribery reported anonymously to be an important tool in combating transnational bribery. They however

²⁰ Recommendation 10-A states that companies "should adopt a policy whereby alleged irregularities occurring within the company are reported [...] The general direction of this policy should be disclosed in the corporate governance report". Company employees cannot be discriminated against, nor suffer any consequence as a result of reporting any alleged irregularities occurring in the company. Although the recommendation is specifically addressed to companies with capital open to public investment, it can also be followed by companies not admitted to trading on a regulated market.

²¹ After the on-site visit, Portugal told the examiners that they had knowledge of one case of witness protection linked to corruption.

recommend Portugal to pursue its efforts to encourage companies to provide internal channels for communication by, and internal protection for potential whistleblowers.

3. Officially Supported Export Credits

a) Awareness-raising efforts

40. The agency responsible for officially supported export credits in Portugal is COSEC, a private insurance company. It has an International Department (DIT) entirely devoted to the management of State Guarantees. COSEC provides export credit and bond insurance coverage as well as investment insurance abroad coverage against political and monetary risks and natural disasters on behalf of the Portuguese State. DIT is composed of ten employees, including four risk analysts. At the time of the Phase 2 evaluation of Portugal, the export credit system was under review, and the publication of the new legal framework was still pending.

41. Representatives of COSEC stated that, since the adoption in 2000 of the OECD Action Statement on Bribery and Officially Supported Export Credits, COSEC informs all applicants requesting official export credit support about the issue of bribery in international business transactions. This is done through a declaration embedded in the application and also through a stand-alone anti-bribery statement that exporters have to submit. In 2000, existing clients of the Portuguese export credit system were explained the need to adopt new application forms referring to bribery issues; and as a general rule any potential client receives – when applying for export credit insurance coverage – an explanation of the obligations they commit to (including in relation to anti-bribery clauses). Portugal also indicated that awareness among COSEC employees and Financial Guarantees Council (FGC)²² members has evolved over the past eight years since first discussions and adoption of the 2000 Action Statement, because their representatives form part of the Portuguese Delegation regularly attending the meetings of both the EU Export Credit Council and the OECD Export Credit Working Group (where bribery in international business transactions has become a regular issue on the agendas). At the time of Portugal's Phase 2 evaluation, steps were also being considered to better inform staff and major clients about COSEC's anti-bribery policy and the recently approved 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits.

b) Detection of foreign bribery

42. The examining team was informed that COSEC always requires at the time of the application that details (e.g. consistency with standard business practice, purpose, and identity of the agent) be provided regarding agents' commissions paid in relation to the export contract. As a rule, agents' commissions included in export contracts are always eligible for cover; provided that they do not exceed the average level according to the business underwritten. However there is no fix ceiling limiting this eligibility. COSEC risk analysts interviewed by the examining team indicated that in practice this "average standard" is generally considered to be 5% of the value of the contract. Due diligence is chiefly performed before support has been granted (during the underwriting procedures). If a commission which seems too high is detected at this stage, COSEC first meets with the interested party to discuss the issue before taking any other steps. Detailed explanations would then be sought regarding the need for the services provided by the agents, the adequacy of the commission *vis-à-vis* the service provided and its justification. If any suspicion of bribery arises after support is granted or in the event of a claim for indemnification, such suspicion could be investigated in order to ascertain whether or not the claim may be rejected or whether reimbursement of indemnifications must be sought (although at this stage in the procedure COSEC does

²² The entity officially in charge of supervising the system for granting official export credit and guarantees – the Financial Guarantees Council (FGC), composed of representatives of the Central Bank, the ministries of finance and the economy, BPI (a private bank), and COSEC – became extinct on 14 March 2006 and, at the time of the Phase 2 Evaluation of Portugal, the details of the structure that would replace it had not yet been clarified.

not perform any systematic additional verification to detect possible illicit bribery payments or allegations in relation to the contract). At the time of the on-site visit, COSEC employees had yet never detected a foreign bribery payment.

c) Duty to report bribery

43. During the on-site visit, it was indicated that COSEC staff are not considered as public officials, and as such they are not subject to the same reporting obligations as Portuguese civil servants. COSEC is a private insurance company and even though its International Department (DIT) is entirely devoted to the management of State guarantees, COSEC and DIT employees are not considered public officials. On-site discussions revealed that, although no explicit reporting procedure exists for DIT employees who detect foreign bribery, in practice DIT employees would report to the supervising authority (the FGC or its successor) after having first met with the concerned applicant; the supervising authority would then assess the facts a second time before submitting the information to the public prosecutor as appropriate.

44. The Portuguese authorities indicated that reports would occur whenever “sufficient evidence of bribery” is detected by employees of export credit agencies before the decision to provide support has been made²³ (COSEC’s due diligence procedure to detect any credible evidence of bribery occurs exclusively at the application stage). At the time of the on-site visit, the policy for detection and reporting of bribery was based on the requirements of the 2000 Action Statement. In the view of the lead examiners, the main challenge of COSEC will now be to consider and implement the measures that it will need to put in place in order to comply fully with the recently adopted 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits, including its enhanced requirements in terms of bribery prevention, due diligence and reporting.

Commentary

The lead examiners recognize that, at the time of the Phase 2 Evaluation of Portugal, COSEC had implemented several measures ensuring overall compliance with the 2000 Action Statement on Bribery and Officially Supported Export Credits. They encourage the Portuguese authorities to continue their efforts in ensuring full compliance with all the requirements that are now included in the recently adopted OECD Council Recommendation on Bribery and Officially Supported Export Credits, including its enhanced requirements in terms of prevention, due diligence and reporting.

4. Official Development Assistance

45. Portugal is a small donor whose development cooperation focuses on the five Portuguese-speaking African countries (PALOPs) and Timor-Leste. Poverty reduction is a primary goal of Portuguese development. In 2005, Portugal’s total development assistance amounted to USD 377 million, or 0.21% of Gross National Income (GNI). The Portuguese Institute for Development Support (IPAD) is at the heart of Portugal’s official development assistance (ODA). Created in 2003 as the central planning, supervisory and coordinating body for Portuguese aid, IPAD, as part of the MFA and with a staff of 169, is responsible for coordinating the participation of over 15 different ministries, 308 municipal governments, universities and other public institutions – all of which get involved with their counterparts in partner countries. Only a small share of Portuguese ODA is contracted out to the private sector or NGOs.

²³ OECD Export Credit Group’s Review of the Responses to the Survey on Measures taken to Combat Bribery in Officially Supported Export Credits [TD/ECG(2005)4/REV].

a) *Awareness-raising efforts*

46. Although IPAD staff met during the on-site visit admitted that corruption is often rife in partner countries, on-site discussions revealed that Portuguese authorities had not engaged in raising the awareness of anti-corruption issues within the agency nor among the various ministries, municipal governments, universities and other public institutions participating in development assistance efforts. Similarly, no steps had been taken to introduce an anti-corruption clause in standard contracts issued by IPAD. On the question why Portugal had not engaged in raising the awareness of foreign bribery within IPAD and other relevant bodies and why no steps had been taken to introduce anti-corruption clauses in development contracts, the Portuguese authorities pointed out that the vast majority of Portuguese ODA is not contracted out to the private sector, but administered directly by Portuguese ministries, public agencies and municipalities in association with partner governments: this would be sufficient to prevent corruption in aid-funded programs. In the view of the lead examiners, given the risk of corruption in aid funded programs, stepping-up the campaign of awareness-raising in these government sectors that participate in Portugal's development assistance efforts should be among the priorities of the Portuguese authorities. Steps should also be taken to advise IPAD personnel of the need to include an anti-corruption clause in all contracts and contribution agreements issued by IPAD and its partners.

b) *Detection of foreign bribery and the duty to report bribery of foreign public officials*

47. Government staff working in development assistance, like other public servants, must report any criminal offence to the prosecuting authorities. However, given the low level of awareness of the foreign bribery offence among IPAD staff, the absence of guidelines or training on the identification and reporting of corruption abroad (e.g. the procedure to follow for reporting, the importance of reporting, etc.), and certain institutional weaknesses in the effective monitoring of ODA interventions as identified in the 2006 DAC Peer Review of Portugal, the possibility that IPAD personnel detects irregularities in connection with the administration of development funds appears rather slim in practice. In the unlikely event that foreign bribery would be detected and that a report would be made, it is also not clear whether the report would be transmitted directly to the prosecution, to IPAD management, or to the MFA.

48. For similar reasons, given the fact that partner public institutions in Portugal, business partners and partner governments have not been provided with any type of instructions on reporting indications of possible acts of foreign bribery, and that no steps have been taken in order to set up channels of communication that could encourage the reporting of foreign bribery offences by those partners, the prospects for detection of foreign bribery offences committed in the context of the administration of development funds by these entities appear in practice rather unlikely.

Commentary

The lead examiners recommend that Portugal take awareness raising measures targeting IPAD staff and IPAD public and private sector partners about issues related to the offence of foreign bribery, including on prevention, detection and reporting. They further recommend that, in the context of ongoing efforts for better monitoring and evaluation of aid efficiency, Portugal conduct a comprehensive assessment of foreign bribery risks in ODA projects.

5. Foreign Diplomatic Representations

a) Awareness-raising efforts

49. Diplomatic missions abroad have an important role to play in enhancing the awareness of enterprises that seek advice when they consider or conduct international business transactions: they can advise Portuguese companies on the level of corruption in the market where they intend to operate (for example, providing warnings about untrustworthy intermediaries or agents). They can also be an important source of guidance and support to enterprises faced with solicitation of bribes. As recognised by the Ministry of Foreign Affairs (MFA) during the on-site interviews, the promotion of Portuguese enterprises has been gaining relevance in the share of the work done by Portuguese diplomatic missions and has been ranked as a priority for many of them. This activity, performed in close co-operation with the Ministry of Economy (notably ICEP)²⁴ would be, according to MFA representatives, “carried with rigorous respect of local rules and ethic principles”.

50. No specific measures had been taken to inform diplomatic missions about the foreign bribery offence, the importance to fight and prevent it, and the possibility to have such offences investigated and prosecuted in Portugal. The Portuguese authorities indicated that “Portuguese diplomatic representations are – as any other public service – aware of the illegality and illegitimacy of bribery”. Yet, in the opinion of the lead examiners, as a result of the lack of specific action, relevant MFA staff and Portuguese diplomatic missions might not have the necessary skills to assist Portuguese companies and individuals facing difficult bribery issues and ethical dilemmas abroad, to advise them on the risk of foreign bribery in the market where they intend to operate, and to work together with foreign government authorities where bribe solicitation has taken place.²⁵

b) Detection of foreign bribery and the duty to report bribery of foreign public officials

51. Portuguese officials working in diplomatic representations abroad are required, as any Portuguese public official, to cooperate with Portugal’s criminal system in the detection of any offences (including therefore foreign bribery) that come to their notice in the course of their duties (art. 242.1.b CCP). At the time of the on-site visit, no specific instructions had been issued by the Ministry to embassies concerning steps to be taken where allegations that a Portuguese company has bribed or intends to bribe a foreign public official come to the notice of embassy personnel.

52. During the on-site visit, the MFA indicated that it would normally fall within the tasks of the diplomatic mission to refer such cases to MFA headquarters as part of its general reporting, although it would seem that no specific instruction exists on the matter. The lead examiners also obtained no indications that diplomatic missions would consider in certain cases to report allegations of foreign bribery directly to the Public Prosecutors’ Office in Portugal or diplomatic representations of other Parties to the OECD Convention. In the view of the lead examiners, in the absence of clear instructions to diplomatic missions on how to handle bribery allegations, various sources of allegations, both internal (MFA staff in close contact with the company) and external (communication by the diplomatic representation of another Party to the Convention, foreign media, foreign civil society, foreign public administration) might go unnoticed by the law enforcement authorities. Appropriate means, specific guidance and awareness raising measures must be in place if an environment conducive to timely and adequate reporting of foreign bribery is to be created.

²⁴ For more information on ICEP and its role in fighting foreign bribery, see section B.1 of the Report.

²⁵ After the on-site visit, Portugal indicated that some awareness raising action had been initiated in response to the findings of the examiners (see footnote 13).

Commentary

The lead examiners are of the opinion that Portugal's diplomatic missions and ICEP may play an important role in enhancing the awareness of companies that seek their advice when they consider or conduct international business transactions. In order to ensure that appropriate guidance is provided, they recommend that Portugal take action to raise the level of awareness of the offence of foreign bribery among its diplomatic missions abroad and export promotion staff, such as by explaining the situations in which the offence may arise, the ways of recognizing it, the rules on jurisdiction and the liability of legal persons for offences committed abroad. They also recommend that Portugal issue specific instructions/guidance to diplomatic and export promotion staff concerning the steps that should be taken when they notice credible allegations that a Portuguese company or individual has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to Portugal's prosecuting authorities.

6. Tax authorities

a) Tax treatment of bribes and reporting duty

53. In Portugal, the tax authorities can be another source of prevention and detection of acts of accounting movements or other acts likely to be connected with bribery of foreign public officials. Since 2001, Portuguese law prohibits – though not explicitly pursuant to Portugal's legal principles – tax deduction for facilitation payments and expenditures linked to foreign bribes: under art. 33.7 of the Personal Income Tax Code and art. 23.2 of the Companies Tax Code, unlawful expenditure, particularly in connection with conduct in breach of Portuguese criminal legislation, even if it has incurred outside the country, is not deductible or considered as costs. Tax officials, like other public servants, must report any offences that come to their notice in the course of their duties to the prosecuting authorities on the basis of art. 242.1.b CCP. Furthermore, apart from this general reporting obligation, art. 31 of Act 11/2004 of 27 March requires them to report suspicions of unlawful activities –including foreign bribery- associated with money-laundering to the public prosecutor.

b) Detection and awareness and training

54. The tax authorities have broad powers of investigation to ascertain the tax position of taxpayers. They can make on-site inspections; they can audit and control the taxpayer's accounting books and records or bookkeeping; they can also request the cooperation of any public entities, which may be necessary for the assessment of the tax situation of the tax payer, or of third persons with whom the tax payer has economic relations. A protocol signed in 2004 with the Ministry of Justice also allows for permanent exchange of information to combat tax fraud. The tax administration has also access, either directly - when there are reasonable grounds that a tax fraud has been committed or when there are concrete identified facts that a person provided false information to the tax administration – or through a judicial decision - in situations not mentioned above- to bank information (articles 63 and 63-B of the General Tax Law). Every year, tax officers make a rather significant number of requests for lifting bank secrecy (643 in 2005).

55. Similarly, there is nothing to stop the tax authorities from exchanging information with foreign partners. The legal authority to exchange information for tax purposes derives primarily from bilateral agreements (Portugal is party to over 40 double tax conventions which closely follow the OECD model) and from domestic law. With EU Member States, information exchange takes place pursuant to the EU directive on Mutual Assistance (EEC/77/99 as amended) and Regulation 2003/1978, which contemplate broad information exchange. Information exchange is also possible through the use of additional mechanisms which, although not primarily designed for tax purposes, permit information exchange for certain criminal tax matters. Such mechanisms include international treaties signed and ratified by Portugal

such as the European Convention on Mutual Assistance in Criminal Matters (29 May 2000) and the European Convention on Judicial Mutual Assistance on Criminal Matters (20 April 1959).

56. Overall, tax officers make a rather significant number of inspections every year: for a universe of over 345 000 company tax payers and of over 4 million individual tax payers, respectively 47 000 and 48 000 inspections were conducted in 2004. Tax inspectors target those among whom tax fraud is most prevalent, such as the self-employed, but also companies active in economic sectors deemed sensitive. For example, the lead examiners were told that the few Portuguese companies doing business in Africa were subject to particular attention from the tax administration. Also, information published in the press, where relevant, would be systematically investigated. Such was the case of a matter dealt with by the tax administration in the recent past, involving suspicious payments made to Portuguese public officials by a private civil airline company, and which came about in the wake of a press article: the company's books were audited and, as the audit brought to light suspicions of (domestic) bribery, the matter was escalated to the public prosecutor for a formal investigation by the criminal police. Other sources of detection include information directly communicated to the tax administration by the police.

57. In preparation for their controls, tax officials are given guidance in ways of identifying deductible costs and detecting unlawful expenditures through a Manual for Tax Auditing. There are also programs at the Directorate General for Taxation's Tax Training Centre for the continuous formation and training of staff on various procedural issues and the detection of unlawful expenditures.

c) *Detecting foreign bribery in practice*

58. Although the tax authorities have broad investigative powers enabling them to enforce the non-tax deductibility of unlawful expenditures and to refer violations of tax and criminal laws detected during their inspections to the prosecutors – as an example, suspicions of domestic corruption were reported to the public prosecutors on at least two occasions in the recent past-, there had been no single case of detection of irregularities associated with transnational bribery at the time of the Phase 2 Evaluation of Portugal.

59. Undeniably, detecting costs and expenditures associated with foreign bribery is intrinsically complex, notably because of the frequent necessity of collecting evidence abroad. Indeed, all tax officials interviewed by the examining team explained that detecting bribes to Portuguese civil servants was easier as, often, both parties (briber and person receiving the bribe) are in the country. However, in the view of the lead examiners, the fact that, at the time of the on-site visit, no specific instructions or training had been developed to give detailed guidance to tax examiners to assist them in the detection of suspicious payments associated with foreign bribery might go some way to explaining this state of affairs. In this regard, an encouraging development was the inclusion, in the framework of the 2006 edition of the Manual of Tax Auditing under preparation at the time of the on-site visit, of specific instructions as to the identification and reporting of “acts of corruption”. In the view of the lead examiners, it would be important that the Manual also covers the detection of unlawful expenditures associated with bribes paid to *foreign* public servants; the handbook on the detection of bribery produced by the OECD could serve as a useful basis for such inclusion in the Tax Manual.

60. Yet, in the view of the lead examiners, there is another, likely more serious, factor that impedes the detection of suspicious payments associated with foreign bribery: the fact that tax law, pursuant to art. 42.1.g of the Companies Tax Code (IRC) and articles 32 and 73.1 of the Personal Income Tax Code (IRS), allows for undocumented, confidential expenditures. Although these expenses (“confidential expenses”) are subject to a special stand-alone tax rate of 50% (70% with respect to companies partially or totally exempt from IRC or not principally engaged in commercial, industrial or agricultural activities), the nature of expenses incurred (including the eventual beneficiaries of the expenses) remains undisclosed to the tax administration. According to Portuguese tax authorities, although in the past expenses of

confidential nature could amount up to 7% of the company's annual turnover, companies today would resort to this mechanism only in small amounts not exceeding 1% of the volume of business transactions. However, the lead examiners remarked that, for businesses with a large turnover, this may still represent important amounts.

61. Statistical data show that, in 2005, for a universe of 348 524 tax payers subject to corporate income tax and whose main activity was of commercial, industrial or agricultural nature, 4 673 companies (1.3%) declared confidential expenses for a total amount of EUR 47.1 million (representing 0.1% of the total business costs declared). Similar statistics show that, for a universe of 31 824 tax payers subject to personal income tax in 2005, 242 (0.7%) declared confidential expenses for a total amount of EUR 144 258 (representing 0.25% of the total business costs declared). Tax officials stated that if a company would declare confidential expenses of abnormal amount, this would immediately trigger an investigation in the framework of which, pursuant to articles 63 and 63-B of the General Tax Law, tax inspectors could request the lifting of bank secrecy in order to identify the eventual beneficiaries of the confidential expenses. In the view of the lead examiners, even if companies may not necessarily resort to this mechanism at all times and in large amounts in order to avoid being investigated by the tax administration, the tolerance granted by the tax administration towards such undisclosed expenditures before deciding to undertake an inspection is sufficiently large to allow the non-disclosure of bribes paid abroad and to conceal the illegal nature of services contracted.

Commentary

The lead examiners recognize the potential of existing mechanisms at the disposal of Portugal's tax officials for identifying and rejecting as deductible expenses bribes paid abroad for export and other contracts and to trigger criminal proceedings. They note however that providing specific training and guidance on the detection of costs and expenditures associated with foreign bribery could enhance the tax administration's ability to enforce the non-tax deductibility of bribes and its contribution to triggering proceedings. The lead examiners also fear that this contribution is weakened by the fact that tax law allows for undocumented, confidential expenditures. They therefore recommend that Portugal draw up clear guidelines for the tax authorities prescribing the verifications to be undertaken with a view to detect possible offences of bribery of foreign public officials and take measures to amend the Personal Income Tax and Companies Tax Codes to disallow and forbid confidential expenses.

7. Accountants and auditors

a) Accounting and auditing of the commercial sector

(i) Accounting standards and awareness and training

62. A rather large universe of entities and individuals are required to maintain proper accounts in Portugal. All "traders" are required, pursuant to the regulations governing accounting records contained in the Commercial Code, to keep orderly accounts appropriate to their commercial activity, including inventories and balance sheets, a general ledger and a register of copies of correspondence issued. It is also a legal requirement that commercial companies and partnerships, co-operatives, public enterprises and other bodies whose main activity is commercial, industrial or agricultural operating in Portugal maintain proper books of account for taxation purposes.²⁶ All such records must be retained for a period of 10 years.

²⁶ Under art. 116 of the Companies Tax Code, there is a simplified accounting system for bodies whose headquarters or place of effective management are in Portugal, whose main activity is not commercial, industrial or agricultural and which do not have a full accounting system. These bodies must maintain a register of income and expenditure. These rules apply to foundations (which are governed in a particular chapter of the Civil Code). However, if these bodies, including

Financial statements must be deposited with the local Commercial Registry and tax authorities and, pursuant to art. 73 of the Commercial Registry Code, all financial statements deposited with the local Commercial Registry are available to the public upon request; in addition, all listed companies have to publish their annual and consolidated accounts, as well as the auditor's report, in the press.

