

Anti-Corruption Regulation 2018

Contributing editor
Homer E Moyer Jr



2018

GETTING THE
DEAL THROUGH

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Homer E Moyer Jr
Miller & Chevalier

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This article was first published in March 2018
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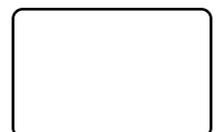


Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

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No photocopying without a CLA licence.
First published 2007
Twelfth edition
ISBN 978-1-912377-49-7

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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Preface

Anti-Corruption Regulation 2018

Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Anti-Corruption Regulation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Portugal.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Homer E Moyer Jr of Miller & Chevalier, for his continued assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
February 2018

Portugal

P Saragoça da Matta and José Ramos de Andrade

Saragoça da Matta & Silveiro de Barros

1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Portugal is a signatory of the following international anti-corruption conventions:

- The Convention on the Fight Against Corruption Involving Officials of the European Union or Officials of member states of the European Union (Brussels, 26 May 1997). Ratified on 15 November 2001.
- The Criminal Law Convention on Corruption (Strasbourg, 30 April 1999). Ratified on 26 October 2001.
- The Organisation for Economic Co-operation and Development Convention on Combating the Bribery of Foreign Officials in International Business Transactions (Paris, 17 December 1997). Ratified on 31 March 2000 and transposed into the Portuguese law by Law No. 13/2001, dated 4 July 2001.
- The UN Convention Against Corruption (New York, 31 October 2003). Ratified on 21 September 2007.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Foreign bribery laws

Article 7 of Law No. 20/2008, dated 21 April 2008 (as amended by Law No. 30/2015, 22/04) – Criminal Responsibility for Corruption Crimes on International Trade and Private Activity – (article 7) defines the active bribery of a national or foreign public official with prejudice of the international trade. (See question 3.)

Article 3, No. 2 of Law No. 34/87, dated 16 July 1987 (as amended by Law No. 108/2001, of 28/11; Law No. 30/2008, of 10/07; Law No. 41/2010, of 03/09; Law No. 4/2011, of 16/02; Law No. 4/2013, of 14/01; and Law No. 30/2015, of 22/04) – the Law on Crimes of Responsibility of the Holders of Political Offices – states that for the purposes of ‘acceptance of undue advantage’ (undue advantage), ‘active bribery’ and ‘passive bribery’ (defined in articles 16 to 18 of the same law) holders of foreign political offices, regardless of their nationality or residence, are equated to Portuguese national political officials, provided that the infraction was, partly or mainly, committed in the Portuguese territory.

Article 386 No. 3 of the Portuguese Criminal Code (CC) (article 386) equates foreign public officials with domestic public officials for undue advantage, active and passive bribery (as defined in articles 372 to 374 of the CC) provided that the infraction was partly or mainly committed in the Portuguese territory.

Domestic bribery laws

The relevant legislation on domestic bribery (ie, undue advantage, active bribery, and passive bribery) is held in articles 16, 17 and 18 of Law No. 34/87, dated 16 July 1987 and in articles 372, 373 and 374 of the CC.

Undue advantage

Pursuant to article 16 of Law No. 34/87, 07/16 (article 16) and article 372 of the CC (article 372), the acceptance of an undue advantage by a

domestic public or political official in the exercise of, or because of, his or her duties is punishable by law.

Conduct that is socially acceptable or is customary is not deemed a criminal offence. However, in September 2016, the Portuguese government approved a code of conduct (see question 27) that applies to:

- all the members of the government members and its respective cabinets;
- all the high-ranked domestic public officials under direction of the government; and
- other public managers of public companies.

These domestic public officials may not receive any advantage worth more than €150 from a single person or entity per civil year.

Passive bribery

The passive bribery of domestic public officials is defined in article 373 of the CC (article 373) and in article 17 of Law No. 34/81, 07/16 (article 17).

In the case of passive bribery, criminal legislation punishes domestic public officials who request or accept a bribe. The simple promise by an official to omit to act or to act contrary to his or her duties is sufficient for him or her to be punished.

The crime is also committed if the public official’s act or omission is not contrary to his or her duties and the ‘benefit’ is not due to him or her.

Active bribery

Active bribery of domestic public officials is defined in article 374 of the CC (article 374) and in article 18 of Law No. 34/81, 07/16 (article 18).

Active bribery refers to the person (or intermediary) who promises or gives a domestic public official a benefit to omit to act or act contrary to the respective duties.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

Article 7 punishes the active bribery of a domestic or foreign public or political official (ie, offering or promising an undue, patrimonial or non-patrimonial, advantage in order to obtain or conserve business, contract or any other undue advantage in international trade).

Articles 16, 17 and 18, define, respectively, the undue advantage, active bribery and passive bribery of holders of foreign political offices, provided that infractions were, partly or mainly, committed in the Portuguese territory.

