



## **PORTUGAL: PHASE 2**

# **FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS ON THE APPLICATIONS OF THE CONVENTION AND THE 1997 REVISED RECOMMENDATION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS**

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 6 October 2009.

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## SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

### a) Summary of findings

1. In June 2009, Portugal presented its Written Follow-up Report, outlining its response to the Recommendations and Issues for follow-up adopted by the Working Group on Bribery at the time of Portugal's Phase 2 Examination in March 2007. The Working Group welcomed the information provided by the Portuguese authorities in the course of this exercise and acknowledged that Portugal has taken some steps to implement the Phase 2 recommendations. However, the Working Group considers that Portugal fully implemented only two of the recommendations and a large number remain only partially implemented.

2. Since its Phase 2 Examination, Portugal has finalised a reform of the criminal liability of legal persons (amending Article 11 of its Criminal Code) and passed a new law introducing new criminal legal framework for corruption in international business (Law 20/2008 of 21 April). This new law deals with a large range of key items, mainly: jurisdiction, bribery of foreign public officials, liability of legal persons and money laundering. Portugal indicated in its written answers that these legislative changes aim at better compliance with the provisions set forth in the OECD Anti-Bribery Convention, the UNCAC and a 2003 EU directive. The Working Group welcomes this important step but acknowledged that, as a consequence, four of Portugal's Phase 2 recommendations (plus three follow-up issues) are either no longer appropriate or did not address new issues that the legislation might raise. Therefore (although Portugal presented corresponding draft responses in its written follow up report) the implementation of these recommendations has not been considered by the Working group at this stage (Recommendations 3d, 4a, 5a, 5b and issues for follow up 7a, 7b and 7c.)

3. Awareness-raising activities targeting the offence of bribery of foreign public officials have been undertaken, but remain limited. Notably, the Export Credits Agency has trained its staff and informed entities involved in export credits about the 2006 Recommendation on Export Credits (via email); and the Portuguese Agency for Investment and External Trade emailed its own staff and Portuguese companies registered as exporters with general information about the Convention. The Ministry of Foreign Affairs sent a document prepared in cooperation with the Central Department for Criminal Investigation and Prosecution and the Criminal Police to all Portuguese Diplomatic Missions abroad. The Portuguese Institute for Development Support provided information on the foreign bribery offence to NGOs working in this domain – but unfortunately not to its public or other private partners. Although the Working Group recognised Portugal's efforts to raise awareness about the offence in a large number of governmental agencies, it regrets that in a number of instances this information remained too general and failed to address in particular the liability of legal persons and the applicable jurisdictional rules. The Working Group encourages Portugal to: broaden its efforts to raise this awareness in the Judiciary; promote and assist in the implementation of preventive organisational measures and ethical standards within businesses present in foreign markets, including targeted assistance to SMEs; and raise awareness on the role that different stakeholders can play in detecting, investigating, or prosecuting the offence of bribery of foreign public officials. (Recommendations 1a, 1b and 1c)

4. Another important issue identified in the Phase 2 evaluation is the need to make public employees subject to the obligation to report more aware of the importance of effectively fulfilling this obligation when they suspect foreign bribery. The Working Group welcomes the creation, in September 2008, of the Council for Prevention of Corruption; its tasks will include raising awareness among public officials, helping in the elaboration of codes of conduct, and promoting training for public employees. However, given its recent creation, none of these tasks have been implemented yet – and it remains unclear

to the Working Group whether these actions will sufficiently target foreign bribery, or if any training or information will focus on making government officials more aware of their duty to report foreign bribery in particular. A Guide to preventing corruption was however prepared by the Ministry of Justice and distributed to civil servants. This catalogue of the different types of corruption goes in the right direction as it cites “Corruption in international business”, illustrates the concept as the corruption of a political person and provides general information on reporting suspicions of corruption. (Recommendation 2a)

5. With regard to the other Working Group recommendations to improve the reporting and detection of foreign bribery, Portugal has taken a number of initiatives. The Ministry of Foreign Affairs and the Agency for Investment and External Trade have issued instructions for their staff on the steps that should be taken when they notice allegations of bribery. ODA and Exports Credit support staff have not received such information so far. Moreover, the document sent by the Ministry of Foreign Affairs to all Portuguese Diplomatic Missions abroad (mentioned above in the section about raising awareness) unfortunately recommends that the officials report suspicions to the Ministry of Foreign Affairs rather than directly to law enforcement authorities – which would avoid any possible conflict of interest. (Recommendation 2b)

6. The Working Group welcomes the important step taken by Portugal in amending the Personal Income Tax and Companies Tax Codes to disallow and forbid confidential expenses. The Lead examiners fear, however, that the reference to “non-documented expenditures” which is included in both codes might impair the effect of this disallowance, particularly in the absence of action by Portugal to draw clear guidelines for tax authorities that include verifications to detect possible offences of bribery of foreign public officials. (Recommendation 2c)

7. Although the Order of Statutory Auditors has issued three circular letters to its members regarding money laundering and the duty to report potentially suspicious transactions (2008 and 2009), and the Chamber of Chartered Accountants (according to Portugal) refers to anti-bribery legislation in all training sessions, the lead examiners reported to the Working Group that the elements provided by Portugal show that only limited information on the offence of foreign bribery was provided to both professions. Additionally, no measure has been taken to improve the effectiveness of disciplinary measures for those who fail to comply with their reporting obligations – notably the one-year time limit, which was identified in Phase 2 as a serious impediment to effective disciplinary measures, has not been addressed. (Recommendation 2d)

8. The Working Group considered that the recommendation on ensuring 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 had been fully implemented by Portugal. (Recommendation 2e)

9. The Working Group regrets that no action has been taken by Portugal to put in place internal channel for communication or to ensure protection of whistleblowers in the private sector. It encourages Portugal to take the necessary steps to ensure such protection, including in SMEs. (Recommendation 2f)

10. During the Phase 2 examination, in view of the low number of prosecutions of foreign bribery cases, the Working Group recommended that Portugal 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 foreign bribery. The Working Group welcomes the approbation by the Portuguese Parliament of two laws defining the Objectives, Priorities and Guidelines approving the Legal Framework of Criminal Policy for 2007/2009 and 2009/2011, respectively and an internal circular from the Attorney General to the prosecutors. According to Portugal, these measures include the prosecution of foreign bribery amongst the highest

priorities. The Working Group noted with satisfaction further explanations provided orally by Portugal, stating that the impact of these laws on the fight against corruption would be evaluated after two years with a view to further improve their effectiveness. Whereas the Working Group considered it premature to evaluate the possible impact of such laws, it certainly encourages Portugal to continue in this direction. (Recommendation 3a)

11. The Working Group noted that no new measures have been taken since Phase 2 with regard to the recommendation that the Central Criminal Investigation and Prosecution Department should take a more active role in directing inquiries and carrying out penal actions associated with foreign bribery, and that other departments of the public prosecution service should promptly report all suspicions of foreign bribery to this Central Department. No measure has been taken since the phase 2 report to ensure such reporting, which implies that the Central Criminal Investigation and Prosecution Department still remains dependent on its own information. The Working Group deems that Portugal still needs to address this recommendation. (Recommendation 3b)

12. The Working Group acknowledged the serious efforts made by Portugal to ensure training of the judicial police and magistrates, and noted with satisfaction the forthcoming increase in resources; 150 new additional inspectors are currently receiving training, a large part of who (according to information provided verbally) will be assigned to fighting economic crimes. It considers that these efforts are fully in line with Recommendation 3c.

13. Portugal has not taken steps to implement the Recommendation on sanctions and the importance of pre-trial seizure of the proceeds of bribes to ensuring the full use of confiscation in enforcement of foreign bribery legislation. However, whereas the Working group welcomed the creation of a criminal record for convicted legal persons to ensure the effectiveness of accessory measures, it was disappointed to learn that the information in this record is not used to temporarily deprive companies of the right to bid in public tenders, which is based on a model declaration whose accuracy is not subject to control. (Recommendations 6a and 6b)

14. As for the inclusion of an anti-corruption clause in aid-funded contracts, the Working Group notes that “a provision related to the fight against corruption” is now included in contracts with NGOs, and encourages Portugal to integrate such clause in contracts with other ODA partners. (Recommendation 6c)

## **b) Conclusions**

15. Based on the findings of the Working Group with respect to Portugal’s implementation of the Phase 2 recommendations, the Working Group reached the overall conclusion that Recommendations 2e and 3c have been implemented satisfactorily. Recommendations 1a, 1b, 1c, 2a, 2b, 2c, 3a, 6b and 6c have been partially implemented. Recommendations 2d, 2f, 3b and 6a have not been implemented and Recommendations 3d, 4a, 5a and 5b were not examined by the Working Group at this stage taking into account the legislative reforms that took place in Portugal recently, as explained in paragraph 2 above.

16. The Working Group invites the Portuguese authorities to report orally on the implementation of Recommendations, 1a, 1b, 1c, 2a, 2b, 2c, 2d, 2f, 3a, 3b, 3d, 4a, 5a, 5b, 6a, 6b and 6c within one year, i.e. by June 2010. With regard to the new legislation reforming the criminal liability of legal persons (amending Article 11 of the Criminal Code) and introducing new criminal legal framework for corruption in international business (Law 20/2008 of 31 April), the Working Group will also follow up Recommendations 3d, 4a, 5a and 5b as part of its future activities to monitor the implementation of the Convention and in particular in Phase 3. The Follow-up Issues identified in the Phase 2 report remain largely outstanding – in particular 7 a, 7b and 7 c, which related to the new legislation – and will continue to be monitored.

## WRITTEN FOLLOW UP TO PHASE 2 REPORT

**Name of country:** Portugal

**Date of approval of Phase 2 Report:** 14 March 2007

**Date of information:** 30 April 2009

**Note:** For ease of reference, the recommendations from the original Phase 2 Report have been re-numbered. Recommendation 1 of this report corresponds to Paragraph 1 on page 62 of the Phase 2 Report and so on.

### Part I: Recommendations for Action

#### Text of recommendation 1(a):

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);

#### Actions taken as of the date of the follow-up report to implement this recommendation:

Raising awareness is an important tool at the disposal of the public and private sector representatives for the promotion of the implementation of the OECD Convention on combating bribery of foreign public officials in international business transactions. In order to comply with the recommendation that has been made to Portugal, at internal level a number of actions took place:

A - The Portuguese Export Credits Agency - COSEC took some action regarding the measures to implement the OECD Council Recommendation on bribery and officially supported export credits in Portugal. Presently, the new requirements deriving from the OECD Recommendation have been fully adopted in the Portuguese Officially Supported Export Credit Scheme:

A.1 - The anti-bribery statements to be subscribed by the exporters and banks were amended and strengthened to include the provisions of the OECD Recommendation, whenever COSEC is approached to provide cover for export credits on behalf of the Portuguese State in the application form. (See the new anti-bribery statement in the Annex).

A. 2 - Information and training sessions were held in COSEC to raise awareness of the risk of corruption and bribery in international business transactions targeted at COSEC's staff dealing with the underwriting and managing of credit insurance policies. This training provided COSEC's staff with information necessary on how to deal with clarification of doubts and claims from the Insureds and was also focused on the actions that underwriters and portfolio managers must apply when enhanced due

diligence procedures are required when assessing the risk and after the credit insurance policy has been issued.

