



Groupe d'Etats contre la corruption  
*Group of States against corruption*

DIRECTORATE GENERAL OF HUMAN RIGHTS AND LEGAL AFFAIRS  
DIRECTORATE OF MONITORING



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**Greco Eval III Rep (2010) 6E**  
**Theme I**

## **Third Evaluation Round**

### **Evaluation Report on Portugal on Incriminations (ETS 173 and 191, GPC 2)**

(Theme I)

Adopted by GRECO  
at its 49<sup>th</sup> Plenary Meeting  
(Strasbourg, 29 November – 3 December 2010)

## I. INTRODUCTION

1. Portugal joined GRECO in 2002. GRECO adopted the First Round Evaluation Report (Greco Eval I Rep (2003) 4E) in respect of Portugal at its 14<sup>th</sup> Plenary Meeting (7-11 July 2003) and the Second Round Evaluation Report (Greco Eval II Rep (2005) 11E) at its 28<sup>th</sup> Plenary Meeting (9-12 May 2006). The afore-mentioned Evaluation Reports, as well as their corresponding Compliance Reports, are available on GRECO's homepage (<http://www.coe.int/greco>).
2. GRECO's current Third Evaluation Round (launched on 1 January 2007) deals with the following themes:
  - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).
  - **Theme II – Transparency of Party Funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).
3. The GRECO Evaluation Team for Theme I (hereafter referred to as the "GET"), which carried out an on-site visit to Portugal on 17-18 May 2010, was composed of Mr Edmond DUNGA, Head of the Office in the Anticorruption Secretariat, Regional Anti-Corruption Initiative (RAI) (Albania) and Mr Henry MATTHEWS, Office of the Director of Public Prosecutions (Ireland). The GET was supported by Mr Björn JANSON, Deputy to the Executive Secretary of GRECO. Prior to the visit, the GET was provided with a comprehensive reply to the Evaluation questionnaire (document Greco Eval III (2010) 6E, Theme I), as well as the pertinent legislation and case law. After the visit, the GET was provided with amended/new legislation, adopted in September 2010.
4. The GET met with representatives of the Ministry of Justice, the Parliamentary ad hoc Commission for the Study of Corruption Criminal Phenomena, the Judiciary, the National Unit against Corruption (Criminal Police), the Central Department for Criminal Investigation and Prosecution, the Lisbon Department for Criminal Investigation and Prosecution. The GET also met with representatives of the Academia (two universities).
5. The present report on Theme I of GRECO's 3<sup>rd</sup> Evaluation Round – "Incriminations" – was prepared on the basis of the replies to the questionnaire, information provided during the on-site visit and the amended/new legislation adopted in September 2010. The main objective of the report is to evaluate the measures adopted by the Portuguese authorities in order to comply with the requirements deriving from the provisions indicated in paragraph 2. The report contains a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to Portugal in order to improve its level of compliance with the provisions under consideration.
6. The report on Theme II – "Transparency of party funding", is set out in Greco Eval III Rep (2010) 6E, Theme II.

## II. INCRIMINATIONS

### Description of the situation

7. Having ratified the Criminal Law Convention on Corruption (ETS 173) on 7 May 2002, the Convention entered into force in respect of Portugal on 1 September 2002.
8. Portugal has signed (15 May 2003) but not ratified the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191). The authorities indicated that the internal ratification procedures of the Protocol are ongoing and it is expected to be concluded before the end of 2010.
9. The Criminal Code (hereafter CC) of Portugal, Chapter IV, section I, contains most of the criminal offences concerning corruption (Law no. 59/2007 as amended by Law no. 32/2010 of 2nd September 2010).

### Bribery of domestic public officials (Articles 1-3 and 19.1 of ETS 173)

10. Active and passive bribery of public domestic officials are criminalised under Articles 373 and 374 CC and the undue accepting of advantage is criminalised under Article 372 CC. According to Article 374, active bribery is at stake when somebody directly or indirectly gives or promises a public official or a third party undue advantage for committing an action or omission. As for passive bribery, Articles 372 (1) and 373 refers to public official who by himself, or through another person, with his consent or ratification, demands or accepts, for himself or a third party, an undue advantage for committing an action or omission. Articles 372 – 374 reads as follows:

#### **Criminal Code, section I (\*)**

##### Article 372

##### **Undue accepting of advantage**

1 – The public official who, in the course of his duties or because of them, by himself or through another person, with his consent or ratification, either demands or accepts, for himself or a third party, any undue advantage, whether of economic nature or not, is punished with imprisonment up to five years or with a fine up to 600 days.

2 – Whoever, by himself or through another person, with his consent or ratification, either gives or promises to a public official or to a third party with the public official's knowledge any undue advantage, whether of economic nature or not which the public official is not entitled to in the performance of his duties or because of them, is punished with imprisonment up to three years or with a fine up to 360 days.

3 – The behaviours socially appropriate and which are in accordance with the praxis and customary behaviours are excluded from the preceding paragraphs.

##### Article 373

##### **Passive corruption**

1 – The public official who by himself, or through another person, with his consent or ratification, demands or accepts, for himself or a third party, any undue advantage whether of economic nature or not, or its promise, for any act or omission contrary to the duties of his position, even if prior to such demand or acceptance, is punished with imprisonment from one to eight years.