63. In drawing up their accounts, all traders are subject to certain minimal accounting standards as stated by the applicable legislation.²⁷ Specific rules apply to domestic and foreign companies covered by the Commercial Companies Code, sole proprietorships (individual companies) also covered by the Code, limited-liability companies, publicly-owned undertakings, co-operatives and other entities whose main activity is commercial, industrial or agricultural operating in Portugal: these entities are subject to accounting standards that are set out in the Official Plan of Accounts (*Plano Oficial de Contabilidade*) supplemented by the accounting directives issued by the *Comissão Normalização Contabilística*, Portugal's national accounting standard setting body.²⁸ Such standards, which, at the time of the Phase 2 on-site visit, were based on the 4th and 7th EU accounting Directives and followed to a large extent the International Accounting Standards/International Financial Reporting Standards (IAS/IFRS), were expected to be strengthened in the near future to bring them even more closely in line with the IAS/IFRS. In response to the EU regulatory and harmonization efforts in the securities market, all listed companies with securities rated in the stock exchange are subject to the adoption of the rules issued by the International Accounting Standards Board (IASB) and the IAS/IFRS, when elaborating the final and definitive accounts since 2005 (according to art. 11 of Decree-Law 35/2005, 17/2).

64. An interesting feature of Portugal's accounting system is the requirement for all entities subject to taxes on revenue to have a chartered accountant: on 31 December 2006, there were 75 764 chartered accountants registered in the Chamber. According to articles 6 and 55 of Legislative Decree 452/99, which define the essential tasks of chartered accountants, it is their duty to "plan, organize and co-ordinate in compliance with the legal norms and the accounting principles in force the carrying out of the accountancy of entities subject to taxes on revenue which must have financial accountancy pursuant to the applicable official plan of accounts". They must also ensure "that the fiscal statements they sign are in compliance with the law and technical regulations in force" and "abstain from the practice of any acts which, directly, or indirectly, lead to concealing, damaging, making useless, forging or invalidating the documents and fiscal statements under their responsibility". Supervision of accountants is undertaken by the Chamber of the Chartered Accountants.

65. The checks performed by chartered accountants may thus touch on accounting irregularities of particular sensitivity where the offence of foreign bribery is concerned. Failure to comply with the duties referred to in articles 6 and 55 of the Legislative Decree entail, in addition to disciplinary sanctions ranging from simple reprimand through fines to temporary or permanent disbarment from practicing the profession, administrative penalties applied pursuant to the General Taxation Infringement Law.²⁹ As explained by a

foundations, derive accessory income from commercial, industrial or agricultural activities, they must make corresponding accounting arrangements to allow checks to be made on any surplus income received.

²⁷ Pursuant to art. 30 of the Commercial Code, the number and types of books and the manner in which the books are organised are at the trader's entire discretion as long as the books are kept in the manner in which the law specifies as "indispensable", i.e. in accordance with the principle of continuity and integrity.

²⁸ The Official Plan of Accounts does not apply to banks, insurance companies and other financial entities as these entities are subject to specific accounting plans (the *Plano de Contas do Sistema Bancário* for financial intermediation and the *Plano de Contas das Companhias de Seguros* for insurance services).

²⁹ According to statistical data provided by the Chamber to the examining team, at the time of the on-site visit, 19 communications from the courts in relation to non-compliance with the overall duties of chartered accountants had been received by the Chamber; 3 chartered accountants had been disciplinary sanctioned, 1 with expulsion and the 2 other with fines; 2 disciplinary proceedings were filed; 14 disciplinary proceedings were undergoing.

member of Portugal's accounting profession during the on-site visit, in the event that a professional would detect irregularities, he or she would immediately address the matter with the management of the company for which he or she performs his/her function and would escalate the matter to the Chamber if appropriate remedial action is not taken. The report made by the accountant to the Chamber would in turn immediately be sent to the public prosecution service pursuant to art. 58 of Legislative Decree 452/99 which requires accountants to report to the prosecuting authorities via their professional association any information that comes to their attention in performing their task and that might indicate a "public crime" (see below in the section of the Report addressing the duty to report foreign bribery).

66. However, the prevention and detection function performed by accountants is likely to be diminished by the lack of precise directive or training on certain accounting irregularities associated with foreign bribery. For sure, to ensure its members' professional qualification, the Chamber's regulations and the law have established precise education requirements (a degree is required) as part of the qualification programme for becoming a member, and additional training courses are provided by the Chamber. Members are also given regular reminders of their obligation to report any public crime to the public prosecutors. It appeared to the lead examiners that there was relatively little focus among the profession on foreign bribery however: the examiners were told that in-house training and reminders primarily focus on money laundering. On the question whether they were familiar with the accounting requirements of the Convention, most representatives of the profession admitted they had only general knowledge of them.

(ii) *Statutory audit*

67. The presence of statutory auditors in Portugal's major enterprises should give them an important role in detecting the active bribery of foreign public officials or, at least, certain factors in any such scheme. All companies that fulfil two of the following three criteria for two consecutive years: a total balance sheet of EUR 1.5 million; a total net turnover of EUR 3 million; and at least 50 employees, are required to be audited by a qualified statutory auditor ("*Revisor Oficial de Contas*" abbreviated to ROC). In total, 20 000 of the 200 000 companies registered in Portugal are required to be audited by a statutory auditor. Audits are carried out in accordance with the auditing standards issued by the Auditor's Institute, the *Ordem dos Revisores Oficiais de Contas* (OROC). These standards are close to internationally accepted auditing standards (ISAs). Audits carried out by international audit firms, in parallel with the statutory audit, are becoming increasingly common in Portugal.

68. Pursuant to relevant provisions of Portuguese law which define the essential tasks of auditors, in particular Decree Law 487/99 of 16 November, it is their duty to check the accounts to ensure that they provide a true and correct statement of the situation. Certification of the company's account, supported by the written audit report which materialises the conclusions of the auditor's controls and investigations, is the primary mission of the auditor. The audit includes an examination, on a test basis, of evidence relevant to the accounts and disclosures in the financial statements. Whilst statutory audit in Portugal is not primarily directed towards the detection of fraud or irregularities associated with foreign bribery, representatives from the profession stated that the methods used by companies to make or conceal bribe payments, including the use of false or poorly described invoices, all form part of the regular methodologies that auditors apply when conducting audits.

69. To ensure the auditor is a highly qualified and independent professional, the admission to the profession is subject to precise educational requirements and Decree Law 487/99, as well as the Code of Ethics of the profession, have established a list of incompatibilities both in general nature and relative to the company in which a statutory auditor is working. Both texts incorporate the major principles of the EU 2002 "Recommendation on Statutory Auditor's Independence"; major differences with the Recommendation include the public disclosure of fees which is, under Portuguese law and regulations of the professional body, not mandatory except for auditors of listed companies and the fact that the

mandatory rotation of auditors is not included in the national prescriptions. Both texts should however be strengthened in the future to bring them more closely in line with the EU Recommendation and the IFAC Code of Ethics so as to expand the objectivity and independence of auditors.³⁰

70. Specific requirements exist for listed entities related to risk management and internal control which go beyond monitoring accounting systems for preparing financial statements. Pursuant to the Corporate Governance Regulation 07/2001 (as amended in 2003 and 2005) issued by Portugal's Securities Market Commission (CMVM), the implementation of an internal control mechanism for an effective detection of risks (including legal ones connected to the company's activity) is recommended for listed entities: the board of directors should create internal audit committees, with the power to assess the corporate structure and its governance. Further, all listed entities have to issue a corporate governance report where the risk control mechanisms are explained in general. According to CMVM representatives, although compliance with the CMVM recommendations is not mandatory, over the past few years there has been a marked increase in their observance by Portuguese companies.

(iii) *Duty to report foreign bribery*

71. An apparently powerful tool in the Portuguese system of preventing and detecting foreign bribery and other business-related offences is the obligation incumbent on chartered accountants and statutory auditors to report "public crimes" to the public prosecutor. Indeed, pursuant to art. 158 of DL 487/99 and art. 58 of DL 452/99, auditors and accountants must report to the prosecuting authorities via their respective professional associations any information that comes to their attention in performing their task and that might indicate that a "public crime", including therefore foreign bribery and associated offences, has been committed.³¹ Furthermore, under Act 11/2004 of 27 March, auditors and accountants, as well as tax advisers, are required to report any suspected cases of money laundering, including cases of laundering of bribes and their proceeds, to the prosecuting authorities.

72. According to articles 80 and 92 of DL 487/99, failure to report public crimes by auditors may be punishable by a maximum fine of EUR 5 000, temporary disqualification from practising or –ultimate sanction- may result in a decision to revoke the auditor's licence; similarly, pursuant to articles 59 to 63 of DL 452/99, non-compliance with the duty to report by accountants may result in fines, temporary disqualification from practising or revocation of the accountant's licence. About 40 reports every year are forwarded to the prosecuting authorities by the auditors' association: 50 reports in 2005, 40 reports in 2004, 17 reports in 2003 and 35 reports in 2002. One thousand seven hundred and ninety reports were forwarded to the prosecuting authorities by the accountants' association from 2002 to 2006; and 565 during the first half of 2006. According to representatives of the profession, practically all reports made by accountants and auditors to their respective associations are immediately forwarded to the public prosecutor.

73. Despite this potentially powerful factor within the Portuguese system for disclosing "white-collar" crime to the prosecution authorities, there have been so far no reports concerning corruption offences in general and none relating to transnational bribery in particular: most of the reports that have reached the prosecuting authorities have concerned tax or social security frauds or invoicing offences. Similarly, at the time of the on-site visit, there had been no reports under Act 11/2004 of bribery (domestic

³⁰ These amendments, which would modify the statute of the auditors, would, among other things, establish a non-renewable seven year term of office for the auditors of companies quoted on the stock exchange. Further amendments were being considered at the time of the on-site visit with respect to the approval of the EU Statutory Audit (8th) Directive.

³¹ Pursuant to Portuguese criminal law, a "public crime" is any crime for which the commencement of proceedings does not require a complaint. The offence of foreign bribery, as well as any other types of corruption and most tax and accounting offences, is a public crime under Portuguese law.

and foreign) as a predicate offence of money laundering originating from the profession. As no guidelines or training for auditors or accountants on the identification and reporting of corruption in general and of bribery of foreign public officials in particular have been developed, the possibility that an auditor or an accountant of a company detects irregularities in connection with bribery appears rather slim in practice. The Evaluation Report on Portugal adopted by GRECO in May 2006 noted that, in the recent past, two cases for failure to report corruption were referred by Portuguese courts to the auditors' professional association to enable it to take the appropriate disciplinary measures against the auditors who failed to comply with their reporting obligation.³²

74. According to the public prosecutors interviewed by the examining team, there is a further factor that would tend to explain the paltry number of useful disclosures by accountants and auditors: the fact that non-compliance with the reporting requirements is rarely sanctioned by the two supervisory bodies when such cases are referred to them by the law enforcement authorities to enable them to take the appropriate disciplinary measures against their members. The representative of the auditors' association whom the examining team met during the on-site visit explained that, because of the one-year time limit that applies for taking action on these cases, it was not always possible for the association to take appropriate disciplinary measures against members who fail to comply with their reporting obligation. Addressing the GRECO Evaluation Team during its visit to Portugal in November 2005 in the framework of the 2nd Evaluation Round of Portugal, the Order indicated that the association's new draft statutes included changes to the time limit for disciplinary measures.³³

b) *Accounting and auditing in the public sector*

75. Government bodies charged with monitoring the management of public funds may also play a role in preventing and detecting criminal activities associated with bribery of foreign public officials as such bodies audit and monitor entities (such as public administrations, state-controlled enterprises or bodies which receive financial assistance directly from the European Union) which may be involved in foreign bribery. Most government departments have their own inspection services which, in performing their task of monitoring the use of public resources, may detect activities referable to the public prosecutor on the basis of art. 242.1.b CCP. The work of these services is supplemented by procedures – devised in this case by the Court of Audit (*Tribunal de Contas*) – to monitor the use of public funds by public institutions, public enterprises in which the State has a majority interest and their subsidiaries abroad, regional and local authorities, and private bodies whose budgets are partially covered by central government or which receive financial assistance directly from the EU.

76. Although, at the time of the on-site visit, no instance of bribery of foreign public officials had been reported by the Court to the public prosecution service, the Court regularly plays a role in bringing to light accounting irregularities such as off the budget accounts and false invoices which are immediately notified to the public prosecutor. The lead examiners were told that, in what relates to state-owned or controlled enterprises, since they have their accounts audited and certified by private auditors, the Court had strategically decided to focus on performance audits. Similarly, in what relates to recipients of European funds, due to other existing control systems (namely certification of accounts and payments and the obligation of coordinating control in this area with the European Court of Auditors), the audit strategy in this area has been the evaluation of the liability of those control systems rather than the control of end payments.

³² Council of Europe, *Second Evaluation Round: Evaluation Report on Portugal Adopted by GRECO at its 28th Plenary Meeting (Strasbourg, 9-12 May 2006)*, p. 23.

³³ *Ibid.*, p. 23.

Commentary

Bearing in mind the major role statutory auditors and chartered accountants may play in detecting acts of bribery of foreign public officials in international business transactions, the lead examiners recommend that Portugal, after consultation with the accountants' and auditors' professional organisations, take steps to improve the reporting of suspected bribery of foreign public officials through guidelines and training on the detection of the offence.

8. Money-laundering

77. Over the past several years, the Government of Portugal has worked diligently to develop and implement an anti-money laundering regime which is generally comprehensive. Portuguese measures to prevent money-laundering may serve as a useful additional tool in preventing the laundering of proceeds of foreign bribery and in detecting foreign bribery offences, especially as art. 2 of Law 13/2001 has made the laundering of both the instrumentality and proceeds of bribery of foreign public officials a criminal offence.

a) Suspicious transactions reporting

78. To facilitate the detection of suspicious transactions, the law has established extensive obligations whereby the professions closest to the point at which such transactions may occur are required to exercise vigilance. Act 11/2004 of 27 March, which implements the European Union's Second Money-Laundering Directive,³⁴ requires all financial institutions to identify their customers, maintain records for a minimum of ten years, and demand written proof from customers regarding the origin and beneficiary of transactions that exceed EUR 12 500.³⁵ Non-financial institutions such as casinos, property dealers and dealers in high-value assets must also identify customers engaging in large transactions and maintain records.

79. In addition, art. 7 of Act 11/2004 imposes an obligation to report suspicious transactions on institutions, organisations and professions listed in the Act, regardless of threshold amount. The scope of the reporting regime instituted in Portugal is vast. It covers the whole financial sector, including credit institutions, foreign exchange bureaux, life insurance companies, investment firms, as well as intermediaries in the property business, non-financial professions, and further sectors (certified public accountants, statutory auditors, lawyers, solicitors and other independent professionals such as tax consultants). Regulatory agencies, including the Central Bank of Portugal, the Securities Market Commission, the Chamber of Chartered Accountants and the Bar Association, have been empowered to monitor and enforce the reporting requirements of the obliged entities and professions. For example, with regard to financial institutions, the Central Bank set forth Instruction 26/2005 (supplementing Instructions 70/96 and 8/2002) which contains a list of potentially suspicious operations.

80. Reports are made to the Attorney General's Office (other than in the case of lawyers and solicitors who submit them to the bar or solicitor's association) that in turn sends the reports to the Financial Information Unit, or *Unidade de Informação Financeira* (UIF). Established through Decree-Law 304/2002 of 13 December, and operating independently as a department of the criminal police, the UIF is at the heart of the Portuguese detection system of money-laundering activities as the UIF is responsible for analysing reports of suspicious transactions from institutions required to do so by law that are transmitted

³⁴ At the time of the on-site visit, Portugal was in the process of further reviewing its criminal legislation and updating its legislation for the purpose of implementing the Third EU Money Laundering Directive.

³⁵ Identification requirements for trusts are established in article 9.4 of the Bank of Portugal Notice 11/2005 and paragraph 3.12.2. of ISP Regulatory Standard 10-2005. For more information on this, see FATF, *Third Mutual Evaluation Report on Money-Laundering and Combating the Financing of Terrorism – Portugal* (13 October 2006), pp. 69-70.

to the UIF by the State prosecutor: when suspicious reports are received from the Attorney General's Office, the duty of the UIF is indeed to process and analyse them in order to assess the degree of veracity in the report. The result of such work is then reported to the Public Prosecution Service that will decide on the follow-up of the investigation, then becoming a formal investigation (inquiry). The inquiry is later sent to the relevant criminal police organ for further investigation.

81. In 2005, the Unit received 330 suspicious transactions reports (STRs), a majority of which originated from the financial sector (over 80% of all STRs). During the same period, suspicious transactions were confirmed in 200 cases which were then sent to other competent authorities for a formal investigation, namely to other departments of the criminal police (such as the Central Directorate for Combating Corruption and Economic and Financial Crime) depending on the matter and the jurisdiction at issue. The great majority of cases brought to light as the result of the analysis of the reports concerned tax fraud (135 cases); there were two predicate offences of corruption, including one possibly relating to corruption in the context of the UN Oil-For-Food Program which originated from a domestic credit institution. During the first quarter of 2006, the Unit received 285 STRs, a majority of which originated from the financial sector (93% of all suspicious transaction reports), and suspicious transactions were confirmed in 125 cases. Most of the cases brought to light as the result of the analysis of the reports concerned tax fraud (82 cases); there were six predicate offences of domestic corruption.³⁶

82. In order to perform its task, the UIF is allocated a staff of 30 officials belonging to the criminal police, 21 of whom play an investigative role. Balance relating to the diversity of the investigation experience of the officials is sought for in the recruitment process, *i.e.* the UIF seeks staff with previous experience in the investigation of offences whose investigative competence is spread over the criminal police 'various central Directorates on the one hand, and are predicate offences to money laundering on the other hand.

b) Exchange of information

(i) Exchange of information with Portuguese tax and law enforcement authorities

83. The Unit's work benefits from a Liaison Standing Group, a structure with representatives from the *Polícia Judiciária*, the General Directorate for Taxes and the General Directorate for Customs and Special Taxes on Consumption. Pursuant to Decree-Law 93/2003 of 30 April, the purpose of this structure is to allow reciprocal access to the databases of the three authorities in order to ensure greater effectiveness in the combat against financial and tax-related crime. In addition to the databases of the Judicial Police and the tax administration, the personnel of the Unit benefit from access to other databases, including the databases relating to civil identification, to legal persons, to vehicles and driving licences, prisoners and weapons, as well as to Schengen and Interpol databases and various open sources.

(ii) Exchange of information with international authorities and with domestic reporting entities

84. The UIF is a full member of the Egmont Group since 1999, complying with the rules for information exchange. Within the framework of cooperation in the exchange of information with its counterparts, the replies of the Unit follow a search and analysis of the information in the various databases available at the Unit. Exchange of information also takes place in the framework of a Memoranda of Understanding (MoUs): at the time of the on-site visit, the Unit had signed MoUs with 25 countries and jurisdictions. In 2005, the UIF received 104 requests for information from its foreign counterparts (with a majority of requests coming from Belgium, Guernsey and Jersey), including one from the US concerning

³⁶ Financial Intelligence Unit, *Activities Report 2005* and *Polícia Judiciária - Directoria Nacional*, "Answers of the Portuguese FIU to the Evaluation Team for their Visit to Portugal from 1st to 6th October 2006".

an alleged case of laundering of proceeds of corruption involving a Portuguese national in the context of the UN Oil-For-Food Program. During the same year, the unit sent 173 information requests to its foreign counterparts, a majority of which to Brazil, France, Italy, the Netherlands and Spain. Portugal has also signed and ratified the Vienna and Palermo UN conventions, which enable the entry into of MoUs. The Portuguese authorities have also joined the FIU-NET, an EU sharing mechanism for FIUs.

85. The Unit provides feedback to the domestic financial entities as far as STRs are concerned. Such procedures happens quarterly, case-to-case. The Unit also annually publishes a report, which contains data relating to the number of reports received, types of suspicious transactions reported by the entities and the respective types of predicate offences, as well as indicators of potentially suspicious transactions. As there is no legal framework that requires law enforcement authorities to report to the Unit information relating to the inquiries, prosecutions and convictions, the Unit is however not in the position to provide feedback to the reporting entities regarding the types of STRs which result in prosecutions or in the proceedings being shelved, before or after judicial investigations. In its Activities Report for 2005, the Unit indicated that one of its desired aim was to provide better feedback to reporting entities about the reports they are making.³⁷ In the view of the lead examiners, such feedback on how reports are being used by the public prosecutors and the police in their criminal investigations could certainly enhance the responsiveness of the system.

c) *Sanctions for failure to report and typologies and guidelines*

86. The penalties for non compliance with the reporting requirements can be severe: according to art. 44 and 47 of Act 11/2004, failure to report suspicious transactions of which financial institutions are aware to the public prosecutor is punishable with administrative fines from EUR 5 000 to EUR 2 500 000 or from EUR 2 500 to EUR 1 million, depending on whether they are applied to financial entities or to the natural persons linked with those entities. Similarly, violation of reporting duties by non-financial entities or natural persons linked with those entities may entail administrative fines from EUR 2 500 to EUR 500 000 (except for lawyers and solicitors who are subject to disciplinary sanctions by their respective professional associations). Besides these fines, natural persons who fail to comply with their reporting duties may face professional disqualification; in addition, the regulatory authority is empowered to make publicity of the final decision imposing the sanction on an individual (not on a legal person).

87. Despite this potentially powerful factor within the Portuguese system for ensuring that suspicious transactions are reported, the actual number of disclosures of laundering cases involving corruption of public officials has remained rather small over the past three years. Six cases of suspected corruption were identified during the first quarter of 2006, two in 2005, and one in 2004. With the possible exception of one in 2005 (which, apparently, was triggered by an information request to the UIF from the United States), none of the cases involved the predicate offence of bribery of foreign public officials. At the time of the on-site visit, there was no situation under analysis at the UIF relating to money laundering associated with corruption of foreign public officials in international business transactions.