A.3 - COSEC has disseminated the information of the new set of rules adopted in the field of export credits as a result of the approval of the new OECD Recommendation, to 62 (sixty two) entities involved in this exports activity – large exporters, SME's, national banks, branches of international banks operating in Portugal, commercial and industrial associations (either by sectors of activity, local or national level), most representative chambers of commerce established in Portugal, government agencies acting in trade promotion and investment. This dissemination was effected by mailing - a letter which enclosed a full translation of the OECD Recommendation. Also in the COSEC's website (currently being updated) will be explained the main contents of the OECD Recommendation and stated that all insurance contracts issued by COSEC on behalf of the Portuguese State will be subject to the OECD Recommendation, with a link to OECD website and availability of the Portuguese translation (See documents in the Annex).

The Research Network of Anti-Corruption Agencies (ANCORAGE-NET) was set up following the international conference “European Anti-Corruption Agencies: protecting the Community's financial interests in a knowledge-based, innovative and integrated manner”, which took place in Lisbon, 17-19 May 2006. At this Conference, all participating ACA heads from Europe and other parts of the world agreed to give substance to this project by voluntarily depositing (and updating) any relevant information concerning the functioning and activities of their specialized agencies. The programme included the delivery of presentations in matters as «Anti-corruption Commissions and Agencies in South East Europe”, the “Mission (im)possible: the direction and limits of the Public Prosecution Service in the fight against corruption (jurisdiction to investigate and interaction with the Criminal Investigation Police)”, “The Difficult First Steps of the European Anticorruption Office (OLAF)” and also “Empowering people to become involved in the fight against corruption” especially important on the issue of raising awareness. There was no founding declaration and no statutes were approved. The collective commitment to work together to develop and share knowledge-based, innovative and integrated solutions to corruption control was kept informal. ANCORAGE-NET is a research network of anti-corruption agencies (ACAs), co-financed by the Foundation for Science and Technology, whose primary aim is to provide comprehensive and easily accessible information about the format, functioning and activities of these bodies to practitioners and analysts in the field of corruption control. It is the first attempt to provide an internet database with substantive country-based and comparative institutional information on various anti-corruption agencies (ACAs) in Europe and abroad.

The second conference of the ANCORAGE, organized by the ISCTE (a public university institute acting in the domains of education, research and community service providing) took place in Lisbon, 14-16th May 2008 and the Agenda of this Conference and other related information is available in the website <http://www.ancorage-net.org/>.

Still in raising awareness activities, in 15th June, 2007, the ISCTE organized a new Seminar on “*Corruption and Ethics in Democracy: Social Representations of the Portuguese in a comparative perspective*”. This Seminar included, besides the Portuguese speakers, Odette Tomescu-Hatto (CEVIPOF/Sciences Po Paris, France); Oscar Mazzoleni (University of Lausanne, Switzerland); James Newell (Salford University, United Kingdom).

On March 2008 information raising awareness of the Convention and its relevant content, emphasizing the liability of national individuals and companies, was directed by the Portuguese Agency for Investment and External Trade - AICEP to the Portuguese companies registered as exporters or as developing transnational activity as well as to professional organizations of such professionals. AICEP was created in 2007 and succeeds in the attributions of the former API (Portuguese Agency for Investment) and ICEP. As the new Portuguese Investment Agency, its mission is to increase competitiveness, promoting the

external image of Portugal and contributing to the international dimension of Portuguese businesses and companies with a particular focus on SMES. Updated information on Portuguese entrepreneurial activities, business sector and investment in Portugal is available on their website [www.investinportugal.pt](http://www.investinportugal.pt) .

On 27th January 2009, “SEDES – Economic and Social Development Association” organized a public conference devoted to the theme: “*How to articulate independence and individual responsibility of the judge in the context of combating corruption*”.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

AICEP will direct new information in the course of 2009 both to the entities mentioned above, to whom information was sent in 2008 and external contacts abroad, namely officials posted abroad. The information, consisting on an explanatory summary table with the fundamental provisions of legislation implementing the OECD convention, will be updated in the light of the legislation adopted in 2008.

**Text of recommendation 1(b):**

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:

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)

**Actions taken as of the date of the follow-up report to implement this recommendation:**

From the preventive side raising awareness is an important tool so that public and private entities, judiciary, law enforcement authorities and public officials to be informed about corruption issues and the need to fully implement the OECD Convention.

Following contacts and meetings between DCIAP – Central Department for Criminal Investigation and Prosecution and the Criminal Police (UNCC – National Unit for the Fight against Corruption), a document with guidelines related to bribery of foreign public officials, including the type of information to be passed on to the Portuguese Authorities has been drawn up. Such document was sent to the Ministry of Foreign Affairs in order to be disseminated to all Portuguese diplomatic missions abroad. It included details about designated points of contact to receive the information in DCIAP and Criminal Police.

In order to facilitate the channel for the reporting of suspicious acts of corruption, specially targeting the personnel in the Portuguese diplomatic missions and consulates abroad, and following agreement between DCIAP, the Criminal Police (UNCC) and the Ministry of Foreign affairs, the later issued a circular-letter, in March 2008, and sent it to 142 Portuguese diplomatic missions (75 embassies, 56 consulates and 11 missions/representations) abroad regarding the need to be aware about the offence of



corruption of foreign public officials in accordance to the OECD Convention. Such text was re-sent, as a reminder, to the diplomatic mission on the 29<sup>th</sup> April 2009.

A new circular-letter has recently been sent to the same Portuguese missions, with the aim to reinforce the need for raising awareness of all the personnel working in the Portuguese missions, consulates and representations.

On March 2008 information raising awareness of the Convention and its relevant content was directed by the Portuguese Agency for Investment and External Trade - AICEP to its own staff, including both the staff serving in Portugal and the staff posted at the national economic representations abroad usually placed in the same facilities of Portuguese missions and consulates. AICEP has a network of circa 50 foreign trade and investment representations worldwide.

A Booklet was elaborated by a working group that included elements from the Criminal Police, General Directorate of Tax and Tariffs and from the General Inspectorate of the Finances, entitled “*Against Corruption: Integrity and Transparency*”, aiming at publicizing the reality of corruption, the ways in which this crime can occur as well as the need to fight it. In this Booklet, the role of the Tax Administration is especially referred to in the following terms: “*The Tax Administration (DGCI), through the Tax Inspection, has the mission of promoting the fulfillment of the tax obligations by implementing measures to monitor the tax statements and to prevent and control tax fraud and tax evasion, aiming at rendering an efficient service in the field of prevention, analysis and accuracy in order to contribute to tax justice and equity*”.

This Booklet was the basis for the exhibition of May 2007 that took place in the Criminal Police Headquarters in Lisbon until the 9<sup>th</sup> December 2007 (the International Day against corruption) and then traveled throughout several cities all around the country in 2008 (Braga, Porto, Coimbra, Lisboa, Setúbal, Évora and Faro and also Santarém and Aveiro) in order to deliver information to citizens about corruption. This exhibition, also addressed the issue of international corruption and the OECD Convention. The contents of the mentioned exhibition can be seen in the internet address [www.pj.pt](http://www.pj.pt) although only in Portuguese.

Accordingly the brochure was further distributed to its citizens as well as to schools and universities and public officials in general. It is also available online, on the website of the Criminal Police.

A list of training session promoted by the FIU is attached in Annex 1.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Not applicable

**Text of recommendation 1(c):**

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:

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).

**Actions taken as of the date of the follow-up report to implement this recommendation:**

Despite the fact that it does not work directly with the private sector, the IPAD - Portuguese Institute for the Aid to Development does render support to some NGOs and in this field, measures have been taken in order to raise this public institute's awareness for the importance of preventing situations of infringement of the OECD Convention. Therefore a formal document was drafted directed to the NGOs in order to make them aware of the importance of the application of Law no 20/2008 of 21<sup>st</sup> April - approving the new criminal regime of corruption in international business and the corruption in the private sector implementing the Framework Decision 2003/568/JHA of the Council - and giving them instructions to report to the competent authorities whenever they have knowledge of any practice of corruption in the international business. In the contracts and agreements celebrated with NGOs, a provision related to the fight against corruption is included.

The Portuguese Agency for Investment and External Trade – AICEP directed to its own staff, composed of public employees, in March 2008, information raising awareness of the Convention and its relevant content, emphasizing the duty to report. As mentioned in answer to recommendation 1a), AICEP was created in 2007 and succeeds in the attributions of the former API (Portuguese Agency for Investment) and ICEP. As the new Portuguese Investment Agency, its mission is to increase competitiveness, promoting the external image of Portugal and contributing to the international dimension of Portuguese businesses and companies with a particular focus on SMES. Updated information on Portuguese entrepreneurial activities, business sector and investment in Portugal is available on their website [www.investinportugal.pt](http://www.investinportugal.pt).

As part of its raising awareness activities, AICEP's website has a permanent link to the "Business Anti Corruption Portal" (<http://www.business-anti-corruption.com/?L=0>)

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Not applicable

**Text of recommendation 2(a):**

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);

**Actions taken as of the date of the follow-up report to implement this recommendation:**

As a general principle in the public administration and according to article 242 (1) b) of the Code of Criminal Procedure, all public officials with any exception have the duty to report all the crimes that comes to their knowledge when performing their professional duties.

After the Recommendation that has been made to Portugal, in order to increase the level of awareness of public officials, actions have been taken internally, that stress the importance of effectively fulfilling the duty to report suspected instances of foreign corruption, to the competent authorities.

For instance, the Tax Administration has translated and made available in the intranet the OCDE handbook "*OECD Bribery Awareness Handbook for Tax Examiners*". The translation of the Handbook is looked as a very important tool for the acknowledgment of the methods of detecting corruption in order to effectively prevent it through positive actions aimed at the tax expenditures connected with the phenomenon.

The Ministry of Justice elaborated and publicly disseminated in January 2007 an Explanatory Guide named "*Preventing Corruption: an explanatory guide on corruption and related rights*". This explanatory guide states the importance of public officials working for the Public Administration to bear in mind the obligation to report any suspicion of corruption. The Guide is also available online, on the portal of the Ministry of Justice, on the website of the Directorate-General for Justice Policy and on the website of the Criminal Police. A copy for information is attached in the Annexes.

In May 2007, the Criminal Police, in collaboration with the Central Department for Criminal Investigation and Prosecution (DCIAP, responsible within the Public Prosecution Service for the investigation of serious crimes) organized a Seminar entitled "*Prevention and Investigation of the Crime of corruption in the Democratic Societies*". This Seminar had the cooperation of the Tax inspection and took place in the Criminal Police Academy.

In order to address some principles and guidelines of GRECO and of the OECD Convention the Ministry of Justice has already initiated formal preparatory works, involving also the Ministry of Finance and Public Administration, regarding a so-called «*Code of Ethics on certain aspects relating to corruption*» for all public officials serving in all departments and other institutions under its supervision aiming at the improvement of awareness regarding the prevention of all forms of corruption and other crimes. The aim of the document is to be of use as a single reference document for all public officials.

We must stress that approval and publication of the new law (Law nr. 20/2008) is also a powerful raising awareness instrument, especially among the public officials who are subject to the obligation to report any offence that comes to their knowledge.

