

THE ANTI-BRIBERY AND
ANTI-CORRUPTION
REVIEW

TENTH EDITION

Editor
Mark F Mendelsohn

THE LAWREVIEWS

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PREFACE

The covid-19 pandemic has had a monumental and disruptive effect on practically all aspects of business, politics, law and daily life in nearly every corner of the globe. For companies conducting cross-border business, and legal practitioners who advise them, corruption remains a substantial risk area. And with national governments engaging in large-scale economic stimulus programmes and contracting on an emergency basis with a wide range of suppliers of critical goods and services, the opportunities for fraud, corruption and abuse are replete. The current global health crisis unfolded onto a world stage that is dynamic and roiling with anti-corruption activity and developments. This tenth edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning the globe, including a new chapter covering Portugal. The comprehensive scope of this edition of the Review mirrors that dynamism.

Over the past two years, countries across the globe have continued to investigate and prosecute a range of corruption cases – many involving heads of state and senior officials – strengthen their domestic anti-bribery and anti-corruption laws, and adopt important new law enforcement policies and guidance documents, though tumultuous international relations, rising economic competition and the effects of the pandemic are combining to threaten international cooperation and the progress of cross-border investigations more generally.

2020 saw French-headquartered Airbus SE reach a US\$3.9 billion coordinated corporate bribery and export controls resolution with authorities in France, the United Kingdom and the United States. The wide-ranging allegations involved alleged bribery of government officials in more than a dozen countries, as well as US export controls-related offences, and now other jurisdictions from Ghana to Malaysia are pressing forward with their own investigations. At the same time, the 1MDB scandal continued to play out, with still further US asset forfeiture actions, criminal charges against a major US Republican fundraiser for allegedly acting as an unregistered foreign agent in an attempt to illegally lobby the Trump administration to drop its probe into the 1MDB corruption scandal and an appeal by former Malaysian prime minister Najib Razak against his convictions on bribery and money-laundering charges and the resulting 12-year prison term. And in Brazil, which has for many years been a hotbed of anti-corruption investigations, President Jair Bolsonaro took the controversial step of ending his country's long-running Car Wash probe, following the resignation of his justice minister who, as judge, had previously presided over the probe.

Given the political turmoil and the global health crisis still confronting us in the remainder of 2021 and into 2022, this book and the wealth of country-specific learning that it contains will help guide practitioners and their clients when navigating the perils of

corruption in foreign and transnational business, and in related internal and government investigations. I am grateful to all of the contributors for their support in producing this highly informative volume.

Mark F Mendelsohn

Paul, Weiss, Rifkind, Wharton & Garrison LLP

Washington, DC

November 2021

PORTUGAL

*Ana de Brito Camacho and João Santos Marta*¹

I INTRODUCTION

This chapter focuses on the main aspects and developments of Portuguese legislation on corruption, international corruption and related offences (such as trading influence or money laundering), including a reference to the international treaties that Portugal has subscribed to and have come into force in its jurisdiction.

We shall also refer to a set of criminal cases on corruption and related criminal offences, investigations and prosecutions that have received media attention. Reference will also be made to international cases relating to corruption with implications in Portugal.

Finally, we set out the next legislative steps on the prevention of corruption, especially the role of compliance programmes. In this context, we highlight new legislation such as the new law that defines the General Regime for the Prevention of Corruption and the law that transposes the EU Whistleblower Protection Directive into Portuguese law.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

In the Portuguese legal system, there is no single crime that corresponds to bribery, but rather a differentiated set of crimes, namely crimes committed in the exercise of public duties² and the crime of influence peddling.³

Regarding crimes committed in the exercise of public duties, we must bear in mind the definition of ‘official’ provided for in the Criminal Code,⁴ which includes: administrative agents; arbitrators, jurors and experts; and anyone who temporarily performs an activity with a public, administrative or jurisdictional function. Judges, managers, members of supervisory bodies and employees of public, nationalised or publicly owned companies or companies with a majority public capital holding and also of public service concessionaires are treated as officials for this purpose.⁵

1 Ana de Brito Camacho is a senior associate and João Santos Marta is an associate at Sérvulo & Associados. The authors express their sincere gratitude to their colleague Inês Nabais do Paulo, of Sérvulo & Associados, for her collaboration on the chapter.