88. Several explanations for these figures were provided to the examining team during the on-site visit. The first explanation, given by the representative of the UIF, dismissed the idea that the staff of the UIF would be insufficiently trained to establish a link between the unusual transactions brought to its attention and the crime of corruption: the fact that the UIF staff comes from the criminal police with previous experience in the investigation of offences that are predicate offences to money laundering and that the personnel of the UIF, from its position under the umbrella of the criminal police, may profit from the continuous training courses at the ISPJCC, the Criminal Police Academy, that include training on corruption, would ensure that the Unit can rely on well-trained officers. The second explanation dismissed the idea that the low number of suspected cases of laundering of corruption sent to the Unit via the public

³⁷ *Activities Report 2005*, p.12.

prosecutor reflects the financial and non-financial institutions' decision to devote their resources to laundering related to crimes other than corruption: the institutions would apply the same diligence to all potential laundering cases, whatever the underlying offence is.

89. The absence of specific guidelines or training on money-laundering associated with foreign bribery would also not impede the capacity of the institutions subject to the obligation to report to make the connection between suspicious transactions and possible acts of foreign bribery: all representatives of the financial sector interviewed by the examining team during the on-site visit said that the existing list of potentially suspicious transactions issued by the UIF and regulatory bodies such as the Central Bank were adequate enough. In the view of the lead examiners, the fact that the institutions and professions subject to the obligation to report suspicions, as well as the bodies involved in the monitoring of the reporting requirements of the obliged entities have not been issued with guidelines and typologies or received any training to help them make the connection between suspicious transactions and possible acts of foreign bribery might go some way to explaining the rather low number of disclosures of corruption in general and of foreign bribery in particular.

Commentary

Portugal has in general a comprehensive anti-money laundering regime that criminalizes the laundering of proceeds of foreign bribery. Financial and non-financial institutions have a mandatory requirement of reporting all suspicious transactions to the public prosecutor regardless of threshold amount and failure to do so entails severe punishment. Further efforts should be made to ensure that the institutions and professions required to declare suspicious transactions, as well as the regulatory agencies and other supervisory authorities, continue to receive directives and training on the identification and reporting of foreign bribery.

C. INVESTIGATION, PROSECUTION AND SANCTIONING OF FOREIGN BRIBERY AND RELATED OFFENCES

1. Investigation and Prosecution of Foreign Bribery

90. In Portugal, the prosecution service (*Ministério Público*) is in the front line in investigating and prosecuting foreign bribery and related offences, because not only it is the designated authority to receive from all public, including the police, and private authorities and individuals information or reports relating to crimes and offences of which they may have knowledge but also because, once such information has been registered with the prosecution service, pursuant to the legality principle, public prosecutors are under an obligation to open an inquiry, delegating to the Judicial Police (the criminal police or *Policia Judiciária*) the authority to investigate the reported situation. Working under the general direction of the public prosecutor and under close supervision of an investigating judge acting as the guardian of fundamental freedom and liberties, the criminal police conduct the investigation by holding hearings and collecting evidence. Depending on whether the investigation permits to gather enough evidence to establish the commission of an offence and to identify a potential suspect, the prosecutor will decide either to prosecute or close the case. Prosecution means referring the case to a trial judge. Criminal proceedings entail therefore two mandatory stages: the inquiry stage (“*inquérito*”), corresponding to the police investigation, and the trial stage.

a) Investigative and prosecuting bodies

(i) The prosecution service

91. In Portugal, criminal prosecution of offences of an economic or financial nature, of which transnational bribery is one, primarily falls within the jurisdiction of the prosecutors' offices serving the courts of first instance in the different judicial districts (*i.e.* prosecutors' offices in the principal towns of the judicial circuits) and the prosecutors' offices at the level of the four Appeal Court regions (Lisbon, Porto, Coimbra and Évora). The latter have, each, a Criminal Investigation and Prosecution Department (DIAP) which sometimes is structured in specialist sections according to the nature or frequency of crimes; this is, for example, the case in Lisbon, where there is a section for economic and financial cases. DIAP's role is to lead the inquiries and penal actions on all crimes within the jurisdiction of the court, as well as on important crimes occurring in more than one area of the same judicial district and on very serious crimes when the complexity or territorial dispersion ask for a centralisation of investigations.

92. However, since the creation, in 1998, of a Central Criminal Investigation and Prosecution Department (DCIAP) within the prosecution services, this office, headed by Portugal's Deputy Attorney General, has been given exclusive jurisdiction over particularly complex economic crimes (including bribery of foreign public officials, money-laundering and other economic offences) involving several judicial districts. In principle, the Central Department directs the inquiries and carries out the prosecution regarding these crimes. At the request of the Prosecutor-General, DCIAP prosecutors also lead inquiries in crimes and carry out penal action when their particular complexity and geographic dispersion throughout Portugal's territory justify the centralisation of investigations.³⁸ As explained to the examining team during the on-site visit, this measure mostly came about from the realisation that money-laundering, corruption offences and other types of economic crime were often highly complex affairs and that the workings of the prosecution service in certain judicial districts was sometimes ill-suited to deal with increasingly complex bribery and money-laundering cases. All reports and complains that reach the prosecutors' offices at district and regional level are in principle immediately forwarded to the DCIAP in order to allow the Department to review whether it should exercise its jurisdiction over the case or decline jurisdiction.

93. In practice, DCIAP takes the lead role only for cases which are initiated by DCIAP itself, for instance on the basis of a MLA request or for cases that are not already well developed at local level, although, under certain circumstances, when the latter cases appear to justify the centralisation of investigations because of their complexity, the Department may decide to take over those cases as well. For cases not referred to or not taken over by DCIAP, the prosecution falls to the DIAPs or the prosecutors' offices serving the courts of first instance in the different judicial districts. At the time of the on-site visit, the twelve prosecutors working in the DCIAP were handling some 200 cases, most of them involving tax fraud and money-laundering but also a few cases possibly related to acts of bribery of foreign officials.

94. Given the shortage, among the public prosecution service of certain regions and districts, of staff with sufficient technical skills in matters of economic and financial crime, this can have an impact on the quality of charges brought. This point was raised by police officers, prosecutors and civil society representatives who met with the examining team. Many persons interviewed during the on-site visit mentioned difficulties in the workings of the prosecutors' offices at local level, often ill-suited to handle highly complex economic and financial cases. In this context, it was noted that, although public prosecutors are subject to continuing training delivered by the *Centro de Estudos Judiciários* (the Centre for Judicial Studies, the entity responsible for training of magistrates), which includes regular modules on economic and financial crime, it was up to the individual prosecutor to determine if he or she requires

³⁸ Art. 46 and 47 of Law 60/98.

training (according to a study conducted by the Council of Europe, the annual percentage of public prosecutors that follow continuation training was only 29% in 2002, one of the lowest percentage in EU countries).³⁹

95. Other participants noted that prosecutors' work was still not supported by research on opportunity structures, actors and types of transactions; such information may be however vital for developing a criminal policy in this area. The lead examiners were advised that the situation should however improve in the future, with an analysis of corruption patterns (both domestic and foreign) to be undertaken in 2007 by DCIAP; it was expected that such analysis would provide a useful tool for magistrates responsible for cases concerning matters falling within the scope of the Convention.⁴⁰ Many panel participants also mentioned important deficiencies in human resources, equipment and infrastructure and information systems. According to public prosecutors interviewed by the examining team, inadequate training, combined with a heavy workload, would often result, under the constant pressure, in oversights which are picked up by procedurally-aware defence lawyers and penalized by the courts. It also results in long delays before cases are committed for trial.

96. The DCIAP indicated that, in the cases it decides not to accept, it readily offers its assistance to the decentralized department by coordinating investigations, with the DIAP or the district office retaining the lead role. Yet, in view of the often low level of expertise of local prosecutors in complex economic crimes, especially among those prosecutors who will defend the case in local courts, there is still the risk, as pointed out by several representatives of local departments of the criminal police during the on-site visit, that, once the case reaches the local court, charges will not be successfully brought against the suspect and, as a result of this, that the local judge – who himself is often not sufficiently equipped to understand all the complexities of a corruption crime, including as regards the accounting documents seized during investigations – decides to absolve the case: according to statistical data provided to the examining team by the Ministry of Justice, out of a total number of 282 cases of corruption that reached Portugal's first instance courts during the period 2001-04, the total number of cases not convicted was 83, of which 74 were absolved due to the lack of evidence collected.

97. In the view of the lead examiners, given the expertise available within DCIAP which may not be available at the regional and district level, it is suggested that DCIAP takes a more active role in directing inquiries and carrying out penal actions associated with the offence of bribery of foreign public officials in the conduct of international business pursuant to article 47 of Law No. 60/98. DCIAP prosecutors whom the examining team met during the on-site visit presented themselves as being well placed to deal with foreign bribery cases, notably given their experience acquired with major economic crimes such as tax fraud, money-laundering and in handling some of the most prominent corruption affairs in Portugal. Such role in conducting inquiries and carrying out penal action should be accompanied by adequate resources in the form of additional staff members and by the provision of proper training with respect to the offence of bribery of foreign public officials.

Commentary

The lead examiners welcome Portugal's prosecution system which provides for a central structure with specialization to handle the most complex criminal and economic offences, including the offence of bribery of foreign public officials, involving several judicial districts. They encourage Portugal to ensure that, pursuant to articles 46 and 47 of Law 60/98, DCIAP takes a more active role in directing inquiries and carrying out penal actions associated with the offence of bribery of

³⁹ European Commission for the Efficiency of Justice, *European Judicial Systems: Facts and Figures* (Council of Europe Publishing, 2005), p. 63.

⁴⁰ See reference to this study under section 1 (a) (i) of part B of the present Report.

foreign public officials in international business transactions and, in this regard, that other departments of the public prosecution service promptly report all suspicions of foreign bribery to the DCIAP. Such more active role should be accompanied by adequate resources in the form of new staff members and by the provision of proper training, particularly with respect to the offence of bribery of foreign public officials.

(ii) *The Judicial Police*

98. As noted above, although in Portugal responsibility for the criminal investigation rests with the prosecution service, which means that the public prosecutor directs the investigations aimed at collecting the evidence that will allow him or her to decide whether there are sufficient indicators of a crime in order to start a prosecution, it is the Judicial Police who actually carries out judicial investigations.⁴¹ According to statistics provided to the examining team, in 2002-05 the Judicial Police conducted a total of 1 251 investigations of corruption cases, *i.e.* an average of 312 investigations per year. Most of them concerned corruption of local and central public authorities (49% of all corruption-related inquiries initiated in 2002-05), security forces (15%), road and traffic authorities (8%), justice (5%), tax administration (4%), health services (4%) and sport (2%).⁴²

99. Several structures exist within the Judicial Police to handle inquiries into transnational bribery and related offences. At the central level, among the Judicial Police's central operational directorates, there is one which is in particular responsible for assisting the prosecutors with their investigations related to corruption offences, including transnational bribery: the Central Directorate for Combating Corruption and Economic and Financial Crime (*Direcção Central de Investigação da Corrupção e Criminalidade Económica e Financeira*- DCICCEF). Set up in the 1990s, the Directorate is responsible for investigating, collecting, centralizing information and providing assistance to the judicial authorities on, amongst other things, corruption and financial offences, including transnational and international economic and financial offences and offences closely connected to them. As such, the DCICCEF has run investigations into the most prominent and far-reaching corruption affairs in Portugal, as well as into ten or so transnational bribery cases, and has often taken over the largest number of inquiries associated with corruption offences initiated in a given year: for example, in 2005, the DCICCEF took over 32% of the 347 corruption-related inquiries initiated that year.⁴³

100. Until recently, the DCICCEF comprised one specialised unit, the Central Corruption Investigation Division (*Secção Central de Investigação de Actividades de Corrupção* - SCIAC), which was specifically responsible for investigating corruption offences, including transnational ones. It comprised an anti-corruption investigation brigade and had a total of 35 operational officers. Since a restructuring of the DCICCEF that took place in January 2006, the SCIAC has become the Central Division for Combating Corruption and Economic and Financial Crime (*Secção Central de Investigação da Corrupção e Criminalidade Económica e Financeira*- SCICCEF), divided into three units, each of them comprising three brigades of 18 inspectors, 52 inspectors in total. The decision to restructure the former SCIAC mostly came about the realisation that corruption cases are highly complex affairs and often closely associated with other types of economic and financial crime and which therefore require the pooling of different expertise within one single structure.

⁴¹ The police have technical and tactical autonomy in conducting the investigation (art. 2 of Law 101/2001). Technical autonomy entails having the freedom to choose the most suitable means of investigation in each individual case, and tactical autonomy involves the freedom to decide the timing of an intervention.

⁴² Judicial Police, *The Crime of Corruption: Evaluation of Organized Crime by the Judicial Police 2002-2005*, pp. 4-5, 8-9.

⁴³ *Ibid.*, p.7.

101. At regional and local level, public prosecutors can benefit from the assistance of the three regional divisions (Porto, Coimbra and Évora) and eight local departments of the Judicial Police (Braga, Aveiro, Guarda, Leiria, Setúbal, Portimão, Funchal and Ponto Delgada). A decentralisation rule applies whereby an investigation takes place in the place where the offence was committed. Hence, in December 2005, the Department of Porto was responsible for 34% of all corruption-related inquiries under investigation by the judicial police at that time, followed by Braga and Setúbal (9%), Coimbra (5%), Funchal (4%), Leiria and Faro (3%), and Ponta Delgada, Aveiro, Portimao and Guarda (2%).⁴⁴

102. In total, prosecutors conducting investigations in cases of international corruption and related offences can call on the services of police officers who, in order to do career in criminal investigation, have passed a competitive examination and regularly attend training at the Judicial Police and Forensic Science Institute (ISPJCC) that includes modules on approaches to criminal investigation in the field of economic and financial crime, including corruption and money-laundering. In practice, prosecutors, in particular DCIAP prosecutors, will tend to rely first and foremost on the Judicial Police forces of the central directorate, in particular the 52 SCICCEF operational officers of the central directorate: as several representatives of the Judicial Police told the examining team during the on-site visit, because of its limited jurisdiction, the DCICCEF had been able to develop a rather strong expertise in corruption investigations. Staff of the SCICCEF can also call upon the logistical support of their 15 colleagues of the Department of Financial and Accounting Expertise, responsible for providing a wide range of technical opinion for investigations upon request.

(iii) Coordination among bodies and agencies

103. When conducting investigations during the inquiry stage, Judicial Police officers not only work under the direct orders of the public prosecutor but also under close supervision of an investigating judge. In particular, the intervention of the judge is required for investigative acts such as searches, arrest in banks and other financial institutions, interception of phone calls, undercover investigations, as well as for the use of certain additional methods of investigation to collect evidence. Judicial Police officers told the examining team that the excessive workload of some investigating judges and their often insufficient training in economic and financial crime would sometimes result in delays before the use of coercive measures receives authorisation from the judges or even in decisions not to grant authorisation: although, investigating judges, like public prosecutors, are subject to continuing training by the Centre for Judicial Studies that offers regular modules on economic and financial crime, because the judiciary is independent of the government, it is up to the individual judge to determine if he or she requires specialised training.

104. As for investigating judges, although trial judges are subject to continuing training by the Centre for Judicial Studies, because the judiciary is independent of the government, it is up to the individual judge to determine if he or she requires specialised training. Due to a heavy workload, many trial judges would decide not to attend such training: competence of the investigating judges in investigations of economic and financial crime would be acquired mainly through on-the-job training as proceedings pass through the judges' hands. Expertise acquired on the job would in any case be undermined by the fact that courts in Portugal –due to the absence of a chamber system- have no genuine specialisation in economic and financial crime. The Police representatives explained that the absence of magistrates specialised in economic and financial crime could explain the sometimes rather large number of non-conviction decisions due to what would be seen by judges as “lack of evidence”.

105. The lead examiners were told that teamwork between Judicial Police departments and prosecution services was generally working better, although the examining team heard conflicting assessments of collaboration between the two bodies. For example, during the on-site visit, the examining

⁴⁴ Ibid., p.8.

team was told that the Judicial Police does not have access to the database of the prosecution service regarding on-going pre-investigations and inquiries, which would sometimes result in parallel investigations. Databases interconnection, as planned at the time of the on-site visit, was expected to improve coordination however. Other constraints, having to do with the police's technical autonomy, were raised by the police: as noted above, although the Judicial Police is free to choose the most suitable means of investigation in each individual case, certain special investigation methods require however an authorisation by the public prosecutor: thus the effectiveness of the inquiry depends heavily on the attention that the prosecuting authorities give to the case. Their complaint related not only to staffing, but also to the fact that certain investigations, such as assets investigations, were not always considered as priority by some prosecutors.

106. By contrast, coordination and cooperation between the Judicial Police and the tax authorities was described as having much improved since the Directorate General for Taxation (DGSI) and the Directorate General for Customs and Consumption Taxes (DGAIEC) entered in 2003 into a Memorandum of Understanding with the Judicial Police, which allows for continuous exchange of information and reciprocal access to databanks of relevance to tax crimes and money laundering associated with tax crimes, with which corruption offences are often related. Meetings with representatives of these agencies at the on-site visit indicated that the MoU has generally facilitated a high level of collaboration between the Ministry of Finance and the Judicial Police in areas of mutual responsibility. In conducting its investigations, the Judicial Police is also authorized to have direct access to information on civil and criminal matters on the files of the Directorate General for Computer Services at the Ministry of Justice, as well as to information of relevance to criminal cases contained in the files of other criminal bodies (Organic Law governing the Judiciary Police adopted in DL 295A/90, as amended by Law 36/94).

Commentary

The lead examiners note that, although judges and public prosecutors are subject to continuing training delivered by the Centre for Judicial Studies which provide regular modules on economic and financial crime, it is up to the individual judge or prosecutor to determine if he or she requires training. They therefore recommend that the Portuguese authorities provide specialized, mandatory training for those professionals in the area of bribery and related economic and financial offences as a means of ensuring the effectiveness of prosecution of foreign bribery. In addition, they encourage the Portuguese authorities to pursue their efforts in gathering relevant information regarding the number, profile and criminal outcomes of cases featuring bribery harmful to international business for developing a criminal policy in this area.

b) The conduct of investigations

(i) The commencement of proceedings

107. Portuguese criminal procedure is based on the principle of legality: once information or reports relating to crimes and offences has been brought to the attention of the public prosecutor, the public prosecutor is in principle under an obligation to initiate and lead an inquiry and has the duty to prosecute all offenders when the legal facts exist to presume that an offence has been committed, even if a victim does not press charges. In practice, where there exists suspicion of a criminal offence, a pre-inquiry (also referred to as a preventive investigation) will often be initiated by the police to gather preliminary information (the public prosecution service is immediately notified of investigations initiated independently by the police); depending on whether the pre-investigation permits to gather enough information to suggest the commission of a criminal offence, the prosecutor will decide to initiate or not a formal inquiry during which more sophisticated investigative tools are available to the police, *i.e.* during

which potential witnesses and suspects will be interviewed, documents obtained and analysed, and financial transactions researched.⁴⁵

108. As a result of the legality principle, in Portugal, a real prosecution policy with priority setting in the prosecution of certain crimes is unknown. Following the legality principle that demands that every crime must be investigated, setting a higher priority for penal action one type of crime would go against the law, as emphasised by DCIAP prosecutors met during the on-site visit.⁴⁶ Furthermore, as belonging to an autonomous and hierarchically-organised service, with the Office of the Chief Public Prosecutor of the Republic as its head (appointed for a six-year term by the President of the Republic on a proposal from the government and who can only be revoked on a joint initiative by the Government and the President, which, in light of Portugal's constitutional system, is very unlikely), prosecutors carry out their duty to prosecute in total independence, without instructions or injunctions from any other authority. Indeed, in accordance with art. 19 of the Constitution and art. 2 of the Statute of Public Prosecutors, the prosecution service is independent from the executive or judicial power. Therefore, the Minister of Justice and the Government are unable to intervene in a criminal inquiry.

109. The closure of the inquiry is brought about by a decision to prosecute or close the case, depending on whether the prosecutor has gathered enough evidence to establish the commission of an offence and to identify a potential suspect: the prosecution is under a duty to present an indictment whenever sufficient information has been gathered to establish the commission of a crime and to identify a perpetrator. The public prosecutor would refrain from prosecution in only three cases (articles 68, 277 and 285 CCP): when the inquiries show that the offender is innocent because there is enough evidence that he did not commit the offence; when it can be seriously doubted that there is a reasonable chance of securing a conviction; and when the prosecution is legally inadmissible due to time limits (see below). In Portugal, public prosecutors are not vested with the right to settle a criminal case out of court.

110. Pursuant to articles 68 to 70 CCP, any victim of a crime may become part of the criminal proceedings as long as the person acquires the status of "*assistente*" (assistant). Such procedure is available for the foreign bribery offence and, according to Justice representatives met during the on-site visit, opened to competitors. One of the consequences of this procedure is the possibility for the *assistente* to request for an *instrução* – a stage handled by an investigating judge which is intended to provide judicial evidence for the decision either to commit the case for trial or to take no further action (art. 287 CCP).⁴⁷ Requesting the status of *assistente* gives the victims/competitors a significant advantage: it makes them a party in the judicial investigation, enabling them to contribute to the investigations by offering evidence, requesting certain procedures and by exercising their rights of appeal against court decisions affecting them, even if the public prosecutor has not done so.

(ii) *Limitation periods and delays in proceedings*

111. The limitation period for the foreign bribery offence is 10 years. The period starts running from the date of the "accomplishment of the act", *i.e.* the date of offering, promising or giving in respect of the

⁴⁵ Representatives of the prosecution authorities and the Judicial Police explained to the examining team that the police will begin pre-investigations based not only on formal complaints but also, as indicated earlier in this Report, on anonymous complaints and other sources of information such as substantial allegations in the press, corporate reports or MLA requests.

⁴⁶ At the time of the on-site visit, as a result of continuous cuts in the budget of government's departments, including the Ministry of Justice, a framework law on criminal policy (Law 17/2006) foresaw the presentation, by the government to the parliament and every two years, of a plan setting out the priorities for the criminal policy; the first presentation was due to occur in 2007. Most public prosecutors and police officers interviewed by the examining team dismissed the idea that such plan would influence their daily work as they are bound to the legality principle according to which once information relating to crimes has been brought to their attention, they are under an obligation to initiate and lead an inquiry.