(See also answer to recommendation 1. b)

Law 54/2008, of 4<sup>th</sup> September, created the Council for Prevention of Corruption. The Council is an independent administrative entity, with the aim of contributing for the preventing corruption. It has no investigatory powers, which remain within the Public Prosecution service. According to article 8 of Law 54/2008, is subject to the duty of communicating to the competent authorities any facts that may come to their knowledge potentially constituting a crime of corruption. Information on legislation in force and the Council's activities can be found on their website <http://www.cpc.tcontas.pt/index.html>

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Not applicable

**Text of recommendation 2(b):**

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:

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);

**Actions taken as of the date of the follow-up report to implement this recommendation:**

In accordance to the recommendation a formal instruction was drafted following the Phase 2 Evaluation Report on several concrete measures to be implemented by IPAD with the aim to disseminate the result of the evaluation of Portugal in the framework of the OECD Convention within its own staff and within public officials posted in Portuguese diplomatic missions abroad.

Another objective was to promote the awareness of the IPAD staff on the importance of the fight against corruption and on the duty to report situations that are suspected to involve the commission of mentioned offence - this measure was implemented through an internal guideline directed to all departments. In addition, the public officials were made aware of the duty to report any acts contrary to law to the competent authorities for criminal investigation.

The Ministry of Foreign Affairs has issued specific instructions/guidance to Portuguese diplomatic missions, consulates and representations abroad on how to handle bribery allegations, mainly concerning the steps that should be taken where credible allegations that a Portuguese company or individual has bribed or take steps to bribe a foreign public official, including the reporting of such allegations to DCIAP and Criminal Police/UNCC. (see also answer to recommendation 1.b)

On March 2008 preliminary information indicating what constitutes crime and the steps to report it, according to the obligations applicable to Portuguese public officials and other public employees, was directed by the Portuguese Agency for Investment and External Trade (AICEP) to its own staff, including both the staff serving in Portugal and the staff posted at the national economic representations abroad. AICEP has a network of circa 50 foreign trade and investment representations worldwide.

Regarding the export credit support COSEC sent a note informing about the new rules adopted in the field of export credits as a result of the approval of the new OECD Recommendation, to 62 (sixty two) entities involved in this exports activity. This dissemination was effected by mailing - a letter which enclosed a full translation of the OECD Recommendation. Also in the COSEC's website the main contents of the OECD Recommendation will be explained and stated that all insurance contracts issued by COSEC on behalf of the Portuguese State will be subject to the OECD Recommendation, with a link to OECD

website and availability of the Portuguese translation (See documents in the Annex).

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Not applicable

**Text of recommendation 2(c):**

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:

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);

**Actions taken as of the date of the follow-up report to implement this recommendation:**

*Dissuasive measures*

The Portuguese tax law expressly prohibits the deductibility of illicit expenditures as tax expenses even when they have occurred outside the Portuguese territory thus making any illicit nature expenditure (such as corruption, bribery, money laundering or other offences) inadmissible for tax purposes.

If the tax payers try to disguise those expenses from illicit operations as lawful business expenses, a tax crime is considered to be committed notwithstanding the crime that can be associated with that tax offence.

On the other hand, also in this field tax inspectors are obliged to communicate to the competent authorities all crimes of corruption, money laundering and other types of crimes that came to their knowledge when performing their tasks and because of those tasks.

The recent organization law of the tax administration incorporates the principle of inter-administrative coordination aiming at the institutional coordination with other public services, among which, the Criminal Police and the Fiscal Department of the National Guard.

In order to improve the fight against tax fraud and tax evasion, the Tax Inspectorate has been reinforced with a new organic unit: the Division for Fraud Investigation and Special Actions (DSIFAE). This unit aims at coordinating the rendering of technical support to the courts as well as to the Criminal Police, the Customs and to the VAT Department in both the providing and the treatment of tax related information.

Law no. 67-A/2007, of 31<sup>st</sup> December has eliminated from the Codes related with tax matters all the rules in which “confidential expenditures” were included. Thus,

- According to article 43 of the mentioned Law, article 73 (1) of the IRS Code (for natural persons) has been modified deleting the reference to “confidential expenditures”;

- According to article 48 of the mentioned Law, article 42 (1), subparagraph g) and article 81 of the IRC Code (for legal persons) has been modified deleting the reference to “confidential expenditures”.

Therefore, the so-called “confidential expenditures” are forbidden under the Portuguese Tax Law since late 2007.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Not applicable.

**Text of recommendation 2(d):**

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:

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);

**Actions taken as of the date of the follow-up report to implement this recommendation:**

Law n. 20/2008, approved and in force since the 21<sup>st</sup> of April 2008, criminalizes in article 7 the *active corruption against international business* and repeals articles 41-A to 41-C of Decree-Law no 28/84 of 20<sup>th</sup> January and Law no 13/2001 of 4<sup>th</sup> June.

According to both Statutes, ROCs and TOCs have the duty to report all crimes that come to their knowledge when performing their tasks.

The Statutes of Chartered Accountants (TOCs), approved by Decree-Law no 452/1999, of 5<sup>th</sup> November, states, in article 58 (communication of public crimes), that the chartered accountants must inform the Public Prosecution Service, through the Chamber, about the facts detected in the performance of the respective duties of public interest which constitute public crimes.

Article 158 of Decree-Law no. 487/99, of 16<sup>th</sup> November, that approves the Statutes of the Order of Statutory Auditors, states that all statutory auditors (ROCs) must communicate to the Public Prosecution Service, through the Order, the facts detected in the performance of the respective duties of public interest which constitute public crimes.

The Chamber of Chartered Accountants (TOCs) demands from its members their full attention to the monitoring of all accountability documents in order to ensure their veracity, bearing in mind the object of

each company's business.

In all training sessions that took place so far, the Chamber referred to the anti-bribery legislation as well as to the anti-money laundering legislation, raising awareness between the statutory auditors to the necessity to fully assess the financial movements of the companies. Currently, about 22.000 TOCs are undergoing training.

The Order of Statutory Auditors (OROC) has issued three circular letters to its members regarding money laundering and the duty to report potentially suspicious transactions: circular 47/08, of 19<sup>th</sup> September, circular 13/09, of 25<sup>th</sup> February and circular 23/09, of 27<sup>th</sup> March. According to Law 25/2008, OROC has established an anti-money laundering service, which includes guidelines on how to proceed when a potential hit is found.

The failure to report facts that come to the knowledge of TOCs and ROCs in the exercise of their professional activities shall be subject to disciplinary action, according to the respective Statutes.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

In addition to the measures already taken regarding money-laundering, the Order of Statutory Auditors (OROC) is planning to issue a circular regarding the issue of corruption of foreign public officials. This circular is going to be directed to the Order's members and will contain guidelines on the proceedings to be followed.

**Text of recommendation 2(e):**

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:

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);

**Actions taken as of the date of the follow-up report to implement this recommendation:**

According to Article 368-A of the Criminal Code the offence of active corruption in international business is considered, among a wide range of other criminal offences, a money laundering predicate offence. Then, all obliged financial and non financial businesses and professions foreseen now in Law no 25/2008 of 5<sup>th</sup> June - establishing the preventive and repressive measures for the combat against the laundering of benefits of illicit origin and terrorism financing, transposing into the domestic legal system Directive 2005/60/EC of the European Parliament and Council, of 26 October 2005, and Directive 2006/70/EC, of the Commission, of 01 August 2006, relating to the prevention of the use of the financial system and of the specially designated activities and professions for purposes of money laundering and terrorism financing - the AML/CFT anti-money laundering and combating the financing of terrorism law (that repealed Law no 11/2004 of 27<sup>th</sup> March) have the duty to report any suspicious transaction of money

laundering or terrorism financing.

Designated non financial businesses and professions (DNFBPs) covered by FATF Recommendation 12, include casinos, real estate agents, dealers in goods that receive payments in cash of €15 000 or more, lawyers, notaries, registrars and *solicitadores*, chartered accountants, statutory auditors, trust and company service providers and also professions that are not covered by Recommendation 12, such as operators awarding betting and lotteries, entities constructing buildings for direct sale and tax advisors, listed in Article 4 of the Law no. 25/2008, are all subject to the AML/CFT legal regime. The list of DNFBPs subject to the new AML/CFT Law has been updated with the inclusion of entities constructing buildings for direct sale.

All these entities are obliged to comply with the customer identification requirements, the due diligence obligations, the duty to refuse to carry out suspicious transactions in certain conditions, to keep documents and records, to scrutinise the operations, to report suspicious operations, to cooperate with the competent authorities, to maintain secrecy in relation to the customer and to have internal control mechanisms and to provide training.

Therefore it is completely clarified that all legal duties to prevent money laundering and terrorism financing prescribed in the Law are applicable to all DNFBPs above mentioned in accordance with the provisions of Chapter II, Section II of the mentioned Law no. 25/2008, with the specifications provided for in Section III of the Law.

In addition to the duty of identifying and verifying the customers' identity, Article 7 (4) of the Law no. 25/2008 imposes also to DNFBPs the duty to identify the beneficial owner and verify its identity according to the money laundering or terrorism financing risk involved.

Furthermore Article 15 of Law no. 25/2008, as well as it is required to financial entities, imposes to DNFBPs the duty to scrutinise all the operations they perform which might involve an increased risk of money laundering and terrorism financing. DNFBPs must include the results of this scrutiny in a written form and maintain this written information for a period of 5 years, information that should be available to auditors, when they exist, and also to oversight authorities.

#### ***Issuance of general guidance and guidelines***

In addition to the legal preventing duties on money laundering and terrorism financing prescribed previously in Law no. 11/2004 and now further developed in Law no. 25/2008, several Designated Non Financial Businesses and Professions oversight authorities have issued guidelines directed to the subject entities explaining them how to comply with the legal regime in force.

That was the case of the Service for Gambling Inspection within the Tourism Institute (that replaced the General Inspectorate for Gambling), a public authority with the competence to oversight on a daily basis the casino industry, that has issued Internal Note n. 2/2008, of 5<sup>th</sup> of June, clarifying the legal regime of Law no. 25/2008.

The Authority for Food and Economic Safety (ASAE), that maintains competence to oversee dealers in high value goods as well as company and legal arrangements service providers, tax advisers and external auditors, were they are not subject to monitoring by another competent authority in accordance with the Article 38 b) of Law no. 25/2008, published in its website, in 2008, an informative paper elaborating on the legal system in place to prevent money laundering and terrorism financing.

The National Institute for Construction and Real Estate (InCI) which received through Article 4 c) of



Law no. 25/2008 the competence to oversight and regulate real estate agents and construction entities selling property directly into the market has already published in its web site information referring to the subject entities and to their legal duties, to raise awareness on the compliance with Law no 25/2008. The Institute is preparing an informative Circular on compliance with AML/CFT Law no 25/2008, of 5th June 2008.