2 Foreseen in Articles 372 et seq of the Criminal Code.

3 Provided for in Article 335 of the Criminal Code.

4 Article 386(1) of the Criminal Code.

5 Article 386(2) and (3) of the Criminal Code.

Crimes committed in the exercise of public duties provided for in the Criminal Code, commonly known as ‘crimes of an official’, are the following:

- a* the crime of undue receipt of advantage⁶ – sanctions the mere request or acceptance, by an official, of a financial or non-financial advantage that is not due to him or her. An act or omission by the official in return for receiving the advantage is therefore not required, as in the crime of corruption referred to below. However, conduct that is socially appropriate and in accordance with traditions and practices will not be punished (offers of low value, if their acceptance does not correspond to the habitual practice of the official). In Portugal, there is also a specific prohibition on health professionals receiving prizes, gifts or other benefits given by companies responsible for information or promotion of medical devices or wholesale distributors,⁷ except in the case of objects of insignificant value and relevant to the practice of the health professional.⁸ Article 61(1)(mm) of Decree-Law No. 145/2009, of 17 June, as amended,⁹ provides that non-compliance with this prohibition constitutes a serious administrative offence under the terms of the Legal Framework for Economic Administrative Offences (approved by Decree-Law No. 9/2021, of 29 January), punishable by a penalty of between €650 and €1,500 (in the case of a natural person) or between €1,700 and €24,000 (in the case of a legal entity and depending on its size); and
- b* the crime of corruption¹⁰ – sanctions the request or acceptance of a financial or non-financial advantage, or the promise thereof, to an official for the commission of an act or omission (whether or not contrary to his or her public duties).

In relation to the crimes referred to above, both active and passive conduct are punishable. The penalties imposed for the various conducts foreseen (active and passive) vary from one year’s to eight years’ imprisonment¹¹ to a fine of up to 600 days.¹² Legal entities may also be punished for the commission of these crimes.¹³

In turn, the crime of trading in influence¹⁴ punishes the request or acceptance of a financial or non-financial advantage in order to exert influence with a public body. The penalties provided for the various conducts foreseen (active and passive) vary from up to five years’ imprisonment¹⁵ to a fine of up to 360 days.¹⁶ Legal entities may also be punished for committing this crime.¹⁷

6 Article 372 of the Criminal Code.

7 See Article 51(1) and (2) of Decree-Law No. 145/2009, of 17 June, amended by Decree-Law No. 5/2017, of 6 January.

8 Order No. 1542/2017, of 31 January 2017, of the Secretary of State for Health, determined that objects of value not exceeding €60 should be considered of insignificant value and relevant to the practice of the health professional.

9 Decree-Law No. 145/2009, of 17 June, amended by Decree-Law No. 5/2017, of 6 January.

10 Articles 373 and 374 of the Criminal Code.

11 Article 41(1) of the Criminal Code.

12 Article 47(1) of the Criminal Code.

13 Article 11(2) of the Criminal Code.

14 Article 335 of the Criminal Code.

15 Article 41(1) of the Criminal Code.

16 Article 47(1) of the Criminal Code.

17 Article 11(2) of the Criminal Code.

In Portugal, corruption is also prohibited in international trade and in the private sector.¹⁸ Article 8 of Law No. 20/2008, of 21 April, provides that any private sector employee who requests or accepts, without its being due, a financial or non-financial advantage, or the promise thereof, to commit an act or omission that constitutes a breach of his or her functional duties, is punishable with a prison sentence of up to five years or a fine of up to 600 days. If the said act or omission causes a distortion of competition or damage to the patrimony of third parties, the agent is punished with a prison sentence of between one and eight years. Article 9 of the same law provides for the corresponding crime of active corruption, punishable with a prison sentence of up to three years or with a fine (however, if the conduct is aimed at causing a distortion of competition or damage to the property of third parties, the agent will be punished with a prison sentence of up to five years or with a fine of up to 600 days). Legal entities may also be punished for committing these crimes, under general provisions.¹⁹

III ENFORCEMENT: DOMESTIC BRIBERY

In the Portuguese judicial system, of note during 2021 was the judicial decision rendered in the well-known case *Operação Marquês*, which involved the former Prime Minister José Sócrates. At the end of pretrial phase, the judge decided that José Sócrates, accused of 31 crimes, will go on trial for three crimes of money laundering and another three of document forgery, the same crimes for which his friend and businessman Carlos Santos Silva was indicted. The judge considered it proved that Carlos Santos Silva corrupted the former head of government, a crime of corruption that is, however, time-barred. The *Operação Marquês* case has links to other legal systems, namely Switzerland, where there were accounts in which – according to the prosecution – sums of money originating from the crimes referred to above were deposited.