⁴⁷ Pursuant to art. 308 CCP, the *instrução* is closed by a decision whether or not to proceed to trial.

foreign bribery offence (art. 119 CC). The limitation period is suspended or interrupted in a number of circumstances, which are listed in articles 120 and 121 CC. As to investigations, they must be completed within 6 to 12 months from the time the investigation was initiated, depending notably on the complexity of the crime.

112. As noted above, procedural delays in corruption investigations and prosecutions in Portugal have been identified during the on-site visit, notably with regard to the use of coercive techniques such as the seizure of documents and bank information. The heavy workload of many public prosecution offices as well as of investigating judges, combined with inadequate training and resources and oversights which are picked by procedurally-aware defence lawyers, would often result in long delays before cases are committed for trial or even in cases which are prescribed in courts: according to Justice data provided to the examining team, out of 170 corruption cases that reached the first instance judicial courts during the period 1997-2000 (latest data available), 74 were not convicted, of which at least 10 prescribed in the courts (57 were absolved due to lack of evidence). Many law enforcement officials pointed out to the examining team that speed is essential in investigations related to complex economic crimes, not only due to the time limit for investigations but also because evidence can be easily hidden or destroyed by offenders and their accomplices. The complexity of foreign bribery investigations can make such investigations more vulnerable to inadequate speed of enforcement action.

c) *Investigative techniques and bank secrecy*

113. To prove its case, the prosecution has broad powers of investigation during the inquiry phase. These include methods to induce people to reveal information (interrogatories, confrontations, testimonial evidence, etc.), coercive measures such as searches of persons and premises, the lifting of bank secrecy,⁴⁸ seizures – including, pursuant to art. 181 CCP, seizures of assets in banks – and other methods designed to produce findings of fact, as well as measures to ensure that the suspects or any person likely to be in possession of information are present (preventive detention, release on bail, etc.). As noted above, in general, recourse to coercive measures depends upon prior authorisation or orders of an investigative judge within his/her respective powers. Yet, the judicial police, under certain circumstances, where it proves impossible to have recourse in due time to the competent judicial authority and the collection of evidence is imperilled, may make use of coercive measures without prior authorisation of the investigating judge. The use of such measures must however be immediately submitted to the investigating judge who is responsible for validating the use of these methods.

114. In addition to these methods, during investigations dealing with domestic and transnational corruption as well as money-laundering cases, more sophisticated techniques to gather material evidence can be used. The so-called special investigation techniques are foreseen both in the CCP (for example as to interception of phone calls and other communication methods) and in separate legislation that is applied to economic and financial crime such as Law 36/94 of 29 September 1994 on Measures for Combating Corruption and Economic and Financial Crime, Act no. 93/99 of 14 July 1999 Governing the Enforcement of Measures on the Protection of Witnesses in Criminal Proceedings, Law 144/99 on International Cooperation in Criminal Matters and Law 104/2001 updating the Law on International Cooperation in Criminal Matters, Act 101/2001 of 25 August on Covert Operations Undertaken for the Purposes of Crime Prevention and Criminal Investigation, and Act 5/2002 of 11 January Establishing Measures for the Combat Against Organised Crime and Economic Financial Crime.

⁴⁸ Pursuant to art. 5 of Law n° 36/94 of September 29 on “measures for combating corruption and economic and financial crime”, 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 documents would be of interest in establishing the truth during the criminal investigation related to offences, including the foreign bribery and money-laundering offences.

115. Special investigative methods thus include the possibilities for intercepting telephone calls and internet communications (articles 187 and 188 CCP), audio and visual recording (art. 6 Act 5/2002), as well as undercover investigations (paragraphs l, m and p of art. 2 of Law 101/2001 of 25 April) and the use of collaborator agents as active bribers: over the past few years, several investigations related to cases of bribery of *Portuguese* public officials have involved agents collaborating as active bribers. In contrast, the use of *agents provocateurs* is strictly prohibited by legislation. All the above-mentioned techniques must be authorized by the investigating judge. Special investigation methods requiring the disclosure of otherwise confidential information, for example by the welfare authorities, credit institutions, finance companies or Inland Revenue officers, require authorisation of the public prosecutor (art. 2.2 of Act 5/2002). Portuguese investigators may also resort to the use of witness protection measures (non-disclosure of identity, use of teleconferencing, physical protection, programme with change of identity and protection of family, etc) as governed by Law 93/99 of 14 July on the Enforcement of Measures on the Protection of Witnesses in Criminal Proceedings and Decree Law 190/2003 on Witness Protection Regulation which regulates the implementation of Law 93/99. Protection may be granted not only in cases of corruption but also in relation to criminal proceedings associated with money laundering.

116. Overall, over the past several years, the Government of Portugal has worked diligently to provide its law enforcement authorities with rather sophisticated investigative tools. Yet, the fact that generally satisfactory legislation relating to the use of special investigation measures appears in a variety of specific and scattered source may impede the effectiveness of investigation and prosecution: this is, for example, an issue where the use of cover agents in economic crimes is concerned as it emerged from discussions with the Union of civil servants working on criminal investigations (ASFIC). Furthermore, despite the strengthening of the means of evidence-gathering and investigation, there has not always been a corresponding increase in financial resources to make sure they are used fully and efficiently. This is an issue where apparently most special investigative methods are concerned, as it emerged from on-site interviews. Also, structural deficiencies in the administration of justice, notably with respect to logistics and adequate communication between, on one hand, the Judicial Police, and, on the other hand, the public prosecutors and the investigating judges whose authorisation must be sought for using special investigative techniques, were said to often result in delays before the use of coercive measures such as searches of bank accounts receives authorisation from the relevant competent authority.

Commentary

The lead examiners welcome the broad range of investigative measures available to investigative authorities in the context of foreign bribery investigations. However, these efforts can only be achieved if adequate resources are forthcoming. As a result, the examiners recommend that every effort be made to give the judicial police, prosecutors and examining magistrates the means, in terms of financial and material resources, to unravel the complexities frequently encountered in transnational bribery cases and related offences.

d) Mutual legal assistance and extradition

(i) Mutual legal assistance

117. Mutual legal assistance (MLA) in Portugal is principally governed by treaties and by the Law on International Judicial Cooperation in Criminal Matters – Law 144/99 of 31 August – which is hierarchically subordinate to the ratified and approved international treaties, while the Code of Criminal Procedure applies when no other provision is contained in the international treaties or in Law 144/99. Portugal is a party to a number of multilateral MLA conventions, including the 1959 European Convention on Mutual Legal Assistance in Criminal Matters and its 1978 additional protocol (the 1959 European Convention), and the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June

1985.⁴⁹ In addition, foreign requests for the temporary seizure of assets or for their confiscation in Portugal may be handled through the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (the 1990 Strasbourg Convention) and the United Nations Convention on Transnational Organized Crime (ratified on 2 April 2004). Portugal has also concluded bilateral treaties with a number of countries. MLA treaties in force in Portugal are applied directly and do not require implementing legislation or other measures.⁵⁰

118. There are four channels for the transmission of requests: (i) diplomatic channels with those countries with which Portugal has not signed an international agreement or convention; (ii) between central authorities (Chief's Public Prosecutor's Office), in which situation incoming requests are directly forwarded to the competent judicial authorities; (iii) direct transmission between judicial authorities under the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters and its Additional Protocol of 17 March 1978 in urgent cases (requests are sent directly to a known address, otherwise via Interpol, or sometimes via the central authority for translation); and (iv) within the framework of the Schengen Convention.⁵¹ While the statistical tools currently available to departments of the Ministry of Justice do not provide a full picture of all MLA requests, every year the Portuguese central authority processes slightly more than one thousand different kinds of incoming and outgoing requests, of which about 50 relate to laundering or corruption. According to figures from the DCIAP provided to the lead examiners, during the past five years, at least three requests for assistance involving suspicions of bribery of foreign public officials were received by Portugal, one from Brazil, one from France and one from Poland.

119. Under Law 144/99, Portugal may refuse to execute a request for assistance from a foreign country if the application threatens Portugal's public policy, sovereignty or security or other, constitutionally defined, interests of the Portuguese Republic. However, such grounds for refusing assistance have apparently never been used as a basis for executing a request relating to a business-related or financial offence. No request for mutual legal assistance may be refused when it seeks production of banking records. Banks cannot refuse to provide information on the assets of suspects or those charged with certain criminal offences, among which serious and international economic and financial crimes. Alerting a customer that s/he is the subject for information is strictly forbidden.

120. Dual criminality is not a general prerequisite for international judicial assistance under Law 144/99; it is however required if the assistance requested involves coercive measures (art. 147). Based on on-site discussions with the Portuguese authorities, it appears that because under Portuguese law criminal responsibility of legal persons is established for only a few specific corruption offences, if international regulatory letters do not specify the specific corruption offence for which assistance from Portugal is required (active bribery harmful to international business), it could preclude the availability of MLA in some cases. As pointed out by a representative of Portugal's central authority for MLA, the description of the facts of a case must be complete and sufficiently detailed to allow Portugal to determine whether the preconditions for cooperation are met.

121. Subject to the fact stated above that might in certain cases prevent Portuguese magistrates from executing international letters rogatory linked to legal persons, the examining team did not identify any

⁴⁹ At the time of the Phase 2 Examination of Portugal, Portugal had signed (on 11 December 2003) but not yet ratified the UN Convention against Corruption (UNCAC).

⁵⁰ In the absence of a specific treaty or convention, MLA is subject to a condition of reciprocity, except when it is necessary to combat "certain serious forms of criminality", which, according to the magistrates interviewed by the examining team during the on-site visit, would cover requests for assistance in respect of the foreign bribery offence.

⁵¹ Apart from Portugal, thirteen countries are part of the Schengen area: Austria, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway and Spain.

fundamental problems with the law, procedure or the quality or timeliness of responses to MLA requests from abroad. Through art. 145 and following of Law 144/99, Portugal is obliged to render the widest MLA in the investigations and proceedings of criminal nature and connected proceedings, in a constructive, effective and timely way. In this regard, most prosecutors and police officers who spoke to the examining team complained of the sluggishness in executing international letters rogatory in certain countries when compared with Portugal's readiness to provide MLA; cooperation with signatories of the Convention was said to generally work better. Portugal also readily gives its approval for visits by foreign authorities (magistrates or police) with knowledge of the case, in order to ensure that the request for assistance is dealt with as efficiently as possible. For example, in a case involving suspicions that officials of an EU country had been bribed by a Portuguese company, the questioning of individuals involved in the case was done in Lisbon by DCICCEF officers accompanied by prosecutors of that EU country.

122. Portuguese authorities also seem to readily make use of incoming requests to initiate their own foreign bribery investigations. Such was the case of the matter being dealt with by the DCIAP at the time of the on-site visit involving suspicions that a Portuguese company had bribed officials of an EU country in the context of the privatisation of insurance companies; the case had been brought to the attention of Portugal in connection with a request by that EU country for international legal assistance regarding the possible laundering of bribe money that would have been deposited in a bank account in Portugal. Another request for MLA, this time coming from another EU country and involving alleged bribe money that would have flowed through subsidiary companies based in Madeira, similarly prompted the initiation of investigations; the case was subsequently closed by Portugal due to lack of evidence.

(ii) *Extradition*

123. Extradition in Portugal is provided pursuant to Act.144/1999, which is hierarchically subordinate to Portugal's multilateral and bilateral extradition agreements. In addition to international treaties that contain relevant provisions on extradition such as the OECD Convention on Combating Bribery of Foreign Public Officials, Portugal is party to a number of bilateral treaties. For EU States Portugal can utilize the procedures set forth in the European Arrest Warrant allowing the efficient processing of extradition actions between Member States without the requirement for dual criminality for certain types of offences, including foreign bribery. Every year the Portuguese central authority processes between 20 and 30 requests, of which about 2 to 3 relate to corruption. Most requests for extradition come from Brazil, Moldavia and Romania.

124. Dual criminality is a requirement under art. 31.2 of Law 144/99, according to which Portugal may provide extradition for criminal investigations instituted by the authorities in a requesting State in respect of offences, including attempted offences, that are punishable under both the Portuguese law and the law of the requesting State by a sanction or measure involving deprivation of liberty for a maximum period of at least one year. The requirement is deemed to be met if the offence for which extradition is sought falls within the scope of Article 1 of the Convention as criminalized pursuant to Portugal's Criminal Code and special criminal laws. As for extradition requests originating from countries that are not parties to the Convention and not EU States, the dual criminality requirement would be applied with flexibility. The Portuguese authorities also stated that, according to case law, the question of whether the offence is punishable both in Portugal and in the requesting State is judged at the time of the commission of the offence.⁵²

125. Requests for extradition involve two stages of decision-making: the administrative stage and the judicial stage. The administrative stage consists of an assessment of the extradition request by the Minister

⁵² See: *Portugal Phase 1 Report: Review of the Implementation of the Convention and the 1997 Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD, May 2002), p. 30.

of Justice for the purpose of deciding on the basis of technical reasons or on discretionary grounds (such as national interests) whether the request is admissible or not admissible. A decision of the Minister of Justice to refuse extradition cannot be appealed (art. 47 of Law 144/99). The judicial stage rests under the exclusive competence of the *Tribunal da Relação* and consists of a legal assessment for the purpose of deciding whether an extradition shall be granted or not (this decision may be subject to an appeal to the Supreme Court of Justice). Pursuant to art. 32 of Law 144/99, Portuguese nationals cannot be extradited unless the applicable treaty or agreement provides otherwise, the offence in question relates to terrorism or to international organized crime, or the legal system of the requesting State guarantees a fair trial. Pursuant to art. 32.5, where extradition is declined solely on the ground that the person is a Portuguese national, the case shall be submitted to the competent authorities for the purpose of prosecution in accordance with art. 10.3 of the Convention.

Commentary

The lead examiners are of the opinion that Portugal has, in general, a developed and responsive system to deal with MLA and extradition requests.

e) The oil-for-food allegations

126. The Independent Inquiry Committee into the United Nations Oil-for-Food Programme (IIC) was established in April 2004 through the appointment by the United Nations (UN) Secretary-General of an independent, high-level inquiry to investigate and report on the administration and management of the UN Oil-for-food Programme. On 27 October 2005, the IIC published its fifth and final substantive report (“IIC Report”). The IIC Report focused on the transactions between the former Iraqi government and companies and individuals to whom it chose to sell oil and from whom it bought humanitarian goods. The IIC Report documented a vast network of alleged illicit surcharges paid to the Iraqi government in connection with oil contracts. It also documented the payment of alleged kickbacks in the form of after-sales-service fees and inland transportation fees in relation to contracts for the sale of humanitarian goods to the Iraqi government. Companies from many countries, including Portugal, are referred to in the IIC Report.⁵³

127. Following the publication of the IIC Report, the UN Secretary-General issued a statement calling on national authorities to take steps to prevent the recurrence of the companies’ alleged activities documented in the Report, and take action, where appropriate, against companies falling within their jurisdiction. The IIC Report only describes the alleged activities, and does not presuppose how national laws would apply to them. With respect to the allegations in the IIC Report concerning Portuguese interests, in general the Portuguese authorities took swift action to cooperate with the IIC concerning the alleged acts of certain Portuguese nationals in relation to the programme, and subsequently assessed whether breach of Portuguese criminal law had occurred in relation to these acts. However, on-site visit discussions with the DCIAP revealed that the dealings of all Portuguese companies in relation to the OFFP had not always been given full consideration: in one particular instance, not all steps had been undertaken to verify the potentially important and well documented information included in the IIC Report.⁵⁴

Commentary

The lead examiners note that the Portuguese authorities have taken certain measures in reaction to OFFP corruption allegations, but also note that additional action might be needed. The lead

⁵³ See Independent Inquiry Committee, *Report on the Manipulation of the Oil-for-Food Programme*, 27 October 2005 and ‘*Response to Report of Independent Inquiry Committee (‘IIC’) into United Nations Oil-for-food Programme*’, OECD (DAF/INV/BR/WD (2005) 25), 5 December 2005, p. 4.

⁵⁴ Some information about cases and allegations unrelated to the OFFP can be found in the introduction.

examiners consider that detecting foreign bribery requires from the law enforcement authorities that they take a more proactive approach to detecting such crimes and therefore recommend that Portugal ensure that law enforcement authorities are provided with the necessary means and instructions to proactively detect and investigate all credible foreign bribery allegations, including the various allegations mentioned in this report.

2. The Offence of Active Bribery of Foreign Public Officials

128. In a growing attempt to tackle the various forms of corruption and to implement evolving European and international standards, Portugal's legal framework on corruption has experienced extensive reforms in recent past. This is revealing of Portugal's continuous commitment to achieve the highest legal standards in fighting corruption, but also raises potential issues related to the choice of statute for the offence, the relation between art. 41-A of DL 28/84 and other active bribery offences, recent evolutions in the conceptual history of bribery offences in Portuguese law and the treatment of certain elements of the offence.

a) Establishing the offence

129. Portuguese law proscribes bribery of foreign public officials in the conduct of international business under art. 41-A of DL 28/84, an offence entitled "Active Bribery against International Business". Decree Law 28/84 primarily deals with offences affecting the national economy and public health, and one of the main purposes of the Decree Law is to address the criminal liability of legal persons for these offences. The Decree Law includes offences such as fraud in obtaining grants and subsidies, but did not originally include any corruption offences. When the offence of foreign bribery was introduced into DL 28/84 in 2001, it was meant to ensure effective liability of natural and legal persons for active bribery of both domestic and foreign officials committed in the conduct of international business.⁵⁵

130. This is not the sole characteristic of the Portuguese legal framework addressing the offence of foreign bribery. Whereas art. 41-A of DL 28/84 addresses active bribery of foreign officials "in international business", other types of active foreign bribery offences committed outside the conduct of international business are covered elsewhere in Portuguese law. Active bribery of a public official from an EU Member State or institution, as well as active bribery of a public official of an international organisation to which Portugal is a member, are addressed in art. 374 of the Criminal Code (CC), whereas active bribery of a political official of an EU Member State or institution is addressed by a special criminal law (art. 18 of Law 34/87). These offences carry a sanction of imprisonment from 6 months up to 5 years when committed "for the purposes of an unlawful act" (art. 374.1 CC and art. 18.1 of Law 34/87) and a maximum of six months imprisonment and a fine up to 60 days when they are committed "for the purposes of a lawful act" (art. 374.2 CC and art. 18.2 of Law 34/87). The offence of active bribery against international business (art. 41-A of DL 28/84) does not make any distinction between bribery acts committed for the purposes of a lawful act and bribery acts committed for the purposes of an unlawful act; and is sanctioned by imprisonment from 1 to 8 years.

131. On the question of whether this legal framework might lead to possible overlaps or to a double-standard application of penal instruments with respect to the offence of bribery of foreign public officials, the Portuguese authorities replied that under the legal principle of primacy of special law over general law, art. 41-A of DL 28/84 applies to all foreign bribery acts occurring "in international business", regardless of whether they involve public or political officials from an EU institution or country, or of an international organisation to which Portugal is a member. In their Responses to the Phase 2 Questionnaires, they further explained that "international business" refers to "all activity of an economical nature, such as operations

⁵⁵ The text of the offence is reproduced in Annex 3.

related to production, exchange, construction works, investments and all other types of services”.⁵⁶ As such, it would seem that all active bribery acts occurring in relation to the conduct of such international operations would be prosecuted and sanctioned under art. 41-A of DL 28/84; and that art. 374 CC or art. 18 of Law 34/87 could then be used as appropriate in certain active bribery cases where the element of “international business” cannot be proven and where the passive briber is a European public or political official (or an official of an international public organisation to which Portugal is a member). The lead examiners were generally satisfied with the explanation provided by the Portuguese authorities, although they note that Law 34/87 is, just like DL 28/84, a special law which has primacy over general law. Also, considering that the present legal framework has not yet been tested,⁵⁷ the possibility remains that certain Convention offences could be tried under art. 374 CC or art. 18 of Law 34/87.

b) Treatment of the elements of the offence

(i) Definition of a foreign public official

132. The most distinctive aspect of the definition of foreign officials in art.41-A of DL 28/84 – when compared to the definition provided in Article 1 of the Convention – is that it is split in two parts: “foreign public officials” (paragraph 2) and “foreign political officials” (paragraph 3). The part of the definition provided in paragraph 3 is non-autonomous: it expressly states that foreign political officials are those qualified as such by the law of this official’s State. This departs from Article 1 paragraph 4 of the Convention, which gives an autonomous definition of foreign public officials to which national legislation should conform.⁵⁸ Indeed, the definition provided in the foreign law might not in fact comply with the definition in Article 1 of the Convention (*i.e.* it might not cover all the necessary categories of officials). The non-autonomous aspect of paragraph 3 of art.41-A is also significant in light of the fact that paragraph 2 does not, for instance, cover foreign legislators.⁵⁹

133. During the Phase 1 examination of Portugal, the Working Group took the view that the approach taken by Portugal could affect the implementation of the Convention and consequently recommended that this aspect of Portugal’s legislation be discussed further in Phase 2. During and after the on-site visit, the Portuguese authorities explained that the approach taken by Portugal’s legislator aims at ensuring that Portuguese public prosecutors, when establishing political official status, refrain to refer to Portuguese law as Portuguese law may not encompass all situations of political holders in foreign States: the objective is eventually to cover a broader scope of political officials than the one found in Portuguese law.⁶⁰ While in agreement with the Portuguese authorities as to the importance that Portugal’s law enforcement authorities do not refer to Portuguese law when establishing public official status, the lead examiners noted however that the need to rely on the opinion of the authorities of the country in question in order to make an informed judgement on whether or not the recipient of the bribe was exercising a political function in this foreign country could significantly impede the effectiveness of the investigation and prosecution of the active briber. It might in practice be difficult to secure the cooperation of the foreign country to establish

⁵⁶ No indication as to what should be considered as occurring “in international business” appears to exist in Portuguese law.

⁵⁷ The relevant provisions in the Criminal Code, in Law 34/87, and in Decree Law 28/84 are in place since 2001.

