PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN PORTUGAL

June 2013

This Phase 3 Report on Portugal by the OECD Working Group on Bribery evaluates and makes recommendations on Portugal's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 14 June 2013.

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EXECUTIVE SUMMARY

The Phase 3 report on Portugal by the OECD Working Group on Bribery evaluates and makes recommendations on Portugal's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report considers country-specific (vertical) issues arising from changes in Portugal's legislative and institutional framework, as well as progress made since Portugal's Phase 2 evaluation. The report also focuses on key Group-wide (horizontal) issues, particularly enforcement.

The Working Group is seriously concerned that Portugal's enforcement of the foreign bribery offence has been extremely low. Despite Portugal's strong economic links to countries plagued by severe corruption, only 15 foreign bribery allegations have surfaced since 2001. Of similar concern is that these allegations have not resulted in a single prosecution to date. Several investigations were closed prematurely. Portuguese authorities did not proactively investigate or seek the co-operation of foreign authorities in several cases. The Working Group thus recommends that Portugal review its overall approach to enforcing its foreign bribery laws. Portugal should take steps to ensure that foreign bribery investigations are not prematurely closed, and seek the assistance of foreign authorities where appropriate. Portugal should gather information more proactively from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations. Concerns about low enforcement are exacerbated by the risk that foreign bribery cases may be influenced by factors prohibited under Article 5 of the Convention. Several of Portugal's foreign bribery allegations involve high-level foreign officials and/or major Portuguese companies and their executives. Portugal should adopt heightened vigilance to address this concern.

The report identifies additional areas for improvement. Portuguese companies and media have an alarmingly low level of awareness of and interest in the fight against foreign bribery. Portugal should further raise awareness and promote corporate compliance programmes to prevent foreign bribery. Greater efforts need to be made to detect, prevent and prosecute money laundering by politically exposed persons, especially those from jurisdictions with pervasive corruption and close economic ties to Portugal. Foreign diplomatic missions have in several instances not informed Portuguese prosecutors of allegations of foreign bribery committed by Portuguese companies or individuals that were widely reported in the local media. Steps must be taken to ensure reporting occurs in practice. Whistleblower protection in the public and private sectors also need to be strengthened. Corporate liability for foreign bribery should be extended to state-owned or controlled enterprises.

The report also notes positive developments. Portugal has maintained the resource levels for key law enforcement bodies despite government-wide austerity measures. It has issued a circular to address the allocation and referral of foreign bribery cases among law enforcement bodies. It has taken some steps to improve co-operation on MLA with other countries, though more should be done. The use of seizure before trial has increased. The foreign bribery offence and related legislation have been improved, though certain provisions still raise some questions. Law enforcement's access to bank information has been improved. Confidential expenses under tax legislation have been disallowed. Portugal has also created a database of criminal convictions of legal persons.

The report and its recommendations reflect findings of experts from Bulgaria and the Netherlands and were adopted by the Working Group on 14 June 2013. It is based on legislation and other materials provided by Portugal and research conducted by the evaluation team. The report is also based on information obtained by the evaluation team during its on-site visit to Lisbon on 12-14 February 2013, during which the team met representatives of Portugal's public and private sectors, legislature, judiciary, civil society, and media. Within one year of the Working Group's approval of this report, Portugal will provide a written follow-up report on its implementation of certain recommendations, and on its foreign

bribery investigations and prosecutions. It will further submit a written report on the implementation of all recommendations, and foreign bribery investigations and prosecutions, within two years. The Working Group will take appropriate measures throughout this process, including the possibility of a Phase 3*bis* evaluation, should Portugal have failed to take steps to adequately address its recommendations.

A. INTRODUCTION

1. The On-Site Visit

1. On 12-14 February 2013, an evaluation team from the OECD Working Group on Bribery in International Business Transactions (Working Group) visited Lisbon as part of the Phase 3 evaluation of Portugal's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention); 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation); and 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation).

2. The evaluation team was composed of lead examiners (Bulgaria and the Netherlands) and the OECD Secretariat.[1] Before the on-site visit, Portugal responded to the Phase 3 Questionnaire and supplementary questions, and provided relevant legislation and documents. The evaluation team also referred to publicly available information. During the on-site visit, the evaluation team met representatives of the Portuguese public and private sectors, judiciary, parliament, civil society, and media. (See Annex 2 for a list of participants.) The evaluation team expresses its appreciation to all participants for their openness during the discussions and to Portugal for its co-operation throughout the evaluation.

2. Summary of the Monitoring Steps Leading to Phase 3

3. The Working Group previously evaluated Portugal in Phase 1 (May 2002), Phase 2 (March 2007) and the Phase 2 Written Follow-Up Report (October 2009). As of October 2009, Portugal had fully implemented 2 out of 19 Phase 2 Recommendations (see Annex 1 at p. 56). The outstanding Recommendations cover issues such as awareness-raising, foreign bribery offence, corporate liability, and enforcement. Exceptionally, the Working Group did not examine the implementation of four Recommendations because legislation had been enacted shortly before the Follow-Up Report.

3. Outline of the Report

4. This report is structured as follows. Part B examines Portugal's efforts to implement and enforce the Convention and the 2009 Recommendations, having regard to Group-wide and country-specific issues. Particular attention is paid to enforcement efforts and results, and weaknesses identified in previous evaluations. Part C sets out the Working Group's recommendations and issues for follow-up.

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[1] Bulgaria was represented by: Mr. Florian Florov, Senior Expert, International Legal Co-operation and European Affairs Directorate, Ministry of Justice; and Mrs. Pavlina Nikolova, Head of Section, Department Counteracting Corruption and Other Crimes Committed by Public Officials, Supreme Prosecution Office of Cassation. The Netherlands was represented by Ms. Kimberley Tielemans, Senior Policy Advisor, Ministry of Security and Justice; and Mr. Jack van Zijl, National Public Prosecutor for Corruption, National Public Prosecutor's Office. In addition, Mr. Tabe van Hoolwerff, Senior Legal Advisor, Ministry of Foreign Affairs; and Mr. Don O'Floinn, Senior Policy Advisor, Ministry of Security and Justice participated in the meetings in Paris to discuss the draft report. The OECD Secretariat was represented by Mr. William Loo, Mr. Joydeep Sengupta and Ms. Lise Née, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

4. Economic Background

5. Portugal has a medium-sized economy by Working Group standards. In 2011, Portugal was the 30th largest economy among the 40 Working Group members.[2] This statistic does not account for Portugal's substantial grey economy, which amounts to 25.4% of GDP, according to one study.[3] In 2011, Portugal was the 33rd biggest exporter of goods and services in the Working Group.[4] Since 2010, domestic demand has weakened, but exports have strengthened across a wide range of goods, services and trade partners.[5] In 2011, Portugal had the 27th largest outward stock of foreign direct investment (FDI) among Working Group members. A large proportion of Portuguese firms have international operations or investments in sectors such as construction, energy, telecommunication, wholesale and retail trade, manufacturing, finance, insurance, and consulting and advisory services.[6]

6. Although most of its trade and investment are with European Union (EU) countries, Portugal has substantial and increasingly stronger ties with emerging economies in Latin America, Africa and Asia. Brazil, Angola and Mozambique are among the top six locations of Portuguese outward FDI. Angola was the fourth largest export destination in 2011.[7] Trade with China increased by 5.2% in the first half of 2012 alone. Chinese investors recently purchased large stakes in Portuguese state-owned energy companies from the Portuguese government.[8] Apart from Angola and Mozambique, Portugal plays a major role in the economies of countries such as Cape Verde, Guinea-Bissau, and São Tomé and Príncipe.

7. Several of these countries have high levels of corruption and thus pose serious risks of foreign bribery. One company at the on-site visit described bribery in its countries of operation as "almost institutional". Of the foreign bribery allegations involving Portuguese companies that have surfaced, more than half involve officials of countries with strong economic ties. Angola alone accounted for one-third. The political elite and public officials in Angola, and individuals linked to them, reportedly have substantial stakes in Portuguese companies in the banking, oil, and information technology sectors.[9] Portuguese prosecutors acknowledged that "corruption in economic activities in Angola, Mozambique, and São Tomé and Príncipe where Portuguese companies develop their work makes investigation of those activities difficult in Portugal."

5. Autonomous Territories of Azores and Madeira

8. The Azores and Madeira archipelagos are autonomous regions. They have their own political and administrative statutes and self-government institutions, but cannot legislate in certain areas such as

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2 GDP figures from OECD.Stat and International Monetary Fund (World Economic Outlook Databases).

3 Observatório de Economia e Gestão de Fraude (2012), "Índice de 2011, A Economia Não Registada em Portugal".

4 OECD.Stat and World Trade Organisation Time Series databases.

5 OECD (2012), *Portugal: Economic Survey*, p. 12.

6 OECD.Stat and UNCTADStat FDI Database 2011.

7 Instituto Nacional de Estatísticas database.

8 Lusa News (30 August 2012), "Exports to China Soar in First Half, as Imports Fall"; Reuters (7 May 2012), "Portugal Sell-offs Opaque, Carry Graft Risk: Study"; OilPrice.com (8 February 2012), "China Buys Into Portuguese National Power Company, Politicians Aghast".

9 Forbes (23 January 2013), "Isabel Dos Santos, Daughter of Angola's President, Is Africa's First Woman Billionaire"; NewsdzeZimbabwe (14 April 2012), "Bags Of US Dollars Found in Mutharika's Bedroom"; Jeune Afrique (11 October 2011), "L'Angola lorgne les fleurons portugais"; Correio da Manha (4 November 2012), "Filho de Kopelipa compra representante da Ferrari em Portugal"; Pestana, Damásio and Faria (2011), "Reverse FDI in Europe: An Analysis of Angola's FDI in Portugal"; CIA World Factbook.

criminal law, international co-operation in criminal matters, or financial supervision. The Convention and all laws implementing the Convention apply to all of Portugal including both territories.[10] Madeira hosts a Free Trade Zone (FTZ) with preferential tax regimes; a similar FTZ in Azores was extinguished in December 2011. Portugal has enacted special laws allowing the recognition of foreign trusts in the Madeira FTZ if the settlor, beneficiary and immovable property of the trust are not situated in Portugal. As of January 2013, 3 278 companies and 51 foreign trusts were registered in the Madeira FTZ, even though the population of Madeira is only approximately 268 000. In at least two foreign bribery allegations involving Portuguese companies, bribes were reportedly channelled through companies or accounts in the Madeira FTZ.

6. Cases Involving Bribery of Foreign Public Officials

9. Portugal has not prosecuted any foreign bribery cases. Since Portugal became a Party to the Convention in 2001, 15 allegations of Portuguese individuals and/or companies bribing foreign public officials have surfaced. Seven allegations are under investigation, while the remaining eight have been closed without prosecution. Portugal also referred to four cases of non-Portuguese companies bribing Portuguese officials.[11] From Portugal's perspective, these are domestic, not foreign, bribery cases and thus do not fall within Article 1 of the Convention. Nevertheless, the cases are relevant to several issues in this report such as international co-operation and the absence of corporate prosecutions. Some case names have been anonymised at the request of Portuguese authorities.[12]

(a) Foreign Bribery Cases Terminated without Prosecution

10. *Case #1 – Parliamentarian (Brazil) No. 1 Case*: Prior to 2005, the then-ruling political party in Brazil paid certain parliamentarians monthly to ensure the passage of legislation proposed by the government. The payments were drawn from public and private sources. Portuguese Company T allegedly agreed to contribute EUR 8 million to this scheme to secure the government's approval of its acquisition of a company in Brazil. The agreement was allegedly negotiated among those involved in operating the bribery scheme, the CEO of Company T, and the Chairman of Portuguese Company S which was a shareholder of Company T. These individuals met twice in Portugal and once in Brazil in 2004-2005.

11. Brazil prosecuted and convicted several individuals of the bribery scheme in 2012, but did not prosecute the two Portuguese CEOs or Company T. Portugal provided mutual legal assistance (MLA) to Brazil but declined to prosecute the CEOs or Company T. It concluded that the first meeting among the parties that took place in Portugal did not relate to the bribery scheme. This conclusion was reached based only on the dates and lengths of the meetings, and the business records of Company T provided to Portuguese authorities. As a result, Portuguese authorities decided that no illicit acts were committed in Portuguese territory. Why they did not exercise nationality jurisdiction to prosecute is unclear. Portuguese authorities were also not aware of the two additional meetings between the parties. They did not seek MLA from Brazil.

12. *Case #2 – Fish Conservatory (São Tomé and Príncipe) Case*: In 2007, Portuguese Company M won a USD 5.5 million tender to construct a fish conservation and commercialisation facility in São Tomé

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10 Constitution of the Portuguese Republic, Article 6(2); Instituto Nacional de Estatísticas; Portugal Phase 1 Report, p. 3.

11 These are the *Burke Case*, *Ferrostaal Case*, *Medical Equipment Case*, and *Military Aircraft Case*. These cases involved convictions of foreign companies or individuals bribing Portuguese officials under Law 13/2001. Portuguese authorities sought and provided MLA in these cases.

12 Portugal's foreign bribery enforcement statistics in the Working Group's Annual Reports in 2011-2013 as provided by Portugal erroneously included cases of bribery of Portuguese officials. These cases do not fall under Article 1 of the Convention for Portugal.

and Príncipe. A local parliamentarian and NGO alleged that Company M won the contract by paying a USD 50 000 bribe to the Minister of Public Works and Infrastructure. Portuguese authorities learned about the case after they were informed by the Working Group of a media article containing the allegation. Thereafter, a São Tomé prosecutor who was based in Lisbon informed Portuguese authorities that the case had been closed in São Tomé and Príncipe. Portuguese authorities also consulted publicly available information on Company M, which did not indicate that the Company was involved in a fish conservation project in São Tomé and Príncipe. Portugal then closed the case. Portuguese authorities did not confirm directly with authorities in São Tomé and Príncipe that the case had been closed, why the case was closed, and what steps São Tomé authorities had taken to investigate the allegations. They also did not seek MLA from São Tomé and Príncipe. After the on-site visit, Portuguese authorities stated that, according to additional press reports, the allegations in the case were made and later withdrawn by an election candidate. Portuguese authorities did not, however, independently verify this information.

13. *Case #3 – Plane Acquisition (Iran) Case*: According to a media report, Iran attempted to purchase an airliner from a sultan of unknown nationality in 2002. A Portuguese national of Syrian origin was an intermediary in the deal. Iran claimed that the then-head of the Iranian acquisition authority was allegedly bribed, presumably by the Portuguese intermediary. The intermediary then pocketed rather than transferred the purchase money to the seller. In April 2008, a Swiss court ruled that evidence gathered pursuant to an MLA request could be transmitted to Iran. This decision was reversed on appeal in 2011. Portuguese authorities first learned about the case after they were informed by the Working Group of a media article containing the allegation. Thereafter, they interviewed an individual in Portugal who was in the business of aircraft purchases, and who stated that he had not heard of the transaction. Portuguese authorities then terminated the case because the identity of the Portuguese intermediary was unknown. They did not seek further information from Iran or Switzerland.

14. *Case #4 – Highway (Bulgaria) Case*: In 2005, the Bulgarian government awarded a 35-year concession to build and operate a highway to a consortium of three Portuguese and two Bulgarian firms. The concession was awarded without a tender and contained terms that were extremely favourable to the consortium. The Bulgarian media alleged that bribes had been paid to the political elite in that country. After a public outcry, a new Bulgarian government reopened negotiations for the concession. Unable to meet the renegotiated terms, the Portuguese companies withdrew from the project. Portuguese authorities learned about the case after they were informed by the Working Group of a media article containing the allegation. However, they did not subsequently open an investigation because they considered that they had insufficient information, and because Bulgarian authorities had not contacted them or opened a formal investigation. Portuguese authorities did not seek additional information from Bulgaria. After the on-site visit, Portuguese authorities added that they could not intervene in the case because they did not know the identity of the Portuguese individuals and companies involved. This information, however, had been published in Bulgaria.

15. *Case #5 – Real Estate (Macau) Case*: C is a dual Portuguese and Cambodian national who had a real estate business in Macau, a Special Administrative Region of China. Sometime before 2006, C bribed A, a senior official in the Macau Government, and obtained favourable government decisions for his real estate developments. The official A was convicted of bribery in Macau in April 2009. C left Macau in 2007 and returned to Portugal before Macau authorities could contact him. In September 2009, C approached the Portuguese Attorney General's Office and asked to be tried in Portugal for the bribes paid to A. Portuguese authorities froze EUR 7 million in Portugal belonging to C on suspicion that these were proceeds of crime. Portuguese authorities asked the judge in Macau who was in charge of the case to provide a certified copy of C's file. The request was made by ordinary letter, not letters rogatory or a formal MLA request. The judge refused, insisting that C should be tried in Macau, after which Macau would consider seeking his extradition from Portugal.

16. In March 2011, C was convicted *in absentia* in Macau of eight counts of corruption and sentenced to six years and ten months in jail. C's co-conspirators and the bribed official remained in Macau and were also convicted. C is presently at large in Portugal but Macau has not sought his extradition. Apart from some narrow exceptions, Portugal does not extradite its nationals but is required to prosecute the national for the same crime. Portuguese authorities take the view that C's conviction *in absentia* prevents him from being prosecuted in Portugal because of the principle of *non bis in idem*. This position, however, is far from a settled point of law.[13] In any event, Portuguese law allows Portugal to enforce the sentence against C at Macau's request if certain conditions are met. Since 2009, Portugal has not discussed the case further with Macau. It has released the EUR 7 million that was frozen earlier.

17. *Case #6 – Sanitation Services (Angola) Case*: A French-owned Company X in Portugal allegedly bribed an Angolan official to obtain a contract for sanitation services. The official subsequently deposited significant amounts of cash in an account in Portugal. Portuguese authorities obtained documents from Company X which did not show that cash had been deposited directly into the Angolan official's account. Information from a bank showed that the Angolan official had obtained loans from the bank with what Portuguese authorities described as unusually limited guarantees. Portuguese authorities then closed the case based on their conclusion that the cash deposited into the official's account came from the bank loans, not Company X. Portuguese authorities originally learned of the allegation while investigating an unrelated matter that had been initiated due to a suspicious money laundering transaction report (STR).

18. *Case #7 – Mining (Zimbabwe) Case*: Portuguese authorities froze a bank transfer by R, a South African national, from Portugal to the UK. The decision was taken because R was listed in the international sanctions regime against Zimbabwe. Portuguese authorities also suspected R of bribing Zimbabwean officials to obtain a mining license. When other countries did not open criminal investigations against R or object to releasing the assets, Portugal unfroze the assets and terminated the case.

19. *Case #8 – TSKJ (Nigeria) Case*: In 1994, four non-Portuguese companies created a joint venture named TSKJ to bid for natural gas contracts in Nigeria. The joint venture was created via three special purpose shell corporations based in the Madeira FTZ. Some of these companies' directors were Portuguese nationals. TSKJ ultimately secured contracts worth more than USD 6 billion by paying over USD 182 million in bribes to various Nigerian public officials. Portuguese authorities provided MLA to several foreign jurisdictions that prosecuted and convicted the non-Portuguese companies and individuals implicated in the case. They did not, however, commence a domestic investigation against Portuguese individuals or companies for foreign bribery, money laundering or other related offences. In their view, "there were no other acts connected with Portuguese territory other than the ones under investigation in other countries." Whether Portuguese authorities considered exercising nationality jurisdiction to prosecute is unclear. Portuguese authorities also explained that the Portuguese individuals and companies were not investigated because French authorities claimed "exclusive jurisdiction" over the entire case. However, the Portuguese individuals and entities were ultimately not prosecuted in France or other foreign jurisdictions. After the on-site visit, Portuguese authorities added that the three Madeira companies were "special purpose vehicles" (SPVs). In their view, the company directors were likely mere nominees and the SPVs likely did not have assets. However, Portuguese authorities did not confirm that this was in fact the case.

(b) On-Going Foreign Bribery Cases

20. *Case #9 - Public Works (Malawi) Case*: Portuguese Company M operates in Malawi and Portugal. In September 2012, Malawian and Portuguese media alleged that M made three payments totalling EUR 43 000 in 2010-2011 to the late Malawian president. The payments were in the form of

[13] For example, the *non bis in idem* principle in the International Covenant on Civil and Political Rights "does not prohibit retrial of a person convicted *in absentia* who requests it, but applies to the second conviction" (UN Human Rights Committee, General Comment No. 32, Doc. CCPR/C/GC/32 (2007)).

cheques issued by Company M senior officials or trusted persons. Company M acknowledged the payments but claimed that one payment of EUR 31 000 was a wedding gift. Another payment was to purchase a book written by the President at an auction, though the book had not been published yet when the payment was made.

21. *Case #10 – Parliamentarian (Brazil) No. 2 Case*: This case is related to the *Parliamentarian No. 1 Case*. Media reports indicate that, according to V, who was one of the principal operators of the bribery scheme, the CEO of Portuguese Company T agreed to pay USD 7 million to the then-President of Brazil. The agreement allegedly was made during various meetings, including at least one in Portugal in 2005. The money would be transferred by a supplier of Company T to accounts controlled by the advertising campaign of the President's political party. Some of the money allegedly also covered the President's personal expenses. These allegations were disclosed by V to Brazilian authorities in September 2012 and subsequently reported in the Brazilian media in November 2012. At the on-site visit in February 2013, Portuguese authorities stated that they were not aware of these allegations. In April 2013, Brazilian authorities issued a statement that they had opened an investigation into these allegations. The Portuguese authorities stated that they were subsequently informed of these allegations only in April 2013 when they were contacted by Brazilian authorities.

22. *Case #11 - Angola / Guinea Case*: In November 2012, Portuguese authorities identified payments of USD 2.5 million made in Portugal by a Portuguese company to an Angolan official. Portuguese authorities stated that the case involves Angolan interests in Guinea and senior political officials in two countries. The case is "complex", "very sensitive" and "could affect international relations". The allegations were detected through an STR in November 2012.

23. *Case #12 - Real Estate (Angola) Case*: After receiving an MLA request from Spain in 2010, Portuguese authorities determined that funds from Portuguese-Angolan companies had been credited to bank accounts in Portugal of a former Angolan minister and his wife. The funds were then used to acquire real estate in 2009-2011 registered in the name of third parties. Bank accounts held by off-shore entities are also involved. Portugal is continuing its investigation to determine the origin of the funds. Portuguese authorities have requested MLA from Angola. Angolan authorities informed their Portuguese counterparts that they are not investigating the case.

24. *Case #13 – Supermarket (Angola) Case*: According to Portuguese officials, a Portuguese company sold goods to a supermarket chain owned by one of the highest-ranking Angolan military officials. Sales were made through an offshore company and some of the proceeds were diverted to a Swiss bank account as kickbacks benefitting Angolan officials. A total of USD 2 million were paid to various individuals in 2006-2010. Switzerland has provided MLA to Portugal. The allegation was detected during a tax crime investigation against the same company.

25. *Case #14 - Aircraft Service (Angola) Case*: According to Portuguese officials, a foreign company issued false invoices through fictitious entities in Spain and Gibraltar. Funds generated therefrom were used to purchase real estate in Portugal in the name of managers of corporate clients. The case also implicates a company in Portugal and a major company in Angola. Portuguese authorities consider that this case is complex and sensitive.

26. *Case #15 - Farm Equipment and Aircraft (Zimbabwe) Case*: According to Portuguese officials, senior political officials in Zimbabwe allegedly received commissions for their involvement in the business of farm equipment and aircraft. The parties implicated were nationals of Zimbabwe, South Africa and Denmark. The alleged payment was made by an off-shore company from a Danish bank account to a Portuguese bank that had an office in South Africa. Portugal has frozen USD 9 million and obtained MLA from Denmark. In 2009, Portugal requested MLA from South Africa but the request remained only partially executed as of December 2012. Portugal learned of the case through an STR.