Articles 372 to 374 define, respectively, the undue advantage, active bribery and passive bribery, provided that infractions were, partly or mainly, committed in the Portuguese territory.

The elements of the offences set out in the CC and in Law No. 34/87 are similar (see question 2).

The differences are in the capacity of the official – which can be a foreign political official (Law No. 34/2008) or a foreign public official (CC) – and in the minimum term of imprisonments, which are higher in Law No. 34/2008 than in the CC.

4 Definition of a foreign public official

How does your law define a foreign public official?

For the purposes of articles 372 to 374 the following are equated to domestic public officials:

- judges, officials, agents and members of any international organisation of public law, regardless of their nationality or residence;
- foreign officials of any other state when the offence takes place, totally or partially, in the Portuguese territory;
- all who hold the offices identical to ones prescribed in any international organisation of public law in which Portugal is a member (when the offence takes place, totally or partially, in the Portuguese territory);
- judges and officials of international courts of which Portugal has declared to accept the jurisdiction;
- all who hold office in out-of-court settlements of disputes proceedings, regardless of their nationality or the residence, and when the offence takes place, totally or partially, in the Portuguese territory; and
- the jurors and arbitrators of any state, when the offence takes place, totally or partially, in the Portuguese territory.

For the purposes of the crimes set out in articles 16 to 18, the holders of a political office in an international public organisation – as well as other political officials of any other state, regardless of their nationality or residence – are equated to domestic political officials, when the offence takes place, totally or partially, in the Portuguese territory.

Law No. 20/2008 defines a foreign public official as any person assuming and holding a public service function in a private company under a public contract, or a person in the service of a foreign country as an official, agent or any other title, whether provisory or temporary, remunerated or unpaid, voluntarily or mandatorily, appointed to:

- render or participate in an activity within an administrative or judicial public position;
- render functions in public bodies or to participate in them; or
- render functions as a manager, or hold a position in a supervisory body of, a public company that is:
 - nationalised;
 - held by public capital;
 - owned by a majority shareholding of public capital; or
 - a concessionaire company of public services.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

There is no specific law on providing foreign officials with gifts, travel expenses, meals or entertainment. Thus, any goods or compensation promised or given to a foreign official would fall under the scope of the current legislation.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Facilitating payments are generally prohibited by law, and fall directly under the scope of legislation against bribery.

Even a high-ranked foreign political official that accepts an undue advantage in the exercise or because of his duties may be punished by law. However, socially acceptable or customary conduct is not deemed to be criminal acts.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

The following laws expressly cover promises, bribes through intermediaries and bribes paid for the benefit of the foreign public official or of a third party:

- article 7 of Law No. 20/2008, dated 21 April 2008;
- articles 16, 17 and 18 of Law No. 34/87, dated of 16 July 1987; and
- articles 372, 373 and 374 of the CC.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Yes. Under the Portuguese Criminal Law (CCC), individuals and companies can be prosecuted and held liable for the bribery of a foreign official. Even state-owned public companies can be prosecuted and be held liable.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

Pursuant to article 11, No. 8 of the CC (article 11), a new legal person created by a division or merger can be held liable for the bribery of foreign officials executed by the former entity.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

The Portuguese Criminal Procedural Code (CPC) foresees the possibility of damaged entities requesting civil compensation within a criminal proceeding, or requesting compensation in a separate civil proceeding. Civil decisions can be enforced by seizing an offender's assets via a ruling made within a criminal proceeding.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

There are no specific government agencies in Portugal responsible for enforcing foreign bribery laws. However, the Judiciary Police has a special team dedicated to bribery offences: the National Anti-Corruption Unit (UNCC).

Furthermore, the Public Prosecutor's Office has a special division based in Lisbon the Central Department of Criminal Investigation (DCIAP), that coordinates investigations of, among other things, bribery, terrorism, drug trafficking and fraud to obtain benefits from the state.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

Pursuant to article 344, No. 2 of the CC (article 344), the defendant (ie, legal representatives of a company) may confess crime(s) were committed and receive a reduction of 50 per cent of the applicable judicial fees.

Also, if a defendant shows sincere repentance to the judge(s) by making good on any damages that were caused, the maximum term of imprisonment can be reduced, for example, by a third and the minimum term by a fifth. However, the reduction of imprisonment time is only obtainable in crimes that carry a sentence of up to five years. As a result, it only applies to undue advantage and active bribery, as passive bribery carries an eight-year sentence.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

The CPC allows for some resolutions that can avoid a trial.

Recently, the use of plea or settlement agreements, such as used in Brazil and the US, in Portuguese criminal proceedings is being discussed.

Article 280, CPC – Closing the proceeding in case of discharge

This is only applicable to cases when a discharge is a possibility (eg, slander and libel) and not to crimes such as bribery.