⁵⁸ Commentary 3 to the Convention also provides that the foreign bribery offence should be autonomous, “not requiring proof of the law of the particular official’s country”.

⁵⁹ Note also that, for the purposes of offences of bribery of domestic officials, Portuguese and EU legislators are defined as *political* officials (art. 3 of Law 34/87); and so are the President of the Republic, the President of the Assembly of the Republic, Members of the Government, Members of the European Parliament, Ministers of the Republic for an autonomous region, Members of a representative body of local government, and civil governors.

⁶⁰ Portugal explained that the important thing, according to the Portuguese legislator, was that a person be in a position of power in the other state, regardless of the fact that that person would never be considered as a political official in Portugal.

political official status, especially in countries where the judicial authorities show little inclination to cooperate when their own political officials are implicated. The public prosecutors met by the examining team during the on-site visit acknowledged that in cases where the foreign official does not clearly fall under the definition of a “public” official provided in paragraph 2, a proof of the law of the foreign official’s country would be required in order to determine whether paragraph 3 applies; *i.e.* whether the official is qualified as a “political” official by the law of the State for which he/she exercises his/her functions.

134. Also, in addition to being non-autonomous, the definition provided in paragraph 3 of art. 41-A of DL 28/84 appears to depart from Commentary 18 of the Convention, which clarifies that the definition should not be limited to officials from formally recognised “States”, but that it also extends to officials from other entities such as “an autonomous territory or a separate customs territory”.

(ii) *To offer, promise or give*

The relation with the passive bribery offence

135. Under Portuguese criminal law, the offence of active bribery is perpetrated simply by making offers or promises for the purpose defined by the law, whether such offers or promises have been accepted or not. Thus, in principle, for the offence to exist it is sufficient that there be proof, on one hand, of the offer or promise made to the public official, and, on the other, of the purpose of this offer or promise (in order to obtain or retain business, a contract, etc). In the law, the attitude of the public official in respect of the offers or promises does not need to be elucidated.

136. In one case dating from 1995, a Portuguese court ruled that a crime of active corruption is considered to have occurred where the bribe is “given or simply promised thus not being necessary the verification of passive corruption. The simple act of offering an amount of money for the corruption of a public official regardless of its acceptance is considered as a crime of active corruption...”. In another case dating from 1996, however, a trial court considered that a bribery offence was only “proven to have been committed [where] there was a counterpart between the patrimonial advantage and the act of [passive bribery]”.⁶¹

137. Proof of the existence of a counterpart or of passive bribery can be a delicate matter, especially when it has to be sought in a non-cooperative foreign country. All the public prosecutors and police officers interviewed during the on-site visit emphasized this difficulty and saw such requirement not only as an element of proof not provided for in the legal text setting the offence of active bribery but also a potential major obstacle for prosecuting offences such as the offence of foreign bribery: according to them, trial judges would still not have fully assimilated that under the current legal framework, the presence of a counterpart or of an agreement to such a counterpart is no longer required in order to prove the active bribery offence. In the Ministry of Justice’s opinion, this period of incoherence in the praxis of the courts would have however been surpassed, given the fact that the amendments made in 2001 – introduced notably to comply with the requirements of the Convention and other international commitments – were used by the legislator as occasions to reiterate and clarify the separation of the active and passive bribery offences. Officials of the Ministry of Justice also emphasised the consistent interpretation by legal science since 1982 in considering that a corresponding offence by the passive briber is not required to prove the active bribery offence, and vice versa.

⁶¹ Excerpts of court ruling summaries in this paragraph are unofficial translations submitted to the lead examiners by the Portuguese authorities after the on-site visit.

Knowledge by the public official of the offer, promise or gift

138. The act of “offering” a bribe to a public official can be covered by Portuguese law, even though not explicitly included in art. 41-A of DL 28/84. The Responses to the Phase 2 questionnaire notably refer to a case where the simple offering of money to a traffic police officer in order to escape being fined was found to be a crime of active corruption regardless of the fact that the money never exchanged hands. However – in order to prove the offence – it would seem that there is a requirement that the public official had knowledge that the offer, promise or gift took place. An appeal court decision from 1991 states that “the active corruption being autonomous from the passive corruption, regardless of the reaction of the public official to the offer or to the promise, [it] is *enough that those offers or promises reach his/her knowledge* for the crime to be considered having been committed” [italics added]. During the on-site visit, prosecutors confirmed that “if the public official does not have knowledge of the bribe, there is no offence”. After the on-site visit, the Ministry of Justice explained that, pursuant to the relevant provisions of Portuguese law on attempt, the lack of knowledge by the public official will never prevent the liability of the unsuccessful briber: the act of the active briber would fall under the qualification of “attempt” instead of a consummated crime of active bribery. As the examining team was not provided with examples of relevant case law, this remains an area of potential uncertainty under Portugal’s legislation implementing the OECD Anti-bribery Convention.

(iii) *Bribery through intermediaries*

139. Another area of uncertainty is that art. 41-A of DL 28/84 expressly requires a “consent or ratification” of the briber where an intermediary is involved. This wording is also present in domestic bribery offences, but introduces a wording that is not present in Article 1 of the Convention. Portugal, in its Responses to the Phase 2 questionnaires, provided a case law example showing that bribery through intermediaries is covered by the Portuguese legislation, but the example provided did not address the specific issue raised by the Working Group in Phase 1. At that time, the Working Group was concerned that fulfilling the element of “consent or ratification” might in fact require that the briber be aware of the detail of the intermediary’s act, such as the name or position of the foreign public official or the amount of the bribe; and recommended that this issue be followed up in Phase 2. In their exchange with the lead examiners, the Portuguese authorities indicated that the purpose of the wording of the law is to qualify the position of the intermediary; *i.e.* that when a person asks another person to commit bribery, the former in this way gives consent or ratification to the latter to commit bribery on his behalf. Thus, according to Portugal, proving “consent or ratification” would not require any additional specific intention from the briber, and would not require that the briber gave 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. However, in the absence of relevant case law to support this interpretation provided by the Ministry of Justice, it remains unclear at this stage how the “consent or ratification” requirement will be interpreted in practice by law enforcement authorities and trial judges.

(iv) *Third party beneficiaries*

140. Another area of potential uncertainty relates to the requirement, under Art. 41-A of DL 28/84, that where a third party beneficiary is involved, an element of “knowledge” is required in order for the offence to be complete. The Portuguese authorities who addressed the examining team explained that Art. 41-A of DL 28/84 requires that the foreign public official has “knowledge” that the benefit goes to the third party; and that this requirement is only necessary for punishing the public official concerned, not the active briber. In other words, where the active briber gives a bribe to a third party with the intent of obtaining an unlawful advantage from a public official without the knowledge of the latter, the active briber would still be punished because he/she would have consummated the active bribery offence; the public official would however not be punished for passive bribery because he/she had no knowledge that

something was being offered to a third party (e.g. his/her spouse) in order to make him/her act in a certain way. In the absence of relevant case law, some concern remains as to the presence of an element relating to the mental state of the passive briber in an active bribery offence.

Commentary

The lead examiners note that Portugal's legal framework has experienced extensive reforms in recent past. Given that no cases of bribery of foreign public officials have been tried to date, it is difficult to foresee exactly how this recently established legal framework will be applied in practice. Yet, the lead examiners consider that the definition of foreign public official departs significantly from what is required under the Convention, and therefore recommend that the Portuguese authorities take the necessary steps to ensure that the definition of foreign officials is in full compliance with Article 1 paragraph 4 of the Convention and its Commentaries, notably by introducing a statutory definition of a foreign political official that is autonomous from both foreign law and the definition of Portuguese public officials.

The lead examiners also invite the Working Group to follow-up, as practice develops, (i) on the issue of bribery through intermediaries where the briber only gives generic instructions to bribe with no information on the exact amount and exact identity of the intended recipient of the bribe; (ii) on the efficiency of the Portuguese system in prosecuting and sanctioning the active briber in the absence of the proof of a counterpart or of an agreement to such a counterpart by the passive briber; and (iii) on the use of art. 374 CC and art. 18 of Law 34/87 in cases of active bribery of non-Portuguese public officials.

d) Defences and exemptions from prosecution

141. In Phase 1, the Portuguese authorities indicated that only the general defences in the Portuguese Criminal Code (including “mistake of fact”, “mistake of law” or “necessity”) apply to the foreign bribery offence. A defence of “effective regret” is not available in active bribery cases. Similarly, the fact that the briber promises or gives a bribe in response to solicitation by the foreign public official, or the fact that the bribe is presented as the only way possible to keep business, are not available defences in Portuguese law. Yet, according to the findings of the lead examiners, it would appear that – pursuant to paragraphs “b” and “c” of art. 72 of the Criminal Code – these behaviours (regret, response to strong solicitation, bribery for an honourable motive) could theoretically be taken into account as mitigating circumstances in sentencing.

142. The defence of small facilitation payments is not available in Portuguese law (Phase 1 Report, p.7). Payments made by Portuguese nationals or companies in foreign jurisdictions to induce public officials to perform their functions – such as issuing licenses or permits – could thus be prosecuted and sanctioned in a Portuguese court.⁶² The lead examiners nevertheless consider that the issue of whether facilitation payments paid by Portuguese companies abroad fall within the scope of art. 41-A of Decree Law 28/84 remains open and can only be verified through practice.

3. Liability of Legal Persons

143. Criminal liability of legal persons as laid down in art. 3 of Decree Law 28/84 has existed in Portugal since 1984, and was expressly introduced as a practical solution to fight economic crimes more effectively. Its scope *rationae materiae* covers only the few specific offences included in the Decree Law, such as private sector bribery (articles 41-B and 41-C of DL 28/84) and foreign bribery (art. 41-A of DL

⁶² During Phase 1, the Portuguese authorities also indicated that 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.

28/84), but not other types of bribery offences and offences of accounting or money-laundering. The scope *rationae personae* is broad: it includes all legal persons, companies and *de facto* associations. Article 3 of DL 28/84 provides that such legal persons are liable for all offences laid down in DL 28/84 when they are committed by their governing bodies or representatives, on their behalf and in the collective interest (paragraph 1). It also provides that legal persons are not liable if the offender has acted against express orders or instructions from authorised persons (paragraph 2). In addition, the liability of the legal person does not exclude the individual liability of the offenders (paragraph 3).

144. At the time of the on-site visit, a major reform of the regime governing the criminal liability of legal persons was underway. A multi-stakeholder expert unit established by the Council of Ministers in March 2006 had produced a draft text for the purpose of amending art. 11 CC, which, if approved by Parliament, would introduce criminal liability of legal persons for certain specific offences of the Criminal Code, including traffic in influence, money laundering, and corruption offences (including active bribery of a domestic or EU public official; but not active bribery of a domestic or EU political official).⁶³ The text, based in part on the elements of criminal liability already in place for offences included in article 3 of DL 28/84, was not expected to have a direct impact on DL 28/84, which determines the regime of liability applicable to the offence of bribery in international business. But there are nevertheless differences between art. 3 of DL 28/84 and the draft new art. 11 CC. The adoption of the latter would thus result in the establishment of different standards of liability for, on one side, certain domestic bribery offences and, on the other, bribery offences committed in international business.

a) *Scope rationae personae*

145. As noted above, the scope *rationae personae* of art. 3.1 of DL 28/84 appears to be broad as it provides that entities subject to criminal liability are “legal persons, companies and *de facto* associations”. But in Phase 1 the Working Group was not able to conclude whether this definition in practice covered state-owned and state-controlled legal persons, as there were no cases tried under DL 28/84 that had ever applied to a state-owned and state-controlled legal person (the Working Group recommended that this issue be followed up in Phase 2). Unfortunately, as no relevant case law development has occurred since then, it remains difficult to assess how public prosecutors would apply in practice art. 3.1 of DL 28/84 in a foreign bribery case, including with regard to the liability of state-owned and state-controlled entities.

b) *Elements of liability*

(i) *Acts of the legal person’s governing bodies or representatives committed on the legal person’s behalf and in the collective interest*

146. Article 3 of DL 28/84 does not explicitly state that acts committed by regular employees and agents can trigger the liability of legal persons, as it only refers to acts committed by “governing bodies or representatives”. The terms “governing bodies or representatives” refer to the associates/shareholders as well as to the persons that have managing power and are able to act in the representation of the legal person. In order to be considered as such, these persons need to be duly identified in the constitution of the legal person, but the Portuguese authorities told the examining team that the acts of “*de facto* representative” can also trigger the criminal liability of the legal persons. In this regard, they further indicated that any director, manager or employee can demonstrate the will or the “animus” of a legal person (Supp. Responses at 8). The only test that would apply would apparently be to find whether the director, manager or employee who perpetrated the offence acted “on [the legal person’s] behalf and in the collective interest [of the legal person]” (an element provided in art. 3.1 of the DL 28/84). As no case law was submitted to support these interpretations, it remains unclear at this stage whether the broad

⁶³ See Annex 3 for a copy of a portion of the draft amendment of art. 11 CC as elaborated by the Special Unit.

interpretation favoured by Portugal will be followed in practice by prosecutors and trial judges. More practice might also be needed in order to clearly determine that acts committed by any employee or outside agents (intermediaries) can directly trigger the liability of the legal person (e.g. even in the absence of a formal contract) as long as it can be proven that, at the time of committing the acts of bribery, this employee or agent was acting on behalf of the legal person and in its collective interest.

147. The ensuing question would be to consider what is considered to be, in practice, acting “on behalf” of a legal person and in its “collective interest”. When addressing the examining team, Portugal indicated that legal science has considered that a person acts on behalf of a legal person whenever total or part of the benefits enters the legal persons’ property (Supp. Responses at 8). Still unclear is what is meant by “in the collective interest”, and whether this could entail any additional requirements. Also unclear is whether acts that do not directly result in profits “entering” the legal person (bribery to obtain tax breaks, custom clearance, etc.) could trigger the liability of the legal person. Moreover, this interpretation of the element “in its behalf and in the collective interest” raises questions as to whether and how the liability of legal persons would operate in cases of bribes paid by the representative of a company for the benefit of another (e.g. bribes paid by parent companies for the benefit of foreign subsidiaries and vice versa). In the Supp Responses (at 7), Portugal indicated that in a situation where a parent company gains an advantage as a result of foreign bribery committed by a foreign-based subsidiary, that parent company established in Portugal would be held liable for the acts committed by its subsidiary as long as the former gave its “consent or ratification”. In the absence of case law supporting such interpretations, it remains unclear at this stage whether the interpretations favoured by Portugal will be followed in practice by Portuguese prosecutors and judges.

148. The lead examiners noted that, in the context of the on-going reform of the criminal liability of legal persons, unlike the rather broad approach of art. 3 of DL 28/84 and of its interpretation provided above concerning the categories of natural persons whose acts may trigger the liability of a legal person, the draft amendment to art. 11 CC opts for a much narrower approach. It provides that only “*persons that occupy a leadership position*” can trigger the criminal liability of the legal person; leadership position being defined as “*the organs and the representatives of the legal persons and whoever within the structure of the legal person has the authority to develop the control of its activity*”. With the prospect of the adoption of draft art. 11 CC, there is a potential concern that the vaguer aspects of art. 3 of DL 28/84, and notably the categories of persons that can trigger the liability of the legal person, could be interpreted in the future in the same (narrow) way as they are defined in draft art. 11 CC. On this issue, during the on-site visit, the lead examiners heard the President of the Reform Mission Unit for Criminal Law state that the new wording of art. 11 CC would not affect special laws such as DL 28/84.

149. The draft amendment to art. 11 CC also provides for a new concept to the liability of the legal person: it can be triggered when the offence, committed by any subordinate, resulted from an infringement of the duties of vigilance and control to which this person in a leadership position is obliged (draft art. 11.1.b CC). If adopted, this standard could involve that a manager’s failure to take action to prevent or stop bribery committed by a subordinate while he was in a position to do so – or a manager’s failure to set up the required internal controls which could have otherwise prevented the bribery offence – will trigger the liability of the legal person in a domestic bribery case. This can be an important tool in the fight against bribery, providing firms with clear incentives to set up effective control and prevention measures. However, such liability of legal persons for “infringement of the duties of vigilance and control” will not be applicable in foreign bribery cases, as the new art. 11 CC will not apply to offences laid down in DL 28/84. Of course, this differing standard will be inconsequential if case law shows that legal persons – under art. 3 of DL 28/84 – are criminally liable for any active bribery offences committed by any agent or employee, provided that this offence was totally or in part to the benefit of the legal person (see previous paragraphs). However, the examining team were provided with no clear indication that Portuguese courts have found that art. 3 of DL 28/84 creates such automatic liability for the legal person, irrespective of the

degree of managerial misconduct and liability. Overall, the lead examiners are concerned about the creation of a double standard regarding the liability of legal persons for offences of domestic and foreign bribery.

(ii) *Identifying the natural person*

150. The specific identity of a natural offender – member of the governing body or representative of the legal person – must first be determined before prosecuting the legal person and for that purpose an investigation must be opened against this natural person or group of persons. The Portuguese authorities point out that both the natural person(s) and legal person must be investigated for the same offence, and that the first stages of investigation can be initiated against the legal person alone. At the end of the investigation phase, the public prosecutor has to decide to file the case or to render its accusation against the natural person(s) that have allegedly committed the offence and/or against the legal person as appropriate. In its responses to the Phase 2 supplementary questionnaire, Portugal further specified that a natural person and a legal person can be appearing as accused persons within the same proceeding and that legal persons can be held criminally liable despite the fact that the natural person is not convicted. No supporting case law was submitted by Portugal. The lead examiners note that there might be problems in establishing the criminal liability of legal persons in cases of foreign bribery where the identity of the individual offender can not be clearly determined.

(iii) *Absence of liability of the legal person if the individual offender has acted against expressed orders from authorised persons*

151. Paragraph 2 of art. 3 of DL 28/84 provides that there will be no liability of legal persons in certain specific cases: “*they are not liable if the offender has acted against express orders or instructions from authorised persons*”. Although no case law was available on the use of this provision at the time of the Phase 2 Evaluation of Portugal, it seems clear that a general order not to bribe could not exempt the legal person from criminal liability. However, in light of the wording of paragraph 2 of art. 3 of DL 28/84, there remains a concern that certain corporations might be tempted to try to avoid corporate liability by issuing express and specific orders not to bribe while at the same time informally arranging the corrupt deal around a lower level employee designated to take the blame in case the offence is uncovered by the law enforcement authorities. Also unclear is how broadly the concept of “authorised persons” will be interpreted.

Commentary

In the context of the reform of the liability of legal person for certain offences in the Criminal Code, the lead examiners recommend that the Portuguese authorities clarify. The lead examiners recommend that Portugal draw the attention of the investigating and prosecutorial authorities on the criteria for triggering the liability of legal persons as applied to foreign bribery cases. This should include clarification of (i) the status of the provisions of article 3 of DL 28/84 when confronted with the general provisions on the liability of legal persons in the Criminal Code, (ii) the application of the criminal liability of legal persons when a bribe is given by a regular employee or an outside agent of the legal person and (iii) of the application of the criminal liability of legal persons when there is no prosecution or conviction of a natural person for a corresponding offence. In addition, the lead examiners recommend that Portugal consider taking measures in order to prevent abuse of the legal provision laying down the absence of criminal liability of legal persons in cases where the foreign bribery act was committed by the natural perpetrator against orders from authorised persons within the legal person.

The lead examiners further recommend that the Working Group follow-up on the application of the criminal liability of legal persons where: (i) the bribery act does not directly result in profits entering the legal person (e.g. bribery to obtain tax breaks, custom clearance, etc.); (ii) a bribe is given to a foreign public official by a representative of this legal person only for the legal person's partial benefit or for the benefit of another legal person; (iii) the offence is committed wholly abroad by Portuguese legal persons, including where the natural person who committed the offence is not a Portuguese national or is not found in Portugal; and (iv) this legal person is state-owned or state-controlled.

4. Establishing Jurisdiction over the Foreign Bribery Offence

a) Territorial jurisdiction

152. Article 4 of the Criminal Code provides that Portuguese Penal Law applies to offences committed within the Portuguese territory, irrespective of the nationality of the perpetrator, or on Portuguese ships or aircraft. In Phase 1, the Portuguese authorities indicated that a telephone call, fax, or e-mail emanating from Portugal is sufficient to trigger territorial jurisdiction. However, no case law was provided in support of this affirmation.

b) Nationality and extraterritorial jurisdiction

153. Article 3 of Law 13/2001 – the piece of legislation implementing the Convention in Portuguese law (and introducing art. 41-A in Decree Law 28/84) — provides for a jurisdiction rule that specifically applies to the foreign bribery offence. Pursuant thereto, “[w]ithout 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 [including article 41-A of Decree Law 28/84] 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”. Both the general rules on territorial jurisdiction described in the preceding subsection and the specific rules on (nationality and) extraterritorial jurisdiction laid down in art. 3 of Law 13/2001 can thus apply to acts of foreign bribery. The “general framework governing the territorial application of criminal law” could also seemingly include articles 5, 6 and 7 CC. Article 6.2 provides that “although the Portuguese law is applicable... the act is sentenced according with the law of the country in which this act was committed, if that law is considered concretely more favourable to the perpetrator. The applicable penalty is converted in the correspondent penalty applicable in the Portuguese system...”. In sentencing foreign bribery acts, Portuguese judges thus have to take into consideration the applicable sanction for bribery in the country where the act was committed.

154. More ambiguous is the application of art. 5 CC in foreign bribery cases. Its wording departs significantly from the wording of art. 3 of Law 13/2001 and both provisions deal with extraterritorial jurisdiction (acts committed outside of Portugal in the first case, and acts committed anywhere in the second). In addition to the requirement that the offender be “found in Portugal”, which is comprised in both provisions, art. 5.1.c CC has the additional requirements that the acts be also punishable by the law of the place where those acts were committed (dual criminality requirement); and that that the act constitutes an extraditable offence, that extradition was requested and that it could not be granted.