Upon Notaries and Registers impends the duty to report suspicious operations for detection of money laundering. As regards to this duty, the Institute for Registers and Notaries Institute (IRN, I.P.) has issued several orders with guidelines concerning the identification and report of transactions related with money laundering. Additionally, with the Simplified Business Information, the mandatory register of annual accounts, statistical and fiscal information, that the companies had to deliver to the Ministry of Justice, to the Fiscal Administration, to the National Institute for the Statistics and to the Bank of Portugal is now electronically delivered, in a single moment, which allowed for the creation a public data base of annual accounts (currently with data concerning the years of 2006, 2007 and 2008), which can be easily accessed through the internet, at [www.empresonline.pt](http://www.empresonline.pt), and in other forms, providing the supervision authorities with easy access to the economic situation of companies for purposes of detecting suspicious transactions of money laundering. The Bar Association and the Chamber of *Solicitadores* have also published in their web sites information on the legal preventive regime of money laundering and terrorism financing as well as the EC Directives on this subject.

The Chamber of Chartered Accountants has promoted in 2006 the clarification of the legal regime stated in the former Law no 11/2004, specially on how to comply with the duty to report suspicious transactions to the Attorney-General Office and to the FIU and published also Law no 25/2008 in its website, as well as in SITOC (an e-learning system), a CD-ROM distributed every month to these professionals. With the aim of clarifying and promoting awareness of these professionals to the preventive AML/CFT legal regime several opinion Articles were published in TOC Magazine and also in some national newspapers.

The Order of Statutory Auditors has also published in its web site information on the legal AML regime related with Law no. 11/2004 and is preparing new information disseminating Law no.25/2008 on money laundering and terrorism financing.

Regarding the *financial sector*, since 1993 guidance and guidelines have been issued by the Portuguese supervision authorities: the Bank of Portugal, the Portuguese Insurance Institute and the Securities Market Commission.

Under the competence of the above mentioned authorities information has been sent to the financial entities through Instructions, Circular-Letters, Regulatory Standards and Regulations.

The Portuguese Insurance Institute (ISP) has been issuing informative notes directed at the entities under its supervision regarding the present recommendation. In fact, under Regulatory Provision no. 10/2005-R, of 19<sup>th</sup> July, preventive measures against money laundering in the insurance activity were set including the duty to report suspicious operations to the competent authorities as well as Regulatory Standard no.14/2005, of 29<sup>th</sup> November, setting risk management and internal control principles.

The Portuguese FIU issues on a regular basis guidelines to financial and non-financial businesses and professions, for instance to improve the quality of STRs – suspicious transactions reports – , to inform about trends of terrorism financing, money laundering and predicate offences, as well as to explain how to identify the signs of ML/FT and how to gather financial evidence.

The FIU continued to deliver training to financial and non-financial entities regarding this matter,

namely to insurance companies, the Service for Gambling Inspection and consultants companies. Moreover, the FIU produces an annual report which includes statistics about ML/TF predicate offences and typologies where a chapter is devoted to several cases using different typologies. This report is disseminated to the Oversight and Supervision Authorities of the financial and non-financial sectors, the Bar Association, to other entities with responsibilities in this matter and to a great number of financial and non-financial entities.

The entry into force of Law n. 25/2008, of 5th June (the new AML/CFT Law), has defined the FIU as the national central unit competent to receive, analyse and disseminate suspicious information on money laundering or terrorism financing (article 2 (10)).

The Portuguese FIU does not analyse specifically information on corruption, but all the suspicions of money laundering that result from the predicate offences listed in the Law (article 368-A of the Criminal Code). From the analysis of the suspicious reports sent by the obliged entities, pursuant to article 16 of the mentioned Law, it is up to the FIU:

1. To disseminate information on known trends and practices as far as money laundering and terrorism financing are concerned (article 42);
2. To provide feedback to the obliged entities on the destination and the result of the suspicious reports received (article 43);
3. To collect, prepare and keep up to date statistical data on the number of transactions reported and on the result of such reports (article 44 (1)).

As mentioned above, article 16 establishes a duty to report - to which all entities identified in articles 3 and 4 are to comply with – on their own initiative, to the Attorney General Office and the FIU, where they know, suspect or have reasonable grounds to suspect that an operation is likely to incorporate a money laundering or terrorism financing offence is being or has been committed or attempted. Furthermore, according to number 2 of the same legal provision, the information provided shall only be used in criminal proceedings, and the identity of the person who provided the information shall in no case be disclosed.

The FIU disseminates on an annual basis, through its report, information on the “typical cases” detected, in accordance with the known suspicion indicators (Instruction no. 26/2005, Annex 2, of the Central Bank of Portugal).

This kind of information is also dealt with during the meetings between the FIU and the obliged entities (March 2007 – 6<sup>th</sup> Meeting FIU / Banking sector) and during the various contacts that occur on a daily basis with the obliged entities.

The FIU has also participated, as a partner, in a study relating to money laundering and terrorism financing jointly with KPMG and the various banking institutions. The results of the study - «*Prevention on money laundering and terrorism financing – Study KPMG/FIU/2008 – How the banking and insurance sectors are responding to the challenge*» - were presented in a seminar that was organised for that specific purpose (February 2008). It should also be mentioned that the FIU participates in training actions jointly with the Banking Training Institute (IFB), as well as in seminars, in which practical issues – case studies – are dealt with. In 2008, a number of training sessions were carried out. Please see the Annex.

The FIU also provides feedback to the entities who report suspicious transactions, every three months and case by case. The information provided on the “status” of the report (whether it is “under analysis”,

whether it was “closed” or “sent for investigation”, this is to say that the suspicions was confirmed).

A monthly report with the data relating to the reports received is elaborated by the FIU. These data, among other things, contain:

- The number of reports sent by each entity (financial and non-financial);
- The type of suspicious transaction reported;
- The number of reports in which the suspicion was confirmed, the respective destination and, when possible, the predicate offence involved. [...]

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Under the Financial Supervisors National Council – where the supervisory authorities are represented – the work for the updating of the guidelines in force is ongoing, due to the approval and enter in force of the new AML/CFT Law, Law no 25/2008, of 5<sup>th</sup> June.

According to article 39 (1) of Law n. 25/2008, the Securities Market Commission will issue a regulation concerning the obligation to declare suspicious transactions, the information and clarification duties, as well as the means and ways to comply with these duties by the financial entities and other professionals subjected to these obligations.

**Text of recommendation 2(f):**

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:

f) pursue its efforts to encourage companies to provide internal channels for communication by, and internal protection for, potential whistleblowers (Revised Recommendation, Section V).

**Actions taken as of the date of the follow-up report to implement this recommendation:**

First of all, it must be stressed that the size and the type of companies and other legal persons in Portugal should be taken into account when analysing the recommendation regarding efforts taken to encourage companies to provide internal channels for communication by, and internal protection for, potential whistleblowers.

The Portuguese corporate sector is mostly composed of small and medium size companies (99,6% of all companies), employing 75,2 % of all workers.

Taking this reality into consideration, we must stress that the Portuguese Law has a protective general framework in its labour law. Internal protection of witnesses is therefore indirectly set forth in Portuguese legislation. According to the labour law in force, an employee could not be fired or subject to any other measures (punitive or disciplinary) where a suspicion of corruption has been communicated to its hierarchy or even in the case where the suspicion of the commission of any crimes has been communicated to the

Prosecution Service or to the Criminal Police.

External protection of witnesses is granted by Portuguese Law. In fact, Law no. 93/99, of 14<sup>th</sup> July, on witness protection in criminal proceedings, that has been amended by Law no. 29/2008, of 4<sup>th</sup> July, under certain conditions renders protection to all individuals and its family members where they play an important role in the criminal proceeding, namely where they can reveal important evidence and are key witnesses for the success of the trial.

Portuguese Law foresees legal protection for whistleblowers. According to article 4 of Law no. 19/2008 of 21<sup>st</sup> April, the public officials of the Public Administration and the employees of companies belonging to the State business sector that report offences that come to their knowledge in the performance their duties or because of those duties cannot, by any form, including an involuntary transfer, be harmed.

In order to reinforce the general principle of protection established, the same legal provision states that it is presumed abusive, until proven otherwise, the application of a disciplinary sanction to the public officials and employees of companies referred to in the previous paragraph, when this sanction is applied within the period of one year after the respective denunciation.

As measures of protection, the workers referred to in the previous paragraphs are entitled to:

- a) Anonymity, except to the investigators, up to the issuance of the accusation;
- b) Transfer at his own request without the possibility of refusal, after the issuance of the accusation in court.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Not applicable.

**Text of recommendation 3(a):**

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);

**Actions taken as of the date of the follow-up report to implement this recommendation:**

Since 2007, date of the Phase 2 Report, until present substantial progress has been achieved and a number of legislative updating – especially in the field of prevention and repression of crime – have been

successfully carried out.

According to Law no. 51/2007, of 31<sup>st</sup> August, defining the objectives, priorities and guidelines for 2007-2009, subsequent to Law no 17/2006 approving the legal framework of Criminal Policy, all types of corruption have been defined as criminal offences that should be submitted to priority preventive rules and priority criminal investigation by competent authorities.

Corruption remains one of the major concerns of the Government and will be included in the new legislation defining the objectives, priorities and guidelines for 2009-2011, currently under preparation for further discussion in the Parliament. This law is to be approved by the 15<sup>th</sup> of June 2009 and shall enter into force in the 1<sup>st</sup> of September 2009.

Article 219 of the Constitution establishes the autonomy of Public Prosecutors when performing their duties, which implies that only the Attorney-General is able to provide very generic orientations, to Public Prosecutors. As a consequence the Portuguese Government is unable to issue guidelines or draw the attention of public prosecutors in accordance to the principles of separation of powers and independence of prosecutors.

According to article 2 of the Statute of the Public Prosecution Service (Law no. 60/2008 of 27<sup>th</sup> August), public prosecutors are autonomous from all the other organs of central, regional and local power. This autonomy is characterized by its conformity to legality and objectivity criteria and to the exclusive obedience to the orders, directives and instructions foreseen by this Statute.

The Attorney-General issued an Internal Circular in 2008 (nº 1/2008), aimed at giving priority to investigations related to certain crimes. These instructions are to be followed by all public prosecutors in charge of criminal investigations. In the above mentioned circular letter among the crimes to which investigation should be given priority, the crime of corruption is expressly identified. All circular letters are directed to public prosecutors and are also made available online, on the website of the Public Prosecution Service ([www.pgr.pt](http://www.pgr.pt)) on a permanent basis.

The new Criminal Police Organic Law (Law no. 37/2008 of 6<sup>th</sup> August) created the National Unit for the fight against Corruption. This new Unit replaces the former DCICCF – Central Department for the Investigation of Corruption and Economic and Financial Crime - which was previously competent to investigate suspicions of corruption. This, along with the definition of criminal investigation and prevention priorities (Law no. 51/2007 of 31<sup>st</sup> August) demonstrates a strong commitment of Portuguese authorities against corruption.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Not applicable.

**Text of recommendation 3(b):**

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

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);

**Actions taken as of the date of the follow-up report to implement this recommendation:**

Regarding the recommendation in order to ensure that the Central Department for Criminal Investigation and Prosecution (DCIAP) takes a more active role in directing inquiries and carrying out penal actions and that other departments of the public prosecution service promptly report all suspicions of foreign bribery to the DCIAP, a mechanism allowing for the DCIAP to gather information on the cases of corruption initiated in other departments is already in place. All pending investigations of particular complexity, namely because of the international dimension, should be directed by the DCIAP itself.

