

## Financial and business crime in Portugal: overview

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A Q&A guide to financial and business crime law in Portugal.

The Q&A gives a high level overview of matters relating to corporate fraud, bribery and corruption, insider dealing and market abuse, money laundering and terrorist financing, financial record keeping, due diligence, corporate liability, immunity and leniency, and whistleblowing.

To compare answers across multiple jurisdictions, visit the Financial and Business Crime *Country Q&A tool*.

This Q&A is part of the global guide to corporate crime, fraud and investigations law. For a full list of jurisdictional Q&As visit [www.practicallaw.com/corporatecrime-mjg](http://www.practicallaw.com/corporatecrime-mjg).

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## Fraud

### Regulatory provisions and authorities

#### 1. What are the main regulatory provisions and legislation relevant to corporate or business fraud?

The central provisions pertaining to fraud are Articles 217 and 218 of the Portuguese Criminal Code. Related offences and/or legislation may be found in specific laws (for example, the General Taxation Infringements Law, Decree-Law no. 28/84 of 20 January, Portuguese Companies Act (PCA)).

### Offences

#### 2. What are the specific offences relevant to corporate or business fraud?

The following offences are potentially relevant in a corporate and business context:

- **Fraud (Articles 217 and 218, Portuguese Criminal Code (PCC)).** This applies to anyone who causes another person to do acts that cause material losses to that person or to a third person:
  - with the intent of obtaining an unlawful material benefit for himself or a third person;
  - by provoking an error or misunderstanding about facts.
- **Embezzlement (Article 205, PCC).** This applies to anyone who misappropriates funds (or other movable property) received on the understanding that they would be handled in a certain way.
- **Criminal breach of trust (Article 224, PCC).** This applies to anyone who, being responsible for the property interests of another

party, intentionally and in serious breach of his duties, causes damage to the other party.

- **Tax fraud (Articles 87 and 103, General Taxation Infringements Law).** This concerns any fraudulent act (on the list set out in the law) committed in order to avoid or minimise the payment of due taxes, or to obtain undue tax benefits. Attempt is not punishable.
- **Subsidy fraud (Article 36, Decree-Law no. 28/84).** This applies to any incorrect or incomplete statements (on the list set out in the law) on facts relevant to the granting of the subsidy, made to a public authority with power to approve a subsidy. Negligence is sufficient to trigger criminal liability.
- **Obtaining credit fraudulently (Article 38, Decree-Law no.28/84).** This applies to any inaccurate or incomplete statements or documents (as listed in the law) used to apply for, maintain or modify credit.
- **Bankruptcy fraud (Article 227, PCC).** This applies to a debtor that does one or more of the following acts in the context of an insolvency in order to prejudice the creditors (*Insolvência dolosa*):
  - destroys, damages, renders unusable or causes to disappear any part of his property;
  - makes misstatements relating to his financial position; or
  - creates a false financial reality.

Unless otherwise stated, they are all non-strict liability offences (that is, they require intent by the perpetrator) and attempt is always punishable.

There is also a wide range of non-strict liability criminal offences established in the Portuguese Companies Act (PCA), mainly regarding unlawful acts in respect of (Articles 509 to 526):

- The acquisition, payment and amortisation of quotas or shares.
- The distribution of company assets.
- The convening and holding of general meetings.
- Information duties and rights.

## Enforcement

### 3. Which authorities have the powers of prosecution, investigation and enforcement in cases of corporate or business fraud? What are these powers and what are the consequences of non-compliance?

#### Authorities

In general, all criminal offences are investigated by the competent public prosecutor's office, although it may be assisted by police officials (there is a wide array of measures that may be delegated to the police bodies).

With regard to tax-related offences, investigations are usually carried out by tax inspection authorities (*órgão da administração tributária*).

For more information see box, *The authorities*.

The investigation phase of the criminal proceedings ends with a final decision of the public prosecutor on whether or not to submit the defendant(s) to trial (Articles 277 and 283, Portuguese Code of Criminal Procedure (PCCP)).

It is possible to require to an investigating judge (*juiz de instrução criminal*) to assess this decision of the public prosecutor. The trial court may be constituted by a single judge or a panel of judges, depending on the severity of the offence (Articles 14 and 15, PCCP).

(For more details on Portuguese courts' jurisdiction, see Question 31).

The Portuguese authorities can request assistance from foreign authorities (see Question 30).

#### Prosecution powers

The competent public prosecutor's office is, on the one hand, entitled to initiate criminal proceedings and, on the other hand, has the duty to start investigations. In fact, in Portuguese criminal procedure, the "principle of legality" is a prevailing procedural principle. This means that the competent public prosecutor is:

- Required to initiate an investigation whenever he receives notice that a crime has been committed. The sole exception to this is private crime in the broad sense, where a complaint is required, for instance, a criminal breach of trust.
- Subject to the duty of prosecuting whenever sufficient evidence is gathered, during the inquiry, that the requirements on which the application of a criminal penalty depends are fulfilled. The sole exception to this is private crime in the strict sense, where private prosecution is required. None of the crimes mentioned (*see Question 2*) are considered to be private crimes in that sense.

The public prosecutor conducts the investigation and, for that reason, has the authority to discover and collect evidence, within legal limits.

The investigatory measures provided for by law include:

- Examination and seizure of objects (*Article 178, PCCP*).
- Body searches (*Articles 171 and 174, PCCP*).
- Searches of premises and seizures of relevant items and documents (including, under some circumstances, values and monies existing in bank accounts) (*Articles 174 to 182, PCCP*).
- Interception, monitoring and recording of communications and telecommunications (*Article 187, PCCP*).
- Questioning or provision of information or documentation (to both witnesses and suspects, although suspects do have the right to remain silent).
- Surveillance (acoustic and visual), under the circumstances defined by Law no.1/2005 of 10 January.

However, there are certain investigative acts that can only be done (*Article 268, PCCP*) and others that can only be authorised (*Article 269, PCCP*) by the investigating judge. There are also certain acts that have to be carried out by the public prosecutor exclusively (*Articles 143 and 270 (2), PCCP*).

Additionally, as regards subsidy fraud (*Article 36, Decree-Law no. 28/84*), infiltration is allowed as an investigatory measure (*Law no.101/2001, of 25 August*) (*see Question 10*).

When conducting the investigation phase, the public prosecutor's orders and decisions are mandatory, and non-compliance may even constitute a crime (*Articles 348, 359, 360 and 367 PCC*) (*see Question 3, Court orders or injunctions*).

### **Powers of interview**

Excluding the first preliminary court hearing of an arrested defendant, which is an exclusive power of the investigating judge (*Article 268, PCCP*), the public prosecutor is able to:

- Conduct the first out-of-court preliminary hearing of an arrested defendant, all of the subsequent hearings, and any hearing of a defendant not in custody (*Articles 143 and 144, PCCP*).
- Examine witnesses (*Articles 128, 129, 263 and 267, PCCP*);
- Conduct interviews with the victim and the civil parties (*Articles 145, 129, 263 and 267, PCCP*).

### **Powers of search/to compel disclosure**

The public prosecutor has wide powers to conduct searches (*see Question 3, Investigatory measures and Powers of interview*).

Witnesses have the duty to answer truthfully any questions posed by the competent authorities (*Article 132(1)(d), PCCP*) and failure to comply with this duty may constitute the commission of a crime (*Articles 359, 360 and 367, PCC*). Witnesses subject to professional secrecy (for example, lawyers, doctors, journalists, members of credit institutions) may even be ordered to testify, upon judicial order (*Articles 135, 136 and 137, PCCP*).

However, defendants have the right to refuse to answer questions made (namely those considered self-incriminatory) and their silence cannot be used against them (*Article 61 (1)(d), PCCP*).

(*See Question 3, Court orders or injunctions*).

### **Court orders or injunctions**

The most important court orders / injunctions to be considered are the ones that relate to the coercive and financial guarantee measures, that can be imposed on the defendant, under certain circumstances, if deemed necessary, adequate and proportionate (*Article 193(1) and (4), PCCP*).

The PCCP provides for a wide range of coercive measures, which can only be enforced when, regarding the defendant, it is concluded that there is a risk of:

- Danger of evasion.
- Disturbing the normal course of the investigation.
- Continuing the criminal activity or gravely affecting public order and peace.