Commentary

The lead examiners are seriously concerned about the low level of foreign bribery enforcement in Portugal. Only 15 foreign bribery allegations have surfaced since Portugal became a party to the Convention in 2001. This figure is low, given Portugal's strong economic links to countries plagued by severe corruption. Moreover, the 15 allegations to date have not resulted in a single prosecution. Portuguese authorities have not been sufficiently proactive in investigating these allegations. Several cases have also been closed prematurely. As explained in this report, Portugal has improved its foreign bribery and related legislation. While this is commendable, Portugal must now focus its attention and resources on the enforcement and application of these laws.

B. IMPLEMENTATION AND APPLICATION BY PORTUGAL OF THE CONVENTION AND THE 2009 RECOMMENDATIONS

27. This part of the report considers Portugal's approach to key horizontal (Group-wide) issues identified by the Working Group for all Phase 3 evaluations. Consideration is also given to vertical (country-specific) issues arising from Portugal's progress on weaknesses identified in Phase 2, or from changes to Portugal's domestic legislative or institutional framework.

1. Foreign Bribery Offence

28. Since Phase 2, Portugal has enacted a new foreign bribery offence in Article 7 of Law 20/2008:

Whoever, per se or, by his/her own consent or ratification, through an intermediary, gives or promises to give to a national or foreign public official or official of an international organisation official or to a national or international holder of a political office, or to a third party, with knowledge of the foregoing, undue patrimonial or non-patrimonial advantage, in order to obtain or maintain a business, a contract or other undue advantage in international business transactions, is punished by imprisonment for a term between one to eight years.

29. This Phase 3 evaluation is the first occasion for the Working Group to assess this new offence. This offence contains some differences from its predecessor in Article 41-A of Decree Law 28/1984. This report will focus on issues with the previous offence that were identified in Phase 2, and new issues raised by the current offence.

(a) Offer, Promise or Give

30. Like its predecessor, Article 7 of Law 20/2008 includes "promises" and "giving" of undue patrimonial or non-patrimonial advantages. The Working Group accepted that the Portuguese word "*der*" encompasses both the "giving" and "offering to give" a bribe (Phase 1 Report p. 3).

31. Portugal has clarified that the foreign bribery offence does not require proof of the passive bribery offence or an agreement between the briber and the bribed official (Phase 2 Follow-up Issue 7(a)(ii)). Courts in the 1990s made conflicting interpretations of Portugal's then active domestic bribery offence on this issue. Portuguese authorities explained that revisions to the domestic active bribery offence in 2001 (and now mirrored in Article 7 of Law 20/2008) eliminated this ambiguity. Judges at the Phase 3

on-site visit unanimously agreed that proof of these additional elements is not required. Portugal also provided jurisprudence supporting this position.[14]

32. Less clear is whether it is necessary to prove that the official knows of the offer, promise or giving of the bribe. In Phase 2 (para. 138), prosecutors stated that there is no active bribery offence if there is no such knowledge, while the Ministry of Justice considered that the briber would be guilty of attempted bribery. In Phase 3, Portuguese authorities take a different position. In their view, bribery is an "abstract crime of danger" (as opposed to a "crime of harm"). Proof of "actual injury of a particular legal interest" is therefore not necessary. The active bribery offence is accordingly complete if the act of the briber (such as emailing a bribe offer) never reaches but is sufficiently proximate to its intended target. However, some judges at the on-site visit disagreed: without proof of the official's knowledge, only attempted bribery is proven. Jurisprudence referred to by Portugal did not directly address this issue.[15]

(b) Bribery through Intermediaries

33. When foreign bribery is committed through an intermediary, it is unclear whether the prosecution must prove that a briber knows the details and identity of the bribe recipient. Like its predecessor, Article 7 of Law 20/2008 covers bribery through an intermediary when it is committed with the briber's "consent or ratification". In Phase 2, the Working Group found that these words could be interpreted as requiring that the briber have specific knowledge of the details and identity of the bribed official (Follow-up Issue 7(a)(i)). In Phase 3, Portuguese authorities stated again that the prosecution need not prove "full knowledge of all the details" of the corrupt acts, including the amount or nature of the improper advantage offered, or the specific identity of the person to whom the intermediary will direct the bribe. However, Portugal could not provide jurisprudence to support this position. As noted in Phase 2 (para. 139), the lack of cases makes it difficult to assess how the courts might interpret the provision.

(c) Definition of a Foreign Public Official

34. Portugal's current foreign bribery offence defines a "foreign public official" autonomously, i.e. without requiring proof of foreign law. The offence's predecessor covered bribery of a "foreign political official" who is "qualified as such by the law of [the official's] State". This language is not found in Article 7 of Law 20/2008. Phase 2 Recommendation 4(a) is fully implemented.

35. However, the current definition of a "foreign public official" differs from Article 1(4)(a) of the Convention by not expressly covering "any person exercising a public function for a foreign country". Portugal's previous foreign bribery offence explicitly included this category. Under the current law, Portugal initially stated that these individuals are covered under Article 7 of Law 20/2008 as "managers, officeholders and employees of […] public service concession holders". However, on its face the term "public service concession holder" is narrower than all persons who exercise a public function. After the on-site visit, Portugal took a different position and relied instead on Article 2(a) of Law 20/2008, which covers "any person who, serving for a foreign country as an official, agent or any other capacity… is called to work or take part in the administrative or judicial public service". This provision, however, is also insufficient, since it would not appear to cover persons who perform public functions but who do not work for or take part in the "administrative or judicial service", e.g. private sector contractors who obtain government outsourced contracts to perform public functions. Jurisprudence interpreting this language was not provided. Doubts thus remain whether Article 7 broadly covers all persons exercising a public function.

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14 Tribunal da Relação de Lisboa Cases 504/04 (15 November 2011) and 24195 (9 September 1988); Supremo Tribunal de Justiça Cases 46663 (3 May 1995) and 47817 (7 June 1995).

15 Supremo Tribunal de Justiça Case 47817 (7 June 1995) deals only with the characterisation of the bribery offence as an "abstract crime of danger".

36. The definition of "foreign public official" also refers only to officials of "foreign countries" (i.e. "States"), and not those of "an autonomous territory or a separate customs territory". The Phase 2 Report (para. 134) noted that this represents a departure from Commentary 18 of the Convention. In Phase 3, Portuguese authorities asserted that Law 20/2008 also covers these foreign public officials without providing supporting jurisprudence.

(d) Bribes Given to a Third Party

37. Questions remain over whether it is necessary to prove that a foreign official knows that a bribe has been given to a third party beneficiary. Like its predecessor, Article 7 of Law 20/2008 criminalises bribes paid to a foreign official or "to a third party, with knowledge of the foregoing". "Foregoing" refers to the different categories of foreign public officials envisioned under the legislation. The Phase 2 Report (para. 140) expressed concern that, when a bribe is given to a third party beneficiary instead of an official, the briber is liable only if the official knows of this fact. Portuguese authorities maintain that proof of this knowledge element is required for the liability of the official but not the briber. But a plain reading of Article 7 does not support this position. Judges at the on-site visit appeared uncertain about this issue.

(e) Bribery in Order that the Official Act or Refrain from Acting in Relation to the Performance of Official Duties

38. Article 7 of Law 20/2008 does not expressly cover bribery of a foreign public official "in order that this official use his office – though acting outside his competence – to make another official award a contract to that company" (Convention Commentary 19). Portuguese authorities stated that Article 7 covers this situation, including "trading in influence". Absent jurisprudence, it is difficult to foresee how the provision would be interpreted.

(f) Multiple Foreign Bribery Offences

39. In Phase 2, the Working Group noted that Portugal had multiple offences covering bribery of foreign public officials. Article 374 of the Criminal Code and Article 18 of Law 34/1987 covered bribery of public officials and political officeholders in the EU and its member states. The Phase 2 Report (paras. 130-131 and Follow-up Issue 7(a)(iii)) expressed concerns that Portugal's multiple foreign bribery offences could lead to overlaps and double standards.

40. In Phase 3, Portugal states that Article 6(1) of Law 20/2008 resolves this issue. According to Portugal, this Article provides that, where multiple offences could apply to the same facts, the offence with the most severe penalty applies. In cases of bribery of foreign public officials in international business transactions, this would be Article 7 of Law 20/2008, which is punishable by eight years' imprisonment. However, it should be noted that Article 6(1), on its face, does not reflect Portugal's position. The provision stipulates that, "The penalties foreseen in the present law only apply if the offence is not punishable with a more serious sanction by any other legal provision." The provision thus appears to make Article 7 *operative* in cases of foreign bribery if it provides a more serious sanction than other offences; it does not explicitly *exclude* the concurrent application of other offences in the same case.

Commentary

The lead examiners commend Portugal for amending its foreign bribery offence to provide an autonomous definition of a foreign public official. However, they are concerned about several ambiguities in the offence, many of which were identified in Phase 2 and remain unresolved. They therefore recommend that Portugal take all measures to clarify the following issues: (a) whether a foreign public official must know of the offer or promise of the bribe for a completed offence; (b) whether the briber must know the details and identity of the recipient of the bribe, when the bribery is committed through an intermediary; (c) whether the offence

covers bribery of any person exercising a public function for a foreign country, and officials of any autonomous territories and separate customs territories; (d) proof that the official knows that an improper advantage has been given to a third party; (e) whether the offence covers bribery in order that an official act or refrain from acting in relation to the performance of official duties; and (f) excluding the application of Criminal Code Article 374 and Law 34/1987 Article 18 from foreign bribery cases. The lead examiners also recommend that the Working Group follow up these issues.

(g) Defences to the Foreign Bribery Offence

41. Law 20/2008 introduced a defence of effective regret, which has attracted Working Group criticism in other country evaluations.[16] Article 5(b) states that an "agent is discharged if, voluntarily and before the offence is committed, [the agent] rejects the offer or the assumed promise, returns the advantage already received or, if it is a fungible thing, its value, withdraws the given, or requests that the advantage offered be returned." Portugal confirmed that the defence is available to natural and legal persons who commit active foreign bribery but who report the crime before authorities begin an investigation.

42. As in Phase 2, Portugal states that facilitation payments are illegal under its law. However, the Phase 2 Report (para. 142) noted that this issue "remains open and can only be verified through practice". In Phase 3, Portugal could not provide jurisprudence on facilitation payments made to foreign officials, but did provide jurisprudence showing that facilitation payments made to Portuguese officials are illegal.

Commentary

The lead examiners recommend that Portugal amend Article 5(b) of Law 20/2008 and eliminate the effective regret defence from the active foreign bribery offence.

2. Responsibility of Legal Persons

43. Portugal has substantially amended its legislation on the liability of legal persons since Phase 2. As with the foreign bribery offence, this Phase 3 evaluation is the first opportunity for the Working Group to evaluate the new legislation. This section considers issues that were raised in Phase 2 concerning the law in force at that time and which remain unresolved under the new legislation. It also considers issues introduced by the new provisions. The lack of enforcement in practice is discussed at p. 29.

(a) Applicable Statutory Provisions

44. The general provisions on the criminal liability of legal persons in Article 11 of the Criminal Code now apply to the foreign bribery offence and other enumerated crimes. During Phase 2, Article 3 of Decree Law 28/1984 provided corporate liability for foreign bribery. The Working Group, however, also considered a draft amendment of Article 11 of the Criminal Code. The Group then suggested that Portugal issue guidance on how the amendment (if enacted) would operate alongside Decree Law 28/1984 (Recommendation 5(a)(i)). In the end, Portugal enacted Article 11 of the Criminal Code in 2007, followed by a new foreign bribery offence with Law 20/2008. Article 4 of the latter law states that "legal persons and similar entities shall be held liable, in general terms, for the offences laid down in the present law". This provision thus applies Article 11 of the Criminal Code exclusively to the foreign bribery offence in Law 20/2008. The guidance contemplated in Recommendation 5(a)(i) is therefore no longer necessary.

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[16] See Phase 3 Reports of the Czech Republic (paras. 28-32); Slovak Republic (paras. 30-31 and 70); and Spain (para. 39). See also Phase 1 Report of the Russian Federation (para. 27) and Phase 2 Reports of Greece (paras. 134-136); Czech Republic (paras. 153-163); Slovak Republic (paras. 150-161); Slovenia (paras. 171-178); Spain (paras. 123-125); Poland (paras. 138-141).

(b) Legal Persons Subject to Liability

45. A range of legal persons are excluded from criminal liability for foreign bribery. Doubts were first expressed in Phase 2 on the coverage of state-owned and state-controlled enterprises (SOEs) (para. 145 and Follow-up Issue 7(b)(iv)) with respect to the law in force at that time. The current Article 11(2), however, is clear: it expressly excludes liability for "the State, other public legal persons and international organisations of public law". This exemption applies to SOEs, confirmed Portuguese officials at the on-site visit. This is a serious loophole since the Portuguese government holds stakes in some enterprises that operate internationally in risk sectors such as energy, defence and transport. The Working Group has also stated in other evaluations that the Convention requires SOEs to be held liable for foreign bribery.[17] Also excluded from liability are legal persons governed by public law (including public corporations); concessionaires of public services, regardless of their ownership; and other legal persons enjoying public power prerogatives (Article 11(3)). Civil companies, *de facto* associations, and a company created from a corporate merger or spin-off may be liable for foreign bribery committed by its predecessor, however (Article 11(5) and (8)).

Commentary

The lead examiners recommend that Portugal amend Article 11 of the Criminal Code so that all legal persons, especially state-owned or state-controlled enterprises, can be held criminally liable for foreign bribery.

(c) Acts that May Trigger Liability

46. The Phase 2 Report (para. 146) also expressed concern that Portugal could not impose corporate liability for foreign bribery committed by agents or low-level employees. The law in force during Phase 2 imposed corporate liability only for acts committed by a legal person's "governing bodies or representatives". Portuguese officials asserted that liability also arises for acts committed by a "*de facto* representative", or any individual that demonstrates the "will or *animus*" of the legal person. Recommendation 5(a)(ii) asked Portugal to issue guidance on this point.

47. The new Article 11 of the Criminal Code substantially alleviates this issue. Liability now arises if a person in a leadership position within the legal person commits foreign bribery in the legal person's name and collective interest (Article 11(2)(a)). Portuguese officials confirmed that this provision also applies if a person in a leadership position authorises or directs a lower level person to commit foreign bribery. In addition, a company is also liable if (i) an individual acting under the authority of persons in a leadership position commits foreign bribery, and (ii) the offence occurred "by virtue of a breach of the surveillance or control duties which are incumbent upon [the persons in a leadership position]" (Article 11(2)(b)). These provisions taken together substantially conform to the model set out in Annex I, Section B of the 2009 Anti-Bribery Recommendation.

48. Nevertheless, absent jurisprudence it is not known how liability for failure of surveillance or control would operate in practice, as the Working Group has observed in another evaluation.[18] Portuguese authorities confirmed that, to establish liability, the prosecutor must prove that company management breached its duties of surveillance or control. This could be challenging in practice, given the complexities of modern corporate structures and decision-making. Information about the company's internal operation may also be difficult to obtain. Furthermore, in many cases the prosecution may be required to prove a negative, i.e. the absence of sufficient surveillance and control. A lack of experience in corporate prosecutions for economic crime (see p. 29) presents a further challenge.

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17 For example, see Phase 3 Reports of Spain (paras. 44-46) and Mexico (paras. 25-28).

18 See Phase 3 Report of Korea (paras. 41-43).

49. There are also questions over the first branch of liability, i.e. where a leadership person commits foreign bribery "in the legal person's name" and "collective interest". Both terms were used in the predecessor of Article 11. The Phase 2 Report (para. 147) found that the term "collective interest" could be interpreted to exclude bribery to obtain advantages other than direct profits (e.g. tax breaks, customs clearance). A representative of a subsidiary or joint venture who bribes for the benefit of a parent company may also not be considered to be acting in the name of the parent. The Working Group thus decided to follow up these issues (Follow-up Issues 7(b)(i) and (ii)). In Phase 3, Portugal asserted that a company would be liable in these situations but did not provide jurisprudence to support its position.

Commentary

Since Phase 2, Portugal has extended corporate liability to cases where foreign bribery results from management's breach of its duties of surveillance and control. This is commendable, since it allows liability to be imposed for foreign bribery committed by agents and lower level employees in certain circumstances. Nevertheless, there are questions over this provision's effectiveness in practice. The concerns expressed by the Working Group in Phase 2 over the terms "in the legal person's name" and "collective interest" also remain. The lead examiners therefore recommend that the Working Group follow up these issues as practice develops.

(d) Natural Persons Acting against Express Orders or Instructions of Legal Persons

50. Like its predecessor, Article 11 provides a defence against corporate liability that raises concerns. A legal person escapes liability if the natural person who commits the offence acted against express orders or instructions of authorised persons. The natural person must know of the order, according to Portuguese authorities. The Phase 2 Report (para. 151) noted that corporations might avoid liability by issuing an express order not to bribe while informally designating blame to a lower level employee if the offence is uncovered. Phase 2 Recommendation 5(b) thus asked Portugal to consider taking measures to prevent abuse of this defence. Portugal has not done so. Instead, Portugal stated in Phase 3 that the Portuguese term "*de quem de direito*" (authorised persons) in Article 11 includes all persons with authority to direct or supervise. However, Portugal did not cite jurisprudence to support this position.

51. Of even greater concern is that a general prohibition to employees against committing bribery may be sufficient to invoke this defence. The codes of ethics of several Portuguese companies expressly forbid employees from engaging in bribery (see p. 38). Portugal asserted that a code of ethics must be adequately enforced for the defence to succeed. It also contended that the defence is not available for bribery but is limited to minor crimes, such as an employee stocking supermarket shelves with products past their expiration dates. These assertions are not, however, supported by the text of the provision or jurisprudence. Portugal also asserted that the defence arises only with a specific order not to commit a particular offence. If this position is accepted, then ordering an employee not to bribe when bidding for a specific contract is arguably enough to sustain the defence. Most companies would then have little difficulty escaping liability for foreign bribery.

Commentary

The lead examiners reiterate the Working Group's concerns in Phase 2 Recommendation 5(b) regarding the defence of acting against express orders or instructions. The defence is vaguely defined. Jurisprudence supporting the narrow interpretation of the provision advanced by Portuguese authorities was not provided. It may be possible for a company, for instance, to attempt to limit its liability by issuing a blanket prohibition on foreign bribery, or even issuing specific prohibitions directed at individual transactions, regardless of the actual level of the company's supervision, oversight and control over employee or intermediary behaviour. The defence could thus be interpreted in a manner that would undermine the effectiveness of the corporate liability regime under Article 11 of the Criminal Code. One Portuguese prosecutor

agreed that the defence is now unnecessary after the enactment of Article 11(2)(b) (corporate liability due to management's breach of duties of surveillance or control). The lead examiners thus recommend that Portugal repeal this defence.

(e) Investigation and Prosecution of a Natural Person

52. Article 11 of the Criminal Code has clarified that an investigation and prosecution of a natural person is not a precondition to corporate liability. In Phase 2 (para. 150), Portuguese authorities stated that the natural person(s) who committed the offence and the legal person concerned must both be investigated. The conviction of the natural person, however, is not a prerequisite to convicting the legal person. Recommendation 5(a)(iii) asked Portugal to issue guidance on this point. Article 11(7) now expressly states that corporate liability is not dependent on the liability of the natural person, thereby rendering guidance unnecessary.

3. Sanctions for Foreign Bribery and Related Offences

53. This section considers the sanctions against natural and legal persons for foreign bribery (Phase 2 Follow-up Issue 7(c)). Debarment and denial of other public advantages are considered at p. 47.

(a) Sanctions against Natural and Legal Persons for Foreign Bribery

54. Natural persons are punishable for foreign bribery under Article 7 of Law 20/2008 by imprisonment of one to eight years, which remains unchanged from Phase 2. The penalty may be lessened if a defendant "provides concrete assistance in gathering decisive evidence to identify or capture others responsible or whenever, to some extent, he makes decisive contribution to uncover the truth" (Law 20/2008 Article 5(a)). If a legal person is liable for foreign bribery, persons occupying leadership positions in the legal person may under some circumstances also be liable for the fines or other compensation imposed against the legal person (Criminal Code Article 11(9)).

55. There are concerns that fines against natural persons are available only as converted jail sentences. Portuguese courts generally cannot impose a fine against a natural person for foreign bribery. The only exception is when a sentence of imprisonment of not more than one year is imposed. In these cases, the jail sentence is converted into a fine (or another applicable non-custodial sentence) unless deterrence requires imprisonment (Criminal Code Article 43). The Working Group in previous evaluations has concluded that similar provisions in other countries raise two issues. First, converted sentences may not be sufficiently effective, proportionate and dissuasive.[19] Second, monetary sanctions are a fundamental deterrent for economic offences such as foreign bribery.[20] The limited availability of such penalties may affect the effective, proportionate and dissuasive character of Portugal's sanctions for foreign bribery.

56. Portugal has not sanctioned natural persons for foreign bribery in practice but information on sanctions for domestic corruption offers some guidance. In the *Burke Case*, a bribed official and a briber were sentenced to 7 years' and 18 months' imprisonment respectively. A second briber received an 18-month jail sentence that was suspended because of his advanced age and ill health. In the *Medical Equipment Case*, two bribed officials and two bribers were each sentenced to suspended sentences of 3 years and 6 months' imprisonment. Statistics further indicate that in 2008-2011, none of the eight convictions for domestic bribery ("*corrupçao*") resulted in prison sentences. Over the same period, 239 convictions for "corruption offences" yielded only 13 prison sentences. These statistics refer only to cases in which a prison sentence was served and was not suspended or converted to a fine.

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19 See Phase 3 Reports of Spain (para. 68) and Greece (para. 47).

20 See Phase 3 Report of Italy, paras. 54-60 and Recommendation 3(a).

57. As for legal persons, since Phase 2 the maximum fine for foreign bribery has increased from EUR 1.8 million to EUR 10 million. Fines in a specific case are determined based on the sentence of imprisonment that would have been imposed had a natural person committed the crime. Each month of imprisonment equals a fine of EUR 1 000 to EUR 100 000, depending on factors such as the number of employees, and the financial situation of the legal person (Criminal Code, Article 90-B). Portuguese authorities state that a legal person can be fined even if no natural person has actually been sentenced to imprisonment in a case. In practice, no legal person has been fined for foreign or domestic bribery.

58. Legal persons may receive sanctions other than fines. They may be dissolved, or subject to accessory penalties such as judicial orders; prohibition on the exercise of an activity; prohibition on executing certain contracts or contracts with certain entities; deprivation of the right to subsidies, subventions or incentives; closing of establishment; and publicity of a conviction sentence (Criminal Code Article 90-A to 90-M). Portuguese authorities stated that, as an accessory sanction, a court may monitor a company's implementation of an effective anti-corruption corporate compliance programme. A court may also require an outside body (such as a law firm) to perform the monitoring.

Commentary

The lead examiners are concerned that monetary penalties cannot be applied against natural persons for foreign bribery except in limited cases of conversions of prison sentences. They therefore recommend that Portugal take steps to ensure that sanctions against natural persons are effective, proportionate and dissuasive in all foreign bribery cases. The lead examiners also recommend that the Working Group follow up the sanctions imposed against natural and legal persons for foreign bribery.

(b) Sanctions for False Accounting

59. As noted in the Phase 2 Report (paras. 164-165), four offences may apply to false accounting: Criminal Code Articles 256 (forgery) and 259 (damaging or concealing technical documents etc.); and tax fraud under Articles 103 and 104 of the Legal Regime of Tributary Offences (RGIT). Portugal explained that sometimes both Criminal Code and RGIT offences are applicable, but if a tax issue is involved, then only Articles 103 and 104 RGIT apply. The RGIT offences are also applicable only if the "illicit capital advantage" from the offence exceeds EUR 15 000. The Criminal Code offences are punishable by imprisonment of up to three years or a fine for natural persons, and a maximum fine of EUR 3.6 million for legal persons. The maximum penalty may be increased to 5 years' imprisonment and a EUR 300 000 fine (against natural persons) and EUR 6 million fine (against legal persons) for forgery of certain types of documents, e.g. postal money orders, cheques, commercially transferable documents. The maximum penalty under the RGIT offences is 8 years' imprisonment for individuals and EUR 9.6 million for legal persons.