In another high-profile case, the *BES* case (which concerns investigations into crimes related to the fall of the Espírito Santo Group), the extradition to the US of an accused former manager took place this year, where he may be convicted of money laundering and criminal association. At stake is allegedly a ‘corruption scheme of several Venezuelan politicians and directors and managers of *Petróleos da Venezuela (PDVSA)*, in which more than 3.5 billion euros were embezzled’. The defendant in question is suspected of having ‘served as an intermediary in the payment of bribes from two Venezuelan businessmen, Roberto Rinco and Abraham Shiera, both convicted of corruption in the United States, to officials of PDVSA’.²⁰

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

As mentioned above, Law No. 20/2008, of 21 April, deals with criminal liability for corruption in international trade. Its Article 7 defines that whoever, by themselves or through their consent or ratification, through an intermediary, gives or promises to a national, foreign or international official, or to a national or foreign political officeholder, or to a third party

18 Article 4 of Law No. 20/2008, of 21 April.

19 *ibid.*

20 Quoting an article in the Portuguese online newspaper *Observador*, of 13 July 2021, available at <https://observador.pt/2021/07/13/arguido-do-processo-da-queda-do-ges-extraditado-para-os-eua-poder-condenado-a-45-anos-de-prisao/>.

with their knowledge, an undue financial or non-financial advantage in order to obtain or maintain a business, a contract or another undue advantage in international commerce, will be punished with one to eight years' imprisonment.

As regards the enforcement of foreign bribery laws, in preventive mode, Article 1(a) of Law No. 36/94, of 29 September, combined with Articles 7 and 10 of Law No. 20/2008, of 21 April, indicates that it should be the Public Prosecutor's Office and the Judiciary Police, through the Central Office for the Fight against Corruption, Fraud and Economic and Financial Offences, that carry out preventive actions regarding international corruption.

According to Article 3 of Law No. 36/94, the Judiciary Police shall collect elements that may indicate the commission of a crime and, if the suspicion is confirmed, report it to the Public Prosecutor's Office.

As for denouncing or cooperating with the authorities to obtain some form of leniency, this is generally not allowed in Portugal. The only exception is foreseen under Article 374-B of the Criminal Code, which expressly allows the possibility of mitigation or suspension of the penalty for corruption under specific circumstances such as rejection or restitution of the undue advantage or cooperation with the authorities in the investigation.

Recently, the case of the Portuguese hacker Rui Pinto – who was accused of crimes of illegitimate access, breach of correspondence, computer sabotage and attempted extortion – triggered a discussion about the relevance of the defendant's collaboration with the investigation and judicial authorities. According to the media, in his hacking activity he accessed information useful to other criminal investigations, namely corruption cases, which justified his collaboration with foreign judicial authorities in Belgium, France and the Netherlands.

The National Anti-Corruption Strategy 2020–2024 admits amendments to the Criminal Code to allow the application of the 'reward law' in corruption cases.

For the time being it is not possible to agree with the Public Prosecutor on the applicable penalty in Portugal, but the government has expressed its intent to change this situation in the National Strategy to Fight Corruption 2020–2024, foreseeing a future amendment to the Criminal Code to provide for the possibility of concluding an agreement on the applicable penalty, based on a free and unreserved confession of the facts under investigation (i.e., plea bargaining).

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

Under Portuguese law, money laundering is a crime punishable by up to 12 years' imprisonment. According to Article 368-A, No. 1, Paragraph (k) of the Portuguese Criminal Code, the crime of corruption in both the public and private sectors is considered a predicate offence of money laundering. Usually, the investigation of a crime of corruption encompasses money laundering as well. It is also common that the prosecution as well as the criminal conviction refer to both crimes.

Besides criminal offences, non-compliance with money laundering prevention by obliged entities is also sanctioned as an administrative offence with fines up to €5 million under Law No. 83/2017, of 18 August 2017. This law transposes Directive 2015/849/EU of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing. On 31 August 2020, this law was altered by Law No. 58/2020, with the aim of the prevention of the use of cryptocurrencies for money laundering purposes, in accordance with the Directive 2018/843/EU of 30 May 2018.