The measures are as follows:

- Statement of Identity and Residence (*Termo de Identidade e Residência*) (*Article 196 PCCP*). It is the most lenient coercive measure. It is mandatory and there is no need for the requirements for the application of any coercive measure (*Articles 193 and 204 PCCP*) to be met.
- Security (*Caução*) (*Article 197 PCCP*). It can be imposed when the crime is punishable with imprisonment.
- Obligation of periodic presentation (*Obrigaç o de apresenta o peri dica*) (*Article 198 PCCP*). It can be imposed when the crime is punishable with an imprisonment penalty with a higher threshold that exceeds six months; it has a maximum duration of eight months.
- Suspension of the exercise of a profession, function, activity and rights (*Suspens o do exerc cio de profiss o, de fun o, de atividade e de direitos*) (*Article 199 PCCP*). It can be imposed when the crime is punishable with an imprisonment penalty with a higher threshold that exceeds two years; it has a maximum duration of eight months.
- Prohibition and imposition of conduct (*Proibi o e imposi o de condutas*) (*Article 200 PCCP*). It can be imposed when there are serious indications that the crime is punishable with an imprisonment penalty with a higher threshold that exceeds three years.
- Home detention (*Obriga o de perman ncia na habita o*) (*Article 201 PCCP*). It can be imposed when there are serious indications that the crime is punishable with an imprisonment penalty with a higher threshold that exceeds three years.
- Pre-trial detention (*Pris o preventiva*) (*Article 202 PCCP*). It can be imposed when there are serious indications that the crime committed is a major crime (as provided for by *Article 202 PCCP*).

The financial guarantee measures provided for are the economic security (*Cau o econ mica*) and the precautionary seizure (*Arresto preventivo*) (*Articles 227 and 228, PCCP*).

All of the above mentioned measures can only be imposed by the investigating judge, with the exception of the Statement of Identity and Residence (which can be applied by the public prosecutor or police officials).

If a person properly summoned fails to appear on the appointed day without any justification, the judge must order the payment of a fine, of any expenses caused and may even order detention for the necessary time (*Article 116(1) and (2), PCCP*).

## Protections available

In general terms, every person has the following rights:

- Privilege against self-incrimination.
- A presumption of innocence.
- The right to be assisted by a lawyer.
- The right to privacy.

Evidence obtained through torture, coercion, physical or psychological harm, or abusive intrusion into the private life, domicile, mail or telecommunications of a person is regarded as null (*Article 33(8), Constitution of the Portuguese Republic*). The PCCP expands on these provisions by establishing that the following illegally or improperly obtained evidence is null and cannot be used:

- Evidence obtained through torture, coercion or generally through physical or psychological harm to a person (*Article 126 (1) and (2)*).

- Except where the law rules otherwise (referring to the intrusive investigative measures allowed and regulated by the law), evidence obtained through intrusion, without the consent of the person concerned, in his or her private life, domicile, mail or telecommunications (*Article 126(3)*).

The PCCP also establishes that evidence gathered is null and/or cannot be used when the legal requirements established for the gathering of that evidence are not fulfilled.

Finally:

- A defendant has the general right to intervene and be heard during an investigation.
- The questioning of a defendant cannot exceed eight hours a day (and an intermission of 60 minutes is mandatory after four hours).

## Penalties

### 4. What are the potential penalties or liabilities for participating in corporate or business fraud?

## Civil/administrative proceedings or penalties

All the offences referred to (*see Question 2*) are criminal offences. In some exceptional circumstances, civil proceedings can be brought (*see Question 4, Civil Suits*).

## Criminal proceedings or penalties

The following penalties apply to individuals:

- **Fraud, embezzlement and criminal breach of trust.** Imprisonment up to a maximum of three years or a fine up to the maximum limits (*see below*). For qualified fraud, imprisonment up to a maximum of six years or a fine up to a maximum of 600 days can be imposed (*see below*). For qualified embezzlement, imprisonment from one to eight years can be imposed. Fraud and embezzlement become qualified under certain circumstances set out in the law (for example, where the loss or the value misappropriated is particularly high, or in the case of fraud where the victim is particularly vulnerable).
- **Tax fraud.** Imprisonment up to a maximum of three years or a fine up to a maximum of 360 days (for very serious cases, imprisonment from two to eight years and, for legal persons, a fine from 480 to 1,920 days (*see below*)).
- **Subsidy fraud.** Imprisonment from one to five years and a fine from 50 to 150 days (for very serious cases, imprisonment from two to eight years, and when committed with negligence, imprisonment up to two years or a fine up to 100 days (*see below*)).
- **Obtaining credit fraudulently.** Imprisonment up to a maximum of three years or a fine up to a maximum of 150 days (for very serious cases, imprisonment may be up to five years and the fine up to 200 days (*see below*)).
- **Bankruptcy fraud.** Imprisonment up to a maximum of five years or a fine up to a maximum of 600 days (*see below*).

Unless otherwise stated for an offence, imprisonment is applied for a minimum of one month and a maximum of 20 years (*Article 41, Portuguese Criminal Code (PCC)*). Fines are imposed in daily units with a minimum of ten and a maximum of 360 daily units, unless the law provides otherwise (*Article 47, Portuguese Criminal Code (PCC)*). The court determines the number of daily units based on the offender's personal and financial circumstances. A daily unit can range from EUR5 to EUR500 (*Article 47, PCC*).

A prison sentence (depending on its severity and subject to certain requirements) may be replaced by penalties not involving deprivation of freedom, such as a suspended sentence or community service (community service can also be a substitute for fines) (*Articles 43 to 60, PCC*).

Legal persons may be held liable (under the circumstances referred to in *Question 27*) for certain types of offences (for example, fraud, tax fraud, subsidy fraud and obtaining credit fraudulently). Fines or dissolution of the legal entity may be applied.

The minimum and maximum limits of fines are determined with reference to the term of imprisonment provided for individuals, and a month of prison for an individual corresponds to ten days of fine for legal persons. Fines have a daily minimum of EUR100 and a maximum of EUR10,000 based on the offender's financial circumstances and its costs in respect of its employees (*Article 90-B, PCC*).

Corporate entities can also be punished by (*PCC*):

- A wide range of ancillary penalties, such as (*Articles 90-E to 90-M*):
  - judicial supervision;

- prohibition on certain agreements or activities;
  - publication of the decision;
  - temporary or permanent closure.
- Alternative penalties, such as (*Articles 90-C, 90-D and 90-E*):
    - mere admonition;
    - a good conduct bond; or
    - the obligation of having a judicial representative auditing its activity.

## Right to bail

The Portuguese legal system does not provide for a right to bail, either at the pre-or post- charge phase.

The security (*Caução*) provided for in Article 197 PCCP could be considered to resemble the right to bail, but it is still a coercive measure meant to ensure the subject's assets are sufficient to provide for the payment of any pecuniary sanction / indemnity to which he may be sentenced (*see Question 3, Court orders or injunctions*).

Some legally recognised deviations from the principle of legality (*see Question 3, Investigatory measures*) may also be considered closer to the right of bail (*Articles 280 and 281, PCCP*). The most common is the "provisional suspension of the proceedings" - it has a general maximum term of two years, during which the defendant must comply with certain rules (such as the payment of a pecuniary amount to the state) and it is applicable to offences punishable with imprisonment not exceeding five years or with a penalty other than imprisonment whenever the parties, public prosecutor and investigative judge are in accordance.

## Civil suits

Civil parties can participate in a criminal proceeding and can be awarded civil damages (material or moral) that are proven to be a consequence of the crime, by the same court that decides the criminal issue. The level of civil damages is proportionate to the economic damage caused to the relevant parties, assessed on a case-by-case basis, and may include financial compensation (moral damages).

In some exceptional circumstances, victims can commence a civil suit. Class actions (*direito de participação procedimental e de acção popular*) may be possible. Law no. 83/95 of 31 August, allows those who hold the right of popular action (*Article 2*), to make a denunciation, complaint or notification to the public prosecutor, or to join a pending suit as assistant (*Article 25*). However, that right is only recognised:

- In areas such as public health, the environment, quality of life, cultural heritage and public domain (*Article 1*).
- As long as the actions in question are criminal in nature.

## Bribery and corruption

### Regulatory provisions and authorities

#### 5. What are the main regulatory provisions and legislation relevant to bribery and corruption?

The main criminal offences related to bribery and corruption are described in Articles 372 to 374 of the Portuguese Criminal Code (PCC). There are, however, related offences and/or legislation governed by specific laws (for example, Law no. 34/87, of 16 July, Law no. 20/2008, of 21 April and Law no. 100/2003, of 15 November).

#### 6. What international anti-corruption conventions apply in your jurisdiction?

Portugal is a party to:

- UN Convention against Corruption 2003.
- UN Convention against Transnational Organized Crime, signed on 12 December 2000.