60. Whether these offences are adequately enforced and result in sufficient sanctions could not be confirmed. Statistics provided by Portugal indicate that an average of 1 173 persons were convicted annually under Articles 256 and 259 in 2007-2011. It is unclear how many of these convictions relate to false accounting (as opposed to forgery or damaging of other types of documents). The sanctions imposed in each case are also unknown. Statistics were not provided for the RGIT offences.

Commentary

The lead examiners were unable to adequately assess the enforcement of and sanctions imposed for false accounting in Portugal due to the lack of detailed statistics. They recommend that Portugal collect detailed annual statistics on (i) prosecutions, (ii) convictions, and (iii) types of criminal sanctions imposed on all false accounting offences, and identifying whether each such case relates to bribery or foreign bribery.

4. Confiscation of the Bribe and the Proceeds of Bribery

61. Legislative provisions relating to confiscation of illegal proceeds remain unchanged since Phase 2. Criminal Code Article 109 allows for the confiscation of both the instruments and proceeds of unlawful acts. Article 110 deals with confiscation of instruments or proceeds of a third party. Article 111 provides for the confiscation of advantages, and for payment of an amount equivalent in value to property or rights that cannot be confiscated. When an individual is convicted of certain crimes (including foreign bribery), his/her other assets that are unrelated to the crime may also be subject to confiscation. The applicable provision allows for the reversal of the burden of proof (Law 5/2002, Article 7).

62. The actual use of confiscation appeared low in Phase 2 (para. 190) and remains so in Phase 3. One criminal defence lawyer at the on-site visit stated that authorities are seizing – but not ultimately confiscating – more frequently than before. Confiscation has never been imposed in a foreign bribery case, but its use in domestic bribery cases could offer some indication of its application in future foreign bribery cases. While detailed statistics are not available, information provided in two domestic bribery cases suggest that confiscation is not routinely sought against the briber. In the *Burke* and *Medical Equipment Cases*, the benefits obtained by persons convicted of bribing Portuguese officials were not confiscated. Confiscation was ordered only against the bribe recipient in the *Burke Case*. At the on-site visit, Portuguese authorities stated that they could not trace the actual proceeds in these cases. It is unclear why confiscation of equivalent value under Criminal Code Article 111 was not sought. Portuguese authorities are hopeful that the Asset Recovery Office (GRA) will increase confiscation. But since the GRA was established only in September 2012, it is too early to assess its impact in foreign bribery cases.

Commentary

The lead examiners recommend that Portugal take steps to make full use of confiscation measures available in its law, and ensure that law enforcement authorities routinely consider confiscation in foreign bribery cases. They also recommend that Portugal collect detailed statistics on the application of confiscation in foreign bribery and other criminal cases.

5. Investigation and Prosecution of the Foreign Bribery Offence

63. This section begins with an overview of Portugal's framework for commencing, co-ordinating and terminating foreign bribery investigations and prosecutions. This is followed by key issues that raise substantial concerns, namely proactive enforcement, Article 5 of the Convention, and the absence of corporate prosecutions. The discussion draws on actual case examples whenever possible. The section ends by looking at other matters relating to enforcement, such as jurisdiction to prosecute, statute of limitations, resources and expertise, and investigative techniques.

(a) Co-ordination and Case Assignment

64. The Phase 2 Report (paras. 92-94) noted some uncertainty over the assignment of foreign bribery cases. The Public Prosecution Service headed by the Attorney General (AG) is responsible for criminal prosecutions in Portugal. The Service comprises Departments of Criminal Investigation and Prosecution (DIAPs), each of which covers a judicial district (and some counties with high caseloads). The Service also includes a Central Department for Criminal Investigation and Prosecution (DCIAP) in Lisbon (Law 60/1998, Articles 47, 56-58, 70-73). In Phase 2, Portugal stated that local prosecutors would "in principle" forward all foreign bribery cases to the DCIAP. But in practice, DCIAP would only lead cases that it initiates, for instance on the basis of an MLA request or cases that are not already well-developed at the local level. DCIAP could also take on a case whose complexity justifies the centralisation of investigations. Given the uncertainty over case assignment, Phase 2 Recommendation 3(b) asked Portugal to ensure that "other departments of the public prosecution service promptly report all suspicions of foreign bribery to the

DCIAP". The Recommendation also asked DCIAP to take a more active role in directing foreign bribery investigations.

65. Portugal has since implemented Phase 2 Recommendation 3(b). The AG has issued Circular Letter No. 2/2011, which states that all denunciations, complaints, news and information about foreign bribery offences falling within Article 7 of Law 28/2008 shall be transmitted without delay to the DCIAP. The National Anti-Corruption Unit of the Criminal Police (UNCC) conducts the investigation under the DCIAP's leadership (Law 37/2008, Article 28). At the on-site visit, representatives of the DCIAP and the DIAPs from Lisbon and Porto stated that Circular Letter No. 2/2011 is binding. If a foreign bribery case involves other offences such as tax or money laundering, then the DCIAP and UNCC remain involved in the case.

(b) Commencement and Termination of Investigations and Proceedings

66. Portuguese authorities state that foreign bribery investigations often begin with a "pre-inquiry". When Portuguese authorities receive information (e.g. in the media) about an alleged economic or financial crime, the Criminal Police conducts a pre-inquiry where necessary (Phase 2 Report, para. 107; Law 36/1994, Articles 1(3)(b) and 4). During a pre-inquiry, the police may use less invasive investigative techniques, e.g. voluntary witness interviews, information from public sources, financial documents that are not subject to bank secrecy, and financial information contained in an STR. A case may be terminated if the pre-inquiry does not yield sufficient evidence, e.g. where authorities receive the allegations in an anonymous letter with no further corroborating information or evidence. The case may also be terminated if it is ascertained that a crime has not been committed. The decision to terminate is made by a prosecutor or the Director of the Criminal Police who must inform the prosecutor to confirm the decision.

67. As in Phase 2, in cases of foreign bribery, a formal investigation is opened directly or after a pre-inquiry if there are sufficient grounds for suspicion and the full range of investigative techniques is required to further the investigation. A formal investigation is also opened if authorities receive a formal complaint of a crime. The formal investigation may be terminated without a prosecution if the evidence gathered is insufficient or indicates that the suspect is innocent; or the statute of limitations has expired (Phase 2 Report para. 109; Code of Criminal Procedure Articles 68, 277 and 285). A prosecutor does not have discretion to decline prosecution on grounds of public interest. Portuguese authorities state that a private individual may ask a court to review a prosecutor's decision to terminate a formal investigation.

68. Plea bargaining is unavailable in Portugal. As described at p. 19, an accused may co-operate with authorities and consequently avoid punishment or receive a reduced sentence. The court, with the prosecutor's agreement or proposal, decides the level of sentence reduction. The current law does not set out a framework for negotiations between the prosecution and a defendant. Portugal stated that provisional suspension of proceedings (Code of Criminal Procedure, Article 288) does not apply to foreign bribery cases.

(c) Proactive Enforcement

69. In Phase 2, the Working Group expressed concerns that Portugal may not be sufficiently proactive when conducting investigations. The Phase 2 Report (paras. 126-127) noted that the DCIAP did not take all steps to investigate allegations of corruption committed by Portuguese companies involved in the UN Oil-for-Food Programme. Phase 2 Recommendation 3(a) thus asked Portugal to be more proactive in investigating foreign bribery cases and to use the full range of investigative measures available.

70. These concerns persist in Phase 3. This section considers Portugal's implementation of Phase 2 Recommendation 3(a) by examining actual foreign bribery enforcement actions. Three particular concerns emerge: (i) lack of proactive and thorough investigation before a case is terminated; (ii) lack of proactivity in seeking the co-operation of foreign authorities; and (iii) a tendency to defer to foreign authorities.

(i) Inadequate Investigation before Termination of Cases

71. There are substantial concerns that Portuguese authorities have terminated several foreign bribery cases after only a cursory investigation. In the *Parliamentarian No. 1 Case*, Portuguese Company T allegedly agreed to bribe Brazilian officials to secure government approval of an acquisition of a company. The agreement was negotiated over three meetings between Brazilian officials or their representatives, the CEO of Company T, and the Chairman Company S which was a shareholder of Company T. Two of the meetings occurred in Portugal.[21] Portuguese authorities concluded that one of the meetings did not relate to the bribery scheme. This conclusion, however, was based merely on the dates and lengths of the meetings, and on an examination of Company T's business records provided by the Company. This is peculiar, since it is highly unlikely that a company would record illicit activities in its official documents and provide them to the authorities. Portuguese authorities were not aware of the additional two meetings among the parties. In October 2012, Portugal informed the Working Group that one reason for not investigating this case further was because "no illicit acts [were] found to be committed in Portuguese territory". This statement is curious, given that two of the meetings among the parties took place in Portugal. Furthermore, Portugal could invoke nationality jurisdiction to prosecute the Portuguese individuals and companies implicated in the case for acts committed outside Portugal.

72. The *Fish Conservatory Case* was also terminated after a brief inquiry. In 2007, Portuguese Company M allegedly bribed a government Minister in São Tomé and Príncipe and won a contract to construct a fish conservation and commercialisation facility. A São Tomé prosecutor who was based in Lisbon informed Portuguese authorities that São Tomé authorities were not investigating the case. No reason was provided. Portuguese authorities did not contact authorities in São Tomé. Instead, they consulted publicly available information on Company M, which did not indicate that the Company was involved in a fish conservation project in São Tomé and Príncipe. The case was then closed. After the on-site visit, Portuguese authorities stated that, according to additional press reports, the allegations in the case had been made and then withdrawn by an election candidate. Portuguese authorities did not, however, independently verify this information.

73. The *Plane Acquisition Case* raises similar questions. A Portuguese national of Syrian origin was reportedly an intermediary in the sale of an aircraft to the government of Iran. The Portuguese national allegedly bribed an Iranian official and pocketed the purchase money. Portuguese authorities inquired with an individual in Portugal in the business of aircraft purchases, who replied that he had not heard of the transaction. Portuguese authorities then terminated the case because the identity of the Portuguese intermediary was unknown. No further steps were taken to ascertain the individual's identity.

74. A similar conclusion can be drawn in the *Sanitation Services Case*. Company X in Portugal allegedly bribed an Angolan official to obtain a contract for sanitation services. The official subsequently deposited significant amounts of cash in an account in Portugal. Documents produced by Company X to Portuguese authorities did not show that cash had been transferred directly into the official's account. The Portuguese authorities did not, however, trace the cash to its ultimate recipient to exclude the possibility that bribes were paid through other means, such as via an intermediary. Portuguese authorities also learned that the Angolan official had obtained loans from a bank. They thus concluded that the cash deposits were funds from the loan and not bribes, even though the loans were, according to Portuguese authorities, made with suspiciously few guarantees.

75. No inquiries were made at all in the *Highway Case*. A consortium of three Portuguese firms and two Bulgarian companies obtained a concession without a tender to build and operate a highway in Bulgaria on extremely favourable terms. Articles in the Bulgarian media alleged that bribes had been paid to the political elite. Portuguese authorities learned of the allegations but not the names of the Portuguese

[21] Brazilian officials were convicted of domestic corruption in Brazil in this case in 2012.

individuals and companies involved. For this reason, they did not take any investigative steps. However, they also did not actively seek this information, which had been widely reported in the Bulgarian media. After the on-site visit, Portuguese authorities stated that the consortium had dissolved by the time they learned of the allegation. However, Portuguese authorities confirmed that the three Portuguese companies involved continue to exist, which suggests that Portuguese authorities may now know the identity of these companies. Portuguese authorities further acknowledged that, despite the consortium's dissolution, the Portuguese companies could conceivably be prosecuted for attempting to or promising to bribe a foreign public official. Portuguese authorities added that the Bulgarian authorities did not open a formal investigation.

76. Inquiries were also not made in the *TSKJ Case*. Four non-Portuguese companies established a joint venture that consisted of three companies incorporated in Madeira with Portuguese directors. Bribes were then paid through the joint venture to Nigerian officials to win energy contracts. Despite the case's connection with Portugal, Portuguese authorities did not consider whether any Portuguese individuals or corporations had committed foreign bribery, or related offences such as money laundering or false accounting. This was because French authorities had claimed "exclusive jurisdiction" over the entire case, according to Portuguese authorities. However, French authorities ultimately did not prosecute the Portuguese individuals and companies. Portuguese authorities also did not confirm whether French authorities had thoroughly investigated the involvement of the Portuguese entities. After the on-site visit, Portuguese authorities added that the three Madeira companies were "special purpose vehicles" (SPVs). In their view, the company directors were likely mere nominees and the SPVs likely did not have assets. However, Portuguese authorities did not confirm that this was in fact the case.

Commentary

The lead examiners are gravely concerned that Portuguese authorities repeatedly fail to investigate foreign bribery allegations thoroughly and proactively. In Phase 2, the Working Group observed that Portugal had failed to proactively pursue investigations of corruption allegations. This pattern has since continued. Several of the foreign bribery allegations that have surfaced in Portugal were terminated after a preliminary investigation. Two cases (Highway and TSKJ Cases) were not investigated at all.

After the on-site visit, the lead examiners were encouraged to hear Portugal acknowledge that at least some of its foreign bribery investigations had been closed prematurely. Nevertheless, the lead examiners reiterate Phase 2 Recommendation 3(a) and recommend that Portugal take sufficient steps to ensure that cases involving foreign bribery allegations are not prematurely closed. They further recommend that Portugal increase the use of proactive steps to gather information from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations.

(ii) Lack of Proactivity in Seeking Co-operation from Foreign Authorities

77. Portuguese authorities also appear to lack proactivity when seeking co-operation and MLA from foreign countries, and not only when taking investigative steps in Portugal. Portugal did not send MLA requests in any of the eight terminated foreign bribery enforcement actions. The *Fish Conservatory Case* was terminated after Portuguese authorities learned from a São Tomé prosecutor in Lisbon that the case had been closed in São Tomé. No efforts were made to contact authorities in São Tomé to obtain more information or ascertain why the investigation had been terminated there. The *Highway Case* was likewise terminated without contacting foreign authorities. This was extremely unfortunately, since – unlike the *Fish Conservatory Case* – Bulgarian authorities had made inquiries and gathered substantial evidence (despite not opening a formal investigation). Portuguese authorities added that it could seek MLA only if the identity of the Portuguese suspect was identified. It did not, however, take steps to obtain this

information, which was widely reported in the Bulgarian media. The *Parliamentarian No. 1 Case* was terminated after a cursory review of company documents, even though Brazilian prosecutors had more extensive information about the meetings among the relevant parties. The *Plane Acquisition Case* was closed again because the identity of the Portuguese suspect could not be ascertained. No inquiries were made with Iran, even though that country could have been co-operative since it was seeking to recover substantial funds. Switzerland had also gathered evidence in the case. MLA has not been sought in the on-going *Public Works Case*.

78. Even when MLA has been sought, Portuguese authorities sometimes have not pursued the request diligently. In the *Farm Equipment and Aircraft Case*, Portugal requested MLA from South Africa in 2009. No steps were taken to pursue the request until October 2012, when Portuguese authorities discussed the matter with South Africa in the margins of a Working Group meeting. In the *Ferrostaal Case*, an MLA request to Germany remains outstanding, even though Portugal's investigation began in 2006. The MLA request sent by Portuguese authorities in the *Military Aircraft Case* was executed by foreign authorities almost six years later. It is unclear if Portugal took any steps to actively pursue the request.

79. Some channels for pursuing MLA have also been underused. In international corruption cases, the DCIAP has sought assistance through Eurojust only once and has not used joint-investigative teams (JITs). It stated that JITs are only available with certain countries. When the DCIAP has encountered difficulties in obtaining MLA, it has not sought the assistance of diplomatic officials in Portuguese embassies overseas to take this matter up at the political level, as Portugal holds that this is not a role for its embassies. Nevertheless, seeking diplomatic assistance of embassies where possible is one means of facilitating international co-operation.

80. Of particular concern is the seeking of co-operation and MLA from Angola. As mentioned earlier, one-third of the foreign bribery allegations involving Portuguese companies concern Angola. MLA from Angola was sought in only one of these cases. Portugal's explanations ranged from insufficient basis to seek MLA to Angola's inability to provide evidence of quality. As described in more detail at p. 42, Portugal has taken some steps to improve co-operation with Angola. Nevertheless, more could be done, such as by pursuing outstanding requests more vigorously, and seeking the assistance of Portuguese diplomatic authorities to further facilitate international co-operation. Portugal could also consider sending treaty-based MLA requests such as through UNCAC, to which Angola and Portugal have been parties since 2006 and 2007 respectively.

81. The *Real Estate (Macau) Case* also raises concerns. As described at p. 10, the defendant C is a Portuguese national who bribed a senior official in Macau. After returning to Portugal in 2007, C asked Portuguese authorities to be tried in Portugal for this offence. In 2009, DCIAP asked the Macau judge responsible for the case for a copy of the case file but was refused. In 2011, C was convicted and sentenced *in absentia* in Macau. Other co-conspirators and the bribed official remained in Macau and were also convicted. C, however, presently remains at large in Portugal.

82. The upshot is that a Portuguese national has committed foreign bribery (as determined by a foreign court) but remains at large in Portugal and beyond justice. This is an unsatisfactory status quo which requires Portugal to take proactive steps to resolve. Portugal takes the position that C's conviction *in absentia* prevents a second prosecution in Portugal. But as noted at p. 11, this position is debatable and should be thoroughly reconsidered by Portuguese authorities. In addition, Portuguese authorities should initiate discussions with their Macau counterparts and explore the various options available. For instance, Portugal could ask Macau to consider requesting C's extradition from Portugal to serve his sentence. It could also ask Macau to consider asking Portugal to enforce the sentence imposed by the Macau court (as allowed under Articles 95-96 of Law 144/1999). The DCIAP should consider involving Portuguese diplomatic authorities and the Ministry of Justice in the dialogue with Macau.

Commentary

The lead examiners are extremely concerned that Portugal has not proactively sought the co-operation of foreign authorities in many foreign bribery cases. They therefore recommend that Portugal make greater efforts to obtain evidence and information from foreign authorities before terminating foreign bribery cases. For instance, Portuguese authorities should promptly follow up outstanding MLA requests. They should routinely explore options such as Eurojust, joint investigative teams, and formal treaty-based MLA requests where appropriate. To facilitate international co-operation, Portugal could also seek the diplomatic assistance of Portuguese embassies where possible. Finally, Portugal should take proactive steps to resolve the Real Estate (Macau) Case. The lead examiners also note that obtaining effective MLA in foreign bribery cases is a horizontal issue that affects many Parties to the Convention.

(iii) Deferring to Foreign Authorities

83. Portuguese authorities also appear to defer to foreign authorities too readily instead of conducting their own investigations. In the *Fish Conservatory*, *Highway* and *Mining Cases*, the failure of foreign authorities to investigate was cited as one reason for Portugal to close its own case. In other cases, it was the opposite, i.e. Portugal terminated its case because foreign authorities were investigating. In the *Parliamentarian No. 1 Case*, Brazil prosecuted and convicted its officials and citizens involved in the bribery scheme. It did not, however, prosecute the Portuguese individuals and companies that were implicated. Nevertheless, Portugal declined to investigate partly because "Brazil claimed jurisdiction over all acts." In the *TSKJ Case*, Portugal declined to investigate Portuguese individuals and companies because, according to Portuguese authorities, France claimed jurisdiction over the entire case. These individuals and companies ultimately were not prosecuted in France or any other jurisdiction.

84. At one point, Portugal provided a different explanation of why it declined to investigate the *Parliamentarian No. 1* and *Real Estate (Macau) Cases*. In December 2012, Portugal reported to the Working Group that it had delegated its competence over both cases when it provided MLA to Brazil and Macau. It was thus barred from investigating these cases under Article 19 of Law 144/1999.[22] (See Annex 4 at p. 68 for the text of this provision.) This position is questionable. On its face, Article 19 should apply only when Portugal transfers a prosecution to foreign authorities, and not when it merely provides evidence. In this evaluation, Portugal no longer cites Article 19 as a reason for terminating the *Parliamentarian No. 1* and *Real Estate (Macau) Cases*. Nevertheless, questions remain over Portugal's approach to commencing foreign bribery investigations based on information contained in incoming MLA requests. After the on-site visit, Portuguese authorities pointed out that it opened an investigation in the *Real Estate (Angola) Case* after receiving an MLA request from a foreign country.

Commentary

The lead examiners are concerned that Portuguese authorities defer to other law enforcement bodies in other jurisdictions rather than conduct its own investigations of foreign bribery allegations. Both the absence and the presence of concurrent investigations by foreign authorities have been cited as reasons for Portugal not to investigate. Consequently, foreign bribery allegations against certain Portuguese individuals and companies have not been fully investigated and prosecuted, whether by foreign or Portuguese authorities.

The lead examiners therefore recommend that Portugal should, where appropriate, consider whether to conduct concurrent or joint investigations. This is particularly important where foreign authorities are not investigating and prosecuting Portuguese individuals and

22 Room Document 1, December 2012 Working Group Meeting, footnotes 1 and 2.

companies implicated in a foreign bribery case. The lead examiners also recommend that Portugal ensure that it is not prevented from commencing a criminal investigation or prosecution solely because it has provided MLA to a foreign country in the same case.

(d) Article 5 of the Convention

85. There are concerns that Portugal's foreign bribery investigations and prosecutions could be vulnerable to influence by factors prohibited under Article 5 and Commentary 27 of the Convention. The conclusion is based on an array of factors such as the possible lack of awareness of the provision; the political and economic sensitivity of many of Portugal's alleged foreign bribery cases; and the high number of foreign bribery allegations involving Angola.

86. Article 5 and Commentary 27 of the Convention require Parties to ensure that foreign bribery investigations and prosecutions are not subject to improper influence by considerations of national economic interest, the potential effect upon relations with another State, or the identity of the natural or legal persons involved. Article 5 is part of the Portuguese legal system. International conventions ratified and published by Portugal automatically become part of Portuguese internal law (Constitution Article 8). Portugal adds that it has also implemented Article 5 because the Constitution guarantees the independence and tenure of judges and prosecutors. The President of the Republic appoints and discharges the Attorney General (AG) on the recommendation of the government. Once appointed, the AG is fully independent and not subject to directions by the President of the Republic and executive and legislative branches of government. Other prosecutors are appointed and removed by the AG's Office. Prosecutors are subject to the instructions of the AG and the heads of the DCIAP and DIAPS but not government members or public officials. The commencement of prosecutions does not require the consent of the Minister of Justice or other government members. The Criminal Police also acts under the exclusive co-ordination and direction of the Public Prosecutors, and not the government or other public officials (Constitution Articles 133(m), 219-220).

87. One concern is the possible lack of awareness of Article 5 among Portuguese prosecutors and investigators. Article 5 prohibits a prosecutor in a foreign bribery case from considering the factors enumerated in the Article. To abide by this provision, prosecutors and investigators need to be sufficiently aware of the factors in Article 5; awareness of their independence alone may not be sufficient. Portugal has not, however, raised awareness of this provision within the DCIAP or the National Anti-Corruption Unit of the Criminal Police (UNCC). It has not referred to any awareness-raising and training activities that refer specifically to this Article. After the on-site visit, Portuguese authorities stated that awareness-raising was not necessary since a prosecutor cannot decline prosecution on grounds of public interest.

88. Of even greater concern is that many of Portugal's alleged foreign bribery cases could be influenced by Article 5 factors because of their nature. Several cases would appear to be politically sensitive because they implicate current or former high level officials in foreign countries, including heads of state and Ministers: *Fish Conservatory (São Tomé and Príncipe)*; *Supermarket (Angola)*; *Parliamentarian (Brazil) No. 2*; *Real Estate (Angola)*; and *Farm Equipment and Aircraft (Zimbabwe)*. The *Military Aircraft Case* is a domestic and not foreign bribery case. Nevertheless, it implicates a high level Portuguese official and has yet to result in charges, even though the case is very old. Several cases are also economically sensitive because they concern major Portuguese corporations and their influential executives: *Parliamentarian (Brazil) No. 1 and 2*; *Fish Conservatory*; *Public Works (Malawi)*. At the on-site visit, Portuguese prosecutors stated that the *Aircraft Service (Angola) Case* was sensitive because it concerned a listed Portuguese company and a large Angolan company. At the on-site visit, civil society representatives voiced concerns that many business executives had close ties with senior public officials in Portugal. They were also concerned about executives moving between a "revolving door" of private sector and government positions.