Article 281, CPC – Temporary Suspension of the Criminal Proceeding

This is only applicable when an offence carries a penalty of up to five years imprisonment (ie, undue advantage and active bribery).

A suspension, which can last up to two years, imposes injunctions and conduct rules upon the defendant. Failure to follow these can lead to the defendant being prosecuted and subject to trial.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

The Judiciary Police and the DCIAP (see question 11) have been committed to enforcing foreign and domestic bribery rules in Portugal since 2008, when Law No. 34/2008 was enacted.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

The Criminal Portuguese Law (CPL) is applicable to the offences that take place in Portuguese territories, regardless of the nationality of the perpetrator. Furthermore, the CPL can be applied to some specific crimes that occur outside Portugal (eg, informatics embezzlement and communication, currency counterfeiting, treason, espionage and terrorism).

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Article 372 – acceptance of undue advantage

Up to five years' imprisonment or daily fines of between €5 and €500 lasting up to 600 days.

Article 373 – passive bribery

If the acts/omissions are contrary to the defendants' official duties: one to eight years' imprisonment.

If the acts/omissions were not contrary to the defendants' official duties: one to five years' imprisonment.

Article 374 – active bribery

If the acts/omissions were contrary to the defendants' official duties: one to five years' imprisonment

If the acts/omissions were not contrary to the defendants' official duties: up to three years' imprisonment or a daily fine lasting up to 360 days.

These minimum penalties are lower than the ones prescribed in articles 16 to 18.

Article 7 of Law No. 20/2008

This law punishes active bribery of a national or foreign public or political official (ie, the briber offering or promising undue patrimonial or non-patrimonial advantage in order to obtain or conserve business, a contract or any other undue advantage in international trade) with one to eight years' imprisonment.

A company can be punished with fines.

A company's responsibility does not exclude the criminal responsibility of individuals in charge of said companies, neither do they depend on the responsibilities of the latter.

Both individuals and companies can be subject to loss of the goods, rewards, rights or any advantages obtained from the crime that can be confiscated by the state.

Other assets of those entities can also be subject to seizure by the state.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

There are a few ongoing landmark investigations involving foreign bribery:

- on a former prime minister of Portugal;
- on a former element of the Public Prosecutor's Office;
- on a former Portuguese spy who is currently on trial; and
- on former Portuguese officials and a minister of the government (currently on trial).

Thus, there are no landmark decisions on foreign bribery at the time of publication.

Financial record-keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

According to article 29 et seq of the Portuguese Commercial Code, companies have the obligation to keep accurate corporate books and records.

Also, the companies must make periodic financial statements that (depending on the nature of the company) can be audited externally.

From a criminal law standpoint, the separate Portuguese Corporate Commercial Code expressly provides a specific criminal offence – false information – which carries a penalty of three months' imprisonment or a daily fine of between €5 and €500 lasting up to 60 days.

If the false information was provided with intention to cause damage to a partner or to the company itself, the penalty increases to six months imprisonment or a fine lasting up to 90 days. This crime does not apply to companies.

Furthermore, the CC defines the crime of document forgery, which is punishable by up to three years of imprisonment, or one to five years of imprisonment if the offence was committed by an official during the exercise of his or her duties.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Pursuant to article 242 of the CPC, the police and public officials must disclose violations. In the latter case, disclosure is only required if the violation came to the official's attention due to his or her office or in the exercise of said office's duties. Otherwise, no one is obliged to file a complaint to the authorities.

Accordingly, companies are not obliged to disclose any violations regarding any anti-bribery law or associated accounting irregularities.

20 Prosecution under financial record-keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Ultimately, financial record-keeping is intended to provide a faithful description of the company to the public, and shareholders and partners in particular. However, if a perpetrator uses a company's financial records (or any other company's documents) this information can be used as evidence in a bribery prosecution.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

Apart from the sanctions mentioned in question 18, the perpetrator can be punished with the penalties described in question 16.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Article 23-A of the Portuguese Code of Corporate Income Tax prohibits, among other deductions, the deduction of undocumented expenses (including those from the commission of crimes) and any illicit expenses (expenses resulting from activities that suggest a violation of criminal law, such as bribery) even if they were occurred outside of the territorial range of enforcement.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

The elements of the undue advantage, active bribery and passive bribery offences are similar (see question 2). The differences reside in the capacity of the official (who can be a domestic political official (Law No. 34/2008) or any other domestic public official (CC)) and in the minimum imprisonment terms, which are higher in Law No. 34/2008 than the ones set forth in the CC.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

The law prohibits both the paying and receiving of a bribe as well the promise of the same.