In fact, within its powers of investigation, as foreseen in the law, DCIAP is able to launch a criminal investigation, for instance related to international corruption or money laundering if a minimal or single connection exists with the national territory (for instance, a single banking transfer through a bank whose facilities are in Portugal).

As mentioned in the answer to recommendation 2e), article 16 of Law 25/2008, of 5<sup>th</sup> June, – establishing the preventive and repressive measures for the combat against the laundering of benefits of illicit origin and terrorism financing, transposing into the domestic legal system Directive 2005/60/EC of the European Parliament and Council, of 26 October 2005, and Directive 2006/70/EC, of the Commission, of 01 August 2006, relating to the prevention of the use of the financial system and of the specially designated activities and professions for purposes of money laundering and terrorism financing - establishes a duty to report - to which all entities identified in articles 3 and 4 are to comply with – on their own initiative, to the Attorney General Office and the FIU, where they know, suspect or have reasonable grounds to suspect that an operation is likely to incorporate a money laundering or terrorism financing offence is being or has been committed or attempted. Furthermore, according to number 2 of the same legal provision, the information provided shall only be used in criminal proceedings, and the identity of the person who provided the information shall in no case be disclosed.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Not applicable.

**Text of recommendation 3(c):**

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

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);

**Actions taken as of the date of the follow-up report to implement this recommendation:**

Regarding training activities, in 27-28 March 2007, an international Conference on Corruption took place in the Portuguese Parliament by proposal of the President of the Portuguese Parliament. Besides speeches delivered by the Minister of Justice and the Attorney General, there were presentations delivered by several national and foreign magistrates during a discussion panel on “*corruption: national and international state of play*”.

In December 6<sup>th</sup>-7<sup>th</sup> 2008 a training session took place in CEJ - Center for Judiciary Studies (the Portuguese school of magistrates) dedicated to Economic Criminality.

It should be added that among the compulsory plan of studies followed by CEJ in the initial formation of magistrates, a specific module on corruption and economic crime is included. In this context, all international instruments and relevant Framework Decisions are studied.

Regarding law enforcement authorities, the Criminal Police Institute delivers training courses related to corruption for criminal investigators. In 2008 there was a course on case studies regarding financial and economic criminality, including corruption and corruption in international business.

From the resources point of view, during 2008 and the first trimester of 2009 training was provided in the Criminal Police Institute to the new 150 Inspectors of the Criminal Police on issues as corruption and other economic and financing crimes as well as on methodologies for criminal investigation. We should also stress that some more workshops and seminars have been organized on the issue of corruption for judges, public prosecutors and even to officials of the Criminal Police.

Taking into account the fact that, within the European Union, a European Network of Anti-Corruption Contact Points has been established by Council Decision 2008/852/JHA, Portugal has already appointed its Contact Points: the Public Prosecution Service, the Council for the Prevention of Corruption and the Criminal Police. This network intends to enhance cooperation among authorities in order to improve the prevention and combat to corruption.

In 25-26<sup>th</sup> March 2009, the 2<sup>nd</sup> Annual Congress on Criminal Investigation took place in Lisbon. Its main focus was on taking of evidence and during the two-day sessions, a significant number of relevant subjects in this regard was addressed. This high level event with support from the Ministry of Justice, gathered national and international experts on criminal law and law enforcement. Corruption and its links to transnational organized crime, money laundering, international cooperation in criminal law matters and protection of witnesses were among the subjects specifically addressed in the working sessions.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Not applicable.

**Text of recommendation 3(d):**

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

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).

**Actions taken as of the date of the follow-up report to implement this recommendation:**

Law no. 13/2001 has been repealed by Law no 20/2008, of 21<sup>st</sup> April. Article 3 of Law 20/2008 provides for territorial application. According to the regime established, Law 20/2008 applies to:

- a) Portuguese nationals or aliens found in Portugal, who have been convicted for the commission of the offence referred to in article 7, irrespective of the place where it has been committed;
- b) To persons convicted for the conduct referred to in articles 8 and 9, irrespective of the place where it has been committed, when whoever offers, promises, requests or accepts any undue advantage or the promise of such advantage, is a national public officer or holds a national political office or, being a Portuguese national, is an official of an international organization.

Nevertheless, article 3 applies without prejudice to the general regime of the criminal law territorial application and to what is provided for in international judicial cooperation matters. In other terms, regarding the establishment of national and extraterritorial jurisdiction over foreign corruption offences, articles 4 to 6 of the Criminal Code and Law no 144/99, of 31<sup>st</sup> August on international judicial cooperation in criminal matters apply.

Therefore, this law applies to cases of the incrimination foreseen in article 7 (active corruption in international business), irrespective of the fact that these acts were committed by Portuguese nationals or by foreigners found in Portugal.

Law enforcement authorities and the judiciary are aware of the special criteria for establishing nationality and extraterritorial jurisdiction over foreign bribery offences notably with regard to the absence of the dual criminality requirement. Competent authorities recognise the need for the accurate application of these provisions in the investigation, prosecution and accusation of crimes referred to in the Criminal Code and other relevant legislation as Law no. 20/2008, of 21<sup>st</sup> April. The principle of dual criminality is usually set forth in the treaties, agreements or legal instruments when referring to mutual legal assistance in criminal matters. Within the OECD Convention the dual criminality is foreseen in article 9 (2) and not in article 4, as stated in the Recommendation made to Portugal. Article 9 (2) states that «*where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention*».



Taking into account that all mentioned legal provisions are known by law enforcement authorities and judiciary authorities - judges and public prosecutors – no special awareness raising actions seems to be necessary, bearing in mind that the knowledge of the legislation in force is of fundamental importance in the performance of their functions. In fact, a thorough debate took place before and at the time of the entering into force of Law 20/2008, among the law enforcement community and the judiciary.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Not applicable.

**Text of recommendation 4(a):**

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).

**Actions taken as of the date of the follow-up report to implement this recommendation:**

In the evaluation report on the application on the Convention on combating bribery of foreign public officials in international business transactions of 14<sup>th</sup> March 2007 it was said that Portugal's legal framework on corruption has experienced extensive reforms in the recent past. However, in the opinion of the evaluators potential issues related to the choice of statute for the offence of, the relation between article 41-A of Decree-Law no. 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 on the offence remain.

Some remarks have been made about the definition of *foreign public official* in article 41-A (4) a) of Decree-Law no. 28/84, namely the fact that is not in line with the definition provided in article 1 of the Convention and is not an autonomous offence and expressly stating that foreign political officials are those qualified as such by the law of the official's State.

Regarding the Recommendation that was made by the evaluation team, it was communicated to the working Group during the oral report post Phase 2 in 2008 that a draft law was under discussion in the Parliament aiming at approving the new legal regime of corruption in international trade and in private sector for two reasons: firstly due to the amendments of the Criminal Code (Law no. 59/2007, of 4<sup>th</sup> September) that includes the general regime of criminal liability of legal persons and secondly in order to better comply with the provisions set forth in the OECD anti-bribery Convention, the United Nations Convention against Corruption of 2003 and EU Framework Decision no 2003/568/JHA, of 22<sup>nd</sup> July.

The Law no. 20/2008, creating the new legal regime on corruption in international business and in the private sector was approved and published in the Official Gazette, is in force since 21<sup>st</sup> April, repealing articles 41-A, 41-B and 41-C of Decree-Law no. 28/84 and Law no. 13/2001 of 4<sup>th</sup> July. It introduces an autonomous definition of *foreign public official* as well as autonomous definitions of *official of an international organization* and *foreign political official*. According to article 2 c), a foreign public official

means any person that, working for a foreign country hold a legislative, judicial or office at a national, regional or local level, whether appointed or elected.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Not applicable

**Text of recommendation 5(a):**

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);

**Actions taken as of the date of the follow-up report to implement this recommendation:**

Law no. 20/2008, of 21<sup>st</sup> April, creating the new criminal regime of corruption in international business and in the private sector includes in article 4 the criminal liability of legal persons and similar entities.

Therefore, article 2 of Decree-Law no. 28/84 ceased to be applicable.

Article 4 of Law n° 20/2008 states that legal persons and similar entities are responsible for the commission of crimes set forth in Law no. 20/2008, in general terms (article 11 of the Criminal Code). Both provisions are connected and no collision exists between the two pieces of legislation.

(ii) The offence of corruption is criminally prosecuted irrespective of the fact that it is committed by a regular employee or an outside agent of the legal person, in accordance with article 11 of the Criminal Code.

In addition, (iii) criminal liability of legal persons still exists regardless of the no prosecution or conviction of a natural person for a corresponding offence, according to article 11 of the Criminal Code. For instance, according to the following examples:

(1) where, during a criminal procedure in court the natural person responsible for the offence of corruption committed on behalf of the legal person deceases;

(2) Where, for any reason, the natural person could not be prosecuted under Portuguese criminal law;

or even

In the above mentioned examples, the legal persons could be held responsible regardless of the no prosecution or conviction of a natural person for the commission of the corresponding offence.

In January 2009, the Attorney-General issued a communication to all public prosecutors and the Director of DCIAP regarding criminal liability of legal persons. It was recalled that article 58, par. 1, of the Criminal Procedural Code, establishes the cases where the constitution of a defendant is mandatory. In cases where a legal person can be considered criminally liable along with the members of the board or another natural person responsible for the management, often the legal person is not subject to the above mentioned provision, as only the natural person is considered a defendant.

The constitution as a defendant, besides its mandatory nature as legally established, is an important step to allow the exercise of criminal procedural rights. It also has consequences in terms of statutes of limitation of the criminal procedure.

Taking into account that the Public Prosecution Service is responsible for the decision of constituting a legal person as a defendant, the public prosecutors shall bear in mind the following:

1 – In cases where there are reasonable grounds of suspicion regarding criminal liability of legal persons, the constitution of the legal person as a defendant is mandatory and should be promoted and communicated to the law enforcement authorities responsible for criminal investigation. The decision shall be communicated to the legal representatives of the legal person.

2 –Criminal liability of legal persons does not exclude, per se, the individual liability of their legal representatives which could be personally and individually responsible by the commission of crimes under investigation. Consequently, the status of defendant of the legal person does not exclude either the possibility of a natural person, such as the legal representatives, being constituted a defendant as well.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Not applicable

**Text of recommendation 5(b):**

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

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).

**Actions taken as of the date of the follow-up report to implement this recommendation:**

With the adoption of Law no. 20/2008, of 21<sup>st</sup> April, approving the new criminal regime of corruption in international business and the corruption in the private sector (repealing articles 41-A to 41-C of Decree-Law no. 28/84 and Law no 13/2001), implementing the Framework Decision 2003/568/JHA, of the Council, of 22<sup>nd</sup> July, the criteria basing criminal liability of legal persons are those set in article 11 of the Criminal Code, as amended in 2008.

According to article 4 of Law no. 20/2008, legal persons and equivalent entities are liable, in general terms, for the crimes foreseen in the present law. Mentioned law does not have specific rules on liability of legal persons and as according to article 6 (2) of the same legal instrument, “*to the crimes foreseen in the present law, the provisions of the Criminal Code are subsidiarily applicable*”.