- Council of Europe Civil Law Convention on Corruption 1999.
- Convention on the Fight against Corruption involving Officials of the European Communities or Officials of member states of the EU, adopted by the member states on 26 May 1997.
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997.
- EU Convention on the Protection of the Financial Interests of the Communities and Protocols, ratified by all member states.

## Offences

### 7. What are the specific bribery and corruption offences in your jurisdiction?

#### Foreign public officials

Portuguese law has no specific provisions on bribery of a foreign public official. Therefore, this situation depends on the specific provisions of the applicable laws concerning public officials (*PCC, Law no. 34/87 and Law no. 20/2008*) (see below, *Domestic public officials and International trade and private commercial bribery*).

As regards criminal offences described in the PCC, Article 386 offers a definition of public official which includes:

- A magistrate, public official, agent or equivalent of the EU, regardless of his nationality or place of residence.
- A public official of any other EU member state, whenever the offence is committed, in whole or in part, in Portugal.

Equivalent definitions are included in Law no. 34/87 (*Article 3*) and Law no. 20/2008 (*Article 7*).

#### Domestic public officials

The PCC establishes various criminal offences concerning public officials:

- Any public official who, while performing his duties, or because of such duties, requests or receives (by himself or through a third party with his consent or approval), a financial or other advantage (for himself or for a third party) (*Article 372(1)*).
- Any person that gives or promises an undue financial or other advantage (even if through a third party, with that person's consent or approval) to a (*Article 372(2)*):
  - public official, while performing his duties, or because of such duties; or
  - third party, with the public official's knowledge.
- Whenever a public official requests, receives or agrees to receive (himself or through a third party with his consent or approval), a financial or other advantage (for himself or for a third party), in order to act, omit to act, or to reward a previous act or omission (*Article 373*).
- Where a person gives or promises (himself or through a third party with his consent or approval) a financial or other advantage, to a public official or to a third party with the public official's knowledge, in order to lead the public official to act, omit to act, or to reward a previous act or omission (*Article 374*).

Criminal offences are established in Law no. 34/87 for political office holders and high-ranking public officials:

- Any political office holder or high-ranking public official who, while performing his duties, or because of such duties, requests or receives (himself or through a third party with his consent or approval), an undue financial or other advantage (for himself or for a third party) (*Article 16(1)*).
- Anyone who gives or promises (even if through a third party, with his consent or approval) an undue financial or other advantage to a (*Article 16(2)*):
  - political office holder or high-ranking public official, while performing his duties, or because of such duties; or
  - third party with the political office holder or high-ranking public official's knowledge.



- Any political office holder or high-ranking public official who, while performing his duties or due to his duties, requests, receives or agrees to receive (himself or through a third party with his consent or approval), a financial or other advantage (for himself or for a third party), in order to act, omit to act, or to reward a previous act or omission (*Article 17(1) and (2)*).
- Anyone who gives or promises (even if through a third party, with that person's consent or approval) to a political office holder, a high-ranking public official or to a third party (on the political office holder or high-ranking public official's orders or with any of those persons' knowledge) a financial or other advantage, in order to lead the public official to act, omit to act, or to reward a previous act or omission (*Article 18(1) and (2)*).
- Any political office holder or high-ranking public official that, while performing his duties or due to his duties, gives or promises (himself or through a third party with his consent or approval) an undue financial or other advantage to a public official, a political office holder or a high-ranking public official (or a third party with any of those persons' knowledge), in order to lead the political office holder or public official to act or omit to act (*Article 18(3)*).

Law no. 100/2003 establishes autonomous criminal offences in respect of military officials (*Articles 36 and 37*).

### International trade and private commercial bribery

Criminal offences of corruption in international trade and in the private sector are established under Law no. 20/2008:

- Anyone who gives or promises (even if through a third party, with that person's consent or approval), in order to obtain or maintain an agreement, a contract, or any other undue advantage in international trade, an undue financial or other advantage, to a (*Article 7*):
  - public official (domestic, foreign or of an international organisation);
  - political office holder (domestic or foreign); or
  - third party with the knowledge of one of those persons.
- Any private sector employee that requests, receives or agrees to receive (himself or through a third party with his consent or approval), a financial or other advantage (for himself or for a third party), in order to act or omit to act in breach of the duties inherent to his functions or activities (*Article 8*).
- Anyone who gives or promises (even if through a third party, with that person's consent or approval) to a private sector employee or to a third party with his knowledge, an undue financial or other advantage, in order to lead the employee to act or omit to act in breach of the duties inherent to his functions or activities (*Article 9*).

### Thresholds

Portuguese law does not establish thresholds concerning bribery, but considers practices that are socially accepted according to traditions and local customs to be unpunishable (*see Question 8*). These include, according to the Portuguese Council for Prevention of Corruption in 2011, offers that are of an institutional level and of small value, which some authors consider may correspond to the legal definition used for property crimes of EUR102.

In 2012, the Portuguese Ministry of Justice announced a proposal for a framework law for the creation of a Code of Conduct and Ethics for Public Administration, under which offers must not exceed a maximum value of EUR150.

Under the strict rules of the Health Law, offers of gifts to health professionals must constitute objects of insignificant value, which, according to the Portuguese Minister of Health in October 2014, must not exceed EUR60.

### Defences

#### 8. What defences, safe harbours or exemptions are available and who can qualify?

As far as bribery is concerned, Portuguese law specifically establishes that socially appropriate practices are not punishable (*see Question 7, Thresholds*). In this sense, for instance, hospitality or the allocation of bonuses are not considered illegal, as long as they are deemed reasonable and do not appear to represent any form of pressure or influence on the decision of the person receiving them. However, facilitation payments fall under the scope of the acts prohibited by the legislation against bribery.

In addition, a penalty must not be applied whenever the person, before the crime is committed:

- Voluntarily renounces the offer or promise once accepted.

- Returns or asks for the return of the advantage or, if fungible (that is, such as to be freely replaceable), the respective value.
- Withdraws or refuses the offer made.

As to the bribery offences in the Portuguese Criminal Code (PCC) and Law no. 34/87, there will also be an exemption from the penalty if the person denounces the criminal offence within a time limit of 30 days, as long as criminal proceedings have not yet been initiated (*Article 374-B (1) PCC and Article 19-A (1) of Law no. 34/87*).

Additionally, the penalty can be specially reduced if the offender provides assistance in the collection of evidence, contributing to the truth-finding in the criminal case (*Article 374-B (2) PCC, Article 19-A (2) of Law no. 34/87 and Article 5 (a) Law no. 20/2008*).

Generally, the PCC provides for exemption from liability of legal persons when the agent has acted against express and specific orders or instructions of those in an appropriate, leadership, position.

### **9. Can associated persons (such as spouses) and agents be liable for these offences and in what circumstances?**

There is no specific rule for associated persons such as spouses or agents. These persons will be liable if they fall under the general rules:

- Principal. This is anyone:
  - who commits the act, himself or through an intermediary;
  - takes part directly in its commission, either by agreement or jointly with another or others; and
  - anyone who intentionally causes another person to commit the act.
- Accomplice. This is anyone who aids or abets (materially or morally) the principal.

## **Enforcement**

### **10. Which authorities have the powers of prosecution, investigation and enforcement in cases of bribery and corruption? What are these powers and what are the consequences of non-compliance?**

#### **Authorities**

There is no specific government agency in Portugal responsible for the investigation of bribery offences. However, the Central Department of Investigation and Prosecution (*Departamento Central de Investigação e Acção Penal*)(DCIAP) has been playing an important role in the prevention and investigation of bribery and corruption.

In January 2012, the DCIAP organised a conference to publicise its recently published Good Practices Guide on corruption offences, although the Good Practices Guide is not mandatory in character.

See also *Question 3*.

For more information on the DCIAP see box, *The authorities*.

#### **Prosecution powers**

See *Question 3, Prosecution powers*.

The additional following investigative measures may also be important in this context:

- Control of bank accounts. This involves the establishment of an obligation for a credit institution to communicate any operation performed on a determined bank account within the subsequent 24 hours. The authorities who execute the measure are the criminal police or the public prosecutor, with the authorisation or order of a judge. The investigating judge may order the freezing of bank accounts (*Article 4 Law no.5/2002, of 11 January, as amended*).
- Recording of sound and image by any means and without the consent of the person targeted. This measure depends on prior authorisation or an order of the investigating judge, and Portuguese Criminal Code rules concerning interception and recording of telecommunications apply (*Article 6 Law no.5/2002*).