89. Portuguese prosecutors appear to acknowledge that these cases could impact Portugal's economic interests and diplomatic relations with other states. In the *Public Works (Malawi) Case*, a media article cited an unnamed source at the Portuguese Public Prosecutor's Office as stating that prosecution of the case could result in "diplomatic problems".[23] Portuguese authorities, however, dispute the veracity of this statement. In addition, Portuguese authorities at the on-site visit described the *Angola / Guinea Case* was "complex", "very sensitive" and "could affect international relations". The prosecutors did not mention, however, the prohibition against considering Article 5 factors in foreign bribery cases. As noted above, there have not been efforts to raise awareness of Article 5 among Portuguese prosecutors and investigators.

90. The high proportion of alleged foreign bribery cases involving Angola raises particular Article 5 concerns. Not only do Portuguese companies have substantial operations in the country, but the Angolan elite also have significant investments in Portuguese companies in the energy, banking and information technology sectors (see p. 8). Foreign bribery investigations implicating senior Angolan officials could therefore easily impact the economic and diplomatic relations between the two countries. Civil society representatives at the on-site visit were concerned about deference given to "politically sensitive" cases involving Angola.

91. Two recent DCIAP investigations starkly illustrate the danger that investigations implicating senior Angolan officials may be vulnerable to influence by Article 5 factors. These two cases presently involve only alleged money laundering and not foreign bribery, though further investigation may prove otherwise. More importantly, regardless of the offence involved, these cases demonstrate the external pressures facing Portuguese prosecutors and investigators when investigating allegations that suggest wrongdoing by Angolan officials. In November 2012, the Portuguese media reported that the DCIAP had received information in 2011 concerning money laundering by the Angolan Vice-President, a government Minister, and a Ministerial advisor. A pre-inquiry was ultimately opened in July 2012. In February 2013, the media reported a second DCIAP investigation into money laundering by Angola's Attorney General. Both cases involve the transfer of funds through the Portuguese financial system. News of the investigations has prompted suggestions by Angolan officials and media that Angolan investment in Portugal would decrease.[24] Charges have not been filed in either case yet. Portugal points to other cases in which investigations of cases involving senior Angolan officials have or were commenced. This is encouraging, but these cases have also not produced charges.

92. Additional statements made have raised concerns about these two investigations. Public statements made by a high-ranking Portuguese official after the investigations became public referring to the diplomatic and economic relationship between Portugal and Angola raised concerns about the possibility of improper influence.[25]

Commentary

The lead examiners are concerned about the possible attempts to influence Portugal's foreign bribery investigations and prosecutions by factors prohibited under Article 5 of the Convention. Many of Portugal's foreign bribery allegations involve high-level foreign officials and/or major Portuguese companies and their executives. Portuguese prosecutors already

23 iOnline (7 September 2012), "PGR pode investigar alegada corrupção de Mota-Engil no Malawi".

24 Publico (10 November 2012), "Três figuras próximas de Eduardo dos Santos sob investigação em Portugal"; Publico (13 November 2012), "Ministério Público confirma investigação a altos dirigentes angolanos"; Expresso (25 February 2013), "PGR angolano investigado por suspeita de branqueamento".

25 RTP (16 November 2012); Publico (6 December 2012), "Ex-embaixador que denunciou corrupção em Angola já pode viajar para Portugal"; PortugalDailyView (7 February 2013), "Portugal/Angola: Teams Start Readying First Ever Summit"; Sindicato dos Jornalistas Angolanos (20 February 2013), "Angola "derruba" a primeira magistrada portuguesa"; Publico (27 February 2013).

appear to be mindful that these cases could impact Portugal's economic interests and diplomatic relations with other states. None of these cases has resulted in prosecution yet. Concerns are exacerbated by Portugal's strong economic ties with Angola, the number of foreign bribery cases involving that country, and recent threats of economic retaliation by Angolan media and senior officials.

For these reasons, the lead examiners consider that Portugal should adopt heightened vigilance against possible influence by Article 5 factors in investigations and prosecutions of foreign bribery. Investigations of foreign bribery allegations that involve senior foreign public officials and/or major Portuguese companies should be given high priority and sufficient investigative resources. Such allegations should be promptly and proactively investigated. If such cases are terminated without prosecution, Portuguese authorities should take appropriate steps to ensure that all prosecutors are aware of the requirement to record their reasons for terminating investigations of the bribery of foreign public officials. These cases should also be closely monitored by the Working Group as they arise in the future. Finally, the lead examiners recommend that Portugal raise awareness of Article 5 within the DCIAP, UNCC, and other relevant government bodies.

(e) Absence of Corporate Prosecutions

93. Portuguese law has allowed criminal liability of legal persons for some time. Corporate liability for a range of economic offences dates back to 1984 (Phase 2 Report para. 143). Since 2001 legal persons may be held liable for private sector corruption and bribery in international business (see p. 15). The latter covers both Portuguese companies bribing non-Portuguese officials, and non-Portuguese companies bribing Portuguese officials. In 2007, criminal liability of legal persons was expanded to other offences including money laundering, fraud and forgery (which covers false accounting – see p. 16).

94. In practice, corporate prosecutions for bribery have been extremely rare. Portuguese officials and judges stated that companies have been prosecuted largely for tax offences only and not other intentional economic crimes. Legal persons have not been prosecuted for foreign bribery. Corporate prosecutions for domestic bribery are also rare, which suggest that similar prosecutions for foreign bribery could remain uncommon. In the *Burke Case*, executives and/or owners of two Portuguese companies were convicted. These two Portuguese companies were in turn connected with three foreign companies. Portuguese authorities did not charge these five companies to avoid prolonging the investigation by seeking MLA. One company was also not charged because its sole shareholder was prosecuted instead. These are not reasons for declining prosecution under Portuguese law, however (see p. 22). It is also unclear why the Portuguese authorities did not sever the prosecutions against natural persons from those against legal persons. In the *Medical Equipment Case*, the investigation against two companies began in 2008, four years after the investigation against natural persons in the same case began. At the on-site visit, Portuguese officials explained that the delay may have been due to a lack of time, expertise or evidence to proceed against the legal persons. All of the defendants were acquitted at trial. Portuguese authorities then appealed the acquittals against the natural persons and obtained convictions. They did not appeal the acquittals against the legal persons, citing without elaborating insufficient evidence as the reason. Statistics on corporate prosecutions were unavailable.

95. Explanations for the lack of prosecutions vary. Some Portuguese representatives stated that criminal corporate liability is a new concept. This is debatable, since corporate liability has been available for some domestic economic offences since at least 1984 and for several types of corruption since 2001. A more likely explanation is that prosecutors and investigators are not routinely commencing proceedings against legal persons. A lack of expertise and resources (as discussed below) may also be a contributing factor. In any event, the absence of prosecutions has led to an extremely low level of awareness among Portuguese companies of these provisions (see pp. 38 and 44).

Commentary

The lead examiners recommend that Portugal take steps to ensure the usage of the corporate liability provisions where appropriate, and provide on-going training to law enforcement authorities on the enforcement of corporate liability in foreign bribery cases. Portugal should also review its approach to enforcement, especially regarding corporations, in order to effectively combat international bribery of foreign officials.

(f) Jurisdiction to Prosecute Foreign Bribery

96. Portuguese law provides for jurisdiction to prosecute foreign bribery that occurs wholly or partly in Portugal. Portugal's jurisdiction to prosecute foreign bribery committed outside Portugal (i.e. extraterritorially) raised two issues that were identified in Phase 2.

(i) Jurisdiction over Natural Persons for Extraterritorial Foreign Bribery

97. The first issue concerns extraterritorial jurisdiction over natural persons and has not been resolved. The Phase 2 Report (paras. 153-155) considered two legislative provisions on extraterritorial jurisdiction in force at that time. First, Article 3 of Law 13/2001 provided that Portugal may prosecute Portuguese citizens and foreigners found in Portugal for foreign bribery regardless of where the act was committed. The provision applied "without prejudice to the general framework governing the territorial application of criminal law". Second, Article 5 of the Criminal Code also provided jurisdiction over Portuguese nationals and foreigners found in Portugal for crimes committed outside of Portugal. But unlike Article 3 of Law 13/2001, Article 5 applied if two additional conditions are met: (a) dual criminality, i.e. the act in question is punishable under the laws of the state where it occurred, and (b) the act constituted an extraditable offence but extradition from Portugal was refused or could not be granted.

98. In Phase 2, the Working Group found that it was unclear which of these two provisions would apply to foreign bribery cases. The opening words of Article 3 of Law 13/2001 ("without prejudice to the general framework governing the territorial application of criminal law") could make the Criminal Code provision operational in foreign bribery cases. One senior Portuguese prosecutor stated that Article 3 was "in practice useless, as it could not supersede the general rules on the application of the Criminal Law laid down in the Criminal Code, and thus did not affect the requirement of dual criminality included in Article 5". Phase 2 Recommendation 3(d) thus asked Portugal to raise awareness of its rules on nationality and extraterritorial jurisdiction.

99. The concerns from Phase 2 persist in Phase 3. Article 3 of Law 13/2001 has been replaced by Article 3 of Law 20/2008, but the texts of the two provisions are practically identical. Like its predecessor, the current provision applies "without prejudice to the general regime of the criminal law territorial application". Portuguese authorities state that Article 3 of Law 20/2008 is a "special law" and would therefore apply in foreign bribery cases in lieu of Article 5 of the Criminal Code. No jurisprudence was cited to support this position. Mostly troublingly, four lawyers/academics at the on-site visit took the opposite view and stated categorically that both provisions could apply simultaneously in the same case. Some corporate lawyers also believed that Portugal does not have jurisdiction to prosecute foreign bribery (see p. 44). After the on-site visit, Portuguese authorities presented another position, namely that Article 3 of Law 20/2008 would govern jurisdiction over natural persons, while Criminal Code Article 5 would apply to legal persons. This position, however, only underscores the confusing nature of the two provisions.

100. A final concern relates to practice. In the *Parliamentarian No. 1* and *TSKJ Cases*, Portuguese authorities declined to prosecute Portuguese nationals because they considered that no illicit acts were committed in Portuguese territory. Why Portuguese authorities did not consider exercising nationality jurisdiction to prosecute these cases is unclear. In any event, Portuguese authorities may have had

territorial jurisdiction to prosecute both cases. As described at p. 9, the bribery agreement in the *Parliamentarian No. 1 Case* may have been discussed in meetings in Portugal. In the *TSKJ Case*, foreign bribery was committed through companies in the Madeira FTZ.

Commentary

There is continuing confusion in Portugal over whether jurisdiction to prosecute Portuguese nationals for extraterritorial foreign bribery is governed by Article 3 of Law 20/2008 or Article 5 of the Criminal Code. In Phases 2 and 3, Portuguese prosecutors and lawyers have contradicted the views of Portuguese authorities on this issue. The lead examiners therefore recommend that Portugal clarify this matter.

The lead examiners are also concerned that Portuguese authorities do not make full use of the jurisdictional reach of Portugal's foreign bribery laws. They therefore recommend that Portugal take steps to ensure that its law enforcement authorities consider the exercise of nationality jurisdiction to prosecute foreign bribery whenever appropriate. They also recommend that Portuguese authorities thoroughly explore territorial links to Portugal in foreign bribery cases, so as to rely on territorial jurisdiction to prosecute whenever possible.

(ii) Jurisdiction over Legal Persons for Extraterritorial Foreign Bribery

101. During Phase 2, Portugal had jurisdiction to prosecute legal persons for extraterritorial foreign bribery if (a) there was jurisdiction to prosecute the natural person who committed the offence, or (b) the legal person was "found in Portugal", an undefined term whose interpretation had not been settled in practice. The Working Group also considered that in practice both conditions (a) and (b) may have to be met before there is jurisdiction to prosecute. If this was the case, then Portugal could not prosecute a Portuguese legal person whose "governing body or representative" commits extraterritorial foreign bribery (since there is also no jurisdiction to prosecute the natural persons who committed the crime). The Working Group thus decided to follow up this issue (Phase 2 Follow-up Issue 7(b)(iii)).

102. This issue has now been resolved. In 2007, Criminal Code Article 5(g) was added to provide jurisdiction to prosecute legal persons that are registered in Portugal. This includes legal persons that are incorporated outside of Portugal but are registered inside. Whether the offence in question was committed in or outside of Portugal is immaterial to the question of jurisdiction.

(g) Statute of Limitations

103. The 10-year statute of limitations that applies to the foreign bribery offence in Law 20/2008 is sufficient on its face. The same period applied to the bribery offence that was in force during Phase 2 (para. 111). Time begins to run with the completion of the offence (Criminal Code, Articles 118-119). Articles 120-121 of the Criminal Code stipulate the grounds for suspension and interruption of the limitation period (see Annex 4 for the text of the provision). The limitation period may be suspended for up to three years while MLA is being sought after (but not before) indictment or arraignment.

104. Of concern is the application of the statute of limitations in practice. The Phase 2 Report (para. 112) noted procedural delays in corruption cases. In Phase 3, Portugal could not provide statistics on foreign bribery or other cases in which the statute of limitations had expired. What is clear, however, is that the investigation and prosecution several of the cases referred to in this evaluation have taken a long time. In the *Ferrostaal Case*, the alleged offence was in 2004 and the investigation commenced in 2006. At the time of this report, one set of charges from the case was under trial, and another set had yet to reach the courts. The case could eventually be statute-barred, according to a prosecutor at the on-site visit. The offence in the *Burke Case* took place in 2001, but the convictions were entered only in 2009. In the *Military Aircraft Case*, the bribery allegedly took place in 2004 but the investigation is still on-going.

Commentary

The lead examiners are concerned that the statute of limitations for the foreign bribery offence in Portugal may not allow an adequate period of time for the investigation and prosecution. While the applicable 10-year statute of limitations is sufficiently long on its face, investigations and prosecutions in practice have faced lengthy delays. The lead examiners therefore recommend that the Working Group follow up this issue as practice develops. Portugal should also maintain statistics on foreign bribery and other cases in which the statute of limitations had expired.

(h) Priority, Resources and Expertise

105. Portugal has designated "corruption" as a crime of investigative priority. The term "corruption" includes foreign bribery, according to Portuguese authorities. An instruction to prosecutors and judges gives corruption priority. The Programme of the current Government also states that preventing and fighting corruption is a political priority.

106. The resources of law enforcement authorities responsible for fighting corruption have not been reduced as part of recent government-wide austerity measures. In Phase 2, the DCIAP had 12 prosecutors handling some 200 cases, mostly involving tax fraud and money laundering. In Phase 3, DCIAP has 26 Prosecutors and Deputy Prosecutors. The office's caseload in 2008-2011 increased by about 10% compared to Phase 2. As for the Criminal Police, the UNCC has 63 investigators, up from its predecessor's 54 investigators in Phase 2. The Asset Recovery Office within the Criminal Police became operational in 2012 (see p. 21) and may also assist in foreign bribery cases.

107. More problematic is whether there is sufficient specialised expertise that is needed in foreign bribery cases. The *Núcleo de Assessoria Técnica* (NAT) of the AG's Office provides specialists in economics, finance and forensic accounting to assist prosecutors. Nevertheless, the DCIAP stated that there is not enough specialisation in the prosecutor's office. The Criminal Police has a Forensic Lab and a Cybercrime Unit with experts in information technology. The UNCC said that there is sufficient expertise in this area. However, it also stated that a lot of time was needed to analyse the voluminous digital information often seized in economic crime cases. The amount and complexity of the evidence was cited as a reason for the delay in the *Ferrostaal Case*. The Criminal Police also has a unit with financial expertise. At times, it resorts to experts at the Bank of Portugal or CMVM (the securities market regulator) if it has a case that falls within the remit of these bodies. Criminal judges stated that they do not specialise in particular crimes, though judges in Lisbon are more experienced in economic and financial offences. Representatives of the legal profession, parliament, and civil society agreed that the police, prosecutors and judges may not have sufficient expertise to deal with economic crime.

108. Training of police, prosecutors and judges only address this concern partially. The School of Criminal Police organised training on corruption in May 2011 and December 2012 that was attended by 182 officials. The School also provided training on "corruption in international business and how to investigate this offence", including through special investigative techniques. The Centre for Judiciary Studies (CEJ) provides annual training programmes to judges and prosecutors on economic and financial crimes, including corruption in international business. Recent offerings covered confiscation and asset recovery in corruption and financial crime (March 2010); EU instruments on judicial co-operation, including identification, seizure and confiscation of assets (February 2010); and criminal procedure including corruption in international transactions and asset freezing (January and April 2010). Portuguese judges added that their basic training covers corruption in general terms; foreign bribery is but one of many types of corruption covered. Training on financial crime is also available. These training efforts are useful but do not address shortages in forensic expertise in financial analysis and information technology.

Commentary

The lead examiners are pleased that the resources available to the DCIAP and UNCC have not decreased despite the difficult economic times in Portugal. They recommend that Portugal take steps to ensure that it gives sufficient priority to investigating and prosecuting foreign bribery. Portugal should also ensure that it has sufficient specialised expertise, especially in forensic financial analysis and information technology, for investigating and prosecuting foreign bribery. Finally, Portugal should continue to train investigators, prosecutors and judges on investigating and prosecuting foreign bribery.

(i) Investigative Techniques

109. This section considers issues relating to techniques for investigating foreign bribery, including post-Phase 2 developments in Portugal's tax and bank secrecy laws. The section also considers the gathering of evidence in the Madeira and Azores, given the Free Trade Zones in these territories.

(i) Asset Freezing and Seizure

110. Phase 2 Recommendation 6(a) asked Portugal to draw the attention of investigators and prosecutors to the importance of seizing the proceeds of bribery before trial. The Phase 2 Report (para. 190) expressed concern that confiscation was underused. This was because the provisions on identification, freezing and confiscation of proceeds of crime derived from several unharmonised and ambiguous provisions, according to Portuguese police officials. Judges stated that law enforcement did not routinely investigate issues related to proceeds of crime because of "inadequate resources and structures".

111. This issue has been partially resolved. Portuguese authorities stated that funds have been frozen in Portugal and abroad in three on-going cases. Assets were also seized (and subsequently released) in two terminated cases. More systematic statistics on pre-trial seizure in cases of economic crime were unavailable, however. A criminal defence lawyer at the on-site visit agreed that authorities are seizing more frequently than before. Some of the training for prosecutors and judges described at p. 32 covered identification and seizure of proceeds of crime, including in an international context. As described at p. 21, it is too early to say whether and how the Asset Recovery Office will improve pre-trial seizure.

Commentary

The lead examiners are pleased that pre-trial seizure has been used in some foreign bribery cases. Nevertheless, Portugal should also maintain statistics on pre-trial seizures, including on the offence involved and the amount seized. Given recent developments (such as the Asset Recovery Office), the lead examiners also recommend that the Working Group follow up the application of seizure in practice.

(ii) Bank and Tax Secrecy

112. Developments since Phase 2 have improved law enforcement's access to bank information. In Phase 2, Article 181 of the Code of Criminal Procedure allowed a judge to order the seizure of certain evidence from financial institutions. Law 5/2002 also created a regime to allow a judicial authority investigating certain serious offences (including corruption) to order credit institutions, financial companies and payment institutions to disclose information subject to bank secrecy. Since Phase 2, Law 19/2008 expanded this regime to include investigations of "active and passive corruption". Law 36/2010 further amended Article 79(2)(d) of the Law on Credit Institutions and Financial Companies to allow secret bank information to be disclosed to judicial authorities in the scope of a criminal procedure. Portuguese authorities take the position that bank secrecy is not a ground for opposing a criminal investigation. In

2010, a central database of all bank accounts in Portugal was created in the Bank of Portugal. Portuguese authorities no longer have to issue notices to every bank when seeking account or transaction information.

113. The 2008 legislative amendment described above also allowed a prosecutor to authorise tax authorities to release information that is subject to secrecy rules. Portugal states that tax secrecy does not apply to "legal co-operation between the tax administration and other public entities, acting within their powers". It also does not apply to "collaboration with justice in accordance with the Code of Civil Procedure and the Code of Criminal Procedure" (General Tax Law, Article 64(2)).

(iii) Special Investigative Techniques

114. Special investigative techniques are available with the prior authorisation of a judge under the Criminal Procedure Code and standalone laws. Available techniques include intercepting telephone calls and internet communications (Criminal Procedure Code Article 187-189). Portugal states that other available techniques include audio and visual recording and undercover investigations (Law 101/2001). Controlled deliveries have been used in domestic corruption investigations. No information was available on the actual use of special investigative techniques in foreign bribery cases.[26]

(iv) Gathering Evidence from Madeira and Azores

115. Portuguese authorities stated that they do not have difficulties in obtaining information from Madeira and Azores during investigations. They stated that the same laws on criminal investigation and on access to bank and tax information (see p. 33) apply throughout the country, including in the Madeira FTZ and Azores. The Madeira FTZ has special laws on tax benefits and registration of foreign trusts (see p. 8). Foreign trusts lasting more than one year must be registered in the Commercial Register. The name, identification, purpose, date of creation, and duration of a trust are publicly available and published in the Official Gazette. The identity of a foreign trust's settlor and beneficiary are also recorded in the Commercial Register but may be disclosed only pursuant to a court decision (Decree Law 352/1988, Article 11). Portuguese authorities stated that they may access other non-public information in the Commercial Register during a criminal investigation. Article 3 of Law 5/2002 is cited in support, but that provision only applies to the production of information by "credit institutions, financial companies and payment institutions". Portugal states that the regulatory instruments of the Bank of Portugal may also give law enforcement access to information about foreign trusts.

6. Money Laundering

116. This section considers post-Phase 2 changes to Portugal's money laundering legislation and the issue of politically exposed persons (PEPs), particularly those from high-risk countries such as Angola.

(a) Money Laundering Offence

117. An important concern regarding Portugal's money laundering offence is the low number of prosecutions, as noted by the FATF.[27] Since Phase 2, the maximum penalty for money laundering under Article 368-A of the Criminal Code has increased from 8 to 12 years. The offence is otherwise unchanged. The Phase 2 Report (para. 77) noted that the offence covers the laundering of bribes to foreign public officials and the proceeds of foreign bribery. In 2008-2011, approximately 8.5 persons per year were

[26] Portugal states that Articles 160A – 160C of Law 144/1999 (on international judicial co-operation; see Annex 4 at p. 38 for the full text of these provisions) also provide for the use of special investigative techniques. These provisions may be used upon the request of the competent authorities of a foreign State to gather evidence in Portugal for use in foreign proceedings.

[27] Financial Action Task Force (FATF) (2006), *Portugal: Third Mutual Evaluation Report*, para. 178.

convicted of money laundering. None of the convictions involved foreign bribery as a predicate offence. The total number of money laundering convictions appears low, considering that there was an average of 61.5 domestic corruption convictions per year over the same period. Information on the range of penalties imposed for money laundering was unavailable.

Commentary

The lead examiners recommend that Portugal take appropriate measures to enforce the money laundering offence, particularly where foreign bribery is the predicate offence. They also recommend that Portugal maintain clearer statistics on investigations, prosecutions, and sanctions related to money laundering, including data on cases where foreign bribery is the predicate offence.