Thus, article 11 of the Criminal Code states that:

*« Article 11*

*Liability of natural and legal persons*

1 - Except when stated in the following paragraph and in the cases specially foreseen by law, only individuals are able to be criminally liable.

2 - Legal persons and equivalent entities, except the State; other state owned (public) legal persons and international organizations of public law are liable for the crimes foreseen in Articles 152-A and 152-B, 159 and 160, 163 to 166, if the victim is a minor and in Articles 168, 169, 171 to 176, 217 to 222, 240, 256, 258, 262 to 283, 285, 299, 335, 348, 353, 363, 367, 368-A and 372 to 374 when committed:

a) on their behalf and in the collective interest by natural persons occupying a leadership position within the legal person’ structure; or

b) by whoever acts under the authority of the natural persons referred to in the previous subparagraph,

on account of a violation of his/her duties of vigilance and control.

3 - For the purposes of criminal law, the expression public legal persons include:

- a) Public law legal persons, where the business public entities are included;
- b) Entities rendering public services, regardless of their ownership,
- c) Other legal persons who exercise prerogatives of the public power.

4 - The organs and representatives of legal persons and whoever has within the legal person, the authority to exercise the control of its activity are considered as occupying a leadership position.

5 - For the purposes of criminal liability, civil societies and de facto associations are considered equivalent entities to legal persons.

6 - The liability of legal persons and equivalent entities is excluded when the actor has acted against the orders or express instructions of the person responsible.

7 - The liability of legal persons and equivalent entities does not exclude the individual liability of the respective actors nor does it depend from the liability of those.

8 - The separation (splitting) and the merger do not determine the extinction of the criminal liability of legal person or equivalent entity, being the following criminally liable:

- a) Legal person or equivalent entity in which the merger has occurred;
- b) Legal person or equivalent entity resulting from the separation.

9 - Notwithstanding the right to demand payment to the legal persons or to equivalent entities, persons occupying a leadership position are subsidiary responsible for the payment of fines and compensation in which the legal persons or equivalent entity are sanctioned, regarding to crimes:

- a) Practiced during the exercise of his/her post, without his/her express opposition;
- b) Previously practiced, when it has been due to them that the property of the legal person or equivalent entity has become insufficient for the respective payment or;
- c) Previously practiced, when the final decision to apply them has been notified during the exercise of his/her post and when the lack of payment is due to them.

10 - Whenever several persons are liable according to the previous paragraph, they are jointly liable.

11 - If the fines and compensation are applicable to an entity without legal capacity, the common property and in its absence or insufficiency, the property of each partner shall jointly answer for them ».

There is no account of cases of abuse related to the absence of liability, as foreseen in this recommendation.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Not applicable

**Text of recommendation 6(a):**

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);

**Actions taken as of the date of the follow-up report to implement this recommendation:**

When dealing with corruption and other serious offences seizure and confiscation should be regarded as fundamental tools to deprive criminals from the use of proceeds of crime derived from illicit activities.

The provisions relating to the confiscation and seizing of the proceeds of crime are described in the Penal Code – Articles 109 to 111 – and in the Code of Criminal Procedure – Articles 178 to 186, as to the procedures to be applied. Law no. 5/2002, of 11 January, provides for a special confiscation regime (Article 7), which applies, only in case of conviction, to a set of offences where money laundering is included.

According to Articles 109 to 111 of the Penal Code the proceeds, things, benefits or objects that have been used or were meant to be used for the commission of an illicit act or that constitute the proceeds of that illicit act can be confiscated to the State; confiscation can also be applied to things, rights or benefits - or assets equivalent in value where the earlier mentioned cannot be seized in goods - that, through the illicit act, have been directly acquired by the offender to himself or to a third person and represent property of any kind (Article 111).

Law no. 5/2002, of 11 January, Chapter IV, provides for a special regime of confiscation for the State of goods derived from the commission of a corruption offence, amongst other offences. Thus, in case of conviction, it is considered as benefit from a criminal activity the difference between the value of the defendant's actual property and one that is consistent with his lawful income. It should be noticed, without prejudice of the court's taking into account of any evidence in the proceeding, that the defendant can prove the legal origin of the assets referred to in Article 7 (2) (mitigated inversion of the burden of proof).

In addition to what is mentioned previously, Article 111 (3) and (4) of the Criminal Code states that the confiscation of benefits can include things or rights obtained with the transaction or exchange of things or rights derived directly from crime. They also provide for the possibility of the rights, things or benefits that cannot be confiscated in goods, being replaced by payment to the State of the respective value (assets of equivalent value). Both situations are applicable regardless of whether the agent is in the possession of

the benefits or not.

Nevertheless, the protection of the rights of bona fide third parties is provided for in Article 110 of the Criminal Code.

Additionally, the Portuguese legislation is being updated in these subject matters, namely through legislation that transposes into national law both Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence and Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. These new pieces of legislation will facilitate the issuance of orders, as well as the recognition and execution of freezing and confiscation orders, in Portugal and in all the European Union.

Finally, we should reiterate, as already mentioned in answer to recommendation 3a), that Article 219 of the Constitution establishes the autonomy of Public Prosecutors when performing their duties, which implies that only the Attorney-General is able to provide very generic orientations, to Public Prosecutors. As a consequence the Portuguese Government is unable to issue guidelines or draw the attention of public prosecutors, in accordance to the principles of separation of powers and independence of prosecutors.

Then, in conclusion, Portuguese authorities are aware of the importance of the pre-trial seizure of the proceeds of corruption for the purpose of ensuring the full use of the measure of confiscation in favour of the State in the framework of the enforcement of the domestic criminal legislation, in particular, the enforcement of foreign corruption legislation.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

After the transposition of Council Framework Decision no. 2003/577/JHA and Council Framework Decision no. 2006/783/JHA into domestic law training actions will be organized and delivered to public prosecutors, judges and law enforcement authorities due to innovative aspects on the execution of freezing orders and on the recognition of foreign confiscation orders.

**Text of recommendation 6(b):**

6. With respect to sanctions for foreign bribery, the Working Group recommends that Portugal:

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);

**Actions taken as of the date of the follow-up report to implement this recommendation:**

Regarding the right to bid in public tenders, it should be mentioned, from the preventive side, that the new Code for Public Procurement, approved by Decree-Law no. 18/2008 of 29<sup>th</sup> January includes a «*Model Declaration* » (in accordance to Article 57 (1)) where the natural or legal person (including the

directors or other representatives) should state that they have not been convicted for money laundering or corruption.

Law no. 59/2007, of 4<sup>th</sup> September, approving the new Criminal Code, foresees in article 8 the creation of the criminal record of legal persons and similar entities. The mentioned provision states that, with the necessary adaptations, Law no. 57/98, of 18<sup>th</sup> August and Decree-Law no. 381/98, of 27<sup>th</sup> November and Decree-Law no. 62/99, of 2<sup>nd</sup> March are applicable to criminal identification of legal persons and similar entities until the amendment of the legal regime of criminal identification.

The legal regime of criminal identification is set forth in Law no. 57/98, of 18<sup>th</sup> August and Decree-Law no. 381/98, of 27<sup>th</sup> November regulates and develops the legal regime of criminal identification. Decree-Law no. 62/99, of 2<sup>nd</sup> March regulates the use of electronic files for criminal identification and the protection of personal data.

In practical terms, the criminal record of legal persons and similar entities has already been established and is placed within the Department of Criminal Identification, a department of the Directorate General for Justice Administration. Since the creation of the criminal record of legal persons and similar entities until March 2008, 88 communications of criminal convictions of legal persons have been registered and 51 certificates of criminal record of legal persons have been issued.

Since 2005, a major reform has been taking place regarding simplification of business acts, in order to promote better access, reduce bureaucracy, increase competitiveness and transparency:

- a) Simplified company information – companies can now file accounts and submit annual accounting, statistical, fiscal and financial information to the public authorities by using a single online form available at [www.ies.gov.pt](http://www.ies.gov.pt). The charges can be paid in ATMs or through homebanking services. After payment, the act is registered and published automatically at <http://publicacoes.mj.pt> and the company is issued with a permanently updated commercial registration certificate;
- b) Permanent Certificate – The Permanent Certificate is an online Companies Registry certificate, constantly updated, showing current registry entries and applications for registration and filing, for companies and other organization subject to official registration. The certificate may be obtained by anyone at [www.empresaonline.pt](http://www.empresaonline.pt). When the certificate is requested, the applicant is sent a code by SMS and email which may be presented to any public or private entity instead of a paper certificate. A permanent certificate is automatically generated for each registry entry. The Permanent Certificate remains available at a site managed by the Ministry of Justice and may be accessed by public and private entities.
- c) Online publication of company information – the acts of companies and cooperatives, such as articles of association and any amendments, appointment and resignation of company officers, change of registered offices or resolutions to redeem or convert shares, are now published online, instead of on paper in the Official Journal.
- d) On-the-Spot Firm and Online company incorporation - it is now possible to incorporate and register a single-member or limited liability company in one visit to a single office. It is also possible to incorporate and register commercial and civil companies of various type, merely by accessing the official Portuguese business website and using a digital certification number.

On-the-spot firm and online company incorporation do not preclude any control from the competent authorities and in fact it has updated the mechanisms for control. All main elements regarding the incorporation of a company are made available to the tax authorities, Social Security and the Inspection for



Labour conditions.

Furthermore, a central information system of commercial registration - SIRCOM - has been created, to which all Companies Registries have access and as such, may consult all data on commercial registrations.

Regarding information on convictions, it is available to competent authorities and a certificate of criminal record can be requested and issued except where the legal person has been rehabilitated. Portuguese authorities render a particular attention to the principle of re-socialization both to natural persons and legal persons. Additionally, regarding the criminal record, it is foreseen in the legislation in force in Portugal the prohibition of perpetual sanctions of imprisonment for natural persons and the perpetual register of convictions of natural and legal persons in the criminal record.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Not applicable

**Text of recommendation 6(c):**

6. With respect to sanctions for foreign bribery, the Working Group recommends that Portugal:

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).

**Actions taken as of the date of the follow-up report to implement this recommendation:**

No further information is available apart from the ne provided in answers to recommendations 1 c) and 2 b).

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Not applicable

## Part II: Issues for Follow-up by the Working Group

### Text of issue for follow-up 7(a):

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);

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

As already stated before, new legislation – Law no. 20/2008 – has been approved and is in force since 21<sup>st</sup> of April 2005. The Law criminalizes in article 7 the *active corruption against international business* and repeals articles 41-A to 41-C of Decree-Law no 28/84 of 20<sup>th</sup> January and Law no 13/2001 of 4<sup>th</sup> June.

Among different purposes, one of the aims of the Portuguese legislator was to have a legal instrument exclusively devoted to corruption in international business and corruption in the private sector clarifying the legal regime and the wording used in criminalization provisions. Then, cases of corruption through intermediaries where the briber only gives generic instructions to corrupt with no information to the intermediary on the exact amount and identity of the intended recipient of the corruption are foreseen and Law no 20/2008 and general provisions of the Criminal Code apply.

Active corruption against international business is a so-called «offence of danger». In accordance with the criminal doctrine there is commission of the crime with the offer or the promise to offer or the giving of any undue pecuniary or other undue advantage, regardless the acquirement or the keeping of a business, a contract or any undue advantage in international business in international trade.