- Infiltration. Under the conditions established by law, agents of the criminal police or third parties acting under their supervision can carry out actions under an undisclosed status and identity or, even, a false identity. As an investigative measure, it can be authorised by the public prosecutor and law enforcement agents of other states may be able to carry out infiltration actions in Portugal (*Law no.101/2001*).

### **Powers of interview**

See *Question 3, Powers of interview*.

### **Powers of search/to compel disclosure**

See *Question 3, Powers of search/to compel disclosure*.

Under certain circumstances, the public prosecutor is able to compel governing bodies of credit institutions, financial companies, payment institutions and electronic money institutions (its employees and anyone who provides them services), as well as tax officials, to provide information subject to professional secrecy (*Articles 2 and 3, Law no.5/2002*).

### **Court orders or injunctions**

See *Question 3, Court orders or injunctions*.

### **Protections available**

See *Question 3, Protections available*.

### **Penalties**

#### **11. What are the potential penalties for participating in bribery and corruption?**

### **Civil/administrative proceedings or penalties**

All the offences referred to in *Question 7* are criminal offences.

In some circumstances, civil proceedings can be brought, regardless of the type of crime, whenever civil damage is caused by the offence (see *Question 4, Civil suits*).

### **Criminal proceedings or penalties**

For the specific offences, see *Question 7*. Under the Portuguese Criminal Code (PCC), individuals are punishable with the following penalties, depending on the offence:

- **Offences under Article 372(1)**. Imprisonment up to five years or a fine up to 600 days.
- **Article 372(2)**. Imprisonment up to three years or a fine up to 360 days.
- **Article 373**. Either:
  - imprisonment from one to eight years; or
  - when the act or omission does not breach the public official's duties but the advantage is undue, imprisonment from one to five years.
- **Article 374**. Either:
  - imprisonment from one to five years, when the act or omission breaches the public official's duties; or
  - imprisonment up to three years or a fine up to 360 days, when the act or omission does not breach the public official's duties.

When the offence relates to a major benefit, the penalties may be increased.

Under Law no. 34/87, individuals are punishable with:

- **Offences under Article 16(1)**. Imprisonment from one to five years.

- **Article 16(2)**. Imprisonment up to five years or a fine up to 600 days.
- **Article 17(1) and (2) and Article 18(3)**. Either:
  - imprisonment from two to eight years, when the act or omission breaches the public official's duties; or
  - imprisonment from two to five years, when the act or omission does not breach the public official's duties but the advantage is undue.
- **Article 18(1) and (2)**. Either:
  - imprisonment from two to five years, when the act or omission breaches the political office holder's or high-ranking public official's duties; or
  - imprisonment up to five years when it does not.

In the case of military bribery offences, "active corruption" is punishable with imprisonment from one to six years and "passive corruption" with imprisonment from two to ten years (*Articles 36 and 37, Law no. 100/2003*). Active corruption in this context means anyone who gives or promises to a specified person an undue financial or other advantage, to act or omit to act in breach of the duties inherent to any of those person's duties or activities and that constitutes a danger to national security. Passive corruption means anyone who requests, receives or agrees to receive such an advantage to act or omit to act.

Finally, under Law no. 20/2008, individuals are punishable with:

- **Article 7**. Imprisonment from one to eight years.
- **Article 8**. Either:
  - imprisonment up to five years or a fine up to 600 days; or
  - if the offence is liable to cause a distortion in competition or a financial loss to third parties, imprisonment from one to eight years.
- **Article 9**. Either:
  - imprisonment up to three years or a fine; or
  - if the offence is liable to cause a distortion in competition or a financial loss to third parties, imprisonment up to five years or a fine up to 600 days.

An offence committed by a public official or political office holder can result in (subject to several requirements) the prohibition or suspension of his duties (*Articles 66 to 68, PCC*).

Legal persons may be held criminally liable for the offences of the PCC and Law no. 20/2008.

Attempt is punishable whenever the penalty for the criminal offence is higher than three years' imprisonment (*Article 23, PCC*) as well as for the crime of "active corruption" provided for in Article 374 PCC and Article 9(3) Law no. 20/2008, with the penalty applicable specially attenuated.

For the calculation of fines and for the rules relating to punishment of legal entities, see *Question 4, Criminal proceedings or penalties*.

## Criminal proceedings

### Right to bail

See *Question 4, Right to Bail*.

### Tax treatment

#### **12. Are there any circumstances under which payments such as bribes, ransoms or other payments arising from blackmail or extortion are tax-deductible as a business expense?**

Expenditure incurred in violation of Portuguese criminal law (even if outside its territorial scope of application) is non-deductible for tax purposes (*Portuguese Corporate Income Tax (CIT) Code*).

## Insider dealing and market abuse

### Regulatory provisions and authorities

#### 13. What are the main regulatory provisions and legislation relevant to insider dealing and market abuse?

The regulatory provisions on insider dealing and market abuse are established in Articles 378 and 379 of the Portuguese Securities Market Code (PSMC).

The Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários*) (CMVM) publishes recommendations, understandings and opinions, which are not mandatory, in particular New Measures for the Prevention and Combat against Market Abuse.

### Offences

#### 14. What are the specific insider dealing and market abuse offences?

The insider dealing and market abuse offences are set out under Articles 378 and 379 of the Portuguese Securities Market Code (PSMC) (see *Question 13*). They are strict liability offences, although if committed with negligence, they may be punishable as administrative offences, and attempt is punishable.

### Insider dealing

Under Article 378(1) of the PSMC, the offence is committed when a person fulfils both of the following conditions:

- Possesses inside information by virtue of his:
  - membership of the administrative, management or supervisory bodies of the issuer or his holding in the capital of the issuer;
  - having access to the information through the permanent or occasional exercise of his employment, profession or duties in respect of the issuer or any other entity;
  - public employment or office; or
  - criminal activities.
- Either:
  - discloses that information to any person other than in the normal course of carrying out his functions; or
  - on the basis of such information, trades or advises anyone to trade in securities or other financial instruments, or directly or indirectly orders their subscription, purchase, sale or exchange on his own account or a third party's account.

Under Article 378(2) of the PSMC, the offence is committed when any person (not listed as a "primary insider" under Article 378(1) of the PSMC) who, having become aware of inside information, either:

- Discloses it to a third party.
- On the basis of such information:
  - trades or advises anyone to trade in securities or other financial instruments; or
  - directly or indirectly orders their subscription, purchase, sale or exchange for his own account or a third party's account.

### Market abuse

The following market abuse provisions might apply:

- Whoever discloses misleading, incomplete, exaggerated or biased information, carries out fictitious transactions, or engages in other fraudulent practices that are capable of artificially altering the regular functioning of the securities or other financial instruments market (*Article 379(1), PSMC*).

- Any member of the board of directors or any person responsible for the general management or supervision of areas of activity of a financial intermediary who, having knowledge of practices being conducted under Article 379(1) PSMC, which are performed by individuals directly subject to their management or supervision and in the performance of their functions, does not stop them immediately (*Article 379(3), PSMC*).

## Defences

### 15. What defences, safe harbours or exemptions are available and who can qualify?

The insider dealing and market abuse offences cannot apply to transactions carried out in pursuit of monetary, exchange rate or public debt management policy by the European Central Bank, a state, its national central bank or by any other body designated by that state. In addition, trading in own shares in "buyback" programmes cannot constitute insider dealing and price stabilisation transactions cannot constitute market abuse, if carried out in the conditions permitted under the law (*Articles 378(5) and 379(6), Portuguese Securities Markets Code*).

## Enforcement

### 16. Which authorities have the powers of prosecution, investigation and enforcement in cases of insider dealing and market abuse? What are these powers and what are the consequences of non-compliance?

## Authorities

The main authorities responsible for investigating these offences are the public prosecutor's office and the Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários*) (CMVM).

The CMVM is able to investigate activities which have a relevant connection to Portuguese territory, even if it is an activity with a transnational character (*Articles 3 and 359 (2), Portuguese Securities Markets Code (PSMC)*).

When it comes to international co-operation, Portuguese law provides for important measures (on a reciprocal basis), namely:

- The CMVM is entitled to contact, co-operate with, give information and assistance to foreign similar institutions, regarding several crimes including market abuse and insider dealing (*Articles 376, 377 and 377-B, PSMC*).
- If the competent authority of the Member State or the European Securities and Markets Authority do not take measures deemed suitable after a specific CMVM report on the commission of an offence, the CMVM is entitled to take the appropriate measures in order to protect the investors as well as the proper functioning of markets (*Article 377-A, PSMC*).