(b) Anti-Money Laundering Measures

118. Portugal has enacted a new law on anti-money laundering/terrorism financing since Phase 2. Law 25/2008 (AML/CFT Law) imposes enhanced and simplified customer due diligence ("CDD") requirements for specified situations, such as the identification of beneficial owners, a prohibition on the licensing of shell banks or maintaining relations with such banks, and additional risk assessments of customers and transactions (Articles 7-10). The AML/CFT Law and regulations apply equally to the Madeira FTZ, including on foreign trusts registered there. Portugal's Financial Intelligence Unit (FIU) is autonomous and operates within the Criminal Police. The FIU has 3 tax experts with access to tax and customs databases, 6 support staff, and 20 financial analysts.

119. A range of entities are required to report suspicious money laundering/terrorism financing transactions (STRs) to the FIU and the Attorney General. These include Portuguese-headquartered financial entities, Portuguese branches of similar entities which have their head office abroad, and off-shore branches. Lawyers and *solicitadores* should file STRs through their professional self-regulatory bodies, though no reports have been made thus far. Various supervisory and oversight entities monitor compliance with reporting obligations. Penalties may be imposed for breach of reporting obligations, including fines up to EUR 2.5 million and EUR 1.25 million for legal and natural persons involved in financial activities respectively. The FIU has issued guidelines on reporting for financial and non-financial entities, but these do not refer explicitly to foreign bribery. The FIU verifies and analyses STRs and reports findings to the Public Prosecution Service, where a suspicion of money laundering or terrorism financing exists. Certain on-site visit participants added that the FIU's feedback to reporting entities could be improved.

120. Portugal's FIU stated that there have been no STRs where foreign bribery was the predicate offence. From 2010 to 2012 (first half), just 14 STRs involved "corruption and crimes committed by Portuguese officials". However, the DCIAP stated that the *Sanitation Services*, *Angola / Guinea*, *Farm Equipment and Aircraft*, *Mining (Zimbabwe)*, and *Aircraft Service Cases* originated from criminal investigations that followed analyses of STRs (see pp. 9-13).

121. Unlike its predecessor, the current AML/CFT Law (Articles 2 and 12) specifically requires CDD for politically exposed persons (PEPs). PEPs include natural persons who hold (or who have held in the previous twelve months) prominent political or public functions. They also include these persons' family members, and individuals with whom they have close business or commercial relationships. Financial institutions are required to have adequate risk-based procedures to identify PEPs. Additional regulations require institutions in the banking, securities market, and insurance sectors to obtain information from (resident or non-resident) customers on the official posts that they hold. Financial institutions must consider this information in defining their customers' risk profiles. Business relationships or transactions with non-resident PEPs are subject to enhanced CDD such as senior management approval before

establishing business relationships with PEPs; measures to determine the origin of the property or funds; and on-going monitoring of the business relationship.

122. Whether these measures adequately address Portugal's exposure to potential money laundering by PEPs is unclear. As mentioned at p. 8, recent reports suggest that PEPs, particularly those from Angola, have substantial investments and financial activities in Portugal. The DCIAP is investigating at least two cases of possible money laundering by senior Angolan public officials (see p. 28). Banks at the on-site visit stated that they continuously monitor money transfers and other activities in accounts belonging to PEPs, and routinely report such activities to the FIU. Nevertheless, not a single investigation into the activities of a PEP has led to prosecution for money laundering. As with foreign bribery enforcement, Portuguese authorities cite the lack of co-operation in the PEP's home jurisdiction as the reason, especially the difficulty in obtaining incriminating evidence. Civil society representatives, however, questioned the authorities' willingness to proactively and effectively investigate and prosecute cases involving PEPs from "politically sensitive" or strategically important countries such as Angola. They pointed to the absence of a single PEP from such countries being convicted in Portugal for money laundering.

Commentary

The lead examiners are concerned that Portugal's AML system may not effectively detect, prevent and prosecute laundering of the proceeds of foreign bribery by PEPs, especially those from jurisdictions with pervasive corruption and close economic ties to Portugal. They therefore recommend that Portugal provide additional training to the FIU, law enforcement authorities, reporting entities and their supervisory and oversight authorities on this issue. Guidelines and typologies to reporting entities that specifically refer to foreign bribery would be helpful. Better feedback by the FIU to reporting institutions regarding STRs would also improve the quality of reporting.

7. Accounting Requirements, External Audit, and Corporate Compliance and Ethics Programmes

123. This section considers Portugal's recent developments and implementation of outstanding Phase 2 recommendations concerning accounting and auditing. The section then examines corporate compliance, internal controls and ethics programmes among Portuguese companies, an area of particular concern.

(a) Accounting Standards

124. Portuguese accounting standards are set out primarily in Decree Laws 35/2005 and 158/2009. These laws aimed to implement the International Accounting Standards and International Financial Reporting Standards as required by European Commission Regulation 1606/2002. Portuguese banks, insurance companies and other financial institutions must apply IFRS in their consolidated statements. Other listed companies are permitted to do so in their annual accounts. Unlisted entities may use IFRS for its consolidated accounts and annual accounts.

(b) Detection of Foreign Bribery by External Auditors

125. The auditing standards relevant to detecting foreign bribery are largely adequate; the main issue is their implementation in practice. Portuguese Auditing Standards are "close to" the International Standards on Auditing (ISAs), according to Portuguese authorities. Decree Law 224/2008 (Audit Statute) has replaced Decree Law 487/1999 that was in force in Phase 2. The current law authorises the Order of Statutory Auditors (OROC) to issue Portuguese Auditing Standards.

126. OROC identified two auditing standards that are relevant to detecting foreign bribery. According to OROC, Portuguese Auditing Standards contain a specific standard "very similar" to ISA 240, which

concerns the detection of fraud. In addition, Portuguese external auditors apply directly ISA 250 concerning the detection of non-compliance with certain laws and regulations, since the Portuguese Auditing Standards do not contain a comparable standard. Under both ISAs 240 and 250, an external auditor's task is to detect material misstatements in a company's financial statements caused by fraud or non-compliance with laws. The auditor's mandate is not to detect foreign bribery *per se*. However, material misstatements may result from foreign bribery. An external auditor should therefore be aware of red-flag indicators of foreign bribery when auditing a company that is at risk of committing this crime.

127. In practice, there are some doubts as to whether Portuguese external auditors effectively detect foreign bribery through external audits. Auditors at the on-site visit stated that they would consider red-flag indicators of foreign bribery, but could not give any examples of these indicators. This is surprising, since many Portuguese companies (and hence the auditors' clients) operate in countries and sectors at risk of committing foreign bribery. The auditors were not aware of any actual cases in which external audit uncovered foreign or domestic bribery. Portuguese authorities also could not provide any information.

128. More efforts could be made to train external auditors to detect foreign bribery. OROC states that courses on ISA 240 and 250, and on evaluating and reporting crimes, have been developed. A "reasonable percentage" of auditors have taken courses on fraud and money laundering, which also covered foreign bribery. A 2008 Circular Letter reminded auditors to "carry out the necessary checks to detect" foreign bribery. Overall, these efforts serve to raise awareness of foreign bribery but do not necessarily educate auditors on how to detect this crime in practice.

Commentary

As noted in the 2009 Anti-Bribery Recommendation, external auditors have an important role in detecting foreign bribery, and reporting indications of suspected acts of bribery to management and, as appropriate, to corporate monitoring bodies. The lead examiners recognise that Portugal has taken steps to raise awareness of foreign bribery among external auditors. Nevertheless, they are concerned that in practice external auditors are not fully realising their potential to detect foreign bribery. They therefore recommend that Portugal train external auditors on how to detect foreign bribery, and further raise awareness among auditors of their role in detecting this crime.

(c) Reporting of Foreign Bribery by External Auditors

129. Portuguese external auditors are required to report foreign bribery to the audited company and law enforcement authorities. The principal issue is whether and how reporting operates in practice.

130. Portuguese external auditors must report to the audited company any material misstatements in the company's financial statements that are caused by fraud or non-compliance with laws and regulations. ISA 240(40)-(42) requires fraud or possible fraud to be reported to management or those charged with the company's governance "on a timely basis". ISA 250(22)-(23) requires auditors to report instances of non-compliance with laws unless the non-compliance is "clearly inconsequential". If the non-compliance is intentional, then the auditor must report "as soon as practicable". Portuguese auditors stated that companies listed in Portugal are not permitted to have a qualified audit report. A listed company that receives an auditor's report of a material misstatement must therefore discuss the matter with authorities. The purpose of the discussion is to change the company's accounts to remove the misstatement.

131. As for reporting outside the company, statutory auditors are required to report "public crimes" to the AG's Office (Law 224/2008 Article 158) but have not reported foreign bribery cases in practice. "Public crimes" are those for which proceedings should be commenced without a complaint, which includes foreign bribery, other corruption offences, and most tax and accounting offences (Phase 2 Report footnote 31). An auditor does not report to the AG's Office directly but through OROC. According to

auditors at the on-site visit, OROC does not filter out reports but may provide advice on whether reporting is necessary in a particular case. In case of disagreement, the auditor decides whether to report to the AG's Office. External auditors have reported an average of 40 cases annually in 2002-2005 (Phase 2 Report, para. 72) and 33.5 cases in 2008-2011. However, none of these reports involved foreign bribery.

132. Sanctions ranging from a fine to expulsion are available in theory for failure to report (Decree Law 224/2008, Article 81) but have rarely been imposed in practice (Phase 2 Report, paras. 73-74). OROC explained that, in Phase 2, it was required to take disciplinary action against an auditor within one year of an infraction, which was too short in cases of non-reporting. This period has since been extended to two years (Decree Law 224/2008, Article 88(1)). However, since this extension there have not been reports of foreign bribery or other corruption offences, or sanctions for failure to report.

133. Training courses and guidance on reporting foreign bribery have been provided to external auditors, as suggested by Phase 2 Recommendation 2(d) (see p. 37). The 2008 Circular Letter referred to foreign bribery but not specifically to reporting. A new Code of Ethics for auditors in January 2012 also did not deal with foreign bribery or reporting.

Commentary

Portugal has taken some steps to raise awareness among external auditors of their duty to report foreign bribery. As noted above, the lead examiners have recommended that Portugal further raise awareness of foreign bribery among external auditors. These awareness-raising efforts should also refer to an auditor's duty to report foreign bribery.

(d) Corporate Compliance, Internal Controls and Ethics Programmes

134. There are major concerns that Portuguese companies do not have adequate corporate compliance, internal controls and ethics programmes to address foreign bribery. Many Portuguese companies are exposed to risks of committing foreign bribery (see p. 8). Companies at the on-site visit largely acknowledged their exposure to this risk. But when asked to describe their efforts to specifically address foreign bribery, they referred only to generic and commonplace measures such as standards on corporate governance, internal audit, and corporate social responsibility. None described tangible efforts targeting foreign bribery, such as policies on facilitation payments or due diligence measures for retaining agents and intermediaries. One business organisation regularly organises overseas missions for its members to obtain business, including from foreign governments. Despite frequent contact with foreign officials, it does not have policies that deal with foreign bribery, or matters such as gifts, hospitality or promotional expenditures. The private sector's awareness of the foreign bribery offence is also very low (see p. 44).

135. Companies at the on-site visit also referred to whistleblowing and codes of ethics, but these too were inadequate. Programmes to promote whistleblowing and to protect whistleblowers in the private sector are largely deficient (see p. 46). Many companies emphasised that they have codes of ethics. However, these codes generally do not refer explicitly to foreign bribery, or to the foreign bribery offences in Portugal or those from other jurisdictions that could apply to Portuguese companies. At most, the codes contain a general prohibition against corruption, or refer to broad principles such as integrity and transparency.

136. Private sector lawyers and auditors at the on-site visit agreed that Portuguese companies – except perhaps those listed in the US – generally do not have foreign bribery-related compliance measures. One lawyer opined that Portuguese companies lacked the compliance culture found in their foreign counterparts. One auditor commented that state-owned enterprises (SOEs) also do not have adequate corporate compliance programmes. Small- and medium-sized enterprises (SMEs), which have fewer resources, are even less likely to have anti-foreign bribery measures. A private-sector initiative created a

website to promote corporate compliance among SMEs. Whether this has resulted in SMEs putting measures in place is unclear.

137. These observations suggest that the Portuguese government's efforts to promote bribery-specific corporate compliance measures have not been effective or sufficient. The Ministry of Justice circulated a booklet that contained the Good Practice Guidance in Annex II of the 2009 Recommendation. The Ministry of Justice and the Criminal Police prepared a "Guide for the Prevention of Corruption" in 2008. Whether this deals with corporate measures is unclear. Other efforts (e.g. by AICEP, Portugal's trade promotion agency) aimed mostly to raise awareness of foreign bribery rather than to promote specific corporate compliance programmes. Most importantly, many government bodies and agencies that interact with the private sector have not played a role. These include the Ministry of Economy and Employment (MEE), Institute for Support to Small and Medium-Sized Enterprises and Innovation (IAPMEI), Directorate-General for Economic Activities (DGAE), and Securities Market Commission (CMVM).

Commentary

The lead examiners are extremely concerned by the lack of corporate compliance, internal controls and ethics programmes in Portugal to explicitly address foreign bribery. They recommend that Portugal make greater efforts to encourage Portuguese companies to adopt these measures. Particular efforts should be made to raise awareness among SMEs, which is a horizontal issue among Parties to the Convention. Portugal's efforts should involve all government bodies that interact with Portuguese companies, including AICEP, Ministry of Economy and Employment, IAPMEI, DGAE, and the CMVM.

The lead examiners also reiterate their earlier recommendation (at p. 29) that Portugal vigorously prosecute legal persons for foreign bribery whenever appropriate. As seen in other jurisdictions, robust enforcement of the foreign bribery offence may be the most effective means of raising awareness. Companies may also be unwilling to incur the expense of implementing effective corporate compliance measures absent a credible threat that wrongdoing would be met with prosecution and substantial penalties.

8. Tax Measures for Combating Bribery

138. This section addresses tax-related measures for combating foreign bribery, including recent developments on detection and information sharing. It also considers the issue of undocumented expenses, which the Working Group has identified as a matter of concern.

(a) Tax Deductibility of Bribe Payments

139. Portuguese tax legislation expressly prohibits the deduction of payments involving breach of Portuguese tax and criminal law, whether the payment is made inside or outside Portugal.[28] Within four years after a tax return is initially filed, tax authorities may examine the return to verify whether bribes had been deducted. If the case involves a criminal investigation, then the period for examination is extended by one year from the closing of the criminal proceedings or when *res judicata* applies.[29] Despite these provisions, the tax authorities did not examine the tax returns of the individuals and companies implicated in the *Burke* and *Medical Equipment Cases*, even though in both cases courts found that bribery occurred. The Portuguese courts also did not inform the tax authorities of the convictions in these cases.

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28 Personal Income Tax Code, Article 33; Corporate Income Tax Code, Article 23.

29 General Tax Law, Article 45(5).

Commentary

The lead examiners recommend that the Working Group follow up the enforcement of the non-tax deductibility of foreign bribes, particularly whether Portuguese courts promptly inform the tax authorities of convictions related to foreign bribery, and whether tax authorities examine the tax returns of taxpayers convicted of foreign bribery.

(b) Detection and Awareness-Raising

140. Portugal has issued guidance to tax examiners on detecting foreign bribery, though the guidance has not been integrated into its standard manual for tax examinations. Phase 2 Recommendation 2(c) asked Portugal to "draw clear guidelines for the tax authorities prescribing the verification to be undertaken" to detect foreign bribery. In 2009, the OECD Bribery Awareness Handbook for Tax Examiners was translated into Portuguese, disseminated to all tax examiners, and made available on the internet. However, the Handbook has not been incorporated into the standard Manual for Tax Auditing which tax examiners are required to consult before each tax examination. Tax examiners may therefore not systematically apply the Handbook when conducting tax examinations. Portugal expects to update the Manual before hiring 1 000 new tax inspectors in 2013.

141. The Manual for Tax Auditing also does not refer to the use of shell entities as an indicator of possible foreign bribery. Portuguese tax authorities have identified several cases in which payments were made through "cover entities" (i.e. shell companies) to foreign officials in relation to the award of public procurement contracts. Some of these shell companies were registered in the Madeira FTZ. It is unclear whether Portuguese tax authorities systematically undertake any specific diligence regarding cover entities.

Commentary

The lead examiners commend Portugal for disseminating the OECD Bribery Awareness Handbook to tax examiners. However, Portugal should incorporate the essential elements of the Handbook into the standard Manual for Tax Auditing. To enhance the detection of foreign bribery, the Manual should be regularly updated to reflect the latest trends on how this crime is committed. Portugal should also provide guidelines and training with the Handbook to existing and newly recruited tax examiners.

(c) Undocumented Expenses

142. In Phase 2, the Working Group concluded that "confidential expenses" and "undocumented expenses" under Portuguese tax legislation, though both not tax deductible, could nevertheless be used to hide bribes paid to foreign public officials. Portugal has since eliminated "confidential expenses" but not "undocumented expenses".

143. Until 2007, a Portuguese taxpayer could declare "confidential expenses". This entitled the taxpayer to withhold the nature and recipient of an expense from tax authorities by paying a charge equivalent to 50% of the expense to the authorities. Without the details about the expense, tax examiners would have difficulty determining the true nature of the expense. Bribes declared as confidential expenses could therefore remain undetected (Phase 2 Report, paras. 60-61). Portugal has since amended its tax legislation to disallow confidential expenses, as per Phase 2 Recommendation 2(c) (Phase 2 Written Follow-Up Report, para. 6).

144. However, Portuguese taxpayers may continue to report "undocumented expenses" although they are not tax deductible. Taxpayers are required by law to produce receipts or invoices that would allow the identification of the nature and beneficiary of a transaction, even if a tax deduction is not sought or available for the expense. If they fail to produce and keep such documentation, the expense is not tax

deductible and they must pay a charge equal to 50% (or 70% in some cases) of the amount of the expense (plus an additional fine of up to EUR 2 000 in some cases).[30] The only difference between undocumented and confidential expenses is that the former must be recorded in the taxpayer's books.[31] Portuguese taxpayers reported EUR 96.6 million in undocumented expenses in 2009-2011.

145. The Working Group has stated that undocumented expenses could potentially be used to hide bribes paid to foreign officials.[32] A taxpayer could attempt to declare a bribe as an undocumented expense given that he/she does not have to provide documents proving the expense. At the on-site visit, Portuguese tax authorities sought to alleviate this concern by stating that they would investigate any undocumented expenses that appear suspicious. Nevertheless, without supporting documentation, it would be extremely difficult for a tax examiner to verify whether an expense is a payment associated with bribery or other economic crimes. Furthermore, the level of suspicion required to trigger an investigation is not stipulated and may be unduly high in practice. As one tax official stated that, while a EUR 1 million undocumented expense might generate an investigation, a EUR 10 000 one would not. Participants at the on-site visit also could not identify any cases in which an undocumented expense has resulted in an investigation by tax or law enforcement authorities.

Commentary

The lead examiners commend Portugal for disallowing "confidential expenses". Though not tax deductible, Portuguese tax legislation continues to allow taxpayers to declare "undocumented expenses" which, as noted earlier by the Working Group, could prevent tax examiners from detecting bribe payments. They thus recommend that Portugal take all appropriate measures to discourage the use of undocumented expenses, and ensure that tax examiners routinely assess whether undocumented expenses are hidden bribes.

(d) Reporting Foreign Bribery and Sharing Tax Information

146. Whether Portuguese tax officials systematically report suspected cases of foreign bribery to law enforcement is unclear. The general obligation on all Portuguese public officials to report crimes (see p. 45) applies to tax authorities. Tax secrecy rules do not apply to co-operation between the tax administration and Portuguese law enforcement. Portugal has not issued any guidance on reporting to tax examiners. Statistics on reporting by tax officials are not available. As noted at p. 40, Portuguese tax authorities have identified several cases where payments to foreign officials involved in public procurement were channelled through shell companies. These cases do not appear to have been reported to DCIAP, which has stated that only one foreign bribery allegation (*Supermarket Case*) originated from a tax investigation.

147. Portuguese tax authorities can exchange information with foreign authorities pursuant to an applicable agreement, or EU Directive or Regulation. Portugal is party to 54 tax conventions and 7 tax information exchange agreements (TIEAs). However, only some of its tax conventions include the optional language of the OECD Model Tax Convention allowing the use of information for non-tax purposes, including for combating serious crimes, if certain conditions are met. In addition, Portugal signed in 2010 but has yet to ratify the Convention on Mutual Administrative Assistance in Tax Matters. Article 22.4 of the Convention allows the sharing of information with law enforcement to combat corruption and other financial crimes under certain conditions.

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30 Legal Regime of Tributary Offences (RGIT) Article 123(2). Corporate Income Tax Code (IRC) Article 88(1); and Personal Income Tax Code (IRS) Article 73(1).

31 Corporate Income Tax Code (IRC) Article 123.

32 Phase 2 Written Follow-up Report, para. 6.

Commentary

The lead examiners recommend that Portugal (a) promptly ratify the Convention on Mutual Administrative Assistance in Tax Matters and (b) consider systematically including the language of Article 26 of the OECD Model Tax Convention (on the use of information for non-tax purposes) in its future bilateral tax treaties with countries that are not signatories of the Convention on Mutual Administrative Assistance in Tax Matters. The lead examiners also recommend that the Working Group follow up the reporting of foreign bribery cases by Portuguese tax officials.

9. International Co-operation

148. This section discusses general issues concerning mutual legal assistance (MLA) and extradition in foreign bribery cases. Issues raised in specific enforcement actions are discussed at p. 24.

(a) Mutual Legal Assistance

149. Since Phase 2, there have been no changes to Portugal's framework for MLA. Portugal is party to 13 bilateral MLA treaties[33] and the following multilateral agreements: the MLA agreement with the Portuguese Speaking Countries Community (CPLP) countries; UN Convention against Transnational Organized Crime (including the 3 additional Protocols) (UNTOC); UN Convention against Corruption (UNCAC); 1959 European Convention on Mutual Assistance in Criminal Matters (including the 1978 and 2001 protocols); and the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (and 2001 Protocol). The CMVM has signed the International Organization of Securities Commissions Multilateral Memorandum of Understanding.

150. Law 144/1999 regulates international judicial co-operation in criminal matters. The forms of co-operation provided in the Law are to be carried out in accordance with international treaties, conventions and agreements that bind the Portuguese State. Where such provisions do not exist or suffice, Law 144/1999 applies (Article 3). Portugal may seek and provide MLA without an applicable treaty on the basis of reciprocity (Article 4). Dual criminality is required if the request is for coercive measures (Article 147). The Law designates the Attorney General's Office (AGO) as the "central authority" for receiving and transmitting requests for co-operation. MLA requests may also be transmitted directly between competent judicial authorities (Article 152(1)). The DCIAP executes incoming MLA requests that concern foreign bribery (Circular Letter No. 2/2011).

151. Portugal states that it may provide MLA to foreign countries for use in civil or administrative proceedings against legal persons for foreign bribery. Several Parties to the Convention can only institute civil or administrative – but not criminal – proceedings against legal persons for foreign bribery. Portugal indicates that it can provide MLA in these cases pursuant to Article 1(3)(b) of Law 144/1999. However, the provision only applies to offences of a "regulatory nature" which arguably may not cover foreign bribery.

152. Portugal has sought and provided MLA in foreign bribery cases and cases in which a foreign company bribed a Portuguese public official. Since 2009, Portugal has received only two such requests which were executed in 3-5 months. Portugal has also sent several MLA requests but could not indicate the exact number or whether these requests were treaty-based. Some of these outgoing requests have taken between 5 months to 3 years to execute; others remain outstanding.

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[33] With Algeria, Argentina, Australia, Brazil, Canada, China, Germany, Hong Kong, Mexico, Morocco, Tunisia, São Tomé and Príncipe, and the US.

153. Portugal has taken some steps to improve co-operation on MLA with certain foreign countries though more should be done. Portugal states that it has had difficulties obtaining MLA from countries such as Angola (see p. 28). In response, it recently trained prosecutors from Angola and other Portuguese-speaking countries to raise awareness of international co-operation in criminal matters and to set up contact points. Through Portugal's initiative, the Conference of Ministers of Justice of the Portuguese Official Language Speaking Countries (CMJPLOP) has set up a working group to harmonise existing legislation on foreign bribery in member States[34] and to adopt an action plan for this purpose. These initiatives are commendable. Nevertheless, as described at p. 24, Portuguese authorities need to be more proactive in requesting MLA and in pursuing these requests. Furthermore, Portugal states that obstacles to obtaining MLA may probably be due to interference by foreign political authorities in the judicial system. This may call for closer engagement with these countries on a diplomatic level, and not merely on a technical plane through training seminars.