No potential overlaps exist between article 374 of the Criminal Code (active corruption) and paragraphs 1 and 2 of article 18 of Law no. 34/87, taking into consideration that, in the framework of corruption in international business and corruption in the private sector article 7 (active corruption against international business) of Law no. 20/2008 apply. The same Law no. 20/2008 is also applicable to cases of corruption in international business of EU, EU Member States, and international officials, as defined in article 2.

**Text of issue for follow-up 7(b):**

7. The Working Group will follow up on the issues below, as practice develops, in order to assess:

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);

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

According to article 4 of Law no. 20/2008, of 21<sup>st</sup> April and article 11 of the Criminal Code, legal persons and similar entities are liable, among other offences, for the commission of the offence of active corruption in international business.

Active corruption against international business is a so-called «offence of danger». In accordance with the criminal doctrine the commission of the crime is fulfilled with the offer or the promise of the offer or the giving of any undue pecuniary or other undue advantage.

Then, according to Law no. 20/2008, to article 11 of the Criminal Code and the general provisions of same legal instrument (i) criminal liability of legal persons still remain where the corruption act does not directly result in profits entering the legal person, where (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, where (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. However, regarding (iv) where the legal person is a state-owned or state-controlled legal person acting under private law, taking into account the wording of article 11 (2) of the Criminal Code, criminal liability could also apply.

**Text of issue for follow-up 7(c):**

7. The Working Group will follow up on the issues below, as practice develops, in order to assess:

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);

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

The application of sanctions to natural and legal persons for the offence of foreign bribery is foreseen respectively in articles 7 and 4 of Law no. 20/2008 of 21<sup>st</sup> April. According to article 7 natural and legal persons could be punished by imprisonment from 1 to 8 years.

Mentioned sanctions are higher than those applicable for active corruption, under Article 374 of the Criminal Code (6 months to 5 years imprisonment). Taking into account the fact that the new legislation has recently come into force, there are no statistical data on this matter. Nevertheless, we would like to refer to the data provided in the answer to recommendation 3b). In conclusion, in the opinion of the Portuguese authorities existing sanctions for the prevention and repression for the offence of active corruption against international business cases are, in abstract, effective, proportionate and dissuasive.

The Council for Prevention of Corruption has launched a questionnaire directed to all public entities from central and local administration, aimed at assessing potential risks of corruption, namely in public procurement. The questionnaire was sent to the above mentioned entities in March 2009 and the outcome will be made public in June.

**Text of issue for follow-up 7(d):**

7. The Working Group will follow up on the issues below, as practice develops, in order to assess:

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).

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

The anti-bribery statements to be subscribed by the exporters and banks were amended and strengthened to include the provisions of the OECD Recommendation, whenever COSEC is approached to provide cover for export credits on behalf of the Portuguese State in the application form. (See the new anti-bribery statement in the Annex).

In 2006/7 the Portuguese officially supported export credits system has been reviewed by COSEC.

The management of the export credit insurance with official support is presently entrusted to the Export and Investment Financial Guarantees Board (CGFEI) that has replaced the former Financial Guarantees Council, after the enactment of Decree-Law no. 51/2006, of 14th March and its internal regulation laid down in the By-Law no. 283/2007, of 9 March.

This legal reform initiated in 2006 was further complemented by the Decree-Law no. 31/2007, of 14 February, which has partially revoked the previous credit and bond insurance legal framework, thus producing some modifications in its provisions and procedures relating to the granting of export credits with the Portuguese State Guarantee.

Regarding the scope of intervention, Export and Investment Financial Guarantees Board is an advisory body to the Ministry of Finance and Public Administration, which acts, namely, in the area of export credits, bond and investment insurance with the Portuguese State Guarantee.

Export and Investment Financial Guarantees Board comprises the following entities:

- a representative of the minister responsible for the area of finance , who chairs the Board;
- a representative of the minister responsible for the foreign affairs;
- a representative of the minister responsible for the economy;
- two experts of recognized ability and experience in the issues of the Council's scope of intervention.

Export and Investment Financial Guarantees Board give recommendations on applications for cover of transactions and projects submitted by COSEC and issue advices on other matters related to its scope of intervention (policies, premium system, etc). The Board also proposes to the Government the guiding principles for the Officially Supported Export Credits System, country classification, cover policies and any other measures related to the managing of State Guarantees.

The final decision to grant official support is taken by the Minister of Finance and Public Administration or in whom he has delegated his competence. When comparing with the former FGC, the new Board is not entitled to deliberate; only to issue opinions, advice and recommendations.

The new Board, together with COSEC, represent Portugal in the international *fora* and meetings related to export credits, namely in the EU and OECD.

## **APPENDICES<sup>1</sup>:**

- Appendix 1: relevant legislation and other documentation
- Appendix 2: acronyms
- Appendix 3: steps taken by Portugal to implement and enforce the OECD convention on combating bribery of foreign public officials in international business transactions

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<sup>1</sup> The Attachments are available upon request to the Secretariat only [anti-corruption.contact@oecd.org]

## STATEMENT FROM PORTUGAL

*“The Working Group notes that this is the first time that a Party to the Convention has chosen to make a public Statement expressing a diverging opinion on several recommendations resulting from a Phase 2 examination which had already been agreed by the Working Group. The policy of the Working Group is, in principle, not to comment on a Party’s Statement.”*

### 1. PRELIMINARY CONSIDERATIONS

Portugal understands that the review of implementation mechanisms attached to international conventions are crucial for an effective and growing implementation of the legal framework that we would like to see in force, as is the case of the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions.

Portugal understands that the review of implementation mechanism of the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions has been able to reach the referred purposes, something that will surely be clear during the new Phase 3.

We also consider that the final results that have been reached in the framework of the Phase 2 Evaluation of Portugal have been clear in registering the advances that we’ve reached regarding these matters and, on the other hand, registering the existence of gaps that we have to suppress.

Following this line, and having in mind the need to continue improving the mechanisms to prevent and combat these phenomena, Portugal is working on measures that will complement the existing framework.

This is the case, among other measures, with the creation of a Commission that will define, until the end of March 2010, a Common Framework of Reference of the Codes of Conduct and Ethics of the Public Administration, with the aim of listing those principles that are to be applied to the Public Administration and to companies so that corruption is combated. We foresee covering all public sectors with codes of conduct and risk of corruption preventing measures. The referred Commission is presided by the Secretary of State for Justice. Following this Commission workings we will establish anti-corruption codes of conduct in the public administration and in public companies.

Additionally, we must also point out that the Portugal has been devoting itself to giving the competent entities the necessary means (legislative, material and human) to prevent and repress corruption, in particular, as well as economic and financial criminality in general. Among the wide range of measures already in place, the following should be highlighted:

1. Law Proposal (already in force) concerning the combat to corruption in international trade and in the private sector: following a law proposal, Law 20/2008, of 21 April, was published. This law envisages to improve and complete the incriminations of corruption in international trade and in the private sector, putting these dispositions in line with the recent revision of the Portuguese Criminal Code and with the obligations deriving from several international legal instruments: the

OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Council of Europe's Criminal Law Convention on Corruption, the EU's Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, the UN's Convention against Corruption.

2. Law proposal, also already in force, which amends the Law on the Protection of Witnesses: it was approved, by the Portuguese Parliament, by unanimity, an amendment to the Law on the Protection of Witnesses. Consequently, beyond the protective measures already in place, in case of crimes of passive corruption for an illegal act it is possible, independently of its practice in the context of a criminal association, the use of special programs and measures such as the nondisclosure of the identity of the witnesses. See comments to recommendations 2.f.
3. The revision of the Portuguese Criminal Code (CD): the Portuguese Criminal Code now provides for the criminal responsibility of legal persons for all crimes, including corruption and money laundering. Moreover, and as consequence of this revision, the Parliament has approved an amendment to the Law on Criminal Identification, in order to regulate the registry condemnations of legal persons.
4. The revision of the Portuguese Criminal Procedural Code: criminal conducts such as corruption, trafficking of influence or money laundering have been included in the concept of "highly organized criminality", which means and determines that in relation to these conducts the measure of pre-trial imprisonment may be applied, as well as longer deadlines for it. Moreover, in these cases, night home searches may be undertaken.
5. Proposals for the Framework-Law of Criminal Policy and the Law on Criminal Policy: the Parliament approved the first law on Criminal Policy, in which it were defined the objectives, priorities and orientations in the context of prevention of crimes, investigations and procedures for the biennium 2007-2009. Corruption, trafficking of influence, money laundering, embezzlement, among others, are some of the crimes that should be considered a priority in terms of prevention and investigation (these priorities have, in the meantime, been implemented by the Prosecutor General through generic directives and instructions for the mentioned biennium). These priorities are also included in the Law on Criminal Policy for the biennium of 2009-2011, approved by the Parliament (Law 38/2009, of the 20th of July). See comments to recommendations 3.a and 3.b.
6. The report by the Prosecutor General on the implementation on the Laws on Criminal Policy has to include a section on corruption and connected crimes. Thus, a mechanism of transparency and responsibility of the activity of the Public Prosecution Services is created, as well as the interaction and communication among organs of sovereignty (which define our criminal policy) and the Public Prosecution Services (which is responsible for the execution of this policy). See also comments to recommendation 3.a. and 3.b.
7. Law proposal for the implementation of EC's Directives on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing: the Parliament approved Law 25/2008, of the 5th of June, which transposes for the Portuguese legal order the Directives 2005/60/EC, of the European Parliament and the Council, of 26 October 2005, on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, and the Directive 2006/70/EC, of the Commission laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of 'politically exposed person' and the technical criteria for simplified customer due

diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis.

8. Law Proposals to implement the Framework Decisions on the mutual recognition and execution of confiscation orders and orders freezing property or evidence: see comments to recommendation 6.a.
9. Law Proposal on Cybercrime: Law 109/2009, approved by the Parliament, equips the Portuguese legal system with more effective investigative and cooperation measures to combat new criminal phenomena in the cyberspace, including corruption, when this crime is committed through electronic means or when it is necessary to gather evidence in electronic support.
10. Creation, through the new Organic Law of the Criminal Police (Law 37/2008, of the 6th of August), of a National Unit of Combat against Corruption.
11. The new Statute of the Public Manager (Decree-Law 71/2007, of the 27th of March), which introduces dispositions on criminal responsibility and conduct (articles 23, 36 and 37).
12. Publication of an Explanatory Guide on Corruption and Connect Crimes – “Preventing Corruption”.
13. Creation of a working group to elaborate an “Ethical Chart for the Public Administration concerning Certain Aspects pertaining to Corruption”.
14. New Code on Public Contracts (Decree-law 18/2008, of the 29 of January): establishes that any singular or legal person who wishes to contract with the State must declare that it has not been convicted for crimes such as money laundering or corruption. See comments to recommendation 6.b.
15. Increase of control, communication and data cross reference mechanisms, through multiple measures of simplification and de-bureaucratization. In this context, the modernization initiatives such as “on the spot firm” and “online firm” are fundamental steps for the simplification of the relationship between firms and the Public Administration. The use of electronic applications avoids standard procedures and eliminates territorial exclusives, thus, eliminating situations of discretion.
16. Parliament’s Resolution 47/2007, of 21 September, which approves the Convention against Corruption, adopted by the United Nations General Assembly, on 31 October 2003.
17. Law 5/2002, which establishes special measures of combating organized criminality and economic and financial criminality: provides for special regimes of evidence gathering, breach of professional silence and confiscation of assets in favour of the State. Moreover, it has included in its scope the crimes of active corruption, trafficking of influence and economic participation in business.
18. Measures of a tax nature: duty of communication, by the Finance Director to the Public Prosecution Services of cases in which he/she decides to apply the indirect method of assessing the tax. If the taxpayer is a public servant this communication is also done to his/her superiors, for inquiry. For tax measures see also comments to recommendation 2.c.
19. Non-profit organizations with the main objective of combating corruption which are “assistentes” (assistant) in a criminal procedure are exempted from Court fees.