(See *Question 3, Authorities and Question 30*).

For more information on the CMVM and the public prosecutor's office, see box: *The authorities*.

## Prosecution powers

For the purposes of what is called a preliminary investigation procedure, the CMVM may (*Article 385(1), PSMC*):

- Ask any persons or entities for any clarification, information or documents.
- Seize, freeze, inspect or seal any documents, valuables or items that relate to the suspected offence.
- Ask fixed or mobile telecommunications or internet services providers for any existing records of telephone calls and data transmissions, with prior authorisation of the public prosecutor or judge.

The CMVM may require co-operation of other authorities and/or police officials (*Article 385 (2), PSMC*).

Once the preliminary investigation process has been concluded, the CMVM must report to the public prosecutor if any evidence of facts suggesting criminal offences is gathered (*Articles 364(2) and 386, PSMC*). The public prosecutor will have its usual investigatory powers (see *Question 3, Prosecution Powers*).

If the facts constitute an administrative offence, the CMVM has jurisdiction to impose sanctions and order, during the proceedings, any of the following interim protection measures (*Articles 408 and 412, PSMC*):

- The preventive suspension of any of the activities or functions carried out by the defendant.
- The imposition of conditions on the exercise of functions or including compliance with the duty to inform.

- Seizure or freezing of assets.

'Infiltration' may also be an applicable investigatory measure (see *Question 10*).

### **Powers of interview**

See *Question 16, Prosecution powers*.

### **Powers of search/to compel disclosure**

When necessary, the CMVM may exchange information with entities, such as the Bank of Portugal, the Insurance Institute of Portugal, the European Central Bank or the European System of Central Banks (*Articles 355 and 356(1)(c), PSMC*). The CMVM may require any information, examine books, records and documents and require the co-operation of other persons or entities, including police authorities (*Article 361(1) (a) and (d), PSMC*) and it is entitled to carry out inspections of supervised entities (*Article 364(1)(a), PSMC*).

See *Question 3, Powers of search/to compel disclosure*.

### **Court orders or injunctions**

See *Question 3, Court orders or injunctions*.

### **Protections available**

See *Question 3, Protections available*.

### **Penalties**

#### **17. What are the potential penalties for participating in insider dealing and market abuse?**

#### **Civil/administrative proceedings or penalties**

Individuals or legal persons that fail to meet the legal obligations relating to the securities market may be punishable with financial sanctions (*Article 388, Portuguese Securities Market Code (PSMC)*):

- From EUR2,500 to EUR500,000 (less serious offences).
- From EUR12,500 to EUR2.5 million (serious offences).
- From EUR25,000 to EUR5 million (especially serious offences).

If twice the value of the proceeds of the crime exceeds these maximum fines, this will be the maximum fine instead.

A wide range of ancillary sanctions are also applicable to these administrative offences, such as (*Articles 388 and 404 PSMC*):

- The temporary suspension or disqualification from performing a function or activity.
- The publication of the decision.
- At its most severe, the revocation of the authorisation or cancellation of the registration necessary to carry on the activities of financial intermediation in securities or in other financial instruments.

#### **Criminal proceedings**

Only individuals may be held criminally liable for the crimes of insider dealing and market abuse. The punishments are (PSMC):

- Insider dealing: up to five years' imprisonment or a fine if committed by primary insiders or up to three years' imprisonment or a fine of up to 240 days if committed by secondary insiders (*Article 378 (1) and (2)*).
- Market abuse: up to five years' imprisonment or a fine or, in situations of failure to supervise, up to four years' imprisonment or a fine of up to 240 days (*Article 379 (1) and (3)*).

There are also a wide range of ancillary penalties, such as (*Articles 380 and 380-A*):

- Temporary disqualification from performing a function or activity.
- Publication of the decision.
- The seizure and forfeiture of the object of the offence, including the benefit obtained.

For calculation of the fines, see *Question 4, Criminal proceedings or penalties*.

### **Right to bail**

See *Question 4, Right to bail*.

### **Civil suits**

See *Question 4, Civil suits*.

## **Money laundering, terrorist financing and financial/trade sanctions**

### **Regulatory provisions and authorities**

**18. What are the main regulatory provisions relevant to money laundering, terrorist financing and/or breach of financial/trade sanctions?**

#### **Money laundering**

Money laundering is a criminal offence provided for under Article 368-A, Portuguese Criminal Code (PCC).

Under Law no. 25/2008, the Bank of Portugal has published Regulation no. 5/2013, as amended by Regulation no. 1/2014. This Regulation is mandatory and sets out best practices in relation to the avoidance of money laundering. Non-compliance with the Regulation is an administrative offence.

Recently, the EU Directive 2015/849 on money laundering was enacted (*see Question 26*).

#### **Terrorist financing**

In Portugal, the Counter-Terrorism Law (*Law no. 52/2003, of 22 August*) enacted Framework Decision no.2002/475/JAI.

Bank of Portugal Regulation no. 5/2013 assumes relevance as above.

Recently, the EU Regulation 2015/847 on transfers of funds, for prevention, detection and investigation and terrorist financing was enacted (*see Question 26*).

#### **Financial/trade sanctions**

Law no. 11/2002 of 16 February establishes the criminal punishments for breach of financial or trade sanctions imposed.

### **Offences**

**19. What are the specific offences relating to money laundering, terrorist financing and breach of financial/trade sanctions?**

#### **Money laundering**

The offence of money laundering is committed by anyone who converts, transfers, aids or facilitates any operation of conversion or transfer of advantages, obtained by him or a third party, with the aim of either (*Article 368-A (2), PCC*):

- Disguising the illegal origin of the advantage.
- Avoiding the criminal punishment of the principal or accomplice.

Concealing or disguising the nature, origin, location, disposition, movement or ownership of the advantages or rights related to the advantages is also a criminal offence.



For these purposes, "advantage" is any asset that results from the commission of certain types of offences, listed under Article 368-A (for instance, influence peddling and corruption).

An attempt is punishable but negligence is not.

### **Terrorist financing**

It is an offence to supply, collect or hold, directly or indirectly and by any means, funds or assets, as well as goods and rights that can be converted into funds, if the intention is to use them or if one is aware they could be used, in full or in part, in the planning, preparation or constitution of any terrorist group, organisation or association, as defined under Articles 2(1) and 3(1) of Counter-Terrorism Law (Article 5-A).

The punishment does not depend on producing a result (for instance, the use of the funds above) and an attempt is punishable although negligence is not.

### **Financial/trade sanctions**

Articles 2 to 4 of Law no. 11/2002 establish penalties for non-compliance with any financial or trade sanctions imposed by the European Union or the Security Council of the United Nations.

An attempt is punishable, as is negligence when the sanctions imposed relate to an obligation to freeze funds and financial resources.

### **Defences**

#### **20. What defences, safe harbours or exemptions are available and who can qualify?**

As a general rule, the Portuguese Criminal Code (PCC) provides for exemption from liability of legal persons for the actions of an agent when that agent has acted against express and specific orders or instructions of those in an appropriate (leadership) position.

### **Money laundering**

The penalty for money laundering can be specially reduced under certain circumstances, (*Article 368-A (7 to 10), PCCP*) for example:

- The damage caused is remedied.
- The person in question assists in the gathering of evidence that proves essential to identifying or capturing any other person liable for the commission of the offence.

### **Terrorist financing**

The penalty can be specially reduced or the act not punished if (*Article 5-A (3), Counter-Terrorism Law*):

- The illegal activity is voluntarily abandoned.
- The potential danger is voluntarily removed or diminished.
- The person in question assists in the gathering of evidence that proves essential to identifying or capturing any other person liable for the commission of the offence.

### **Financial/trade sanctions**

There are no specific provisions.

### **Enforcement**

#### **21. Which authorities have the powers of prosecution, investigation and enforcement in cases of money laundering? What are these powers and what are the consequences of non-compliance?**

### **Authorities**

### **Money laundering**

The main authorities responsible for investigating these offences are the Central Department of Investigation and Prosecution (*Departamento Central de Investigação e Acção Penal*) (DCIAP) and the Financial Information Unit (FIU).

(See Question 3, *Authorities*).

### **Terrorist financing**

The main authorities responsible for investigating these offences are the DCIAP and FIU.

Once in the trial phase, terrorist financing cases are submitted to (and decided by) a panel of judges or a jury trial, depending on the specific circumstances (*Articles 13 and 14, PCCP*); there is no possibility for the case to be decided by a single judge.