Commentary

The lead examiners welcome Portugal's initiative to improve co-operation with CPLP and CMJPLOP countries. Nevertheless, they reiterate their recommendation at p. 24 that Portugal proactively seek co-operation and MLA from foreign authorities whenever appropriate. They also recommend that the Working Group follow up whether MLA can be provided in foreign bribery-related civil or administrative proceedings against a legal person to a foreign state whose legal system does not allow criminal liability of legal persons. This is a horizontal issue among Parties to the Convention.

(b) Extradition

154. Portugal is party to 17 bilateral extradition treaties[35] and to an agreement on simplified extradition with Argentina, Brazil, and Spain. It is party to the European Convention on Extradition of the Council of Europe and the 1st and 2nd Additional Protocols (the 3rd protocol is signed but not ratified), UNTOC and UNCAC. The CPLP also has a multilateral agreement on extradition. Law 144/1999 governs the execution of extradition requests where international treaties, conventions and agreements that bind the Portuguese State do not exist or suffice (Article 3). Extradition may be granted in the absence of a treaty on the basis of reciprocity (Article 4). Dual criminality is required: the conduct underlying an extradition request must be punishable by deprivation of liberty for at least one year in Portugal and the requesting state (Article 31). Extradition to EU countries may be effected through a European Arrest Warrant as implemented under Law 65/2003.

155. Portugal provided statistics on extradition. Portugal sent and received approximately 160 and 110 European Arrest Warrant requests annually in 2010-2012. Over the same period, an annual average of 9 and 11 extradition requests were sent and received respectively. Portugal has not received a request to extradite an individual for foreign bribery. It could not execute one extradition request in a corruption case because the fugitive, found in transit in the Lisbon airport, held an Angolan diplomatic passport.

156. The grounds for refusing extradition are listed in Article 32 of Law 144/1999. The effective regret defence (see p. 16) is not mentioned in that provision. Extradition thus cannot be declined on the basis that the person sought has successfully raised this defence, according to Portuguese authorities.

157. Portugal generally declines to extradite its nationals. The only exception is where an agreement to which Portugal is party requires extradition for offences of terrorism and international organised crime,

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34 See the Recommendation adopted by the Conference of Ministers in Santiago, Chile, 5-6 May 2013.

35 With Algeria, Argentina Australia, Bolivia, Botswana, Brazil, Chile, China, Hong Kong, India, Mexico, Morocco, Netherlands, Russian Federation, Switzerland, Tunisia and US.

and if the legal system of the requesting state sufficiently guarantees a fair trial. If extradition is refused by Portugal solely on the basis of nationality, then "criminal proceedings shall be instituted for the offence [underlying the request, and] the requesting State shall be asked to provide such information as is necessary" (Law 144/1999, Article 32). Portugal has never prosecuted a national for foreign bribery on this basis. In the *Real Estate (Macau) Case*, a Portuguese national C allegedly bribed public officials in Macau before returning to Portugal. Portuguese authorities requested Macau to transfer the proceedings to Portugal but were refused. C was then convicted *in absentia* in Macau, but Macau authorities have not sought his extradition from Portugal. As described at p. 25, Portugal has not engaged in further discussions with Macau regarding C's extradition or transfer of proceedings. It also has not commenced an investigation or prosecution in Portugal against C for foreign bribery.

Commentary

The lead examiners recommend that the Working Group follow up the application of Article 32 of Law 144/1999 in foreign bribery cases.

10. Public Awareness and the Reporting of Foreign Bribery

158. The section considers Portugal's efforts to raise awareness of foreign bribery and to encourage reporting. Efforts in these areas relating to tax and public advantages are described at pp. 40 and 47.

(a) Awareness of the Convention and the Offence of Foreign Bribery

159. Two points concerning awareness of foreign bribery in Portugal are of note. First, Portuguese authorities have made some efforts to raise awareness, but several relevant government bodies have not been involved. Second, actual awareness is low, particularly among companies. Phase 2 Recommendations 1(a) and 1(b) have therefore not been fully implemented.

160. The Ministry of Justice (MOJ) has made some efforts to raise awareness, with additional steps taken by AICEP (official trade promotion agency) and the Ministry of Foreign Affairs (MFA). In 2011, the MOJ translated the "2010 OECD Booklet on Corruption in International Business Transactions". The Booklet was sent to public and private entities, business associations, and 60 major exporting companies. In 2007, the MOJ and the Criminal Police prepared a "Guide for the Prevention of Corruption" that was sent and disseminated to the public and private sectors. The MOJ organised a workshop in December 2010 on corruption in international business that was attended by representatives from law enforcement, and the public and private sectors. The MOJ and Ministry of Finance organised exhibitions on anti-corruption around Portugal which covered foreign bribery. AICEP has sent to 6 400 SMEs and large companies information on the Convention, Portuguese foreign bribery legislation, and "measures to avoid being involved in foreign bribery". The Convention is on AICEP's external website and intranet, which is accessible to all staff. AICEP seminars for enterprises cover corruption in international business. AICEP staff also received a circular on foreign bribery and guidelines to prevent corruption. The MFA has sent a circular to its staff, embassies and missions on reporting foreign bribery (see p. 45 for details).

161. Other relevant ministries and bodies have made limited efforts to raise awareness of foreign bribery within the public or private sectors. The Securities Market Commission (CMVM) interacts with the private sector and is therefore well-placed to engage in awareness-raising. The Ministry of Economy and Employment (MEE) develops economic policies on "the internationalisation of enterprises and the promotion of foreign trade" but has not addressed foreign bribery. The Institute for Support to Small and Medium-Sized Enterprises and Innovation (IAPMEI) assists Portuguese SMEs. But it has not helped SMEs address foreign bribery, apart from linking the Convention, Working Group reports, and Law 20/2008 on its websites. After the on-site visit, IAPMEI added that its website provides some additional information, such as how to prevent corruption. Future IAPMEI events with entrepreneurs would also refer to the Convention. The Directorate-General for Economic Activities (DGAE) is Portugal's National Contact

Point under the OECD Guidelines for Multinational Enterprises (MNE Guidelines). Its work thus far has not specifically concerned foreign bribery or corruption. The Directorate General for the Qualification of Workers in Public Functions (INA) (former National Institute of Administration (INA)) administer and train the Portuguese civil service. Neither has raised awareness of foreign bribery within the public sector.

162. Portugal places substantial importance on the Council for the Prevention of Corruption (CPC) but this body is concerned with corruption of Portuguese officials and not foreign bribery. The CPC was established in 2008 to develop a national strategy to prevent corruption and related crimes. It has conducted seminars and conferences, and issued recommendations and best practices to public bodies and "companies of the public sector". Unfortunately, the CPC's work has not addressed foreign bribery or the supply side of corruption. There is also no overall national strategy in Portugal to deal with foreign bribery.

163. These limited and fragmented efforts have resulted in an alarmingly low level of awareness. When asked to describe what they knew about Portugal's foreign bribery offence, two large companies at the on-site visit stated that Portugal does not have jurisdiction to prosecute the crime. General counsel of two companies stated that corporations could not be criminally liable for the offence. Another company said the offence was in the Criminal Code. Only one participant was aware of Law 20/2008.

164. A lack of interest in the issue of foreign bribery compounds the concerns about the low level of awareness. As described at p. 38, Portuguese companies appear aware of their exposure to the risks of committing foreign bribery but lack compliance programmes that specifically address the issue. Unlike their counterparts in other jurisdictions, most Portuguese accounting firms in recent years have not urged their clients to implement corporate compliance measures to prevent the violation of UK and US foreign bribery legislation. When asked why the Portuguese media did not initially report the *Public Works (Malawi) Case*, a journalist at the on-site visit bluntly replied that, "Malawi does not sell." Thus a story involving a major Portuguese company bribing the president of a foreign country was not considered newsworthy.

Commentary

The lead examiners are alarmed by the low level of awareness of foreign bribery and the lack of interest in this issue in Portugal by the private sector and media. Awareness-raising efforts to date have been insufficient and fragmented. Portugal should therefore take steps to raise awareness in the private sector and media. Awareness-raising efforts should involve all relevant ministries and bodies. In particular, the MFA and AICEP need to proactively reach out to Portuguese companies, especially in high risk countries. Finally, the lack of enforcement of the foreign bribery offence exacerbates the lack of awareness. The lead examiners therefore again reiterate their recommendation (at p. 29) that Portugal vigorously enforce its foreign bribery offence.

(b) Reporting Suspected Acts of Foreign Bribery

165. In Portugal, public officials must report to the prosecutor offences that they learn of while performing their duties. Breach of this obligation may result in sanctions.[36] Portugal states that there is no general requirement to first report or discuss the matter internally within the administration. Reports to the prosecutor can be made in writing, by telephone or by email. Statistics on actual reports and sanctions for failure to report were not available.

166. Limited efforts have been made to ensure that this requirement results in the reporting of foreign bribery. The MFA and DCIAP have adopted a reporting procedure. In 2009, the MFA sent a circular letter

[36] Code of Criminal Procedure, Article 242; Law 58/2008, Articles 8-9 and 15-19.

reminding its foreign missions to report foreign bribery allegations. Unfortunately, the letter recommended that reports be sent to the MFA in Lisbon rather than directly to DCIAP (Written Follow-Up Report, para. 5). A second circular letter was disseminated more recently but a copy of the letter was not provided in this evaluation. In December 2012, the MFA conducted a survey of its overseas missions and found that "a great majority" of its diplomatic missions did not have information on foreign bribery concerning Portuguese companies or individuals. It is unclear whether the remaining minority of missions had information of this nature or merely did not respond to the survey. The survey results were communicated to DCIAP. Other public officials have not been reminded of their reporting obligations, as suggested in Phase 2 Recommendation 2(a).

167. Foreign media is an important source of foreign bribery allegations whose potential is not fully tapped. Portugal did not immediately investigate allegations that were widely publicised in foreign jurisdictions in the *Public Works, Real Estate (Macau)* and *Parliamentarian No. 2 Cases*. In the *Plane Acquisition, Highway* and *Fish Conservatory Cases*, Portuguese authorities learned of many of these allegations from the Working Group, which had obtained the information from international press reports. The MFA circular letters described above specifically asked staff to forward media reports of foreign bribery allegations involving Portuguese companies. In practice, Portuguese diplomatic missions are either not reporting allegations to DCIAP as instructed, or not properly monitoring the media for allegations.

168. In practice, foreign bribery allegations have surfaced from other sources. At least three cases originated from suspicious money laundering transaction reports (*Sanitation Services; Angola / Guinea;* and *Farm Equipment and Aircraft Cases*). The allegations in the *Real Estate (Angola) Case* were found in an MLA request from a foreign country. The *Supermarket Case* started after an unrelated tax investigation.

169. Private individuals, unlike public officials, are not obliged to report crimes. The AG's Office created an email account in 2010 for receiving reports of corruption. Anonymous reports are allowed, though persons implicated by the reports have the right to be informed. Of the 1 600 reports received so far, none involved foreign bribery.

Commentary

The lead examiners are extremely concerned that Portuguese public officials are not forwarding widely publicised foreign bribery allegations to the DCIAP. They therefore reiterate their recommendation at p. 24 that Portugal increase the use of proactive steps to gather information from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations. In particular, Portugal should provide information and training as appropriate to their public officials posted abroad on implementing the Convention as suggested in the 2009 Recommendation. The MFA should also take further steps to ensure that its overseas missions report all foreign bribery allegations involving Portuguese companies or individuals to Portuguese law enforcement authorities.

(c) Whistleblowing and Whistleblower Protection

170. Portugal has only a rudimentary mechanism to encourage and protect whistleblowers in the public sector. Under Article 4 of Law 19/2008, workers of the public administration and state-owned companies who report crimes cannot be "harmed". "Harm" includes a "non-voluntary transfer". Disciplinary sanctions against a whistleblower within one year of a report are also presumed "abusive". The provision does not expressly cover other types of reprisals, though Portugal contends that the term "harm" is sufficient. Supporting jurisprudence was not provided. Whistleblowers may remain anonymous only before charges are filed, at which point they are entitled to request a transfer. There is no indication how anonymity would be ensured, or how a whistleblower may seek redress for reprisals. The effectiveness of these provisions cannot be assessed since statistics on the incidence of reports, reprisals,

and protection are unavailable. Portugal has not made efforts to promote this provision among public officials.

171. Whistleblowers in the private sector have even less protection since there is no legislation comparable to Law 19/2008. Legislation on unjust dismissal is not sufficient to protect whistleblowers. Law 93/1999, to which Portuguese authorities refer, protects whistleblowers only if they become witnesses in a criminal procedure. Moreover, the Law does not cover all forms of retribution, but only endangerment to "life, physical or mental integrity, freedom, or property of high value". Article 22 of this Law accordingly only offers protection against physical dangers. Portuguese authorities have not encouraged companies to fill the legislative void, as suggested in Phase 2 Recommendation 2(f). Few Portuguese companies offer whistleblowers adequate protection, based on the discussions at the on-site visit and publicly available information. Portuguese authorities expect to enact the necessary legislation when it ratifies the Council of Europe Civil Law Convention against Corruption.

Commentary

The lead examiners reiterate Phase 2 Recommendation 2(f) and urge Portugal to ensure that appropriate measures are in place to protect public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of foreign bribery from discriminatory or disciplinary action.

11. Public Advantages

172. This section considers several post-Phase 2 developments involving public procurement debarment, official development assistance and export credits. It also deals with several outstanding Phase 2 Recommendations concerning awareness-raising, criminal records, contract clauses, and reporting.

(a) Public Procurement

173. The statutory regime for debarment due to foreign bribery has changed since Phase 2. The principal provisions are now found in Article 55 of the Code of Public Procurement (Decree Law 18/2008). Debarment results if an individual, a company, or a company's officers or management has been finally convicted of listed crimes, including corruption. Criminal Code Article 90-H also allows a court to prohibit a legal person that has been convicted of a crime from entering into certain contracts or contracts with certain entities for one to five years. This provision succeeds Article 8 of Decree Law 28/1984 to which the Phase 2 Report referred. The procurement officials from Entity for Shared Services in the Public Administration at the on-site visit were unaware of Article 90-H. Of the 74 debarments against legal persons in 2007-2011, none was debarred due to convictions for corruption, money laundering or fraud.

174. One concern is that not all procuring authorities verify whether a company has a prior foreign bribery conviction. Portugal has created a database of criminal convictions of legal persons, as suggested in Phase 2 Recommendation 6(b). Some authorities either check the criminal conviction database directly or require a contractor to submit (in the tender application) a certificate of no-conviction issued by the criminal record registry. However, one authority at the on-site visit does so only if a contractor is an individual, not a company.

Commentary

The lead examiners commend Portugal for creating a database of corporate criminal convictions. They recommend that Portugal ensure that all procuring authorities verify whether participants in public procurement, including legal persons, have foreign bribery convictions. Portugal should also raise awareness of Criminal Code Article 90-H among procuring authorities so that court-ordered debarment is effectively enforced.

(b) Official Development Assistance

175. Portugal's bilateral official development assistance (ODA) in 2010 and 2011 was EUR 299 million and EUR 343 million respectively. The main recipient countries were Mozambique, Cape Verde, Timor-Leste, São Tomé and Príncipe, Angola, Guinea-Bissau, Afghanistan, Brazil, Kosovo and China. Data for 2012 and budget estimates for 2013-2014 were not yet available. In Phase 2, the Institute of Development Assistance (IPAD) provided ODA funds to finance projects in developing countries. At the end of 2012, IPAD merged with the Camões Institute to form Camões-Institute for Co-operation and Language (CICL). Project funding is currently provided only to development NGOs but could be extended to other NGOs and companies in the future. In 2007, SOFID was created to provide loans, guarantees or share capital to private sector companies that conduct aid projects in developing countries. The Portuguese state owns 60% of SOFID; the other shareholders are Portuguese financial institutions.

176. IPAD, its successor CICL, and SOFID have done little to raise awareness of foreign bribery, as suggested in Phase 2 Recommendation 1(c). IPAD disseminated the Phase 2 Report to its staff posted abroad. It also prepared an internal guideline on the importance of fighting corruption and created an email account for reporting corruption, fraud and other irregularities. CICL and SOFID have undertaken to raise awareness internally and externally in the near future.

177. SOFID and IPAD/CICL have limited measures to prevent and detect foreign bribery. IPAD contracts require contractors to prevent "irregularities, fraud, corruption and other illicit activities". The contract does not specifically cover foreign bribery (Phase 2 Recommendation 6(c)). Furthermore, the contracts do not require contractors to declare that they have not and will not engage in foreign bribery. There are also no clauses that allow the contract to be annulled if the contractor engages in foreign bribery. SOFID contracts do not contain anti-corruption clauses. SOFID and CICL do not consider whether a recipient of ODA funds has been debarred by multilateral development banks, or has internal controls and compliance measures to address foreign bribery. SOFID audits the projects it funds, but not specifically whether foreign bribery has been committed in connection with the project. CICL audits all NGO projects and projects over EUR 500 000 per year.

178. As for reporting, Article 242 of the Criminal Procedure Code requires all Portuguese public officials including CICL staff to report crimes to the prosecutor. Under CICL's Code of Conduct, staff may report offences internally and anonymously, including through an email account. It is unclear how internal anonymous reporting is reconciled with the duty to report to the prosecutor. IPAD's contracts also required contractors to report crimes to IPAD or law enforcement authorities (but not specifically Portuguese law enforcement). SOFID does not have written policies to report foreign bribery and does not consider itself bound by Article 242. Guidelines on reporting foreign bribery, as suggested by Phase 2 Recommendation 2(b), have not been issued.

179. CICL and SOFID do not have clear policies on denying ODA funds to individuals and companies that have been convicted of foreign bribery. IPAD did not deny funds under these circumstances in Phase 2. In Phase 3, CICL stated that it "would not maintain any kind of relation" with suppliers that are not aligned with its Code of Ethics". How this is enforced in practice is unclear. No debarments due to corruption have been imposed. SOFID stated that it rejects applications from any entity that it has internally blacklisted due to foreign bribery or other illicit activities. It does not consult the blacklists of multilateral development banks.

Commentary

The lead examiners recommend that CICL and SOFID (a) raise awareness of foreign bribery among their staff, the public and private sector partners; (b) ensure all foreign bribery allegations involving Portuguese companies or individuals are reported to the Portuguese law enforcement authorities, and issue guidelines to staff on the reporting procedure; (c) insert

appropriate anti-corruption clauses in their contracts; and (d) before approving support for a project, consider whether the recipient of support has a prior conviction for foreign bribery.

(c) Officially Supported Export Credits

180. The *Companhia de Seguros de Crédito* (COSEC) is Portugal's officially supported export credit and insurance agency. COSEC receives and analyses all applications for support before presenting them to the Secretary of State for Finance for approval. If approved, COSEC manages the support. The Financial Guarantees Council referred to in the Phase 2 Report (footnote 22) has been abolished. Applications for support, especially from SMEs, significantly increased after COSEC expanded its programme in 2009.

181. COSEC believes it has a limited role in detecting foreign bribery but has nevertheless made some efforts to raise awareness. It has provided the 2006 Export Credits Recommendation (in Portuguese) to new applicants for support and to 62 entities in the public and private sectors. COSEC explains to applicants the consequences of engaging in corruption. Training for new employees touched upon foreign bribery and money laundering. According to a 2008 OECD survey,[37] COSEC checks whether an exporter, applicant and agent listed in an application has been debarred by multilateral development banks (MDBs). Enhanced due diligence is conducted if there is reason to believe or there is credible evidence that foreign bribery was involved in the export transaction. The same applies if an exporter or applicant has been blacklisted by an MDB, has been convicted of foreign bribery in the past five years, or is currently charged with foreign bribery.

182. Due diligence conducted on agent fees and commissions raises some concerns. COSEC provides support for such fees up to a ceiling that is determined based on the "usual standard according to business practice". In Phase 2 (para. 42), the ceiling was described as "the average level according to the business underwritten", and in practice "is generally considered to be 5% of the [export] contract value". In Phase 3, COSEC clarified that it may support agent fees above the 5% threshold after conducting further due diligence. What this due diligence comprises of is unclear. Furthermore, COSEC requires disclosure of the purpose of agent fees and the agent's contact information only under limited circumstances.[38] It is unclear why disclosure of such basic information is not routinely required.

183. COSEC has rectified the anti-corruption declaration in its standard contracts (Phase 2 Follow-up Issue 7(d)). The declaration previously referred to an incorrect provision for the foreign bribery offence and did not cover the bribery of all foreign officials. The declaration now merely refers to the Convention, 2006 Export Credits Recommendation, and Portuguese penal law provisions on "bribery detrimental to international business transactions".

184. COSEC's policy and procedure for reporting foreign bribery to law enforcement is very unclear. The Phase 2 Report (para. 43) stated that Article 242 of the Criminal Procedure Code did not apply to COSEC. But in Phase 3, COSEC stated that it would report foreign bribery following "the rules set forth in the Criminal Code and Code of Criminal Procedure". At the on-site visit, COSEC said that it would consult its lawyers before reporting to the prosecutor through "regular channels". The 2008 survey describe another different process. COSEC would always notify law enforcement if it had credible evidence of foreign bribery before support is approved, or if foreign bribery is proven after support is granted. Surprisingly, COSEC would not necessarily notify law enforcement if it has credible evidence or a reasonable belief of foreign bribery after approving support. Phase 2 Recommendation 2(b) asked Portugal to "issue specific instructions/guidance" on reporting. COSEC referred to its 2008 Code of Conduct (Article 20) and a circular on Communications of Irregularities. However, it is unclear whether these

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37 Responses to Questions 9-15 of the "Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits" conducted by the OECD Working Party on Export Credits and Credit Guarantees.

38 *Ibid.*, response to Question 7.

documents cover only wrongdoing by COSEC staff or also crimes committed by COSEC clients. The documents also only require reporting to COSEC's fiscal council, not to law enforcement.

185. Engaging in foreign bribery does not always result in denial of support. A prior conviction for foreign bribery triggers enhanced due diligence but not necessarily debarment. COSEC also checks whether corrective measures have been taken, maintained and documented. Support would be terminated if it has been granted and foreign bribery was then proven to have been involved.

Commentary

The lead examiners are concerned that COSEC considers that it has a limited role in detecting foreign bribery. They recommend that COSEC continue to proactively raise awareness of foreign bribery among its clients and staff, and train its staff on how to detect foreign bribery by conducting appropriate due diligence. Due diligence for agent fees and commissions should be strengthened. COSEC should also adopt a clear, written policy on reporting foreign bribery allegations to law enforcement, and issue guidelines to staff on this issue.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

186. The Working Group is seriously concerned about Portugal's implementation of the Convention. Portugal's record of foreign bribery enforcement has been low. Portugal's strong economic links to countries plagued by severe corruption means its companies are highly exposed to the risk of committing foreign bribery. Yet, only 15 foreign bribery allegations have surfaced since Portugal became a party to the Convention in 2001. Of even greater concern is that these allegations have not yet resulted in a single prosecution. Portuguese authorities did not proactively investigate or seek the co-operation of foreign authorities in many of these cases. Several investigations were also closed prematurely. In part because of this lack of enforcement, Portuguese companies and media have an alarmingly low level of awareness of and interest in the fight against foreign bribery.

187. The Working Group is also concerned that Portugal's foreign bribery investigations and prosecutions may potentially be influenced by factors prohibited under Article 5 of the Convention. Many of Portugal's foreign bribery allegations involve high-level foreign officials and/or major Portuguese companies and their executives. These cases have not yet resulted in prosecution, though some investigations are on-going. The number of foreign bribery cases involving Angola, and recent threats of economic retaliation by Angolan senior officials and media in response to reported investigations of Angolan officials by Portuguese authorities raise concerns. There are also concerns over the detection, prevention and enforcement of money laundering by politically exposed persons, especially those from jurisdictions with pervasive corruption and close economic ties to Portugal.