155. During the on-site visit, a senior representative from the Public Prosecutor's Office indicated that art. 3 of Law 13/2001 was in practice useless, as it could not supersede the general rules on the application of Criminal Law laid down in the Criminal Code, and thus did not affect the requirement of dual criminality included in art. 5.1 CC. In their exchange with the lead examiners after the on-site visit, the Portuguese authorities indicated that this interpretation was incorrect and stressed that art. 3 of Law

13/2001 in fact revokes the dual criminality requirement for the purposes of establishing nationality and extraterritorial jurisdiction over foreign bribery acts. The only criteria for establishing such jurisdiction is that offenders be found in Portugal. Trial judges met during the on-site visit supported this interpretation. In the view of the lead examiners, inconsistencies in interpretation of art. 3 of Law 13/2001 are an illustration of the broader problem of the poor awareness of the special jurisdictional rules applicable to the foreign bribery offence.

Commentary

The lead examiners consider that in general Portuguese law confers a wide degree of territorial jurisdiction on the Portuguese courts where foreign bribery is concerned. But as they noted some inconsistencies during the on-site visit on the interpretation of the use of a dual criminality requirement for the purposes of establishing extraterritorial jurisdiction over foreign bribery acts, the lead examiners encourage Portugal to better publicise the applicable rules and recommend the Working Group to follow-up on the effective use of nationality and extraterritorial jurisdiction in foreign bribery cases.

c) Jurisdiction and legal persons

(i) Portuguese legal persons operating abroad

156. According to Portugal, jurisdiction can be 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) can be established; or (ii) the legal person is “found in Portugal”. In the absence of case law, it is unclear precisely what is encompassed in the notion of a legal person being “found in Portugal”, and how this would be determined in practice. Also, there is a possibility that in practice both criteria are required in order to establish jurisdiction over Portuguese legal persons, as the relationship between the substantive rules for the criminal liability of legal persons (see above) and the rules for establishing jurisdiction over legal persons are not entirely clear. Indeed, Portugal might not be able to establish jurisdiction over acts of foreign bribery committed by any legal persons “found in Portugal” unless it is first able to identify and then to prosecute the natural person as well.⁶⁴

157. This raises certain questions with regard to the enforcement of the foreign bribery offence. Portugal might not be in a position to effectively respond to offences committed in the context of decentralised multinational corporate structures and decision-making. As recognised by companies met during the on-site visit, the dealings of large Portuguese companies with foreign regulations and administration are often carried out and supervised locally by foreign managers and representatives living and working abroad (*i.e.* not “found in Portugal”⁶⁵). Unable to establish jurisdiction over bribery acts committed wholly abroad by the “governing body or representative” of the legal person in such a context, Portugal might not in practice be able to hold the Portuguese legal person liable even though the latter would have directly benefited from the acts of bribery committed by one of its representatives/managers posted abroad. Unless Portugal takes measures to clearly establish that it has the capacity to establish jurisdiction over foreign bribery acts committed in such contexts, there is a risk that a feeling of impunity among Portuguese businesses will prosper as they will have no incentives to monitor more actively the

⁶⁴ These criteria for establishing jurisdiction over legal persons might however empower Portugal to establish jurisdiction over *foreign* legal persons committing acts of foreign bribery through a representative based in Portugal (*i.e.* operating from Portugal), regardless of whether this legal person is “found in Portugal”.

⁶⁵ The condition of the offender being “found in Portugal” is part of the rules for establishing nationality and extraterritorial jurisdiction over natural persons.

lawfulness of decisions taken by foreign based managers and representatives to ensure compliance with Portuguese legislation.

(ii) *Portuguese parent companies and their foreign subsidiaries*

158. Similar issues arise concerning the liability of legal persons for foreign bribery offences committed by their foreign subsidiaries. The liability of parent companies would seemingly only be triggered where all of the criteria on jurisdiction and the liability of legal persons are established: the foreign bribery acts must have been committed on the parent company's behalf and in its interest, the natural perpetrator working in the foreign subsidiary must have acted in representation of the parent company, and jurisdiction over this natural perpetrator must be established. Portugal could also probably, under the provision of the Portuguese Criminal Code on complicity (art. 26), establish its jurisdiction in cases where a specific authorisation to commit the bribery offence was issued to the foreign subsidiary by a representative of the parent company from Portugal. In the absence of case law supporting such interpretation, it remains difficult to draw definitive conclusions on these issues.

Commentary

The lead examiners recommend that the Working Group follow-up on whether Portugal can establish jurisdiction over foreign bribery acts committed abroad by foreign managers and representatives of Portuguese companies residing abroad.

5. The Offence of Money-Laundering

a) Scope of the money-laundering offence and penalties for money-laundering linked to bribery of foreign public officials

159. Foreign bribery, even committed outside of the country, has been a predicate offence in Portugal for the purpose of the application of Portugal's money laundering legislation since 2001. Thus, pursuant to art. 368-A of the Criminal Code which penalizes acts of money laundering, any natural person who directly or indirectly converts, transfers, assists in or facilitates any conversion or transfer of benefits derived from the perpetration of corruption, in order either to dissimulate its illegal origin, or to assist the author or any person participating in the offence of corruption in eluding the legal consequences of his or her behaviour, is liable to imprisonment for a term of 1 to 8 years. Pursuant to the same article, any person who conceals or dissimulates the true nature, origin, whereabouts, layout, movement or entitlement to such benefits is liable to the same imprisonment term. Penalties for money-laundering linked to bribery of foreign public officials are not limited to imprisonment terms: Portuguese laws provide for the confiscation of property and assets connected to money-laundering.

160. The Portuguese authorities stated in the Phase 1 Report of Portugal that a prior conviction for the predicate offence is not required.⁶⁶ In circumstances where the predicate offence takes place abroad, issues could however arise where the courts require that certain additional conditions be met (for example, dual criminality). In its responses to the Phase 2 questionnaire, Portugal responded that, although there is no final court decision on this matter, dual criminality would not be required where the predicate offence is committed abroad.

⁶⁶ *Portugal Phase 1 Report*, p. 23.

b) Enforcement

161. Statistical information shows that a total of 208 criminal inquiries for the offence of money laundering were conducted in 2003-05, and a total of 12 convictions were handed down during the same period. On-site discussions revealed that narcotics related crimes provide the main source of criminal proceeds. Other types of crimes that generate significant criminal proceeds are domestic corruption, trafficking in works of art and cultural artifacts, extortion, embezzlement, tax offences and aiding or facilitating illegal immigration.

162. Out of 61 criminal inquiries that were conducted in 2003, 3 cases reached the courts and the Portuguese courts handed down six convictions; in 2004, out of 134 inquiries, four cases (involving a total of 24 defendants) reached the courts and four persons were convicted; in 2005, out of 13 inquiries, five cases involving 10 defendants reached the courts and two persons were convicted. Convictions resulted in prison sentences ranging from 2 to 8½ years imprisonment, sometimes associated with confiscation: for example, Portuguese courts ordered the confiscation of assets worth EUR 2.4 million in 2005 in association with two convictions for the offence of money laundering (with drug trafficking, customs and tax fraud as predicate offences). Among the cases that reached the courts, none involved the predicate offence of bribery of foreign public officials. Statistics for 2003-05 show that in the majority of convictions the offences underlying the money laundering offence related to drug-trafficking. As there is no legal framework that requires law enforcement authorities to report to Portugal's FIU information relating to suspicious transactions reports which result in prosecutions or in the proceedings being shelved, representatives of the Unit were not able to provide details as to what happened to the case of suspected money-laundering associated with corruption allegedly committed by a Portuguese citizen in the context of the UN Oil-For-Food Program and which was sent by the Unit in 2005 to the competent department of the Judicial Police for a formal investigation.

163. The rather low number of persons convicted for the offence of money-laundering stands in stark contrast with the number of criminal inquiries conducted by the Judicial Police. Members of the judiciary put forward several explanations for these figures during the on-site visit. The main explanation cites the difficulty of producing strong evidence in court, and the fact that many Portuguese prosecutors and trial judges still have little specialisation in handling what are often complex financial cases. As to the rather low number of confiscations pronounced by the courts, the examining team was told by trial judges that this situation was primarily the result of the fact that, during the investigation phase, asset investigations were not carried out systematically because of lack of resources and because apparently they were not always considered as a priority.

6. The Offence of False Accounting

a) Offences and sanctions

(i) Criminal sanctions

164. According to the Portuguese public prosecution authorities met by the examining team during the on-site visit, conducts of the type prohibited by Article 8 of the Convention could be sanctioned pursuant to several provisions under the Criminal Code. Charges could be brought under art. 256 CC (forgery), under which falsifying or forging documents, or using such falsified documents with the intent to cause a damage to others or to the State, or to obtain for oneself or others an illegitimate benefit, is punishable by imprisonment of up to 3 years or a fine. Charges could also be brought under art. 259 CC, under which damaging or concealing technical documents with the intent to cause damage to others or to the State, or to obtain for oneself or others an illegitimate benefit, is punishable by imprisonment of up to 3 years or a fine. Public prosecutors who addressed the examining team explained that potential difficulty in gathering

enough evidence under the offence of foreign bribery could be compensated for by filling indictments under articles 256 and 259 CC as proving forgery is easier than proving bribery of foreign public officials.

165. Criminal charges could also be brought pursuant to art. 103 of the General Taxation Infringement Law (Law 15/2001 of 5 June), subject to the condition that the concealment or alteration of facts or values in books of account and bookkeeping was done for the specific purpose of reducing the tax payer's base and that such conduct resulted in an unlawful wealth increase of EUR 15 000 or above (tax fraud crime). The maximum sanctions applicable to this situation is three years of imprisonment or a fine of 360 days (or, under certain aggravating circumstances, five years of imprisonment for natural persons and a fine of up to 1 200 days for legal persons).

(ii) Administrative and disciplinary sanctions

166. The General Taxation Infringement Law also lays down administrative penalties for various accounting and tax offences, such as failure to maintain proper accounts or important tax books (punished by a fine of EUR 150 to EUR 15 000 pursuant to art. 120), falsifying or altering important tax documents (punished by a fine of EUR 500 to EUR 25 000 pursuant to art. 128), and omissions or inaccuracies in tax declarations and other important tax documents (punished by a fine of EUR 250 to EUR 5 000 pursuant to art. 119).

b) Enforcement

167. Statistical information provided by Portugal's fiscal justice shows that a total of 1 764 legal proceedings for the crime of tax fraud (art. 103, General Taxation Infringement Law) were conducted in 2002-04, with an average level of 588 proceedings per year since 2002. In addition to this, in 2005, 43 123 individuals and 30 498 corporations were sanctioned in relation to omissions or inaccuracies in important tax documents (art. 119, General Taxation Infringement Law) and 138 individuals and 203 corporations in relation to art. 120 of the General Taxation Infringement Law (failure to maintain proper accounts or important tax books). Also, in 2001-04, a number of convictions were handed down for the offence of forgery pursuant to articles 256, 257 and 258 CC. Statistical data from the Ministry of Justice provided to the examining team indicate that, out of the total number of convictions for forgery passed in 2004, 68% resulted in fines and 31% in prison sentences (of which 21% were suspended and 3% were substituted by fines).

168. The rather low number of disciplinary sanctions imposed by the disciplinary authorities responsible for ensuring the proper application of the law by the accountants and auditors they supervise stands in stark contrast with the number of criminal and administrative proceedings conducted each year in relation to the false accounting offences outlined above. As noted earlier in this report, these authorities, whether it be, the Chamber of Chartered Accountants or the Auditors' Institute, are empowered to deploy a broad range of disciplinary sanctions in relation to accounting and auditing offences ranging from simple reprimand through administrative fines to permanent disbarment from practicing the profession. The current case law of the two associations shows very few disciplinary sanctions: whereas the Chamber of Chartered accountants, during and after the on-site visit, referred to some disciplinary cases for non-compliance with the overall duties of its members which resulted in fines or permanent disbarment and one disciplinary case for forging documents which resulted in the expulsion of the accountant, representatives of the Order of Statutory Auditors interviewed by the examining team said that disciplinary sanctions had never been imposed for forgery.

Commentary

The lead examiners consider that Portuguese law contains measures that may effectively sanction the fraudulent conducts referred to at Article 8 of the Convention and note in this regard that the number of criminal and administrative proceedings conducted each year by the competent authorities may play a dissuasive role in relation to omissions and falsifications. They note however the apparent low number of disciplinary sanctions on chartered accountants and statutory auditors and therefore recommend that the Portuguese authorities make the supervisory bodies more aware of the importance of making use of the disciplinary penalties available to them with a view to sanctioning more dissuasively any non-compliance with Portugal's accounting and auditing standards.

7. Enforcement of the Non Tax Deductibility of Bribes

169. According to the representatives of the tax administration interviewed by the examining team during the on-site visit, individuals and companies who attempt to pass off bribes, commissions, facilitation fees, etc. paid to foreign public officials as deductible expenses run the risk of incurring three types of penalty.

170. In the first place, a company or individual who fraudulently tries to pass off as a deductible expense a commission paid to a foreign public official is liable, under art. 103.1 of the General Taxation Infringement Law (a tax fraud offence which sanctions the concealment or alteration of facts or values in books of account and bookkeeping for the purpose of obtaining illegitimate tax benefits of not less than EUR 15 000), to imprisonment of up to three years or a fine of up to 360 days. Where a certain aggravating circumstance (*e.g.* use of false invoices, destruction of elements relevant to tax inspection) exists, penalties increase to imprisonment from 1 to 5 years for natural persons and a fine of up to 1 200 days for legal persons (offence of aggravated tax fraud). Where the illegitimate tax benefit is inferior to EUR 15 000, intentionally falsifying, vitiating, concealing, destroying elements relevant for tax purposes is, pursuant to art. 118 of the General Taxation Infringement Law, punishable by an administrative fine of up to EUR 25 000 for natural persons and of up to EUR 50 000 for legal persons.

171. The tax administration may also decide to take steps to ensure that the offender is, pursuant to articles 256, 257 and 259 CC, prosecuted for falsifying documents and damaging or concealing technical documents and assessments. For example, under art. 256.1 CC, any individual who, with the intent to cause a damage to others or to the State or to obtain for himself/herself or others an illegitimate benefit, has produced a false document, has forged document, has used the signature of other person to produce a false document, has used such falsified documents, etc., is liable for imprisonment or a fine of 10-360 days. Finally, tax officials, in common with other civil servants, will be bound to notify the Public Prosecutor's Office of the offence of active bribery of foreign public officials in accordance with the provisions of art. 242.1.b CCP. The briber would then be exposed to criminal prosecution for active bribery harmful to international business.

8. Sanctions for Foreign Bribery

a) Criminal sanctions

(i) Criminal sanctions on natural persons

172. Under the criminal measures introduced by Portugal in application of the Convention, any individual who pays a bribe in order to obtain an advantage in an international business transaction is liable to a maximum of 8 years' imprisonment, with a minimum imprisonment term of one year (art. 41-A of DL 28/84).⁶⁷ Another consequence of such offence may be to compromise the person's professional activities since penalties may include assets forfeiture or temporary professional disqualification (see below, in the section addressing accessory sanctions). In practice, in conformity with Portuguese law, penalties are fixed by judges taking into account various factors, including the circumstances of the offence and the character of the offender (see below, in the section addressing mitigating and aggravating circumstances).

173. As, at the time of the Phase 2 Evaluation of Portugal, there had been yet no conviction under art. 41-A of DL 28/84, it is difficult to assess whether the available penalties are persuasive, proportionate and dissuasive in relation to the offence of foreign bribery. Yet, three points emerge from an analysis of aggregated statistical information on convictions handed down by Portugal's courts of first instance for breaches of certain passive and active domestic bribery offences provided by the Portuguese authorities to the examining team.

174. The first point is that Portugal has registered an overall increase in the number of convictions from the end of the 1990s to the mid-2000s, with an average level of 50 convictions per year since 2001. The statistics also indicate that the level of convictions (defined as the proportion of convicted persons in relation to the total number of accused persons) for bribery offences (as defined in articles 372, 373 and 374 CC) is higher than level of convictions for the totality of the proceedings in the judicial courts. The second point is that most convictions handed down by Portuguese courts in the years 1997-2004 resulted in prison sentences (68%) – 58% of convictions resulted in suspended prison sentences and 10% resulted in actual imprisonment – rather than in fines (32%, including imprisonment substituted by a fine). Statistical data also show that, while the level of fines handed down from 1997 to 2002 was stable, by 2004 the highest fine imposed and average amount of fine imposed for a bribery offence had increased by 167% and 253%, respectively, from their 1997 levels. A marked increase can also be observed in the average duration of prison sentences handed down since 2001.

175. The statistics submitted by Portugal provide an indication of the general trends in sentencing bribery offences, and could be interpreted as signs of generally adequate enforcement of bribery offences in Portugal. However, the examiners note that these statistics blur the difference between active and passive bribery, include all petty forms of corruption and exclude, among others, the offence of bribery of political officials as provided in Law 34/87. In the absence of differentiated statistics and sample court decisions more closely related to the sort of sanctions and court decision that would likely be handed down for an offence of active bribery in international business, drawing definitive conclusions on these issues remains difficult.

(ii) Sanctions on legal persons

176. As noted earlier in this Report, a company found guilty of the offence may also incur criminal liability. The main penalties applicable to legal persons consist of a reprimand, a fine, and, in cases where company founders had the exclusive or predominant intention of using the company to commit offences of

⁶⁷ Natural persons can in no circumstance be punished with a fine for the commission of the offence of foreign bribery.

foreign bribery, or where the repeated commission of these crimes shows that the legal person was being used for this purpose, of dissolution (art. 7 of DL 28/84). To these penalties, the courts are empowered to add additional penalties such as a temporary ban on exercising a commercial or industrial activity or a temporary deprivation of the right to bid in public tenders (see below, in the section addressing mitigating and aggravating circumstances).

177. Fines are calculated according to a day-fine system. According to information submitted by Portugal, the minimum limit is of 10 day-fines and the maximum limit of 360 day-fines, pursuant to the general rules on the imposition of fines in the Criminal Code. Each day-fine corresponds to an amount between EUR 5 and EUR 5 000 that the court shall determine on the basis of the economic and financial situation of the legal person as well as its expenses (art. 7.4 of DL 28/84). Hence, according to this day-fine system, the minimum fine would be EUR 50 and the maximum fine EUR 1.8 million.

178. According to the Portuguese authorities, in case of a merger or acquisition of a firm by another, the criminal penalties applicable to the absorbed company would be “transferable” to the company performing the take-over because, pursuant to recent legal science, “the sociological reality within the company is maintained”. Yet, as Portuguese courts have not yet produced final decisions on this issue, whether the criminal liability of a legal person – including fines and accessory criminal sanctions such as the deprivation of the right to bid in public tenders – is “transferable” to another firm, and whether mergers and acquisitions could affect the way absorbed firms are investigated, prosecuted and sanctioned remain to be tested by practice. It is also not entirely clear whether the same logic could also apply to mergers that do not result in one firm being absorbed by another, but in the creation of a new legal person.

179. At the time of the on-site visit, there had been no cases in which a legal person was charged pursuant to a violation of articles 41-A, 41-B or 41-C of DL 28/84; one investigation was however apparently underway concerning the possible liability of a foreign firm in a case of bribery of a Portuguese public officials. This being said, since the entry into force of the legal provisions establishing the criminal liability of legal persons, legal persons have been regularly sanctioned for violations of non-bribery related offences included in DL 28/84, including crimes against the quality of foodstuff or “crimes against the economy” such as fraud in obtaining funding, loans, subsidies or goods. For example, according to official data, for offences included in DL 28/84, a total of 23 and 12 legal persons were convicted in 2004 and 2005⁶⁸, respectively.⁶⁹

180. The average amount of fines imposed in these cases was EUR 5 392 (2004) and EUR 10 280 (2005). In view of the maximum limit for fines – EUR 1.8 million – these averages appear as being rather low. During the on-site visit, judges indicated that they generally had difficulties in imposing a sentence on legal persons that corresponded to their culpability. One regarded guidance and training provided to judges on this topic as inadequate, suggesting that this could challenge the effectiveness of the regime establishing the liability of legal persons in Portugal. Until specific cases of foreign bribery offences are tried by Portuguese courts, it remains impossible to know exactly how the penalties available to them to sanction legal persons found guilty of the offence will be applied in practice.

⁶⁸ Preliminary data and corresponding to 98% of all registries expected in this statistical operation (source: Ministry of Justice of Portugal).

⁶⁹ Provisional data as of 13/10/2006 (source: Ministry of Justice of Portugal).

(iii) *Mitigating and aggravating circumstances*

Mitigating circumstances

181. Articles 71 and 72 CC provide for generally applicable mitigating circumstances for purposes of sentencing. According to the findings of the lead examiners, it would appear that (pursuant to paragraphs 2.b and 2.c of art. 72 CC) the fact that a bribe was given in order to win a contract, or that the briber responded to strong solicitation from the foreign official, or that the briber demonstrated acts of “regret” (through acts such as restitution), or that the briber maintained a good behaviour in the time between the commitment of the offence and the verdict, could all theoretically be taken into account as mitigating circumstances in sentencing an active briber. The judge could also take into account the conduct of the accused prior to the commission of the act (paragraph 2.d of art. 71 CC): according to the Portuguese authorities, the presence of internal compliance programmes and other preventive measures could thus be taken into account by the judge in sanctioning a legal person for foreign bribery. Finally, as the only possible mitigating circumstances are the ones permitted by law, judges met during the on-site visit confirmed that the reference to the importance of the national economy in the preamble of DL 28/84 could never be used to provide that foreign bribery offences committed to obtain a contract that beneficiates the national economy be sanctioned with more clemency than other types of bribery offences.

Aggravating circumstances

182. In addition to the general rules regarding the determination of the appropriate sanction stated in the Criminal Code, art. 6 of DL 28/84 describes specific aggravating circumstances to be considered by the judge in sentencing offences listed in DL 28/84 (including foreign bribery). Certain of the aggravating circumstances listed appear more directly relevant to foreign bribery cases. They include: the fact that the offence caused an abnormal change in prices in the market; the fact that there was connivance, alliance or opportunism on the part of the voluntary association to commit the offence; the fact that the offender has substantial economic power in the market, more than 400 employees and a dominant position in the market; the fact that the offence enabled the offender to achieve excessive profits or was committed with the intention of obtaining them; and the fact that the offender favoured foreign interests in detriment to the national economy.