Under the provision of Articles 43 and 44 of Law No. 83/2017, of 18 August 2017, financial institutions and other (non-financial) obliged entities have a legal duty to report all suspicious transactions to the authorities – the Portuguese Financial Intelligence Unit and the Public Prosecutor’s Office. The obliged entities (financial and non-financial) must maintain a record of the reported transactions.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

In recent years, there have been several cases involving cooperation between the Portuguese legal system and others to pursue corruption at an international level. An example is the Rota do Atlântico investigation, which involves Portuguese businessmen, high-ranking state figures in the Congo and various multinationals, such as the Gunvor group, linked to the commercialisation of oil.²¹ In this investigation, the Portuguese authorities collected data that originated in another criminal case investigation, namely *Operação Lex*, which ended with several Portuguese judges from the Court of Appeal accused of corruption and accepting undue advantage.²²

The Brazilian Lava Jato criminal investigation is also under way. The Portuguese Public Prosecutor’s Office has been collaborating with the investigations that allegedly are linked to other high-profile criminal cases such as *Operação Marquês*, *Monte Branco* and *BPN*.²³

More recently, there was also the result of the Luanda Leaks journalistic investigation, in which the businesswoman Isabel dos Santos, daughter of former Angolan President José Eduardo dos Santos, was linked to money laundering, trading in influence, wrongful management and forgery, among other economic crimes. Portuguese judicial authorities are collaborating with the Angolan judicial authorities, the former having carried out a preventive seizure of Isabel dos Santos’s bank accounts requested by the latter.²⁴

In 2021, Portugal also executed an international arrest warrant issued by Angola, as part of the *CNC* case, in which the former chair of the board of directors of the Luanda Urban Collective Transport Company is accused of involvement in embezzlement of public funds.²⁵

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

On 1 September 1999, the Council of Europe Criminal Law Convention on Corruption came into force in Portugal. Afterwards, the Additional Protocol to this Convention also came into force on 1 July 2015. Both the Treaty and its Additional Protocol are relevant to the prevention of corruption and related offences leading to the criminalisation of conduct such

21 Based on an article in the Portuguese online newspaper *Sábado*, of 26 April 2018, available at www.sabado.pt/portugal/detalhe/processo-de-jose-veiga-vai-arrastar-se-ate-2019.

22 Based on an article in *Observador*, of 10 January 2020, available at <https://observador.pt/2020/01/10/empresario-jose-veiga-arguido-na-operacao-lex-por-alegadamente/>.

23 Based on an article in *Observador*, of 21 July 2015, available at <https://observador.pt/2015/07/21/lava-jato-5-graficos-caso-brasileiro-cruza-varios-processos-portugal/>.

24 Based on the *DW* online article of 4 May 2021, available at www.dw.com/pt-002/justi%C3%A7a-portuguesa-arresta-contas-de-pessoas-pr%C3%B3ximas-a-isabel-dos-santos/a-57420906.

25 Based on an article in the Portuguese online newspaper *Diário de Notícias*, of 18 January 2021, available at www.dn.pt/sociedade/detido-pela-pj-para-extradicao-ex-administrador-de-empresa-de-transportes-de-angola--13244781.html.

as trading in influence and corruption in the private sector and in international organisations. The Group of States against Corruption (also known as GRECO) established by this Treaty has been closely monitoring its implementation by the ratifying states, such as Portugal.

Although Portugal has ratified the Organisation for Economic Co-operation and Development Anti-Bribery Convention, the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime, over the past decades relevant legal developments stem from European Union legislation on corruption. For example, the approval of Council Framework Decision 2003/568/JHA, of 22 July 2003, on combating corruption in the private sector resulted in the criminalisation in Portugal of corruption in the private sector and in international trade (under Law No. 20/2008, of 21 April 2008), as well as of the new offence of accepting undue advantage.²⁶

VIII LEGISLATIVE DEVELOPMENTS

On 17 June 2021, the Portuguese Council of Ministers approved a Decree-Law establishing both the new national anti-corruption mechanism and the new rules for the prevention of corruption. The primary objective of this legislation is to set several obligations for the public and private sectors (covering medium-sized and large companies) regarding the prevention of corruption.

The General Regime for the Prevention of Corruption foresees that companies employing more than 50 employees must have an extensive compliance programme (including codes of conduct, whistle-blowing channels and training programmes) aimed at the prevention of corruption and related offences.

The second objective of the legislation is to create a new administrative authority – the National Anti-Corruption Mechanism – entrusted with monitoring compliance with the legal obligations set out in the General Regime for the Prevention of Corruption.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

Approval of the new legislation that transposes the EU Whistleblower Protection Directive – Directive 2019/1937/EU of the European Parliament and of the Council, of 23 October 2019, on the protection of persons who report breaches of EU law – is still expected between the time of writing and the end of 2021.