(See Question 3, *Authorities*).

### **Financial/trade sanctions**

The main authorities responsible for investigating these offences are the DCIAP and FIU.

(See Question 3, *Authorities*).

For more information on the DCIAP and FIU see box, *The authorities*.

### **Prosecution powers**

#### **Money laundering**

See Question 10, *Prosecution powers*.

#### **Terrorist financing**

See Question 10, *Prosecution powers*.

#### **Financial/trade sanctions**

See Question 10, *Prosecution powers*.

#### **Powers of interview**

See Question 3, *Powers of interview*.

#### **Powers of search/to compel disclosure**

#### **Money laundering / Terrorist financing**

See Question 10, *Powers of search*.

#### **Financial/trade sanctions**

See Question 3, *Powers of search*.

#### **Court orders or injunctions**

See Question 3, *Powers of interview*.

#### **Protections available**

See Question 3, *Powers of interview*.

#### **Penalties**

**22. What are the penalties for participating in money laundering, terrorist financing offences and/or for breaches of financial/trade sanctions?**

## Money laundering

Individuals are punishable with imprisonment from two to 12 years (*Article 368-A (2), Portuguese Code of Criminal Procedure (PCCP)*).

For further details and legal persons' liability, see *Question 4*.

### Right to bail.

See *Question 4, Right to bail*.

## Terrorist financing

Individuals are punishable with imprisonment from eight to 15 years (*Article 5-A (1), Counter-Terrorism Law*).

For further details and legal persons' liability, see *Question 4*.

### Right to bail.

See *Question 4, Right to bail*.

## Financial/trade sanctions

Individuals are punishable with imprisonment from three to five years (*Article 2(1) and 3(1) Law no. 11/2002*). However, the offence of breach of duty to freeze funds and financial resources referred to in Article 2 of Law no. 11/2002 is punishable with a fine up to 600 days, if the offence is committed negligently (*Article 2 (2)*).

Any attempt to commit these offences is punishable - with the penalty applicable to the crime committed, although this penalty is specially reduced (*Article 23 (2), Portuguese Criminal Code*). Legal persons are punishable for acts done in their name and on their behalf by their corporate bodies or representatives, with a fine not lower than the amount of the financial transaction carried out and not exceeding double that value. When the offence does not involve a financial transaction, the applicable fine is from EUR5,000 to EUR2.5 million or from EUR2,500 to EUR1 million, whether or not the perpetrator is a financial institution.

Both individuals and legal persons can be subject to an ancillary penalty of publication of the sentence.

For further details, see *Question 4*.

### Right to bail.

See *Question 4, Right to Bail*.

## Financial record keeping

### 23. What are the general requirements for financial record keeping and disclosure?

Under Portuguese corporate and tax law, companies must keep records and supporting documents (correspondence, company records and documents) for a period of 12 years. Records can be kept either physically or electronically (*Article 123, Corporate Income Tax Code (CTI)*).

The records for operations subject to Portuguese income tax must be centralised in an establishment or facility located in Portuguese territory (*Article 125 CTI*). Both share companies and quota companies must submit annual (or quarterly in the case of public companies) accounting statements, which are (*Decree-Law no. 158/2009 of 13 July*):

- Signed by all the directors.
- Audited and legally certified by the auditors.
- Approved by the quotaholders or shareholders at a general meeting.
- Submitted to the Tax Authority.

For further details, see *Questions 3, 10 and 16*.

### 24. What are the penalties for failure to keep or disclose accurate financial records?

Failure to keep or disclose accurate financial records is punishable with a financial sanction of between EUR375 and EUR22,500 (in the case of individuals) or EUR750 and EUR45,000 (in the case of corporations), depending on the seriousness of the offence (*Articles 26 and 119-A, General Taxation Infringements Law*). It may also lead to the taxable profit of the company or merchant being determined using indirect methods (which are based on market average profit ratios).

Individuals can also be subject to criminal punishment:

- If any false information on the company is provided to a third party (if those individuals are legally obliged to provide it) with imprisonment up to three months and with a fine up to 60 days (*Article 519 Portuguese Companies Act (PCA)*).
- For forgery of documents, with imprisonment up to three years or with a fine (in serious cases, imprisonment from six months to five years or with a fine from 60 to 600 days) (*Article 256 Portuguese Criminal Code (PCC)*).

### **25. Are the financial record keeping rules used to prosecute white-collar crimes?**

The financial statements and documents of a company can be used as evidence of the commission of a white-collar crime. Moreover, any employee of a public entity that is aware of the commission of a crime is subject to the duty to report it to the competent criminal authorities.

## **Due diligence**

### **26. What are the general due diligence requirements and procedures in relation to corruption, fraud or money laundering when contracting with external parties?**

Law no. 25/2008, which enacted Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (Third Anti-money Laundering Directive), and Directive 2006/70/EC implementing Directive 2005/60/EC on simplified customer due diligence procedures and exemption (Customer Due Diligence Directive), establishes a set of duties applicable to financial institutions and financial intermediaries (and other entities including notaries, lawyers or accountants in specific situations such as transactions of assets over a certain amount), in order to prevent and combat money laundering and financing of terrorism. In their business relations, entities subject to this Law have the duties, among others, to:

- Identify the client, by requesting certain documentation and information.
- Be diligent, in particular, by obtaining information about the purpose and intended nature of the business relationship and client's risk profile.

The Bank of Portugal regulations in place establish the documentation and information requirements in this respect in more detail.

Recently, the fourth EU Directive on money laundering (*Directive (EU) 2015/849 of the European Parliament and of the Council, of 20 May 2015*) and an EU Regulation on transfers of funds, for prevention, detection and investigation and terrorist financing (*Regulation (EU) 2015/847 of the European Parliament and of the Council, of 20 May 2015*) were enacted.

The Directive seeks to strengthen the fight against money laundering and terrorist financing. Among other measures, these new European rules require the creation and maintenance of central records in all EU countries on real beneficiaries of companies, foundations, trusts and other entities. The Member States must ensure this information is stored in a register outside the companies, using, for example, a central database. The Directive also strengthens the supervision duties of banks, financial institutions, tax consultants, auditors, lawyers, real estate agents and anyone who trades goods and who, for that reason, receives or makes cash payments amounting to at least EUR10,000, on, among other things, suspicious transactions of the respective clients, which may be communicated to a central authority. Additionally, the Directive includes a provision to protect whistle-blowers. The Directive will have to be enacted into national law within two years.

The EU Regulation covers transfers of funds, in any currency, sent or received by a payment services provider or an intermediary payment services provider established in the EU. It imposes a range of obligations on payment services providers and to intermediary payment services providers, who must ensure that all bank transfers are accompanied by information about the payer and about the beneficiary of the transfer in order to better prevent money laundering and terrorist financing. The regulation will fully enter into force by 26 June 2017.

## **Corporate liability**

### **27. Under what circumstances can a corporate body itself be subject to criminal liability?**

As a general rule, under Portuguese law, only individuals are subject to criminal liability.

A legal entity can be held criminally liable for certain offences, whenever expressly established by law, and mainly in the circumstances set out under Article 11 of the Portuguese Criminal Code (PCC):

- If those offences are committed on behalf of the corporate or legal entity and in its collective interest by anyone in a leadership position, that is:
  - members of its corporate bodies;
  - representatives; and
  - anyone who has the authority to control its activity.
- If the crime is committed by someone acting under the authority of those in a leadership position, by virtue of a breach of the duties of supervision or control by which they are bound (unless the criminal actions are carried out against express orders or instructions of the competent body or individual).

## Cartels

### **28. Are cartels prohibited in your jurisdiction? How are cartel offences defined? Under what circumstances can a corporate body be subject to criminal liability for cartel offences?**

Cartels are classified not as criminal but as administrative offences (punishable with pecuniary sanctions) and defined as a type of collusive practice carried out by competing undertakings aiming at co-ordinating their behaviour in the market in order to eliminate the risks and uncertainty of competition (namely price-fixing or, limiting production to increase prices or market and/or customer sharing) (*Article 9, Law no. 19/2012 of 8 May, "Competition Law"*).

The Portuguese Competition Authority and the European Commission are the authorities that have the powers of prosecution, investigation and enforcement in cases of cartels.

## Immunity and leniency

### **29. In what circumstances is it possible to obtain immunity/leniency for co-operation with the authorities?**

Immunity and leniency are not expressly established in general terms. Co-operation with the authorities may, however, grant the accused an exemption from or reduction in the penalty (*see Questions 8 and 20*). In addition, a leniency policy is expressly established for Competition Law administrative offences.