188. Regarding outstanding recommendations from previous evaluations, since Portugal's Phase 2 Written Follow-Up Report, Phase 2 Recommendations 2(d), 3(b), 4(a), 5(a), 6(b) have been fully implemented or have become moot. Recommendations 1(a), 1(b), 1(c), 2(a), 2(b), 2(c), 2(f), 3(a), 3(d), 5(b), 6(a) and 6(c) are only partially implemented or not implemented at all.

189. In conclusion, based on the findings in this report on Portugal's implementation of the Convention, the 2009 Recommendation and related OECD anti-bribery instruments, the Working Group (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and

(2) will follow up the issues identified in Part 2. The Working Group invites Portugal to provide a written self-assessment report within one year (i.e., by June 2014) on (1) all of its foreign bribery investigations and prosecutions, and (2) the implementation of recommendations 3, 5(a), 5(b), 5(c), 5(e), 5(f), and 11. Portugal is further invited to submit a written follow-up report within two years (i.e., by June 2015) on all recommendations, follow-up issues, and foreign bribery investigations and prosecutions. The Working Group will take appropriate measures throughout this process, including the possibility of a Phase 3*bis* evaluation, should Portugal have failed to take steps to adequately address its recommendations.

1. Recommendations of the Working Group

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

1. With regards to the foreign bribery offence, the Working Group recommends that Portugal take all measures to clarify that:

   (a) The offence does not require proof that (i) the foreign public official knows of the offer or promise of the bribe for a completed offence, (ii) the briber knows the details and identity of the recipient of the bribe, when the bribery is committed through an intermediary, and (iii) the official knows that an improper advantage has been given to a third party (Convention Article 1; 2009 Recommendation III.ii and V);

   (b) The offence covers (i) bribery of any person exercising a public function for a foreign country, and officials of autonomous territories and separate customs territories; and (ii) bribery in order that an official act or refrain from acting in relation to the performance of official duties (Convention Article 1; 2009 Recommendation III.ii and V);

   (c) Criminal Code Article 374 and Law 34/1987 Article 18 do not apply to foreign bribery cases (Convention Article 1; 2009 Recommendation III.ii and V).

2. With regards to defences to the foreign bribery offence, the Working Group recommends that Portugal amend Article 5(b) of Law 20/2008 and eliminate the effective regret defence from the active foreign bribery offence (Convention, Article 1; 2009 Recommendation III.ii, V).

3. With regards to liability of legal persons, the Working Group recommends that Portugal amend Article 11 of the Criminal Code (a) so that all legal persons, including state-owned or state-controlled enterprises, can be held criminally responsible for foreign bribery, and (b) to repeal the defence of acting against express orders of legal persons (Convention Article 2; 2009 Recommendation Annex I.B).

4. With regards to sanctions and confiscation, the Working Group recommends that Portugal:

   (a) Take steps to ensure that sanctions against natural persons are effective, proportionate and dissuasive in all foreign bribery cases, in light of the system of converting prison sentences to fines (Convention Article 3(1));

   (b) Take steps to make full use of confiscation measures available in its law and ensure that law enforcement authorities routinely consider confiscation in foreign bribery cases (Convention Article 3(3)).

5. Regarding investigations and prosecutions, the Working Group recommends that Portugal:

   (a) Review its overall approach to enforcement, especially regarding corporations, in order to effectively combat international bribery of foreign public officials (Convention Articles 1, 2, 5; 2009 Recommendation V);

(b) Increase the use of proactive steps to gather information from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations (Convention Article 5, Commentary 27; 2009 Recommendation IX(i), Annex I.D);

(c) Take steps to ensure that its authorities (i) do not prematurely terminate cases involving foreign bribery allegations, (ii) proactively seek co-operation and MLA from foreign countries whenever appropriate, (iii) consider whether to conduct concurrent or joint investigations, where appropriate, and (iv) use the corporate liability provisions where appropriate (Convention Articles 2, 5, Commentary 27; 2009 Recommendation XIII, Annex I.D);

(d) Ensure that Portugal is not prevented from commencing a criminal investigation or prosecution solely because it has provided MLA to a foreign country in the same case (Convention Article 5, 9, Commentary 27; 2009 Recommendation Annex I.D);

(e) Where foreign bribery allegations involve senior foreign public officials and/or major Portuguese companies, (i) ensure these allegations are promptly and proactively investigated on a high priority basis and with sufficient resources, and (ii) take appropriate steps to ensure that all prosecutors are aware of the requirement to record their reasons for terminating investigations of the bribery of foreign public officials (Convention Article 5, Commentary 27; 2009 Recommendation Annex I.D);

(f) Train investigators, prosecutors and judges on investigating and prosecuting foreign bribery (including on the enforcement of corporate liability), and raise awareness of Article 5 within the DCIAP, UNCC and other relevant government bodies (Convention Article 5, Commentary 27; 2009 Recommendation III.i, Annex I.D);

(g) Give sufficient priority to investigating and prosecuting foreign bribery, and provide the DCIAP and UNCC with sufficient specialised expertise (Convention Article 5, Commentary 27; 2009 Recommendation Annex I.D).

6. Regarding jurisdiction over foreign bribery cases, the Working Group recommends that Portugal:

(a) Clarify whether jurisdiction to prosecute Portuguese nationals for extraterritorial foreign bribery is governed by Article 3 of Law 20/2008 or Article 5 of the Criminal Code (Convention Article 4(2));

(b) Take steps to ensure that its law enforcement authorities consider the exercise of nationality jurisdiction to prosecute foreign bribery wherever appropriate (Convention Article 4(2));

(c) Thoroughly explore territorial links to Portugal in foreign bribery cases, so as to rely on territorial jurisdiction to prosecute wherever possible (Convention Article 4(1)).

7. With regards to enforcement data, the Working Group recommends that Portugal maintain detailed statistics on (i) investigations, prosecutions and sanctions for false accounting and money laundering, including data on whether foreign bribery is the predicate offence, (ii) the application of confiscation in foreign bribery cases, (iii) pre-trial seizures, including on the offence involved and the amount seized, (iv) cases in which the statute of limitations had expired (Convention Articles 3(3), 6, 7, 8).

Recommendations for ensuring effective prevention, detection, and reporting of foreign bribery

8. With regards to money laundering, the Working Group recommends that Portugal:

(a) Take appropriate measures to enforce the money laundering offence, particularly where foreign bribery is the predicate offence (Convention Article 7);

(b) Provide guidelines and typologies to reporting entities that specifically refer to foreign bribery, as well as additional training to the FIU, law enforcement authorities, reporting entities and their supervisory and oversight authorities on adequately detecting, preventing and prosecuting money laundering by politically exposed persons (Convention Article 7; 2009 Recommendation III.i);

(c) Ensure better feedback by the FIU to reporting institutions regarding STRs (Convention Article 7; 2009 Recommendation III.i).

9. With regards to accounting and auditing, corporate compliance, internal control and ethics, the Working Group recommends that Portugal:

(a) Train external auditors on how to detect foreign bribery, and further raise awareness among external auditors of their key role in detecting foreign bribery and their duty to report suspected foreign bribery (2009 Recommendation III.i, X.B);

(b) Make greater efforts to encourage Portuguese companies (particularly SMEs) to adopt internal control, ethics and compliance measures that explicitly address foreign bribery, and ensure that these efforts involve all government bodies that interact with Portuguese companies, including AICEP, Ministry of Economy and Employment, IAPMEI, DGAE and the CMVM (2009 Recommendation X.C).

10. With regards to tax-related measures, the Working Group recommends that Portugal:

(a) Incorporate the essential elements of the OECD Bribery Awareness Handbook into the standard Manual for Tax Auditing, regularly update the Manual to reflect latest trends on how the crime of foreign bribery is committed, and provide guidelines and training with the Handbook to existing and newly recruited tax examiners (2009 Recommendation III.i, III.iii, VIII.i; 2009 Tax Recommendation II);

(b) Take all appropriate measures to discourage the use of undocumented expenses, and ensure that tax examiners routinely assess whether undocumented expenses are hidden bribes (2009 Recommendation III.iii, VIII.i; 2009 Tax Recommendation II);

(c) Promptly ratify the Convention on Mutual Administrative Assistance in Tax Matters, and consider systematically including the language of Article 26 of the OECD Model Tax Convention (on the use of information for non-tax purposes) in its future bilateral tax treaties with countries that are not signatories of the Convention on Mutual Administrative Assistance in Tax Matters (2009 Recommendation VIII.i; 2009 Tax Recommendation I.iii).

11. With regards to awareness-raising and reporting, the Working Group recommends that Portugal:

(a) Take steps to raise awareness in the private sector and media with the involvement of all relevant ministries and bodies (2009 Recommendation III.i);

(b) Take steps to ensure that (i) Portugal provide information and training as appropriate to its public officials posted abroad on implementing the Convention, (ii) MFA and AICEP proactively reach out to Portuguese companies, and (iii) MFA take further steps to ensure that its overseas missions report all foreign bribery allegations involving Portuguese companies or individuals to Portuguese law enforcement authorities (2009 Recommendation IX.i, IX.ii, Annex I);

(c) Ensure that appropriate measures are in place to protect public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of foreign bribery from discriminatory or disciplinary action (2009 Recommendation IX.iii).

12. With regards to public advantages, the Working Group recommends that:

(a) Portugal take steps to (i) ensure that all procuring authorities verify whether participants in public procurement, including legal persons, have foreign bribery convictions, and (ii) raise awareness of Criminal Code Article 90-H among procuring authorities (Convention Article 3(4); 2009 Recommendation XI.i);

(b) CICL and SOFID (i) raise awareness of foreign bribery among their staff, and their public and private sector partners, (ii) report all foreign bribery allegations involving Portuguese companies or individuals to Portuguese law enforcement authorities, and issue guidelines to staff on the reporting procedure, (iii) insert appropriate anti-corruption clauses in their contracts, and (iv) before approving support for a project, consider whether the recipient of support has a prior conviction for foreign bribery (Convention Article 3(4); 2009 Recommendation III.i, IX.ii, XI.i);

(c) COSEC (i) continue to proactively raise awareness of foreign bribery among its staff and clients, (ii) train its staff on how to detect foreign bribery by conducting appropriate due diligence, and strengthen its due diligence for agent fees and commissions, and (iii) adopt a clear, written policy on reporting foreign bribery allegations to law enforcement, and issue guidelines to staff on this issue (2009 Recommendation III.i, IX.i, XII.ii; 2006 Export Credit Recommendation).

2. Follow-up by the Working Group

13. The Working Group will follow up the issues below as jurisprudence and practice develop:

(a) Application of the foreign bribery offence, particularly the elements of the offence that have raised issues identified in this report (Convention Article 1; 2009 Recommendation III.ii and V);

(b) Application of Article 11 of the Criminal Code, particularly the liability of legal persons for management's breach of duties of surveillance and control, and the terms "in the legal person's name" and "collective interest" (Convention Article 2, 2009 Recommendation Annex I.B);

(c) Sanctions imposed against natural and legal persons for foreign bribery, especially in light of the system of converting certain prison sentences into fines (Convention Article 3(1));

(d) Investigations and prosecutions of foreign bribery allegations involving senior foreign public officials and/or major Portuguese companies (Convention Article 5, Commentary 27; 2009 Recommendation Annex I.D);

(e) Application of the statute of limitations in foreign bribery cases (Convention Article 6);

(f) Pre-trial seizure in foreign bribery cases (Convention Article 3(3));

(g) Enforcement of the non-tax deductibility of foreign bribes, particularly whether Portuguese courts promptly informs tax authorities of convictions related to foreign bribery and whether tax authorities examine the tax returns of taxpayers convicted of foreign bribery; and the reporting of foreign bribery cases by Portuguese tax officials (2009 Recommendation VIII.i);

(h) Provision of MLA in foreign bribery-related civil or administrative proceedings against a legal person to a foreign state whose legal system does not allow criminal liability of legal persons (Convention Article 9(1));

(i) Application of Article 32 of Law 144/1999 in foreign bribery cases (Convention Article 10).

ANNEX 1 WORKING GROUP PHASE 2 RECOMMENDATIONS TO PORTUGAL AND THEIR IMPLEMENTATION

Phase 2 Recommendation	*2009 Working Group Evaluation*
Recommendations Concerning Prevention, Detection and Awareness of Foreign Bribery	
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);	Partially implemented
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)	Partially implemented
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).	Partially implemented
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);	Partially implemented
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);	Partially implemented
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);	Partially implemented
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);	Not implemented

Phase 2 Recommendation	*2009 Working Group Evaluation*
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);	Satisfactorily implemented
f) Pursue its efforts to encourage companies to provide internal channels for communication by, and internal protection for, potential whistleblowers (Revised Recommendation, Section V).	Not implemented
Recommendations Pertaining to Investigation of Foreign Bribery	
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);	Partially implemented
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);	Not implemented
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);	Satisfactorily implemented
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).	Not examined by Working Group
Recommendation Pertaining to the offence of foreign bribery	
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).	Not examined by Working Group

Phase 2 Recommendation	*2009 Working Group Evaluation*
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);	Not examined by Working Group
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).	Not examined by Working Group
Recommendations Pertaining to Prosecution and Sanctioning of Foreign Bribery and Related Offences	
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);	Not implemented
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);	Partially implemented
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).	Partially implemented
Follow-up by the Working Group	
7. The Working Group will follow up on the issues below, as practice develops, in order to assess:	
a) Whether amendments to Decree Law 28/84 or other measures are required to supplement or clarify the existing language defining the elements of foreign bribery with regard to (i) cases of bribery through intermediaries where the briber only gives generic instructions to bribe with no information to the intermediary on the exact amount and identity of the intended recipient of the bribe; (ii) cases of active bribery in the absence of the proof of a counterpart or of an agreement to such a counterpart by the passive briber; and (iii) cases of bribery in international business of EU, EU Member States, and international officials, in light of potential overlaps with paragraphs 1 and 2 of art. 18 of Law 34/87 and art. 374 CC (Convention, Article 1);	Continue to follow up

Phase 2 Recommendation	*2009 Working Group Evaluation*
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);	Continue to follow up
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);	Continue to follow up
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).	Continue to follow up

ANNEX 2 PARTICIPANTS AT THE ON-SITE VISIT

Public Sector

- Ministry of Justice
- National Anti-Corruption Unit of the Criminal Police (UNCC/Polícia Judiciária)
- Asset Recovery Office (GRA) of the Criminal Police
- Criminal Police School (Escola de Polícia Judiciária)
- Financial Intelligence Unit
- Bank of Portugal
- Portuguese Insurance Institute (*Instituto de Seguros de Portugal* – ISP)
- General Inspectorate for Finances (IGF)
- Ministry of Foreign Affairs
- Portugal Global - Trade & Investment Agency (AICEP)
- Tax and Customs Authority
- Comissão Normalização Contabilística
- Entity for Shared Services in the Public Administration I.P. of the Ministry of Finance and Public Administration
- Directorate General for Treasury and Finances
- Camões–ICL
- SOFID
- COSEC
- Council for the Prevention of Corruption
- Directorate General for the Qualification of Workers in Public Functions (INA)
- Securities Market Commission (CMVM)
- Directorate-General for Economic Activities (DGAE)
- Institute for Support to Small and Medium-Sized Enterprises and Innovation (IAPMEI)

Judiciary

- Court of 2nd Instance, Évora
- Criminal Court of Lisbon
- Central Department for Criminal Investigation and Prosecution (DCIAP), Attorney General's Office
- Documentation and Comparative Law Office, Attorney General's Office
- Centre for Judiciary Studies
- Department for Criminal Investigation and Prosecution (DIAP), Judicial District of Lisbon
- Department for Criminal Investigation and Prosecution (DIAP), Judicial District of Porto

Parliamentarians

- Socialist Party (Partido Socialista - PS)
- Democratic and Social Centre (Centro Democrático e social – CDS)
- Left Block (Bloco de Esquerda - BE)
- Social Democratic Party (Partido Social Democrata – PSD)

Private Sector

Private Enterprises

- BANIF
- Banco Espírito Santo
- CGD
- CIMPOR
- Crédito Agrícola Group
- EDP
- EFACEC
- EMPORDEF
- GALP Energy
- Group Portucel Soporcel
- Mota-Engil Group
- Portugal Telecom
- REN
- TAP Air Portugal
- Teixeira Duarte Group

Business Associations

- Portuguese Bankers Association (*Associação Portuguesa de Bancos* – APB)
- Associação dos Industriais da Construção Civil e Obras Públicas (AICCOPN)

Legal Profession and Academics

- Rascão Santo Pereira Advogados
- Morais Leitão Galvão Teles Soares da Silva & Associados
- Ms Vânia Costa Ramos, Lawyer
- University of Lisbon, Law School

Accounting and Auditing Profession

- Order of Chartered Accountants (*Ordem dos Técnicos Oficiais de Contas* – OTOC)
- Order of Statutory Auditors (*Ordem dos Revisores Oficiais de Contas* - OROC)
- Accounting Standards Commission (*Conselho Nacional de Supervisão e Auditoria* - CNSA)
- Deloitte
- Ernst & Young
- KPMG
- PWC

<u>Civil Society</u>

- Transparência e Integridade, Associação Cívica – TIAC (Transparency International Portugal)
- Global Compact Network Portugal
- Portuguese Association for Business Ethics (*Associação Portuguesa de Ética Empresarial* - APEE)
- Observatório de Economia e Gestão de Fraude (OBEGEF)
- Correio da Manhã (newspaper)
- Jornal de Notícias (newspaper)
- Portuguese Association of Journalists
- União Geral dos Trabalhadores (UGT)

ANNEX 3 LIST OF ABBREVIATIONS AND ACRONYMS

AG	Attorney General
AICEP	Portugal Global - Trade & Investment Agency (*Agência para o Investimento e Comércio Externo de Portugal*)
AML	anti-money laundering
CICL	Camões-Institute for Co-operation and Language
CoE	Council of Europe
CMJPLOP	Conference of Ministers of Justice of the Portuguese Official Language Speaking Countries
CMVM	Securities Market Commission (*Comissão do Mercado de Valores Mobiliários*)
CNSA	National Council for the Supervision of Auditors (*Conselho Nacional de Supervisão e Auditoria*)
COSEC	*Companhia de Seguros de Crédito* (Portuguese export credit agency)
CPC	Council for the Prevention of Corruption
CPLP	Portuguese Speaking Countries Community (*Comunidade dos Países de Língua Portuguesa*)
DCIAP	Central Department for Criminal Investigation and Prosecution (*Departamento Central de Investigação e Ação Penal*)
DGAE	Directorate-General for Economic Activities
DIAP	Department for Criminal Investigation and Prosecution (*Departamento de Investigação e Ação Penal*)
EAW	European Arrest Warrant
EU	European Union
EUR	euro
FATF	Financial Action Task Force
FCPA	U.S. Foreign Corrupt Practices Act 1977
FIU	Financial Intelligence Unit
FTZ	Free Trade Zone
GRA	Asset Recovery Office
IAPMEI	Institute for Support to Small and Medium-Sized Enterprises and Innovation (*Instituto de Apoio às Pequenas e Médias Empresas*)
IAS	International Accounting Standards
IFRS	International Financial Reporting Standards
IOSCO MMOU	International Organization of Securities Commissions Multilateral Memorandum of Understanding
INA	Directorate General for the Qualification of Workers in Public Functions
ISA	International Standards on Auditing
MDB	Multilateral Development Bank
MEE	Ministry of Economy and Employment
MFA	Ministry of Foreign Affairs
MLA	mutual legal assistance
MOJ	Ministry of Justice
NAT	Núcleo de Assessoria Técnica/PGR
NGO	Non-governmental organisation
NIA	National Institute of Administration
ODA	Official Development Assistance
OROC	Order of Statutory Auditors (*Ordem dos Revisores Oficiais de Contas*)
OTOC	Order of Chartered Accountants (*Ordem dos Técnicos Oficiais de Contas*)
PEP	Politically Exposed Person
SME	Small and medium-sized enterprise
SOE	state-owned or state-controlled enterprise
SOFID	*Sociedade para o Financiamento do Desenvolvimento, Instituíção Financeira de Crédito, S.A.*
SPV	special purpose vehicle
STR	Suspicious Transaction Report
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCC	National Anti-Corruption Unit of the Criminal Police (*Unidade Nacional de Combate à Corrupção*)
USD	United States dollar

ANNEX 4 EXCERPTS OF RELEVANT LEGISLATION

Law 20/2008 (Foreign Bribery Offence)

Establishing the new criminal regime to combat corruption in international trade and in the private sector, in compliance with the Council Framework Decision n. 2003/568/JHA, of 22 July

In accordance with Article 161(c) of the Constitution, the Assembly of the Republic hereby decrees the following:

CHAPTER I GENERAL PROVISIONS

Article 1 Scope

The present law establishes the criminal liability regime regarding corruption in international trade and in the private sector.

Article 2 Definitions

For the purposes of this law:

a) "Foreign public official" means any person who, serving for a foreign country as an official, agent or in any other capacity, even if temporarily, either for free or paid, in a voluntary or compulsory manner, is called to work or take part in the administrative or judicial public service or, in similar circumstances, is called to work or take part in public-benefit organizations or has a management position or holds a supervisory post or is an employee in a state-owned company, nationalized company, public capital company or in a company with controlling public interest, or public service concessions holders;

b) "Official of an international organization" shall be understood as any person who, working for a public international organization as an employee, agent or in any other capacity, even if temporarily, either for free or paid, in a voluntarily or compulsory manner, is called to work or take part in an activity;

c) "Person holding a foreign political office" is any person who, working for a foreign country, holds a legislative, judicial or administrative office, at national, regional or local level, whether appointed or elected;

d) "Employee in the private sector" means any person who works, or holding a management position or a supervisory post, under an individual working contract, or under a professional agreement or in any other capacity, even if temporarily, either for free or paid, at a private sector entity;

e) "Private sector entity", shall be understood as a private law legal person, a civil company and a de facto association.

Article 3 Territorial application

Without prejudice to the general regime of the criminal law territorial application and to what is provided for in international judicial co-operation matters, the present law also applies:

a) To Portuguese nationals or aliens found in Portugal, in the case of the offence referred to in article 7, irrespective of the place where it has been committed;

b) In the case of the offences 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.

Article 4 Criminal liability of legal persons or similar entities

Legal persons and similar entities shall be held liable, in general terms, for the offences laid down in the present law.

Article 5 Special mitigating circumstances and discharge

For the offences set forth in the present law:

a) The penalty is especially lessened if the agent provides concrete assistance in the gathering of decisive evidence for the identification or capture of others responsible or whenever, to some extent, he makes a decisive contribution to uncover the truth;

b) The agent is discharged if, voluntarily and before the offence is committed, rejects the offer or the assumed promise, returns the advantage already received or, if it is a fungible thing, its value, withdraws the promise given or requests that the advantage offered be returned.

Article 6 Subsidiary law

1 – The penalties foreseen in the present law only apply if the offence is not punishable with a more serious sanction by any other legal provision.

2 – The provisions laid down in the Penal Code shall be ancillary applied to the offences set forth in the present law.

Chapter II Crimes

Article 7 Active corruption in international trade

Whoever, per se or, by his/her own consent or ratification, or through an intermediary, gives or promises to give to a national or foreign public official or official of an international organization official or to a national or international holder of a political office, or to a third party, with knowledge of the foregoing, undue patrimonial or non-patrimonial advantage, in order to obtain or maintain a business, a contract or other undue advantage in international business transactions, is punished by imprisonment for a term between one to eight years.

Article 8 Passive corruption in the private sector

1 – Whoever works for a private sector entity and who, per se or by his/her own consent or ratification, through an intermediary, requests or accepts, for itself or for a third party undue patrimonial or non-patrimonial advantage, or the promise to act or to refrain from acting in relation to the performance of official duties, is punished by imprisonment up to two years or with a fine.