Commentary

The lead examiners recommend that the Working Group follow-up, as case law develops on the level of sanctions (including prison sentences, fines, and accessory sanctions) imposed on natural and legal persons for foreign bribery offences with a view to determining whether the sanctions imposed in practice are effective, proportionate and dissuasive.

b) *Other sanctions: accessory sanctions and confiscation*

(i) *Accessory sanctions*

183. In addition to the main penalties for offences of foreign bribery, the judge may also apply on a discretionary basis a series of accessory sanctions (art. 8 of DL 28/84). These include assets forfeiture, temporary interdiction on exercising certain activities or professions, temporary deprivation of the right to bid in public tenders and the deprivation of the right to subsidies from public bodies or departments. The details of these accessory sanctions are provided in articles 9 to 21 of DL 28/84. During the on-site visit, the Portuguese authorities indicated that these accessory sanctions can be imposed by the judge on both natural and legal persons, as appropriate, for any offence included in DL 28/84 (including foreign bribery).

184. The accessory sanction of “temporary deprivation of the right to bid in public tenders” is applicable when the circumstances in which the offence was committed show that he/she is not worthy of the general trust needed to participate in public tenders (art. 13.1.b of DL 28/84). The deprivation can have duration of one to five years (art. 13.2) and depending on the circumstances the court may limit the deprivation of the right to bid to certain tenders or bids (art. 13.3). Yet, on-site discussions revealed that a comprehensive system for ensuring the effective application of accessory sanctions in the context of the process for awarding public tenders was still lacking in Portugal: while an appropriate system was in place for assessing the past conduct of natural persons representing applicant companies (including through the request of an extract from the judicial record of this representative), contracting authorities had no means to effectively exclude firms sanctioned under art. 13 of DL 28/84 as no criminal record (or similar) existed for convicted legal persons.

185. The application in practice of art. 13 of DL 28/84 (“temporary interdiction on exercising certain activities or professions”) raised similar issues. Under this article, company representatives convicted of foreign bribery could theoretically in certain situations be banned from being registered in a commercial register for a period between two months and two years, but the absence of centrally available information on businesses was seen as jeopardising the possibility to effectively enforce this accessory sanction. During the on-site visit, the Portuguese authorities indicated that solutions to these problems were actively being sought.

(ii) *Confiscation*

186. Under Portuguese law, confiscation is an ancillary penalty but may also be applied in the absence of a conviction, where an offence has been committed, in the interests of public order or morals or of public safety. Confiscation is mandatory for the offence of foreign bribery. It is ordered by the courts and applies equally to individuals and legal persons.

187. Under art. 109 CC, confiscation applies not only to the bribe that is the object of the offence of bribing foreign public officials, but also to any proceeds directly or indirectly related to the offence as long as that the object or the direct or indirect proceeds of the offence, by its nature or circumstances, threatens public safety or public order or morals, or is likely to be used to commit further offences, which, according to the Portuguese authorities is the case with foreign bribery. Furthermore, under art. 111 CC in conjunction with art. 109, confiscation may also apply to any rewards offered or promised to the perpetrators of the offence, for themselves or on behalf of others and to property, rights or other benefits obtained directly⁷⁰ by the perpetrators of the offence and which constitute pecuniary benefits in whatever form.

188. The unavailability of the goods concerned, whether because they have disappeared or have been unidentifiably incorporated into other property than that of the convicted persons, is not an obstacle to confiscation: the courts have an obligation to order confiscation of assets of equivalent value (art. 111 CC). Furthermore, confiscation does not in all cases involve the property of the person convicted: this is only a requirement for confiscating the bribe with which the offence was committed. Under art. 110 CC, confiscation may be applied to assets belonging to third parties when the latter have contributed to their use or production, if they have derived benefits from their use or if the assets have been acquired as a result of a bribery offence and the owners are aware of their unlawful origin.

189. To this end, one of the most important tasks of the prosecution and the investigating judge is to seize provisionally the objects that have been used to commit the offence of foreign bribery or constitute

⁷⁰ Pursuant to articles 110 and 111 CC, confiscation applies to assets obtained directly from an offence, including the ones that have been negotiated or transferred to a third party, and the ones that are derived, transformed, mixed or converted.

the proceeds of it. The rules governing seizure are provided in articles 46 and 49 of DL 28/84 and art. 178 CCP and apply equally to individuals and legal persons. Seizure may be applied to objects that have been used to commit the offence, are intended for such use, or, in accordance with articles 109 to 111 CC, constitute the proceeds of, income from, price or reward for the offence. Seizures are authorized, ordered and confirmed by the courts; where they are carried out by the judicial police, they must be approved by the judicial authorities within 72 hours. Custody of seized items is the responsibility of the courts.

190. In practice, application of confiscation measures appears relatively low, although a lack of comprehensive statistics on seizures and confiscations prevents a full evaluation of effectiveness. According to criminal police representatives, this would be partly due to the fact that the provisions governing the identification of proceeds, seizure, freezing and confiscation derive from a number of legal sources, are not always harmonized and are sometimes ambiguous. According to trial judges, such situation would primarily be due to inadequate resources and structures: because of this, asset investigations would not always be carried out systematically during the investigation phase.

Commentary

The lead examiners recommend that Portugal draw the attention of the investigating and prosecutorial authorities (e.g. through training or guidelines) to the importance of pre-trial seizure and confiscation to sanction offences such as the offence of bribery of foreign public officials: a prompt and focused financial investigation in the early stages of the procedure (e.g. for the purposes of the pre-trial seizure of the bribe and of the proceeds of bribery) is essential. They also recommend that Portugal set up a criminal record for convicted legal persons, with a view to assist in ensuring the effective implementation of accessory sanctions such as the temporary deprivation of the right to bid in public tenders and the temporary interdiction on exercising certain activities or professions.

c) Additional civil, administrative and non-criminal sanctions

(i) Additional civil or administrative sanctions

191. As already noted in the framework of the Phase 1 Evaluation of Portugal, there are no additional non-criminal (administrative or civil) sanctions that would be imposed in connection with an offence of foreign bribery. However, as mentioned above, there are several accessory criminal penalties that can be imposed by courts on natural and legal persons for the foreign bribery offence.

(ii) Non-criminal sanctions imposed by agencies other than courts in the context of officially supported credits

192. Measures have been taken to possibly deny or withdraw insurance in the field of export credits. Since 2000, applying the OECD 2000 Action Statement on Bribery and Officially Supported Export Credits to which Portugal has subscribed, a mechanism has been put in place requiring that, when an exporter makes an application for credit insurance, the exporter must declare that the contract covered by the guarantee was not secured by actions outlawed by “art. 41-A of Portuguese Criminal Code” and the application for credit insurance will be rejected if the applicant has been convicted for one of the actions outlawed by art. 41-A. Furthermore, the entitlement to indemnity will be lost if the insured party is subsequently convicted for an offence provided for under art. 41-A: indeed, pursuant to the stand alone declaration submitted by the applicant, “the exporter will reimburse COSEC at its first request, of all sums that have been paid to the insured as a claim... if the exporter was tried and convicted, by a definite court decision, of the crime of bribery punishable by law (article 41-A Portuguese Criminal Code) where it was

proven that the export contract, to which the loan agreement relates, was obtained or retained by improper advantage, either patrimonial or not, attempted or actually given to foreign public officials, in the conduct of international business”.

193. Although the above measures are important, it would seem that COSEC standards which specifically address the situation where the contract would have been secured by actions outlawed by art. 41-A might be somewhat lower than under the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits, which requires (i) “suspending approval of the application during the enhanced due diligence process” if before credit, cover or other support has been approved “there is credible evidence that bribery was involved in the award or execution of the export contract”; and (ii) that COSEC “shall refuse to approve credit, cover or other support [if] the enhanced due diligence concludes that bribery was involved in the transaction”. The same can be said about the COSEC measure that provides that the entitlement to indemnity is lost only when the insured party is subsequently convicted for actions outlawed in art. 41-A by a Portuguese court – and not, as required by the 2006 Recommendation, regardless of whether or not a conviction has been handed down (credible evidence of bribery is sufficient under the 2006 Recommendation to deny payment or indemnity or to obtain refund of sums provided)⁷¹ and regardless of the statute or jurisdiction under which such bribery was proven.

194. The lead examiners also noted that, unlike the Portuguese offence implementing Article 1 of the Convention, the COSEC Declaration only prohibits bribery of foreign *public* and not *political* officials. They also noted that COSEC policy to deny or withdraw insurance wrongly refers to “article 41-A of the Portuguese Criminal Code” – which does not exist – instead of art. 41-A of DL 28/84. After the on-site visit, COSEC representatives indicated that corrective measures had been taken to make the reference to Portuguese criminal law accurate. COSEC representatives also indicated that steps to better comply with the recently approved most recent OECD standards were being considered.

(iii) Non-criminal sanctions imposed in the context of the administration of official development assistance

195. Although OECD donors started to introduce anti-corruption provisions in aid funded procurement agreements in 1996 following the adoption of the OECD Recommendation on Anti-Corruption Proposals for Aid-Funded Procurement, such provisions in Portuguese aid-funded procurement were still lacking at the time of the Phase 2 Evaluation of Portugal (as were any other type of anti-bribery measures in the context of the administration of Portuguese ODA). As a result of this, aid-funded procurement contracts could not be denied as an additional sanction for foreign bribery.

Commentary

The lead examiners recommend that the Working Group follow-up on future anti-bribery measures taken by COSEC, including any revision of the anti-bribery declaration in COSEC contracts and of the anti-bribery stand-alone statement submitted by exporters applying for support. They also recommend that Portugal include an anti-corruption clause in aid-funded contracts concluded with the various actors involved in the administration of ODA projects, including businesses, NGOs, external experts, state-owned or state-controlled companies, and public institutions.

⁷¹ In the 2006 Recommendation, a credible evidence of bribery is defined as “evidence of a quality which, after critical analysis, a court would find to be reasonable and sufficient grounds upon which to base a decision on the issue if no contrary evidence were submitted”.

RECOMMENDATIONS

Based on the findings of the Working Group with respect to Portugal's implementation of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Portugal. In addition, the Working Group recommends that certain issues should be re-examined as the case law and practice evolve.

Recommendations for Ensuring Effective Prevention and Detection of the Bribery of Foreign Public Officials

1. With respect to awareness raising and prevention-related activities to promote implementation of the Convention and the Revised Recommendation, the Working Group recommends that Portugal:
 - a) take necessary measures – in association with business and civil society organisations– to raise awareness among the private sector regarding the Convention, the offence of foreign public officials and the liability of legal persons, as well as applicable jurisdictional rules, and promote and assist in the implementation of preventive organisational measures and ethical standards within businesses present in foreign markets, including through provision of targeted assistance to SMEs (Revised Recommendation, Section I);
 - b) take necessary measures to raise the level of awareness among officials in government agencies and the judiciary that may play a role in detecting, reporting, investigating, or prosecuting the offence of bribery of foreign public officials, and among those in contact with Portuguese companies exporting or investing abroad (in particular diplomatic missions and trade promotion agencies), as well as the general public (Revised Recommendation, Section I);
 - c) take awareness raising measures specifically targeting Portuguese Institute for Development Support (IPAD) staff and its public and private sector partners about issues related to the Convention and corruption in the context of ODA projects (Revised Recommendation, Section I).
2. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences, the Working Group recommends that Portugal:
 - a) make public employees who are subject to the obligation to report any offence that comes to their knowledge more aware of the importance of effectively fulfilling this obligation in suspected instances of foreign bribery (Revised Recommendation, Section I);
 - b) issue specific instructions/guidance to diplomatic, export promotion, export credit support, and ODA staff concerning the various steps that should be taken when they notice allegations that a Portuguese company or individual has bribed or taken steps to bribe a foreign public official, with a view to ensure that serious allegations eventually reach the Portuguese prosecuting authorities as appropriate (Revised Recommendation, Section I);
 - c) take measures to amend the Personal Income Tax and Companies Tax Codes to disallow and forbid confidential expenses, and draw clear guidelines for the tax authorities prescribing the verifications to be undertaken with a view to detect possible offences of bribery of foreign public officials (Revised Recommendation, Section IV);
 - d) ensure, in consultation with the relevant supervisory bodies, that chartered accountants and statutory auditors receive training and guidelines regarding the provisions of article 41-A of Decree Law 28/84 in connection with their obligations to report any public crime to the Public

Prosecutor's Office, and that those who fail to comply with this obligation are subject to effective disciplinary measures (Convention Article 8; Revised Recommendation, Sections I, II and V);

- e) ensure that financial and other entities and professionals subject to the obligation to declare suspicious transactions to the Financial Information Unit continue to receive guidelines on the identification of transactions related to foreign bribery (Revised Recommendation, Section I);
- f) pursue its efforts to encourage companies to provide internal channels for communication by, and internal protection for, potential whistleblowers (Revised Recommendation, Section V).

Recommendations for Ensuring Effective Investigation, Prosecution and Sanctioning of Foreign Bribery and Related Offences

3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Portugal:

- a) encourage relevant law enforcement authorities to take a more proactive approach to investigating all foreign bribery allegations and to make full use of the broad range of investigative measures available to them to effectively investigate and prosecute cases of foreign bribery (Convention, Article 5; Revised Recommendation, Sections I, II);
- b) ensure that the Central Criminal Investigation and Prosecution Department (DCIAP), pursuant to articles 46-47 of Law 60/98, takes a more active role in directing inquiries and carrying out penal actions associated with the offence of bribery of foreign public officials in international business transactions; and ensure, in this regard, that other departments of the public prosecution service promptly report all suspicions of foreign bribery to the DCIAP (Convention, Article 5; Revised Recommendation, Sections I, II);
- c) ensure that sufficient training and resources, including specialised expertise and relevant information regarding the number, profile, treatment and criminal outcomes of cases featuring bribery in international business, are made available to relevant authorities – including the judicial police and magistrates – for the effective detection, investigation and prosecution of foreign bribery (Convention, Article 5; Revised Recommendation, Sections I, II);
- d) raise awareness among the law enforcement authorities about the special applicable rules, provided in article 3 of Law 13/2001, for establishing nationality and extraterritorial jurisdiction over foreign bribery offences; notably with regard to the absence of a requirement of dual criminality (Convention, Article 4, Revised Recommendation, Section I).

4. With respect to the offence of foreign bribery, the Working Group recommends that Portugal:

- a) amend the definition of foreign political officials in order for it to fully comply with the requirements of the Convention in respect of the autonomous definition of foreign public officials (Convention, Article 1 paragraph 4; Commentaries 3 and 12 to 19).

5. With respect to the liability of legal persons, the Working Group recommends that Portugal:

- a) provide guidance to investigating and prosecutorial authorities on the criteria for triggering the liability of legal persons as applied to foreign bribery cases; this should include clarification (i) of the status of the provisions of article 3 of DL 28/84 when confronted with the new general provisions on the liability of legal persons in the Criminal Code; (ii) of the application of the criminal liability of legal persons when a bribe is given by a regular employee or an outside agent of the legal person; and (iii) of the application of the criminal liability of legal persons when there

is no prosecution or conviction of a natural person for a corresponding offence (Convention, Article 2; Revised Recommendation, Section I);

- b) consider taking measures in order to prevent abuse of the legal provision laying down the absence of criminal liability of legal persons in cases where the foreign bribery act was committed by the natural perpetrator against orders from authorised persons within the legal person (Convention, Article 2; Revised Recommendation, Section I).
6. With respect to sanctions for foreign bribery, the Working Group recommends that Portugal:
- a) draw the attention of the investigating and prosecutorial authorities (e.g. through training or guidelines) to the importance of the pre-trial seizure of the proceeds of bribery for the purpose of ensuring the full use of the measure of confiscation in the enforcement of the foreign bribery legislation (Revised Recommendation, Section I; Convention, Article 3 paragraph 3);
 - b) with a view to ensure the full effectiveness of accessory measures in the enforcement of foreign bribery legislation, such as the temporary deprivation of the right to bid in public tenders, set up a criminal record for convicted legal persons (Revised Recommendation, Section I; Convention, Articles 2 and 3 paragraph 4);
 - c) take appropriate measures to include an anti-corruption clause in aid-funded contracts concluded with the various actors involved in the administration of ODA projects (Revised Recommendation, Sections II.v and VI.iii; Convention, Article 3 paragraph 4).

Issues for Follow-up by the Working Group

7. The Working Group will follow up on the issues below, as practice develops, in order to assess:
- a) whether amendments to Decree Law 28/84 or other measures are required to supplement or clarify the existing language defining the elements of foreign bribery with regard to (i) cases of bribery through intermediaries where the briber only gives generic instructions to bribe with no information to the intermediary on the exact amount and identity of the intended recipient of the bribe; (ii) cases of active bribery in the absence of the proof of a counterpart or of an agreement to such a counterpart by the passive briber; and (iii) cases of bribery in international business of EU, EU Member States, and international officials, in light of potential overlaps with paragraphs 1 and 2 of art. 18 of Law 34/87 and art. 374 CC (Convention, Article 1);
 - b) the application of the criminal liability of legal persons where: (i) the bribery act does not directly result in profits entering the legal person (e.g. bribery to obtain tax breaks, custom clearance, etc.); (ii) a bribe is given to a foreign public official by a representative of this legal person only for the legal person's partial benefit or for the benefit of another legal person; (iii) the offence is committed wholly abroad by Portuguese legal persons, including where the natural person who committed the offence is not a Portuguese national or is not found in Portugal; and (iv) this legal person is state-owned or state-controlled (Convention, Article 2);
 - c) the application of sanctions to natural and legal persons for the offence of foreign bribery with a view to determining whether the sanctions are sufficiently effective, proportionate and dissuasive to prevent and punish the offence (Convention, Article 3);
 - d) future anti-bribery measures taken by COSEC, including any revision of the anti-bribery declaration in COSEC contracts and of the anti-bribery stand-alone statement submitted by exporters applying for support (Revised Recommendation, Sections I and II).

ANNEX 1: LIST OF PARTICIPANTS IN THE ON-SITE VISIT

Examining Team

Lead Examiners from Brazil

Mr. Luiz Armando BADIN
Head of Secretariat of Legislative Affairs
Ministry of Justice

Ms. Valquíria SOUZA TEIXEIRA DE ANDRADE
Senior Police Officer
Federal Police

Mr. Olavo VENTURIM CALDAS
Auditing and tax expert
Office of the Controller-General

Lead Examiners from the Netherlands

Mr. Puk VAN DER LINDE
Senior Policy Advisor, International Corporate Social
Responsibility
Ministry of Economic Affairs
Foreign Economic Relations

Ms. Anne-Marie SMITS
National Delegate – OECD Working Group on Bribery
Ministry of justice
Criminal Investigation Policy Department

Ms. Marita J.A. VAN THIEL
Public Prosecutor
National Coordinator for Corruption Investigations
National Public Prosecutor's Office

OECD Secretariat

M. Frédéric WEHRLE
Evaluation Coordinator – Portugal Phase 2
Principal Administrator
Anti-Corruption Division
Directorate for Financial and Enterprise Affairs

M. Sébastien LANTHIER
Administrator, Policy Analyst
Anti-Corruption Division
Directorate for Financial and Enterprise Affairs

Government and Public Service Institutions of Portugal

Ministries

Ministry of Economy and Innovation

Portuguese Agency for Economic Promotion (*Portugal Instituto das Empresas para os Mercados Externos* – ICEP)

Ministry of Finance

General Directorate for European and International Relations Issues

General Directorate for Public Procurement (*Direcção-Geral do Património* – DGP)

General Directorate for Tax (*Direcção-Geral dos Impostos* – DGCI)

Centre for Tax studies

General Tax Inspectorate

Direction for the Investigation of Fraud and Special Action (DSIFAE)

Ministry of Foreign Affairs

Portuguese Institute for Development Support (*Instituto Português de Apoio ao Desenvolvimento* – IPAD)

Ministry of Internal Affairs

Ministry of Justice

Bureau for International European and Cooperation Relations

General Directorate for the Documentation

General Directorate for Registries and Notaries (*Direcção-Geral dos Registos e do Notariado* – DGRN)

Special Unit for Criminal Reform

Other Public Institutions

The Judiciary, Prosecution and Judicial Investigation Authorities

An Investigative Judge

Court Judges

Public Prosecution Service

Central Criminal Investigation and Prosecution Department (DCIAP)

Comparative Law Office of the Public Prosecutors Office

Criminal Investigation and Prosecution Department – Coimbra (DIAP Coimbra)

Criminal Investigation and Prosecution Department – Lisbon (DIAP Lisbon)

Section for Economic or Financial Cases/corruption

Public Prosecutor attached to the *Tribunal da Relação de Lisboa*

Police

Financial Intelligence Unit – FIU (*Unidade de Informação Financeira* – UIF)

Judicial Police

Central Directorate for Combating Corruption and Economic and Financial Crime (DCICCEF)

Central Division for Combating Corruption and Economic and Financial Crime (SCICCEF)

Department of Financial Expertise

Coimbra Office of the Judicial Police

Funchal (Madeira) Office of the Judicial Police, Criminal Investigation Department

Others

Accounting Standards Commission (*Comissão de normalização contabilística* – CNC)

Central Bank of Portugal (*Banco de Portugal*)

Court of Auditors (*Tribunal de Contas*)

Export Credit Agency (*Companhia de Seguro de Créditos* – COSEC)

Financial Guarantees Council – FGC (*Conselho de Garantias Financeiras* – CGF)

Insurance Institute of Portugal (*Instituto de Seguros de Portugal* – ISP)

Securities Market Commission of Portugal (*Comissão do Mercado de Valores Mobiliários* – CMVM)

Private Sector

A company specialized in accounting and auditing
A legal firm
A medium sized company of the pharmaceutical sector
A medium size company with substantial State shareholding, public works and services sector
Portuguese banks

Professional Organisations

Chamber of Chartered Accountants (*Câmara dos Técnicos Oficiais de Contas – CTOC*)
Order of Statutory auditors (*Ordem dos Revisores Oficiais de Contas – OROC*)
Portuguese Bankers Association (*Associação Portuguesa de Bancos – APB*)
Portuguese Bar Association (*Ordem dos Advogados*)
Small and Medium Enterprises Association of Portugal (*Associação das PME de Portugal*)

Labour Union

Banking Union of Southern Portugal and the Islands (*Sindicato dos Bancários do Sul e Ilhas – SBSI*)
UGT (multi-sector trade union)
Union of Civil Servants Working on Criminal Investigations (*ASFIC*)

Civil Society – Academics – Media

A professor of law
Correio da Manhã (newspaper)
Jornal Expresso (newspaper)
OIKOS (NGO – international development)
Portuguese Association of Journalists
Researcher – Centre for Sociological Research (*Centro de Investigação e Estudos de Sociologia, ISCTE*)
A political party of the opposition (CDS-PP)

ANNEX 2: ABBREVIATIONS AND ACRONYMS

Art.	Article
CC	Criminal Code
CCP	Code of Criminal Procedure
CIRC	Companies Tax Code
CMVM	Comissão do Mercado de Valores Mobiliários (Securities Market Commission)
CNC	<i>Comissão Normalização Contabilística</i> (Portuguese Accounting Standards Board)
COSEC	<i>Companhia de Seguro de Créditos</i> (Portugal's export credits agency)
DCIAP	Central Criminal Investigation and Prosecution Department <i>Direcção Central de Investigação da Corrupção e Criminalidade Económica e Financeira</i> (Central Directorate for Combating Corruption and Economic and Financial Crime)
DCICCEF	Criminal Investigation and Prosecution Department
DIAP	Criminal Investigation and Prosecution Department
DL	Decree Law
EFTA	European Fair Trade Association
EUR	Euros
EU	European Union
FGC	Financial Guarantees Council
FIU	Financial Intelligence Unit
GNI	Gross national income
IAS	International Accounting Standards
IFAC	International Federation of Accountants
IFRS	International Financial Reporting Standards
INA	National Institute of Administration
ISA	International Standards of Auditing
ISPJCC	Criminal Police Academy
MLA	Mutual Legal Assistance
MNE Guidelines	OECD Guidelines for Multinational Enterprises
NIA	National Institute of Administration
OROC	<i>Ordem dos Revisores Oficiais de Contas</i> (Order of Statutory Auditors)
PALOPs	Portuguese-speaking African countries
PJ	<i>Polícia Judiciária</i> (Criminal Police)
ROC	<i>Revisor Oficial de Contas</i> (Statutory Auditor)
STR	Suspicious transactions report
UIF	<i>Unidade de Informação Financeira</i> (Financial Information Unit)
USD	United States Dollars

ANNEX 3: EXCERPTS FROM RELEVANT LEGISLATION

DECREE LAW 28/84, AS MODIFIED BY LAW 13/2001

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 paragraph 1 does not exclude individual liability of the offenders and paragraph 3 of article 2 is applicable, with the necessary adaptations.