## Cross-border co-operation

### **30. What international agreements and legal instruments are available for local authorities?**

#### **Obtaining evidence**

Mutual legal assistance with foreign countries is governed by international treaties, conventions, agreements and EU decisions, signed and ratified by Portugal, such as the following:

- EC Conventions on Mutual Assistance in Criminal Matters, of 20 April 1959 and of 29 May 2000 and additional protocols.
- Convention implementing the Schengen Agreement of 19 June 1990.
- UN Convention against transnational organized crime, of 15 November 2000.
- UN Conventions against Corruption, of 31 October 2003.
- Decisions 2008/615/JHA and 2008/616/JHA on cross-border co-operation.
- Decision 2003/577/JHA on the execution of orders of freezing property or evidence.

- Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders.
- Bilateral treaties on extradition and mutual assistance in criminal matters.

In the absence of a treaty, mutual legal assistance is governed by specific provisions of the Law no. 144/99, of 31 August and the PCCP (*for example, Article 229*).

The mechanisms adopted to obtain evidence overseas are mainly rogatory letters that must be sent by the public prosecutor's office to the authority to which they are addressed.

### Seizing assets

The following conventions and decisions, among others, are available:

- EC Conventions on Mutual Assistance in Criminal Matters, of 20 April 1959 and of 29 May 2000 and additional protocols.
- Convention implementing the Schengen Agreement of 19 June 1990.
- UN Convention against transnational organized crime, of 15 November 2000.
- UN Conventions against Corruption, of 31 October 2003.
- Decision 2007/845/JHA on co-operation between asset recovery offices of the member states in the field of tracing and identification of proceeds from, or other property related to, a crime.
- Decision 2006/783/JHA on the application of the principle of mutual recognition of confiscation orders.
- Decision 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property.
- Decision 2003/577/JHA on the execution in the EU of orders freezing property or evidence.
- Decision 2001/500/JHA of 26 June 2001 on money laundering, identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of a crime.
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 13 May 2005.
- Bilateral treaties on mutual assistance in criminal matters.

The mechanisms adopted to seize evidence overseas are mainly rogatory letters.

### Sharing information

The following decisions and agreements, among others, are available:

- Convention implementing the Schengen Agreement of 19 June 1990.
- Decision 2002/465/JAI on joint investigation teams.
- UN Convention against transnational organized crime, of 15 November 2000.
- UN Conventions against Corruption, of 31 October 2003.
- Decisions 2008/615/JHA and 2008/616/JHA on cross-border co-operation, particularly in combating terrorism and cross-border crime.
- Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters.
- Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the EU member states.
- Council Decision 2000/642/JHA related to arrangements for co-operation between financial intelligence units of the member states in respect of exchanging information.

- Agreement between the European Union and the government of the United States of America on the security of classified information, 2007.
- Bilateral treaties on mutual assistance in criminal matters.

The public prosecutor's office, police officials, the CMVM and the Bank of Portugal (BoP) may exchange information with authorities in other jurisdictions, mainly with their counterparts and with the EU Member States.

### **31. In what circumstances will domestic criminal courts assert extra-territorial jurisdiction?**

Portuguese courts have jurisdiction over all offences committed within Portuguese territory, that is, when at least some of the prohibited conduct takes place in Portugal (*Article 19, Portuguese Code of Criminal Procedure (PCCP)*). Extra-territorial jurisdiction generally only applies in very limited circumstances (*Articles 20 to 23, PCCP*).

On the other hand, Portuguese criminal law is generally based on the territoriality principle, limiting its effect to offences committed in Portugal, regardless of the agent's nationality (*Article 4, Portuguese Criminal Code (PCC)*). There are some exceptions for offences committed abroad, mainly taking into consideration the (*Article 5, PCC*):

- Portuguese nationality of the victim or individual responsible for the crime.
- Applicable extradition conditions.
- International treaties or conventions under which Portugal is bound to act.

### **32. Does your jurisdiction have any statutes aimed at blocking the assertion of foreign jurisdictions within your territory?**

The extradition of suspects is regulated by conventions or agreements signed by Portugal (for example, the European Convention on Extradition, of 27 April 1977 and several bilateral agreements and treaties).

If Portugal is the state that extradites suspects, besides those conventions and agreements, Portugal is subject to certain limitations set out in Article 33 of the CPR, as well as Law no. 144/99, of 31 August and in Law no. 27/2008, of 30 June.

Law no. 65/2003, of 23 August (pursuant to Decision 2002/584/JAI) provides for the European arrest warrant, which any Member State can issue and address to any other Member State (regarding the crimes listed and once the requirements established by law are met).

In limited cases, the PCC allows the applicability of foreign criminal law by Portuguese Courts (*Articles 5(1)(f) and 6(1) and (2), Portuguese Criminal Code (PCC)*).

## **Whistleblowing**

### **33. Are whistleblowers given statutory protection?**

There is no specific legislation on statutory protection for whistle-blowers, apart from in the context of criminal offences provided for in the Portuguese Securities Market Code (PSMC) (*Article 382 (6)*), in the context of co-operation with the authorities and in relation to the leniency policy (*see Question 29*).

However, the recent Directive (EU) 2015/849 of the European Parliament and of the Council, of 20 May 2015 on money laundering includes a provision to protect whistle-blowers (*Article 38*).

For more information on Directive (EU) 2015/849 see *Question 26*.

## **Reform, trends and developments**

### **34. Are there any impending developments or proposals for reform?**

The current global and domestic economic situation has had a major impact on the investigation and prosecution of white-collar crimes. Administrative offence proceedings relating to the Portuguese financial system and institutions have increased and the General Law on Administrative Offences was amended on October 2014 (aimed principally at reinforcing and facilitating the investigation and prosecution of offences).

## Market practice

### 35. What are the main steps foreign and local companies are taking to manage their exposure to corruption/corporate crime?

Companies are becoming aware of the need to implement a strong internal compliance programme, as well as a zero-tolerance policy towards corruption and corporate crime. This is also due to the fact that internal guidelines are powerful weapons when it comes to any defence of the company.

## The authorities

### Public Prosecutor's Office

**W** [www.pgr.pt](http://www.pgr.pt)

**Status.** At the head of the Public Prosecutor's Office is the Attorney-General's Office, which comprises the:

- Attorney-General.
- Superior Council.
- Consultative Council.
- Administrative Support Services.

The following operate beneath the Attorney General's Office:

- District Deputy Attorney General's Offices (at the judicial district headquarters), the District Attorneys' Offices (located in the judicial areas and in county capitals) and the Deputy District Attorneys (who hold their offices in counties or groups of counties).
- The Central Department of Investigation and Prosecution, the Bureau for Documentation and Comparative Law and the Technical Advisory Unit.

**Principal responsibilities.** The Public Prosecutor's Office is the state body responsible for representing the state, exercising criminal prosecution powers and defending democracy within the existing legal system.

### Central Department of Investigation and Prosecution (Departamento Central de Investigação e Acção Penal) (DCIAP)

**W** [http://dciap.pgr.pt/DCIAP\\_index.html](http://dciap.pgr.pt/DCIAP_index.html)

**Status.** The DCIAP was created in August 1998 as a multi-disciplinary body directly dependent on the Attorney General's Office.

**Principal responsibilities.** The DCIAP has important functions of co-ordination and direction of the investigation and prevention of certain types of criminal offences. For instance, the DCIAP is exclusively responsible for investigating and prosecuting bribery offences, money laundering, terrorism or economic and financial offences committed internationally, transnationally or as part of organised crime, whenever the:

- Criminal activity occurs in a different area of the country.
- The Attorney General considers that the complexity or territorial dispersion of the offences justifies a centralised investigation.

When the DCIAP is not responsible for the investigation and prosecution of these crimes, the co-ordination of the investigation must be committed to the DCIAP. The DCIAP is also responsible for organising and putting into practice preventive actions or measures regarding the above offences.

### Police officials (Policia Judiciária, Policia de Segurança Pública, Guarda Nacional Republicana)

**W** [www.policiajudiciaria.pt](http://www.policiajudiciaria.pt)

[www.psp.pt](http://www.psp.pt)



[www.gnr.pt](http://www.gnr.pt)

**Status.** Governmental organisation.

**Principal responsibilities.** The criminal police bodies assist the judicial authorities (public prosecutor and judge) by:

- Taking note of crimes.
- Preventing their consequences and identifying the perpetrators.
- Arresting offenders in the act.
- Carrying out urgent measures necessary to gather evidence on the case.