This legislation will apply to reporting persons working in the private or public sectors who acquired information on breaches of EU law in a work-related context. The obligation to set a whistle-blowing channel within the organisation will apply to companies with more than 50 employees.

X COMPLIANCE

The importance of compliance programmes in Portugal has increased over the past decade. Compliance programmes are not mandatory for most companies and sectors – except for the prevention of money laundering – nor are considered a defence mechanism under the Portuguese Criminal Code.

²⁶ Foreseen in Article 372 of the Portuguese Criminal Code.

Nevertheless, the existence of compliance programmes is generally considered a mitigating factor when it comes to determining the sanctions for criminal or administrative offences, since it demonstrates the company's compliance with the applicable law, particularly in relation to the prevention of corruption, related offences and money laundering.

However, the approval of the General Regime for the Prevention of Corruption and the transposition of the EU Whistleblower Protection Directive will most definitely change this scenario and increase the number of companies (in both the public and private sectors) subject to the legal obligation of having a compliance programme specially designed to prevent corruption, related offences and money laundering.

XI OUTLOOK AND CONCLUSIONS

The recently approved Decree-Law will certainly have a profound impact on medium-sized and large companies in relation to compliance and the prevention of corruption.

Additionally, the expected legislation that transposes the EU Whistleblower Protection Directive will facilitate (and probably increase) the number of reports of suspected acts of corruption, even if limited to EU law. Nevertheless, it will be interesting to see if there is an effective increase in denunciations and, if so, if this will result in an increase in the number of judicial investigations, prosecutions and criminal convictions.

The recently approved National Anti-Corruption Strategy 2020–2024 will bring changes to the rules about the admissibility of defendant collaboration with ongoing investigations in exchange for mitigation or suspension of the procedure or sanction. It remains to be seen whether these changes will be implemented by the new Decree-Law and the actual extent of the admissibility of these kinds of agreements.

One should be aware of the continual increase in the rules and penalties regarding the prevention of money laundering and terrorism financing.

Last, one should expect an increasing relevance of compliance programmes on the determination of companies' liability for criminal and administrative offences of corruption and related infractions.

ABOUT THE AUTHORS

ANA DE BRITO CAMACHO

Sérvulo & Associados

At Sérvulo since 2008, Ana de Brito Camacho is a senior associate in the corporate crime and regulatory compliance and in the litigation and arbitration departments. She graduated in law from the Faculty of Law of the University of Lisbon in 2003. From 2005 to 2007 she was an associate at Ferreira Pinto & Associados, where she was a trainee lawyer from 2003 to 2005. She joined the Bar Association in 2005. She obtained a graduate qualification in consumer law from the Faculty of Law of the University of Lisbon in 2007, and she further attended graduate courses in: law enforcement, compliance and criminal law, at the Faculty of Law of the University of Lisbon in 2016; administrative sanctions law, at the Faculty of Law of the University of Lisbon in 2015; European justice on human rights, at the Faculty of Law of the University of Coimbra in 2008; and economic and European criminal law, at the Faculty of Law of the University of Coimbra from 2004 to 2005. From 2017 to 2019, Ana was a member of the Legislative Policy Office of the Portuguese Bar Association, among others roles functioning as coordinator of the Working Group for the Reform of Administrative Offences of the Bar Association. She is a founding member of the Criminal Forum – Association of Criminal Lawyers.

JOÃO SANTOS MARTA

Sérvulo & Associados

João Santos Marta has been at Sérvulo since 2016, and is an associate in the litigation and arbitration department, which he joined as a trainee lawyer. He currently attends the postgraduate course in corporate law at the Faculty of Law of the University of Lisbon. He obtained graduate qualifications in economic and European criminal law in 2021 and compliance and criminal law in 2020, both from the Faculty of Law of the University of Coimbra. He previously attended a graduate course in digital evidence in criminal procedure at the Faculty of Law of the University of Lisbon in 2019. He concluded a master's in forensic legal sciences in 2015, and graduated in law in 2013, both from the Faculty of Law of the University of Coimbra. He joined the Bar Association in 2018.

SÉRVULO & ASSOCIADOS

Rua Garrett, 64

1200-204 Lisbon

Portugal

Tel: +351 210 933 000

Fax: +351 210 933 001/2

abc@servulo.com

jsm@servulo.com

www.servulo.com

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