20. Amendment to the Law on Public Control on the wealth of persons who hold political positions, establishing that the Public Prosecutor at the Constitutional Court annually analyses the declarations of wealth provided by persons whose mandates have ended or ceased.
21. Law 54/2008, of 4 September, which creates the Council on the Prevention of Corruption, an independent administrative entity, which works at the Court of Auditors and which aims at developing, in the terms set by law, an activity at national level, in the context of the prevention of corruption and related offences. We will refer to it as the Anti-Corruption Council: see comments to recommendation 2.a.

## 2. MORE CONTROVERSIAL ISSUES OF THE EVALUATION

In the framework of the Phase 2 Evaluation of Portugal some deficiencies have been prejudicial to the evaluation at stake, something that is reflected in the final result of the evaluation process. We will proceed with the identification of controversial issues that are examples of such a reality.

### *2.1 Recommendations considered as non-fulfilled:*

*Recommendation 2 (f) pursue its efforts to encourage companies to provide internal channels for communication by, and internal protection for, potential whistleblowers.*

**OECD Working Group:** it has considered that the protection regarding Labor Law does not meet the demands of the recommendation and, since the Portuguese law is limited to the protection of the whistleblowers on the public sector, the recommendation as been deemed as “non-fulfilled”.

**Portugal’s position:** although, among other measures, the growing implementation of recommendation 10-A of the Securities Market Commission of Portugal (CMVM) has been explained to the WG, Portugal has no objections to the evaluation presented in this recommendation. Portugal does, however, have some reserves concerning the content of the recommendation itself, given the Portuguese business structure.

As it has also been explained during the evaluation proceedings, Portugal has enacted legislation to establish guarantees for public employees that denounce cases of corruption or other crimes that they know of in the performance of their duties (eg: cannot be harmed; cannot be transferred against their will; presumption that the application of a disciplinary sanction is abusive; anonymity; transfer per request).

*Recommendation 3 (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.*

**OECD Working Group:** as to the DCIAP’s attributions, the evaluators have considered that there were no results that would allow concluding that there was a “proactive attitude during inquiry and carrying out penal actions”, once the reply given by Portugal didn’t show any improvements in view of the data available in 2007.

**Portugal’s position:** on one side, the WG doesn’t seem to recognize the autonomy of the Public Prosecution Services (PPS), which prevents the Government from interfering in the sense of “encourage the public prosecution services to take a more proactive approach”, as well as the fact that even the Prosecutor General himself who has, by law, the power to issue guidelines can only do it in very general

terms. Additionally, we must point out that Portugal (through a Framework Law approved in the National Parliament) has defined the fight against bribery as a priority of our criminal policy.

**Recommendation 6 (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.*

**OECD Working Group:** considered that no relevant data were presented in the sense of concluding that the attention was being drawn to the full use of the measures of confiscation in cases of bribery in foreign business.

**Portugal's position:** Portugal presented figures concerning the seized amounts and DCIAP has explained, in the preparatory meeting, that these were amounts resulting from both bribery and money laundering; on the other hand one must recognize and respect the Public Prosecution Services' (PPS's) autonomy, that disallows the Government from interfering in these matters; in what regards the PPS's action, Portugal stresses that all public prosecutors and operators are subject to the law and that the measures concerning the proceeds of bribery are legally foreseen. Furthermore, there is recently published legislation, on the Official Journal:

- Law no. 25/2009, of the 5th of June, that transposes the EU's Council Framework Decision 2003/577/JHA, of 22 July 2003, on the execution in the European Union of orders freezing property or evidence, and
- Law no 88/2009, of the 31st of August, that transposes the EU's Council Framework Decision 2006/783/JHA, of 6 October 2006, on the application of the principle of mutual recognition to confiscation orders.

## **2.2 Recommendations considered to have been partially fulfilled:**

**Recommendation 1 a):** *take necessary measures – in association with business and civil society organizations – 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 organizational measures and ethical standards within businesses present in foreign markets, including through provision of targeted assistance to SMEs.*

**OECD Working Group:** considered that, notwithstanding the set of measures adopted by Portugal concerning the private sector, the recommendation is not fulfilled in what regards its second part: *“promote and assist in the implementation of preventive organizational measures and ethical standards within businesses present in foreign markets, including through provision of targeted assistance to SMEs”*.

**Portugal's position:** the fact that some recommendations have generic formulations together with the lack of definition of some parameters leads to some arbitrariness during the evaluation. This is one of such recommendations. Portugal considers that this recommendation should be considered as fulfilled.

*Recommendation 1 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.*

**OECD Working Group:** determined that, although PT has adopted a set of measures aiming the public officials and the public in general, there were no specific measures aiming the judiciary.

**Portugal's position:** considers that, pursuant to the above mentioned position, this conclusion expresses arbitrariness in the appraisal of the awareness measures that were implemented, lack of definition of the fulfillment parameters, as well as the disregard for unprecedented efforts undertaken by Portugal such as the drafting of brochures, the permanent presence of these subject in conferences, celebration of itinerant exhibitions, high level debates, including in the National Parliament. Portugal thus considers that this recommendation should be considered as fulfilled.

*Recommendation 2 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.*

**OECD Working Group:** considered as insufficient the measures undertaken by Portugal to raise the awareness of the public officials as to the duty of reporting this type of acts of bribery. The justification given was the fact that, in what concerns Tax Administration, the translation of the OECD's manual "*OECD Bribery Awareness Handbook for Tax Examiners*", was made without taking into consideration the specificities of the Portuguese system and that no training actions were organized. It was also considered that the Anti-Corruption Council, although its creation has been an important step, hasn't, so far, presented any specific initiatives to that effect. It also considered that Portugal could set up a *hotline*.

**Portugal's position:** similarly to the previous recommendations, it is considered that this conclusion translates arbitrariness in the appraisal of the measures developed by Portugal, not giving the due importance to all the actions developed. Furthermore, in what concerns the specific case of the translation of the OECD's manual, the WG incomprehensibly penalizes the proactive adoption of measures that were not demanded in the recommendation. In fact, the Recommendation didn't mention the translation of the manual by the Portuguese Tax Administration services, nor this one was approached by the recommendation, thus we consider that it is abusive not to consider the recommendation as fully fulfilled based on the fact that Portugal did not comply with something that was not mentioned in the first place. Portugal also considers incorrect to consider that the Anti-Corruption Council hasn't presented any specific initiatives; the WG ignores a wide range of actions in due course and has not taken into consideration future initiatives that are already programmed; in the program of activities for 2010 of the Anti-Corruption Council the following operative activities have been defined so that the prevention of corruption and related infractions is addressed: to follow the effective implementation of the plans of prevention of risks of corruption and related infractions in several public entities; to cooperate with entities in implementing their plans of prevention of risks of corruption and related infractions; to identify and typify, in a systematic and permanent way, the most important situations that present risks of corruption and related infractions; to follow the accomplishment of GRECO recommendations; to promote the drafting of codes of conduct; to promote training sessions (see article 2.º, n.º2, b), of Law 54/2008, of the 4<sup>th</sup> of September); to promote a seminar with the purpose of raising awareness regarding the need to prevent corruption; to analyze the main deficiencies of the internal systems of control of entities; to analyze the reporting rules. Portugal therefore considers that this recommendation should be considered as fulfilled.

**Recommendation 2 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.

**OECD Working Group:** considered that, notwithstanding the elimination of the “confidential expenses” under Portuguese law, the existence of the item “non documented expenses” represented a potential risk of covering transactions destined to pay bribes.

**Portugal’s position:** disagrees with the verdict “partially fulfilled”, since the recommendation only expressly mentions the confidential expenses and not the non documented ones, item that already existed when the Recommendation was drafted, in 2007. Therefore, since Portugal has clearly eliminated the item “confidential expenses”, non documented expenses cannot be seen as deriving from the confidential ones. They are clearly different, the later allowing the tax administration to identify the nature, amount and beneficiary of the undocumented expense, which wasn’t possible in the confidential expenses. Portugal thus considers that this recommendation should be considered as totally fulfilled.

**Recommendation 2 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.

**OECD Working Group:** during the Plenary Meeting of the evaluation report, the experts (Brazil and Holland) have mentioned that they were not able to reach a consensus regarding the interpretation of the recommendation, reason why they disagreed as to the evaluation of its fulfillment by Portugal. As such, the decision was put on hold.

In the Plenary Meeting, the delegations referred that a consensus hadn’t been reached and, as such, they had reached a compromise decision of “*partially fulfilled*” since they believed it wasn’t clear if it was possible to detect bribery in international business transactions, or if it was even a specific aim.

**Portugal’s position:** considers that the decision taken during the debate could have been positive and, consequently, the recommendation would be fulfilled.

**Recommendation 3 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.

**OECD Working Group:** the experts considered that, notwithstanding the fact that there were some initiatives with the purpose of giving priority to bribery, they did not render the crime of bribery in international business transactions autonomous, which made it doubtful to conclude whether those initiatives would bear fruits on that regard.

**Portugal’s position:** on one hand, the WG doesn’t seem to recognize the autonomy of the Public Prosecution Services, which impedes the Government from interfering in the sense of “encouraging proactivity in the Public Prosecution Services” as well as the fact that even the Prosecutor General has the power to issue guidelines but it can only do so in generic terms. Additionally, we must point out that, to Portugal, as it has been widely explained (including specific references to the content of article 6.º of Law 19/2008, of the 21<sup>st</sup> of April – in this case the new legislation foresees that **the report by the Prosecutor General** on the implementation on the Laws on Criminal Policy has to include a section on corruption and connected crimes), it is clear that any reference to “bribery” under the definition of priorities in criminal policy legislation (2007-9 and 2009-2011) include bribery in international business transactions, as well as all other types of crimes related to bribery.

*Recommendation 6 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.*

**OECD Working Group:** as to the recommendation that refers to the setting up of a criminal record for convicted legal persons, despite its effective set up, it was considered that Portugal could have done more regarding public procurement and, as such, it was concluded that the recommendation was not fully fulfilled.

**Portugal's position:** Portugal has already made clear that the Portuguese legislation on these matters not only is in conformity with EU legislation but also demands the presentation of the criminal record in legally foreseen situations, although not at an early stage of the procedures. Portugal believes that more important than the bid is the adjudication moment and that is the sense in which the recommendation should be perceived. Moreover, a copy of the Portuguese legislation was provided to the Brazilian experts, but it was completely disregarded. Portugal believes the recommendation should be considered as fulfilled.