For these purposes, and notwithstanding their functional dependence on the judicial authorities, the criminal police enjoy technical and tactical autonomy.

### **Police Financial Information Unit**

**W** [www.policiajudiciaria.pt/PortalWeb/page/%7BE6E29429-8228-44A5-8338-9A3F3BCC3986%7D](http://www.policiajudiciaria.pt/PortalWeb/page/%7BE6E29429-8228-44A5-8338-9A3F3BCC3986%7D)

**Status.** This is a special unit created inside the Portuguese Criminal Police (*Polícia Judiciária*).

**Principal responsibilities.** It is responsible for the collection, centralisation, handling and publication, on a national level, of the information regarding prevention and investigation of the crimes of money laundering, financing of terrorism and criminal tax offences, ensuring co-operation between the relevant entities, both nationally and internationally.

### **Securities Market Commission (Comissão do Mercado de Valores Mobiliários) (CMVM)**

**W** [www.cmvm.pt](http://www.cmvm.pt)

**Status.** The CMVM is an independent public institution, with administrative and financial autonomy.

**Principal responsibilities.** The CMVM was established in April 1991 with the task of supervising and regulating securities and other financial instrument markets (traditionally known as stock markets), as well as the activity of all those who operate within the said markets. It is the authority responsible for the conduct of administrative proceedings and for co-operating in criminal proceedings aimed at investigating and prosecuting offences related to stock markets.

### **Tax inspection authorities (órgão da administração tributária)**

**W** <http://info.portaldasfinancas.gov.pt>

**Status.** Governmental organisation.

**Principal responsibilities.** These are authorities responsible for the conduct of administrative proceedings and for co-operating in criminal proceedings aimed at investigating and prosecuting tax-related offences.

## **Online resources**

### **Prosecutor General of the Republic (Procuradoria Geral da República)**

**W** [www.pgr.pt](http://www.pgr.pt)

**Description.** Official updated website maintained by the Public Prosecutor's Office, providing access to legislation and relevant information and documentation in Portuguese. Parts of the website are available in English.

### **Prosecutor General of the Republic (Procuradoria Geral-Distrital de Lisboa)**

**W** [www.pgdlisboa.pt/home.php](http://www.pgdlisboa.pt/home.php)

**Description.** Official updated website maintained by the Lisbon District Deputy Attorneys General's Office, providing access to legislation, case law and relevant information and documentation in Portuguese.

### **Bureau for Documentation and Comparative Law (Gabinete de Documentação e Direito Comparado)**

**W** [www.gddc.pt](http://www.gddc.pt)

**Description.** Official updated website maintained by the Bureau for Documentation and Comparative Law (Public Prosecutor's Office), providing access to legislation and relevant information and documentation in Portuguese. Parts of the website are available in English.

### Securities Market Commission (Comissão do Mercado de Valores Mobiliários) (CMVM)

**W** [www.cmvm.pt/CMVM/Pages/default.aspx](http://www.cmvm.pt/CMVM/Pages/default.aspx)

**Description.** Official updated website maintained by the CMVM, providing access to legislation, case law and relevant information and documentation in Portuguese. The website is available in English.

## Contributor profiles

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**Professional qualifications.** Portugal, Lawyer, Universidade Católica Portuguesa, Lisbon, 1991

**Areas of practice.** Criminal law; white collar defence; compliance; medical negligence.

#### Recent transactions

- Defence lawyer for the former National Director of the Portuguese Foreigners and Border Service Office (SEF), in a criminal case regarding the concession of permanent residence permits under the "Golden Visa" scheme, involving several foreign individuals and high-profile Portuguese individuals, mainly high level representatives of the Public Administration (for example, the President of the Portuguese Registry and Notary Public Office, the Portuguese Internal Affairs Minister and three Lisbon Appeal Court judges, including the President of the Court). The case is based on allegations of influence peddling, embezzlement, abuse of power and corruption, among other crimes.
- Defence lawyer for a Portuguese company (major investor in the luxury tourism sector) and a company director in a criminal case widely broadcast by the Portuguese media (referred to as "*Operação Marquês*") in which a former prime minister of Portugal is being held on remand and several defendants are being accused of the crimes of corruption, money laundering and tax fraud, among other crimes.
- Defence lawyer in a case known as "*Processo das Secretas*", in which some former public officials of the Portuguese Secret Services were charged with the crimes of intrusion on privacy, violation of state secrecy, influence peddling and abuse of powers, among others.
- Defence lawyer for the founder and former chairman of the board of directors of Banco Privado Português, S.A. recently acquitted of the accusations of qualified fraud criminal offences.
- Defence lawyer in a case related to a complex M&A operation between two Portuguese companies acting in the soft drinks sector, in which several Portuguese individuals and companies were charged with tax fraud crimes.

**Languages.** Portuguese, English

**Professional associations/memberships.** Member of the Portuguese Bar Association; Founder and Member of the Portuguese Criminal Law Specialists Association (*Fórum Penal, Associação de Advogados Penalistas*); Member of the European Criminal Bar Association (ECBA).

**Publications.** *PLMJ's Anti-Bribery Best Practice Manual* ([www.plmj.com/en/know\\_guias.php?aID=11639](http://www.plmj.com/en/know_guias.php?aID=11639)).

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**Professional qualifications.** Portugal, Lawyer, Universidade Católica Portuguesa, Lisbon, 1994**Areas of practice.** Criminal law; white collar defence; compliance; sports; banking and financial institutions.**Non-professional qualifications.** Postgraduate in accounting and legal support for companies, Universidade Católica Portuguesa, Lisbon, 1997; Postgraduate course in Economic and European Criminal Law, Faculty of Law of the University of Coimbra, 2009**Recent transactions**

- Defence lawyer for several defendants in a case known as "*Operação Furacão*", which involves hundreds of Portuguese companies and individuals accused of money laundering, fraud and tax evasion, among other crimes.
- Defence lawyer for several defendants in a number of criminal and administrative cases relating to the collapse of Banco Português de Negócios, S.A. It involves a major investigation into the crimes of corruption, fraud, tax fraud and money laundering, involving high profile individuals, including politically exposed persons.
- Defence lawyer in the "submarines case". The facts relate to the acquisition of two submarines by the Portuguese State from a German consortium and they also involve Banco Espírito Santo (BES) / Espírito Santo Group (GES). The case is connected to similar investigations taking place in Greece and Germany.
- Defence lawyer for the former Director of MoneyOne Casa de Cambios, Ltda., José Augusto Martins, who is being prosecuted as promoter of and/or collaborator in a complex scheme of money laundering involving currency exchange bureaus and connected to several jurisdictions (mainly US, Brazil, Spain, England, Belgium, UK and Portugal).
- Defence lawyer for the former Vice President of Sporting Clube de Portugal, one of the major national football clubs, in several criminal proceedings. Several defendants are being accused of the crimes of qualified fraud, money laundering, embezzlement, criminal association, illegal possession of weapons, among other crimes.

**Languages.** Portuguese, English, Spanish**Professional associations/memberships.** Member of the Portuguese Bar Association; Founder and Member of the Portuguese Criminal Law Specialists Association (*Fórum Penal, Associação de Advogados Penalistas*); Member of the European Criminal Bar Association (ECBA); Board Member of PLMJ; Vice President of the Disciplinary Committee of the Lisbon Football Association; Director of Professional Football, Sporting Clube de Portugal, Futebol SAD**Publications**

- *PLMJ's Anti-Bribery Best Practice Manual* ([www.plmj.com/en/know\\_guidas.php?aID=11639](http://www.plmj.com/en/know_guidas.php?aID=11639)).
- *Co-author of the "New Sports Laws Annotated", PLMJ Collection, Coimbra Editora 2010.*
- *Co-author of the book "Company Insolvency and Recovery Code Annotated", PLMJ Collection, Coimbra Editora, 2012.*

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**Languages.** Portuguese, English

**Professional associations/memberships.** Member of the Portuguese Bar Association; Member of the Portuguese Criminal Law Specialists Association (*Fórum Penal, Associação de Advogados Penalistas*); Member of the Fair Trials International, Legal Experts Advisory Panel.

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**Products:** Corporate Crime, Fraud and Investigations Global Guide, PLC Cross-border, PLC EU, PLC UK Corporate, PLC UK Dispute Resolution, PLC UK Financial Services, PLC UK Law Department, PLC US Capital Markets & Corporate Governance, PLC US Commercial Transactions, PLC US Corporate & Securities, PLC US Corporate and M&A, PLC US Law Department, PLC US Litigation

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