The penalties for a passive bribe are higher than the ones set forth for an active bribe or the acceptance of undue advantage.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

Article 386 of the CC also defines public officials as:

- civil officials;
- administrative agents;
- arbitrators, jurors and experts;
- people who, whether provisory or temporarily, remunerated or unpaid, voluntarily or mandatorily, are appointed to render or to participate in an activity within the administrative or judicial public position or, under the same circumstances, to render functions in public bodies or to participate in them; and
- managers or holders of positions in supervisory bodies of:
 - public companies;
 - nationalised companies;
 - companies held by public capital;
 - companies with a majority shareholding of public capital; and
 - concessionaire companies of public services.

Among others, article 33 of the Law No. 34/87 also defines political officials as:

- the president of the republic;
- the president of the parliament;
- the deputies of the parliament; and
- members of the government.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

Article 19 et seq. of the Law No. 35/2014, dated 20 July 2014, regulates the conflict of interest for public officials.

Generally, public officials are not allowed to accumulate commercial interests in areas that are similar to, or in conflict with, the ones he or she is responsible for while serving as a public official.

Moreover, the public officials can be criminally responsible for:

- any illegal economic participation;
- damaging his or her office's interest; or
- receiving a patrimonial advantage because of his or her office.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

There is no specific anti-bribery law that restricts providing domestic officials with gifts, travel expenses, meals or entertainment. Thus, any goods or compensation, promised or given, to a domestic official would fall directly under the scope of Portugal's general legislation against bribery.

Updates and trends

The cases mentioned in question 17 are relevant and stunned the Portuguese public, since the highest ranks of public officials in Portugal (including politicians) are now suspected of being involved in bribery.

Likewise, Portugal has been witnessing new reports of bribery, not only within the public officials' environment, but also in sports (specifically, the alleged bribery of football referees) and other areas (namely private areas).

Accordingly, since 2013 (ie, since the pre-trial detention of the former Portuguese prime minister), Portugal has seen a significant increase in combating domestic bribery, and corruption abroad. The Judiciary Police and the Public Prosecutor's Office, are very determined to enforce existing anti-corruption laws in Portugal.

Furthermore, there are some prominent public prosecutors who defend the creation of special courts that only hear crimes of bribery.

Lastly, we must stress that from a legal standpoint, the anti-bribery laws currently in force in Portugal are strong and very well enacted. However, the application of the laws is very difficult since these types of crimes are very difficult to prove in a court of law. Furthermore, perpetrator(s) are often very powerful, capable and cautious which, obviously, jeopardises investigations carried out by the judicial authorities.

Likewise, as mentioned in question 2, pursuant to article 16 of the Law No. 34/87 and article 372 of the CC, a domestic public or political official who accepts an undue advantage in the exercise of or because of his or her duties may be punished by law. But socially acceptable or customary conduct is not deemed as criminal. However, after a scandal in 2016, in which a secretary of state of the Portuguese government took a trip to an European football match which was allegedly paid for by a Portuguese private company, the Portuguese government approved a Code of Conduct of the Government. (See question 2.)

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

See questions 5 and 27.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Articles 8 and 9 of Law No. 20/2008, dated 21 April 2008 (as amended by Law No. 30/2015, 22/04) – Criminal Responsibility for Corruption Crimes on International Trade and Private Activity – defines the crimes of passive and active bribery of workers in the private sector.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

The applicable sanctions for individuals and companies in the private sector depend on the form of the bribe (ie, active or passive bribery), and are as follows:

Passive bribery in the private sector

- up to five years of imprisonment; or
- a daily fine of €5 to €500 lasting up to 600 days.

If the act or omission is able to cause a distortion competition or patrimonial damage, the penalty is imprisonment of one to eight years.

Active bribery in the private sector

- imprisonment of up to three years; or
- a fine.

If the act or omission caused by the perpetrator(s) is able to cause a distortion in the competition or a patrimonial damage, the penalties are:

- imprisonment of up to five years; or
- a daily fine of €5 to €500 lasting up to 600 days.

The sanctions are equal for both individuals and companies.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

Yes. The latest statistics available in Portugal on bribes subject to trial between 2007 to 2016 show that the domestic bribery laws have been enforced in Portugal. This statistic comprise all type of bribes (active and passive) committed by the public officials in Portugal, including the ones regarding facilitating payments.

Please note, a high-ranked domestic public or political official that accepts an undue advantage in the exercise of or because of his duties is punished by law. Nevertheless, socially acceptable conduct and customary behaviours are excluded. On the other hand, low-level officials (eg, public servants in general) are not allowed to receive any facilitating or 'grease' payments. Otherwise, their actions/omissions will fall under the scope of the acts prohibited under the anti-bribery legislation in force in Portugal.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

The investigation of the former prime minister of Portugal (see question 17) also involves the domestic bribery laws, due to the alleged bribery from domestic and foreign companies.

Thus, there are no landmark decisions on domestic bribery in Portugal up until this date.

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