2 – If the action or the omission referred to in the previous paragraph is liable to lead to a distortion of competition or to cause a patrimonial damage to third parties, the agent is punished by imprisonment up to five years or with a fine up to 600 days.

Article 9 Active corruption in the private sector

1 - Whoever, per se or, by his/her own consent or ratification, or through an intermediary, offers or promises to the person referred to in the article 8, or to a third party, with his/her consent, an undue patrimonial or non-patrimonial advantage, in order to pursue the aim defined in mentioned provision, is punished by imprisonment up to a year or with a fine.

2 – If the conduct set out in the previous paragraph aims to obtain or is liable to lead to a distortion of competition or to cause a patrimonial damage to third parties, the agent is punished by imprisonment up to three years or with a fine.

CHAPTER III Final provisions

Article 10 Laundering and fight against corruption and economic-financial crime

According to article 368-A of the Criminal Code and to article 1 (1) a) of Law no. 36/94, of 29th September (measures to fight against corruption and economic and financial crime) the conduct set out in article 7 should be considered an offence of corruption.

Article 11 Repealed norm

Articles 41-A, 41-B and 41-C of Decree-Law no. 28/84, of 20th January and Law no.13/2001, of 4th June are repealed.

Criminal Code (Liability of Legal Persons and Statute of Limitations)

Article 11 Liability of natural persons and legal persons

1 – Except as provided in the following paragraph, and in those cases specially foreseen in the law, only natural persons can be criminally liable.

2 – Legal persons and equivalent entities, with the exception of the State, other public legal persons and international organizations of public law, are responsible for the crimes foreseen in articles 152-A and 152-B, in articles 159 and 160, in articles 163 to 166, when 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) In its name and in the collective interest by persons who hold a leadership position within such legal person or entity; or

b) By whoever acting under the authority of the persons referred to in the previous paragraph by virtue of a breach of the surveillance or control duties which are incumbent upon them.

3 – For the purposes of criminal law the term public legal persons includes:

a) Legal persons governed by public law, which includes public corporations;

b) Concessionaires of public services, regardless of their ownership;

c) Other legal persons enjoying public power prerogatives.

4 – The bodies and representatives of the legal person and whoever within that legal person has the authority to exercise control over the legal person activity is deemed to hold a leadership position.

5 – Civil companies and de facto associations are considered, for criminal liability purposes, entities equivalent to legal persons.

6 – The criminal liability of legal persons and equivalent entities is excluded when the agent acted against express orders or instructions from authorised persons.

7 - The criminal liability of legal persons and equivalent entities does not exclude the individual criminal liability of the respective agents nor is dependent on them being criminally liable.

8 – The criminal liability of a legal person or of an equivalent entity is not extinguished by a demerger or by a merger, responding for the commission of the crime:

a) The legal person or equivalent entity within which the merger has taken place; and

b) The legal persons or equivalent entities resulting from the demerger.

9 – Without prejudice to the right of recourse, the persons holding a leadership position are subsidiarily liable for the payment of fines and compensations for which the legal person or equivalent entity is convicted of, in respect of crimes:

a) Committed in the period in which such persons held the position, without their express opposition;

b) Committed in a prior moment, where the insufficiency of the property of the legal person or equivalent entity to cover payment is their solely responsibility, or

c) Committed in a prior moment, when the final decision to apply them has been notified during the period in which such persons held the position and the lack of payment is imputable to them.

10 – In the case of several persons being responsible under the previous paragraph, they become jointly and severally liable.

11 – If the fines or compensations are applied to an entity without legal personality, their payment shall be made out of the joint property and, in the absence or insufficiency thereof, jointly and severally out of each partner's property.

Article 118 Statutory periods of limitation

1 – The criminal proceedings are extinguished on the grounds of the statute of limitations when, from the time the criminal offence was committed, the following terms have elapsed:

a) Fifteen years, in case of criminal offences punishable with custodial sentence with a maximum limit over ten years;

b) Ten years, in case of criminal offences punishable with custodial sentence with a maximum limit equal to or over five years but not exceeding ten years;

c) Five years, in case of criminal offences punishable with custodial sentence with a maximum limit equal to or over one year but not exceeding five years;

d) Two years, in the remaining cases.

2 – For the purposes of the preceding paragraph, when determining the maximum sentence applicable to each criminal offence, the elements pertaining to the type of criminal offence are to be taken into consideration, but not the aggravating or mitigating circumstances.

3 – If the criminal proceedings relate to a legal person or equivalent entity, the periods provided for in paragraph 1 are fixed on the basis of the custodial sentence, prior to the conversion set out in paragraphs 1 and 2 of article 90-B.

4 – Where the law provides for the imposition of imprisonment, or a fine in alternative thereto, only the first one is considered for the purposes of this article.

Article 119 Commencement of the limitation period

1 – The term of the limitation period for the criminal proceedings runs from the date at which the act was completed.

2 – The term of the limitation period only runs:

a) In case of permanent criminal offences, from the date at which the execution ceases;

b) In case of continuous and habitual criminal offences, from the date of commission of the last act;

c) In case of not completed criminal offences, from the day of the last execution act.

[…]

Article 120 Suspension of the statute of limitation

1 -The statute of limitation of criminal proceedings is suspended, beyond the cases specially foreseen in the law, during the time in which:

a) Criminal proceeding cannot be legally initiated or continued due to lack of legal authorization or due to a pending court decision from a non-criminal court or as a result of the sending of a preliminary issue to a non-criminal jurisdiction;

b) Criminal proceeding are pending, from the notification of the indictment (accusation) or, in the cases where an indictment was not issued, from the notification of the decision of the instruction phase to prosecute the accused or from the request for the application of a sanction in summary proceedings;

c) A judgment by default is in force;

d) A sentence cannot be served on the accused tried in absentia; or

e) The offender serves abroad a custodial sentence or a measure involving the deprivation of liberty.

2 - In the case foreseen in paragraph b) of the previous paragraph the suspension may not exceed three years.

3 - The statute of limitation runs again from the day in which the cause for suspension ceases.

Article 121 Interruption of the statute of limitations

1 – The statute of limitations for the criminal proceedings is interrupted:

a) With the acquisition of the status of defendant;

b) With the service of the bill of indictment or, in case the bill of indictment was not produced, with the service of the arraignment or of the application for the imposition of a penalty under the extra-summary proceedings;

c) With the contumacy statement;

d) With the service of the order which appoints a day for the hearing in the absence of the defendant.

2 – A new term of the limitation period runs after each interruption.

3– Without prejudice of paragraph 5 of article 118, the statute of limitations for the criminal proceedings always takes place when, from its commencement and with the exception of the suspension period, the normal term of the limitation period has elapsed added by its half. When, by virtue of a special provision, the term of the limitation period is less than two years the maximum term of the statute of limitations corresponds to the double of such term.

Criminal Code and Legal Regime of Tributary Offences (False Accounting Offences)

Criminal Code Article 256 Forging or counterfeiting a document

1 – Whoever, with intent to cause loss to another person or to the State, to obtain for himself or for another person an unlawful benefit or to prepare, facilitate, execute or cover up another criminal offence:

a) Makes or draws up a false document or any of the components which are to be embodied therein;

b) Forges or alters a document or any of the components which are a part thereof;

c) Abusively uses the signature of another person to forge or to produce a counterfeit document;

d) Falsely inserts in a document or in any of its components a legally relevant fact;

e) Uses a document to which reference is made in the preceding sub-paragraphs; or

f) By any means whatsoever, grants or possesses a forged or a counterfeit document;

is punished with imprisonment for not more than three years or with a fine.

2 – An attempt is punishable.

3 – If the facts referred to in paragraph 1 relate to an authentic document or to a document of equal value, to a sealed will, a postal money order, a bill of exchange, a cheque or other commercial document transferable by endorsement, or to any other security not covered by article 267, the offender is punished with imprisonment from six months to five years or with a fine from 60 to 600 days.

4 - If the facts mentioned in paragraphs 1 and 3 are committed by a public official, in the performance of his duties, the offender is punished with imprisonment from one to five years.

Criminal Code Article 259 Damaging or stealing a document and a technical notation

1 - Whoever, with intent to cause loss to another person or to the State, or to obtain for himself or for another person an unlawful benefit, destroys, damages, renders unusable, makes disappear, conceals or steals a document or a technical notation, which is either not, or not exclusively at his disposal or whose delivery or submission may be legally required by another, is punished with imprisonment for not more than three years or with a fine.

2 – An attempt is punishable.

3 – Paragraph 4 of article 256 is correspondently applicable.

4 – Whenever the victims are natural persons, criminal proceedings depend upon complaint.

Legal Regime of Tributary Offences Article 103 Fraud

1 – The unlawful conducts described in this Article that aim at the non-assessment, delivery or payment of tax due or at the undue granting of tax reliefs, reimbursements or other capital advantages that may cause a reduction of the tax revenues shall be deemed as tax fraud, punished with imprisonment of up to 3 years or a fine of up to 360 days. Tax fraud may occur by:

a) The concealing or change of facts or values that shall be stated in accounting and bookkeeping records, or in declarations submitted or provided for the specific inspection, determination, assessment or control of the tax base by the tax administration;

b) The concealing of facts and values not declared and which shall be disclosed to the tax administration;

c) The conclusion of a simulated agreement, both on the amount and on the nature, by interposition, concealing or replacement of people.

2 – The events provided for in the previous paragraphs shall not be punishable where the illegitimate capital advantage shall not exceed EUR 15,000.

3 - For the purposes of the provisions of the previous paragraphs, the amounts to be considered shall be those that, under the applicable laws, shall be stated in each tax return to be submitted to the tax administration.

Legal Regime of Tributary Offences Article 104 Aggravated fraud

1 – The events provided for in the previous paragraphs shall be punished with imprisonment between 1and 5 years for individuals and a fine between 240 and 1,200 days for legal persons, where in the presence of more than one of the following circumstances:

a) The offender colluded with a third party subject to ancillary obligations for the purposes of tax inspection;

b) The offender is a public official and has seriously abused of his duties;

c) The offender used the help of a public official with severe abuse of his duties;

d) The offender falsifies or taints, conceals, destroys, renders unusable or refuses to deliver, display or present books, computer programs or files and any other documents or evidence required by the tax law.

e) The offender uses the books or any other document mentioned in the previous paragraph knowing they were falsified or tainted by a third party;

f) Where it was used the interposition of individuals or legal persons resident outside the Portuguese territory and there subject to a clearly more favourable tax scheme;

g) The offender colluded with a third party with whom he is in a situation of special relations.

2 – The same penalty shall be applied where:

a) The fraud shall take place by the use of invoices or equivalent documents for non-existing operations or for different values or even for the intervention of people or entitles other than those of the underlying operation; or

b) The capital advantage shall exceed € 50,000.

3 – Where the capital advantage shall exceed EUR 200,000, the penalty shall be of imprisonment between 2 and 8 years for individuals and a fine between 480 and 1,920 days for legal persons.

4 – The events provided for in paragraph 1 (d) and (e) of this Article, with the purpose described in Article 103 (1) shall not be autonomously punishable, unless a more serious penalty applies.

Code of Criminal Procedure and Law 58/2008 (Reporting of Crimes)

Article 242 Code of Criminal Procedure

1 - The denunciation is mandatory, including whether the offenders are unknown:

[…]

b) For public officials, as defined by Article 386 of the Criminal Code, regarding crimes that they acknowledge in the performing of its duties or due to its duties.

Law 58/2008 (Disciplinary Statute of Public Officials)

Article 8. When the facts are regarded to be a criminal offence, the communication to the Public Prosecutor competent for criminal proceeding is mandatory according to Article 242 of the Code of Criminal Procedure.

Law 144/1999 (International Co-operation in Criminal Matters)

Article 19 Non bis in idem

Where a request for international co-operation is granted that carries delegation of competence over criminal proceedings to a foreign judicial authority, criminal proceedings shall neither be initiated nor continued in Portugal for the same facts that substantiated the request; neither shall a sentence, the enforcement of which has been delegated to a foreign judicial authority, be enforced in Portugal.

Article 32 Cases in which extradition is excluded

1. Extradition shall be excluded in the cases mentioned in Articles 6 to 8 above, as well as in the following cases:
   a) where the offence was committed on the Portuguese territory;
   b) where the person claimed is a Portuguese national, without prejudice to the provisions of the following paragraph.

2. The extradition of Portuguese nationals shall however not be excluded where: extradition of nationals is provided for in a treaty, convention or agreement to which Portugal is a Party, and extradition is sought for offences of terrorism or international organised crime, and the legal system of the requesting State embodies guarantees of a fair trial.

3. In the circumstances covered by the preceding paragraph, extradition may only take place for purposes of criminal proceedings and provided that the requesting State gives assurances that it will return the extradited person to Portugal for that person to serve in Portugal the sanction or measure eventually imposed on him, once the sentenced is reviewed and confirmed in accordance with the Portuguese law, unless the extradited person expressly refuses to be returned.

4. For the purpose of assessing the guarantees mentioned in sub-paragraph c) of paragraph 2 above, account shall be taken of the European Convention of Human Rights and other relevant international instruments ratified by Portugal, as well as the conditions under which protection is ensured against the situations mentioned in sub-paragraphs b) and c) of paragraph 1 of Article 6.

5. Where extradition is not granted on any of the grounds stated in paragraph 1 above or in sub-paragraphs d), e) or f) of paragraph 1 of Article 6, criminal proceedings shall be instituted for the offence on the grounds of which the request was made; the requesting State shall be asked to provide such information as is necessary. The judge may impose such provisional measures as he deems adequate.

6. The question of whether the person claimed is or is not a Portuguese national shall be examined at the time of the decision on the extradition request.

7. Special arrangements, within the framework of military or other alliances, may provide that offences under military law which are not offences under ordinary criminal law shall be extraditable offences.

Article 95 Principle

1. Final and enforceable foreign criminal judgements may be enforced in Portugal under the conditions laid down in this law.

2. The request for delegation must be made by the sentencing State.

Article 96 Specific requirements

1. Any request for the enforcement in Portugal of a foreign criminal judgement shall be admissible only subject to the general requirements provided for in this law, as well as the following requirements:

a) a sentence imposing a criminal reaction must have been rendered for an offence in respect of which the foreign State has jurisdiction;

b) if the sentence was pronounced during a trial in the absence of the sentenced person, the later must have been given the legal possibility of requesting a new trial or introducing an appeal;

c) the enforcement of the sentence must not run counter to the fundamental principles of the Portuguese legal system;

d) the facts involved must not be the subject of criminal proceedings in Portugal;

e) the facts involved must amount to a criminal offence under Portuguese law;

f) the sentenced person must be a Portuguese national, or otherwise must have his habitual residence in Portugal;

g) the enforcement of the sentence in Portugal must be justified in terms of a better chance of, either the rehabilitation of the sentenced person, or compensation for damages caused by the offence;

h) the sentencing State must have provided guarantees that, once the sentence has been enforced in Portugal, it shall consider the criminal liability of the person concerned to be extinguished;

i) the term to be served under the sentence must not be less than one year or, in case of a pecuniary sanction, it should correspond at least to the equivalent of 30 units of account in criminal procedure;

j) where the sentence involves deprivation of liberty, the sentenced person must give his consent.

2. Without prejudice to the provisions of the preceding paragraph, a foreign judgement may also be enforced in Portugal if the person concerned is already serving in Portugal a sentence for any offence other than the offence for which the foreign judgement was passed.

3. The enforcement in Portugal of a foreign sentence involving deprivation of liberty shall also be admissible, even where the requirements provided for in paragraph 1, sub-paragraphs g) and j) above are not met, if, in case of escape to Portugal or other situation in which the person is present in Portugal, the extradition of the person concerned, for the offence for which he was sentenced, has been refused.

4. The provisions of the preceding paragraph shall also apply, subject to an agreement between Portugal and the foreign State concerned, once the person concerned has been heard, to the cases in which expulsion will be imposed once the sentence has been served.

5. The requirement provided for in paragraph 1, sub-paragraph i), may be dispensed with in special cases, notably where the health of the sentenced person, or reasons pertaining to his family or his profession, so dictate.

6. The enforcement of the sentence may however take place, notwithstanding the requirements provided for in paragraph 1, when Portugal, in accordance with the provisions of paragraph 2 of Article 32, will have previously extradited a Portuguese national.

Article 160 - A Controlled and surveyed deliveries

1. For the purposes of obtaining the identification of largest possible number of offenders and establishing their criminal liability, in co-operation with one or more foreign States, the Public Prosecution shall be empowered to authorise on a case by case basis, upon request from one or more foreign States, in particular where such is provided for in a conventional instrument, that criminal police bodies abstain from acting within the framework of trans-border criminal investigations concerning extraditable offences.

2. The Portuguese authorities shall have the legal powers to act as well as the supervision and control of the criminal investigation operations conducted within the framework of the provisions of the preceding paragraph, without prejudice to the necessary co-operation with the competent foreign authorities. 3. Authorisations given under paragraph 1 above shall be without prejudice to the exercise of criminal proceedings for the facts in respect of which the Portuguese law is applicable; they shall be given only where :

a) the competent foreign authorities have ensured that both their legislation provides adequate criminal sanctions for the offence at stake and criminal proceedings shall be exercised; and

b) the competent foreign authorities have ensured the security of the substances and goods at stake against the risks of flight and loss; and

c) the competent foreign authorities have undertaken urgently to communicate detailed information about the results of the operation as well as the acts performed by each of the offenders, in particular those who acted in Portugal.

4. Even where the above-mentioned authorisation has been granted, the criminal police bodies shall act if safety margins noticeably decrease or if any circumstance arise that renders the arrest of the culprits, or the seizure of the substances or goods, more difficult; where such action by the police bodies was not previously communicated to the authority that granted the authorisation, such shall be done in writing within the next 24 hours.

5. Subject to the existence of an agreement with the country of destination, where prohibited or dangerous substances are in transit, they may be partially replaced by innocuous; a written record shall be filed.

6. Non-compliance of obligations undertaken by foreign authorities may constitute grounds for refusal of authorisation in case of future requests.

7. International agreements are made by the National Bureau of INTERPOL, through the "Polícia Judiciária" (criminal police organisation).

8. Any other entity that receives requests for controlled deliveries, in particular the "Direcção-Geral de Alfândegas" (Directorate General of Customs), either through the Customs Co-operation Council or through its foreign counterparts, without prejudice of processing of custom-specific data, shall address such a request to the "Polícia Judiciária" (criminal police organisation) for action.

9. The Public Prosecution magistrate of the judicial circle of Lisbon shall be empowered to decide upon requests for controlled deliveries.

Article 160 - B Undercover action

1. Criminal investigation officials of other States may develop undercover action in Portugal, in accordance with the applicable law; in such cases, their status shall be similar to that of Portuguese criminal investigation officials.

2. Action as mentioned in paragraph 1 above is subject both to a request based on an international agreement, treaty or convention, and reciprocity.

3. The judge of the "Tribunal Central de Instrução Criminal" (Central Court of Criminal Investigation) shall be empowered to authorise such action, upon a proposal of the Public Prosecution magistrate at the "Departamento Central de Investigação e Acção Penal - DCIAP" (Central Department for Criminal Investigation and Action)

Article 160 - C Interception of telecommunications

1. Upon request of the competent authorities of a foreign State, the interception of telecommunications effected in Portugal may be authorised, if such is provided for in an international agreement, treaty or convention and provided that, in similar national circumstances, interception would be admissible under the Portuguese criminal procedural law.

2. The "Polícia Judiciária" (criminal police) shall be empowered to receive requests for interception; it shall thereupon submit the requests to the Criminal Investigations' judge of Lisbon for authorisation. 3. The decision concerning the authorisation mentioned in the preceding paragraph shall include an authorisation for the immediate transmission of the communication to the requesting State, should such transmission be provided for in the international agreement, treaty or convention under which the request was made.

Law 19/2008 (Public Sector Whistleblower Protection)

Article 4. 1 - Workers of the Public Administration and of State owned companies, who report the commission of offences that they have knowledge of in the exercise of their duties or because of them cannot, in any form, including their non-voluntary transfer, be harmed.

2 - It is presumed abusive, until proven otherwise, the application of disciplinary sanction to the workers referred in the preceding paragraph, when taking place within one year of their complaint.

3 - The workers referred to in the preceding paragraphs are entitled to:

a) Anonymity, except for the person in charge of investigation, until the deduction of charges;

b) Transfer on request, without right of refusal, after the deduction of charges.

Law 36/1994 (Pre-Inquiries)

Article 1 Actions or Prevention

1 - It is the responsibility of the Public Prosecution Service and the Criminal Police, through the Central Directorship for the Combat against Corruption, Fraud and Economic and Financial Infractions(*), to carry out, without prejudice to the competencies of other authorities, actions for the prevention of the following crimes:

a) Corruption, embezzlement of public moneys and economic participation in business;

b) Prejudicial administration in an economic unit of the public sector,

c) Fraud in the obtaining or misappropriation of subsidies, grants or credit;

d) Economic/financial offences committed in an organized manner and resorting to information technologies;

e) Economic/financial offences on an international or transnational scale.

2 - The Criminal Police carries out the actions set out in the preceding paragraph, either at its own initiative or at that of the Public Prosecution Service.

3 - The actions of prevention referred to in paragraph 1 comprise:

a) The gathering of information in relation to news of matters that may give ground for the suspicion of the danger of the commitment of an offence;

b) The request for inquiries, investigations, inspections and other preparatory inquiries that prove necessary and adequate for the investigation of the legal conformity of determined administrative acts or procedures within the framework of the relations between the Public Administration and private bodies;

c) The proposing of measures designed to lead to a reduction in corruption and in economic and financial crime.

Article 4 Request for inquiries

With the due adaptations, and at the initiative of the competent judicial authority, in the course of the proceedings initiated for any of the offences referred to in article 1 (1), the provision set forth in article 1 (3), subparagraph b) applies.

ANNEX 5 BRIBERY AND FALSE ACCOUNTING ENFORCEMENT STATISTICS

1. Bribery under Chapter IV, Section 1 of the Criminal Code

Statistics on section 122 of the Portuguese Criminal Code do not distinguish between foreign and domestic bribery offences.

Year	Proceedings in the judgment phase in the courts of 1st instance	Defendants	Convicted	Acquitted	Fines	Imprisonment replaced by fine	Suspended imprisonment	Imprisonment
2007	42	81	50	17	3	12	25	-
2008	62	100	58	37	5	5	25	3
2009	43	133	65	51	3	11	32	10
2010	56	163	68	36	3	32	30	-
2011	53	133	48	5	3	7	36	-
Total	250	610	289	146	17	67	148	14

The figures include data related to the following offences: passive corruption for illicit act, passive corruption for licit act, passive corruption, active corruption, attempted corruption and aggravate corruption.

2. False Accounting under Chapter II, Section 1 of the Criminal Code

Procedures finalized in Courts of 1st Instance

Year	**2011**	**2010**	**2009**	**2008**	**2007**
Offences	**Number of procedures**				
Forging or counterfeiting a document	1086	1037	1241	1545	1741
Forging or counterfeiting a document aggravated	56	48	36	30	4
Attempt of forging or counterfeiting a document	9	14	19	18	17
Damaging of documents and technical notation	7	3	11	8	8
Theft of documents and technical notation	22	23	20	25	26
Attempt of theft of documents and technical notation	-	-	-	-	4
TOTAL	1180	1130	1329	1628	1802

Convictions

Year	**2011**	**2010**	**2009**	**2008**	**2007**
Offences	**Convictions**				
Forging or counterfeiting a document	935	887	1118	1331	1557
Forging or counterfeiting a document aggravated	45	37	31	41	4
Attempt of forging or counterfeiting a document	12	16	21	11	18
Damaging of documents and technical notation	-	-	4	4	4
Theft of documents and technical notation	6	8	8	13	13
Attempt of theft of documents and technical notation	-	-	-	-	-
TOTAL	999	952	1182	1400	1599