Article 41-A – Active Bribery 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 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.

LAW 13/2001 [article 1 of this law introduced article 41-A in Decree Law 28/84]

Article 3

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.

CRIMINAL CODE

Article 4 – Application to conduct within Portugal: General rule

Unless otherwise stated in international treaties or conventions, the Portuguese criminal law shall apply to all acts committed: a) Within the Portuguese territory, regardless of the nationality of the perpetrator, or b) Aboard Portuguese ships and aircrafts.

Article 5 – Acts committed outside the Portuguese territory

1. Unless otherwise stated in international treaties or conventions, the Portuguese criminal law shall also apply to acts committed outside the Portuguese territory:... c) by Portuguese nationals, or by aliens if

against Portuguese nationals, whenever: I) the perpetrators are found in Portugal; II) the acts are also punishable by the law of the place in where those acts were committed, except where in that place punitive powers are not exercised; and III) the acts are considered extraditable crimes and extradition cannot be granted; or d) against Portuguese nationals, by any other Portuguese nationals who regularly residing in Portugal at the time of the commission of these acts and that were found in Portugal; e) by aliens found in Portugal, whose extradition was requested, where the acts are considered an extraditable crime and extradition cannot be granted.

2. The Portuguese criminal law is also applicable to acts committed outside the national territory, where, by way of an international treaty or convention, the Portuguese State has undertaken to bring such acts to trial.

Article 374 – Active corruption

1. Whoever, directly or through an intermediary, with his/her consent or ratification gives or promises to give, to a third party with his/her knowledge, a pecuniary advantage or a non pecuniary advantage not due to the employee, with the purpose stated in the article 372, shall be punished with a penalty of imprisonment from 6 months up to 5 years.

2. If the purpose is the one stated in article 373, the actor shall be punished with imprisonment from 6 months or with a fine up to 60 days.

3. The stipulations stated in paragraph b) of article 364 is correspondingly applicable.

LAW 34/87, AS MODIFIED BY LAW 108/2001

Article 3 – Definition of a Political Official

1. For the purposes of this law, the following are political offices: a) President of the Republic; b) President of the Assembly of the Republic; c) Member of the Assembly of the Republic; d) Member of the Government; e) Member of the European Parliament; f) Minister of the Republic for an autonomous region; g) Member of a government body of an autonomous region; h) Member of a representative body of local government; i) Civil governor.

2. For the purposes of Sections 16 to 19, political office-holders of the European Union, irrespective of their nationality or place of residence, shall be treated as national holders of political office, as shall be political office-holders of other Member States of the European Union if the offence has been committed wholly or partly on Portuguese territory.

Section 18 – Active bribery

1. Whoever either directly or through an intermediary with the latter's consent or ratification, gives or promises to a holder of political office, or with his knowledge to a third party, any undue pecuniary or intangible advantage for the purposes set out in Section 16, shall be punished with a prison sentence of 6 months to 5 years.

2. If the purposes are those specified in Section 17, the political office-holder shall be punished with a prison sentence of up to 6 months or a fine of up to 60 days.

3. A holder of political office who, in the course of his duties, either directly or through an intermediary with the latter's consent or ratification, gives or promises to a public official or other political officeholder, or with his knowledge to a third party, any undue pecuniary or intangible advantage for the purposes set out in Section 16, shall be punished with the prison sentence specified in that section.

AMENDMENT PROPOSAL BY THE SPECIAL UNIT OF THE COUNCIL OF MINISTER OF MARCH 2006 – ARTICLE 11 OF THE PORTUGUESE CRIMINAL CODE (LIABILITY OF LEGAL PERSONS)

“Article 11

1. Legal persons and equivalent entities, with the exception of the State, other public legal persons and international organization of public law, shall be liable for the crimes foreseen in articles..., article 368^a-A

(money laundering), 372 to 374 (domestic active and passive corruption),... when committed: a) In its behalf and in the collective interest by persons that occupy a leadership position, or b) By anyone who acts under the authority of the persons referred to in the above paragraph due to an infringement of the duties of vigilance and control to which they are obliged.

3. The organs and the representatives of the legal persons and whoever within the structure of the legal person has the authority to develop the control of its activity are considered to have a leadership position.

4. To the purposes of criminal liability the civil firms and de facto associations are considered to be equivalent entities to legal persons.

5. The liability of the legal persons and equivalent entities is excluded whenever the actor has acted against the express orders or instructions of anyone who has the power to issue those orders or instructions.

6. The liability of the legal persons and the equivalent entities does not exclude the individual liability of the agents of that legal person.

[...]"

LAUNDERING

Duty to report (Article 7 of Law no. 11/2004 of 27 March)

1. If the examination of the transaction, under the preceding Article or by any other means, gives rise to the suspicion or knowledge of certain facts indicating the commission of a laundering offence, the entity that has detected the situation shall immediately inform the Attorney General of the Republic.

Money-laundering offence (Article 368-A of the Criminal Code)

1. For the purposes of the provisions of the following paragraphs, the term benefits is applied to the goods proceeding from the perpetration, by any means of co-partnership, of illicit acts that are typical of incitement to prostitution, sexual exploitation of children or minors, extortion, trafficking in narcotic drugs and psychotropic substances, arms trafficking, trafficking in human organs and tissues, trafficking in protected species, tax fraud, trafficking of influence, corruption, and any other offence referred to in article 1, paragraph 1, of Law No. 36/94, of 29 September; it also applies to typical illicit acts punishable by a minimum penalty of more than 6 months' imprisonment or a maximum penalty of more than 5 year's imprisonment, as well as to the goods that are obtained thereby.

2. Any person who directly or indirectly converts, transfers, assists in or facilitates any conversion or transfer of benefits obtained by himself or by a third party, in order either to dissimulate its illegal origin, or to assist the author or any person participating in such offences in eluding the legal consequences of his or her behaviour, shall be liable to imprisonment for a term of 2 to 12 years.

3. Any person who conceals or dissimulates the true nature, origin, whereabouts, layout, movement or entitlement to such benefits, shall be liable to the same penalty.

4. Any acts and omissions as typified under paragraphs 2 and 3 shall also be punishable where the respective predicate offence will have been committed outside the national territory, or even though the place of the perpetration or the identity of the authors are unknown.

[...]

10. The penalty set forth in the preceding paragraphs shall not exceed the maximum limit of the highest penalty that is provided for the typical illicit acts originating the benefits.

CRIMINAL PROCEEDINGS

Mandatory denunciation (Article 242 of the Code of Criminal Procedure)

1. Denunciation is mandatory, even where the offenders are unknown: a) for police authorities, in respect of all crimes they become aware of; b) for public functionaries, as defined in Article 386 of the Criminal Code, in respect of crimes that come to their knowledge in the performance their duties and because of such duties.

Powers of the Central Criminal Investigation and Prosecution Department (DCIAP) (Article 47 of Law N° 60/98)

1. The Central Criminal Investigation and Prosecution Department has jurisdiction to coordinate the direction of the investigation of the following crimes:

a) Crimes against peace and humanity; b) Terrorist organisation and terrorism ;c) Crimes against national security, with the exception of electoral crimes; d) Traffic of narcotics, psychotropic and precursory substances, except in situations of direct distribution to the consumer, and criminal association for drug-trafficking; e) Money laundering; f) Corruption, embezzlement and economic subterfuge in business; g) Fraudulent insolvency; h) Prejudicial management in economic units of the public sector; i) Fraudulent receipt or embezzlement of subsidies, grants or credit; j) Economic or financial breaches committed as part of an organised crime, namely using information technology; k) Economic or financial breaches on an international or transnational scale.

[...]

3. The Central Criminal Investigation and Prosecution Department shall be responsible for directing inquiries and carrying out penal action: a) Concerning the crimes outlined in Paragraph 1, when the criminal activity occurs in areas belonging to different judicial districts; b) Following an order of the Attorney General, when, concerning crimes that display severity, or a particular complexity or where the criminal activity is widespread throughout the territory, a concentrated direction to the investigation is justified.

[...]

LAW N.º 36/94 OF SEPTEMBER 29 : MEASURES FOR COMBATING CORRUPTION AND ECONOMIC AND FINANCIAL CRIME

Article 5 - Breach of the professional secrecy

1. In the investigation, fact finding and trial phases for the crimes listed in paragraph 1 of article 1, members of the governing bodies of credit institutions and financial companies, the employees of, and persons who provide services to, the said institutions and companies are no longer bound by professional secrecy if there is reason to believe that the respective information is of great importance for the discovery of the truth and for the purpose of evidence.

2. The provision laid out in the preceding paragraph requires at all times the prior authorization of a court by means of a reasoned order.

LEGISLATIVE DECREE 452/99 [establishing the Statute of the Chamber of Chartered Accountants]

Article 3

1. The entities subject to taxes on revenue which possess or should possess financial accountancy, according to the official accountancy plan applicable, are obliged to arrange for a chartered accountant.

STATUTE OF THE CHAMBER OF CHARTERED ACCOUNTANTS

Article 6 - Duties

1. The following duties are attributed to the chartered accountants: a) To plan, organize and co-ordinate the carrying out of the accountancy of entities subjected to tax on revenue who must have financial accountancy, according to the accounts plan officially applicable, respecting the legal norms and the accounting principles in force as well as of rest of entities obliged by means of decree from the Minister of Finance to have chartered accounts; b) To shoulder the responsibility for the technical correctness, in the accounting and fiscal areas, of the entities referred to in previous paragraph; c) To sign, together with the legal representative of the entities referred to in paragraph "a", the respective fiscal reports, the financial results and their attachment, producing confirmation of their quality, in the terms and conditions defined by the Chamber, without detriment to the competence of and the responsibilities practiced by commercial and fiscal law to the respective bodies.

Article 55 - Duties towards the fiscal administration

1. In their dealings with the fiscal administration, the chartered accountants have the following duties: a) To ensure that the fiscal statements that they sign are in accordance with the law and the technical regulations in force; b) To accompany, when so requested, the examination to the records and documentation of the entities to which they render a service, as well as the documents and fiscal statements related thereto; c) To abstain from the practice of any acts which, direct or indirectly, lead to concealing, destructing, making useless, forging or invalidating the documents and the fiscal statements under their responsibility.

2. The violation of the duties referred to in previous number is, besides the disciplinary responsibility which may take place, punishable according to the norms of the Judicial Regime of the Non Customs Fiscal Infringement, approved by Decree-Law no.20-A/90 of January 15 or from a regime which may replace it.

Article 58 - Communication of public crimes

The chartered accountants must inform the District Attorney, through the Chamber, the facts, detected in the execution of the respective duties of public interest, which constitute public crimes.

Article 63 - Disciplinary penalties

1. The disciplinary penalties applicable to the chartered accountants for the infringements practiced are the following: a) Warning; b) Fine; c) Suspension up to 3 years; d) Expulsion.

ANNEX 4: STATISTICAL INFORMATION

Table 1- Origin of the information on the basis of which criminal investigations for corruption offences are launched

	Official reports	Individuals	Anonymous	Media
2002	97	86	104	4
2003	94	142	110	3
2004	108	86	74	2
2005	116	101	116	8

Source: Judicial Police of Portugal

Table 2 - Number of inquiries related to corruption offences initiated per year and outcomes of the inquiries (2002-2005)

	Inquiries	Filed inquiries	Incorporated inquiries	Indictment
2002	291	131	21	48
2003	349	107	24	78
2004	270	140	23	76
2005	341	207	41	93

Source: Judicial Police of Portugal

Table 3 – Inquiries investigated by areas (2005)

	Local & central administration	Security forces	Road & traffic authority	Health services	Tax administration	Justice	Social solidarity entities	Private entities	Others
2005	169	54	31	16	13	11	8	8	36

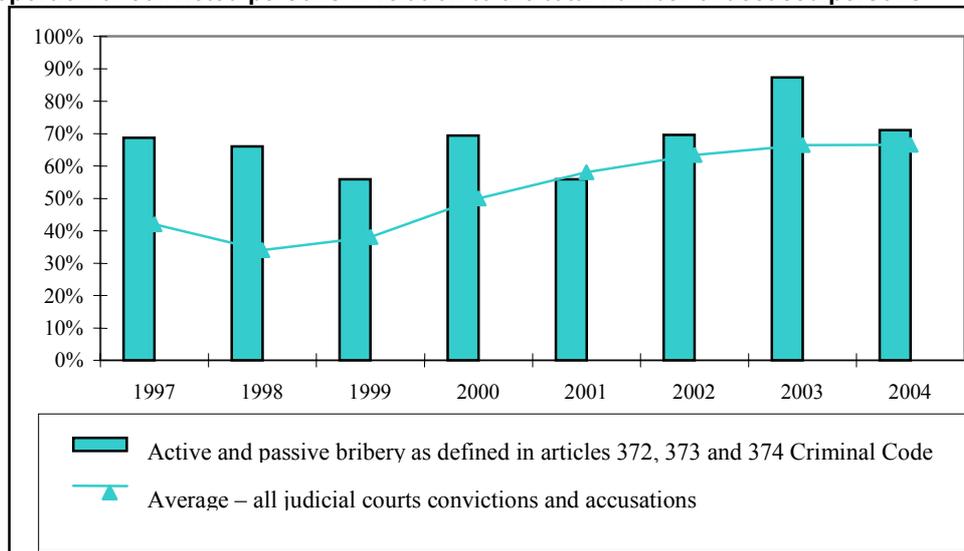
Source: Judicial Police of Portugal

Table 4 – Criminal proceedings finalized in first instance judicial courts: Proceedings, accusations and convictions for active and passive domestic bribery (as defined in articles 372, 373 and 374 of the Criminal Code) (2000-2004)

	Cases	Persons charged	Persons Convicted
2000	46	62	43
2001	49	68	38
2002	45	82	57
2003	53	63	55
2004	48	69	49

Source: Portuguese Ministry of Justice

Table 5 – Proportion of convicted persons in relation to the total number of accused persons



Source: Portuguese Ministry of Justice

Table 6 – Non convicted persons according to the motive of the non-conviction – Active and passive bribery (as defined in articles 372, 373 and 374 of the Criminal Code)

	Non-convictions	motivation for the absence of conviction					
		acquittal/lack of evidence	withdraw of complaint	amnesty	statute of limitation	non indictment-rejection of the accusation	other motives
1997	21	14	...	...	3	...	...
1998	17	13	...	...	4	...	...
1999	17	13	...	...	...	...	...
2000	19	14	...	...	3	...	...
2001	30	28	...	...	...	...	...
2002	25	25	...	...	...	...	...
2003	8	6	...	...	...	...	...
2004	20	17	...	...	...	...	...

– Null result or protected by secrecy

Source: Portuguese Ministry of Justice

Tables 7a, 7b and 7c – Amount of penalties of fine and duration of applied prison sentences to persons convicted of active and passive bribery (as defined in articles 372, 373 and 374 of the Criminal Code)

Table 7a – Averages, minimums (lowest amount imposed) and maximums (highest amount imposed)

Imprisonment substituted by fine (euros)			
Year	Average	Minimum	Maximum
1997	396,92	74,82	1496,39
1998	563,64	199,52	1122,3
1999	300,11	224,46	448,92
2000	549,13	174,58	1047,48
2001	564,31	74,82	1720,85
2002	1821,61	224,46	9976
2003	1398,95	240	4500
2004	1400,36	179	4000
Penalty of imprisonment neither substituted nor suspended (in months)			
Year	Average	Minimum	Maximum
1997	33	18	42
1998	28	7	72
1999	21	8	42
2000	11	6	15
2001	74	19	120
2002	50	12	144
2003	28	19	36
2004	51	48	54

Table 7b – Average values of the fine penalty (in euros)

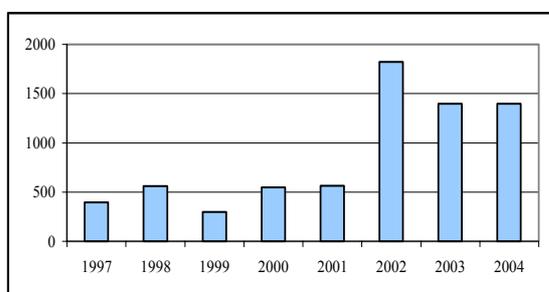
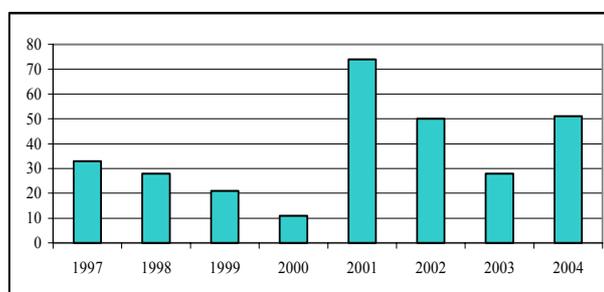


Table 7c – Average duration of imprisonment (in months)



Source: Portuguese Ministry of Justice

Table 8 – Convicted persons according to the penalties and measures applied – Active and passive bribery (as defined in articles 372, 373 and 374 of the Criminal Code) (1997-2004)

	Convictions	Penalties and Measures				
		Fines	imprisonment non substituted but suspended	imprisonment substituted by fine	imprisonment neither substituted by fine nor suspended	Other penalties or measures
1997	46	10	20	10	6	...
1998	33	9	11	4	8	...
1999	24	5	13	...	5	...
2000	43	6	30	5	...	...
2001	38	15	19	...	4	...
2002	57	10	38	4	5	...
2003	55	16	34	3	...	...
2004	49	8	36	3	...	...

... – Null result/protected by secrecy

Source: Portuguese Ministry of Justice

Table 9 – Inquiries, charges, convictions and confiscation of assets for the offence of money laundering under Article 368-A of the Criminal Code (2000-2005)

	2000	2001	2002	2003	2004	2005
Inquiries	10	8	8	61 (*)	134 (*)	13
Cases in court	3	5	2	3	4 (26 defendants)	5 (10 defendants)
Final Convictions (no appeal admissible)	1	2	-	6	4	2
Number of convicted persons	2	2	-	6	4	2
Criminal sanctions applied	4 ½ years imprisonment 4 years 3 months imprisonment	6 ½ years imprisonment 1 year imprisonment	-	3 years imprisonment 2 years imprisonment 33 months imprisonment + 3 years of interdiction of police functions	2 years imprisonment 8 ½ years imprisonment 7 ½ years imprisonment 7 years imprisonment	3 years imprisonment (suspended by 5 years) 3 years imprisonment
Predicate offence	Drug Trafficking	Drug Trafficking	-	Drug Trafficking	Drug Trafficking, incitement to prostitution	Drug Trafficking customs and tax crimes
Confiscated assets	EUR 141,190.20	EUR 629,867 USD 447.09 ESP 733,600 PTE 4,729,000	-	1 car	-	EUR 2,430,443 plus legal interest, 1 car, bearer shares, apartment (confiscation of the house owned by the defendant was pending as of September 2006)

* The high number of inquiries in 2003 and 2004 derived from indiscriminate reports by notaries following the entry into force of Law 11/2004.

Source: Portuguese Ministry of Justice