2 – If the act or omission is not contrary to the duties of his position and if the advantage is undue the offender is punished with imprisonment from one to five years.

Article 374

**Active corruption**

1 – Whoever by himself, or through another person, with his consent or ratification, gives or promises to a public official, or to a third party with the public official's knowledge, any undue advantage whether of economic nature or not, with the purpose mentioned in Article 373 (1), is punished with imprisonment from one to five years.

2 – If the purpose is the one mentioned in Article 373 (2), the agent is punished with imprisonment of up to three years or with a fine penalty of up to 360 days.

(\*) As amended by Law no. 32/2010, of 2 September 2010

Elements/concepts of the offence

*“Domestic public official”*

**Criminal Code, section VI (\*)  
General provision**

Article 386

**Concept of officer**

1 – For the purposes of criminal law the expression “officer” comprises:

- a) The civil officer;
- b) The administrative agent; and
- c) Whoever, even provisionally or temporarily, against remuneration or freely, voluntarily or compulsorily, has been called to perform or participate in the performance of an activity comprised in the public administrative or judicial function or, in the same circumstances, performs duties in public utility bodies or participates therein.

2 – The managers, the members of the supervision bodies and the employees of public companies, nationalised, State-owned or of which the majority of the share capital is public as well as of concessionaries of public services are equivalent to officers.

3 – For the purposes of Articles 372 to 374, the following are also equivalent to officers:

- a) The magistrates, officers, agents and equivalents of the European Union, regardless of the nationality and residence;
- b) The officers' who are nationals of another Member State of the European Union, when the infringement has been committed, totally or partially, in Portuguese territory;
- c) The arbitrators, jurors and experts; and
- d) All that perform duties equal to those described in no. 1 in the scope of any international organisation governed by public law of which Portugal is a member, when the infringement has been committed, totally or partially, in Portuguese territory;

4 – The equivalent to officer, for the purposes of criminal law, ie those who perform political duties are governed by special law.

(\*) As amended by Law no. 32/2010, of 2 September 2010

11. “Public official” is defined in Article 386 of the Criminal Code. The concept of public official is used in connection with both active and passive bribery (Articles 373 and 374 CC) as well as in respect of the undue accepting of an advantage (Article 372 CC). It comprises civilian officials; administrative agents; and whoever, even provisionally or temporarily, under remuneration or not, voluntarily or mandatorily, has been called to perform or participate in the performance of an activity comprised in the public administrative or judicial function or, in the same circumstances,

performs duties in public utility bodies or participates therein. Managers, members of supervisory bodies and employees of public companies, State-owned companies or companies with a majority of the share capital controlled by the public as well as concessionaries of public services are considered as public officials.

12. Ministers and mayors are also covered by the notion of public officials (Law no. 34/87, of 16 July, amended by Law no. 108/2001, of 28 November 2001 and by Law no. 41/2010, of 3 September 2010 on crimes committed by elected officials (politicians) punishes active and passive bribery (Articles 17 and 18) and the undue accepting of advantage (Article 16).

*“Promising, offering or giving” (active bribery)*

13. The elements of “giving” and “promising” are expressly contained in the English translation of the provision on active bribery (Article 374 CC) and undue accepting of advantage (Article 372 (2) CC), but “offering” is not. However, the authorities stress that the operative verbs contained in the original Portuguese text are “prometer” which translates “promising” in English and “dar” which encompasses both “offering” and “giving”. This was also confirmed by interlocutors met on site<sup>1</sup>.

*“Request or receipt, acceptance of an offer or promise” (passive bribery)*

14. The provisions contained in Article 373 CC (passive corruption) and Article 372 (1) (undue accepting of advantage) contain the words “demands or accepts ... any undue advantage or its promise” in case of Article 373 CC.

*“Undue advantage”*

15. The provisions on active bribery (Article 374 CC), passive bribery (Article 373 CC) and undue accepting of advantage (Article 372 CC) cover “any undue advantage whether of economic nature or not”. The authorities have explained that whether the advantage is due or undue is not related to the value. Articles 373 and 374 CC do not graduate values and, therefore, any undue advantage or benefit or its mere promise may constitute a situation of bribery if all the other conditions foreseen in the law are met. However, Article 372 (3) CC excludes from the criminalisation of undue acceptance of advantage behaviours which are “socially appropriate and which are in accordance with the praxis and customary behaviours”. The GET was told that the graduation of the values in this respect will be incorporated in a “Reference framework” for codes of conduct and ethical issues of the public sector (including central, regional and local levels as well as to publicly owned companies) that has been prepared by the Ministry of Justice (Order no. 376/2010<sup>2</sup>) and sent to the different Ministries for comments. The legislative procedures for the approval of the Reference framework were ongoing at the time of the adoption of this report.

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<sup>1</sup> (a) According to the Great Dictionary of Portuguese Language, 25 Edition 1966, I page 769 and II page 1828;

**Dar** (latin **dare**) – transferir, ceder gratuitamente, presentear com, **oferecer** / **To give** - transfer, to freely cede, to present as a gift, to offer

**Oferecer** (Latin **offere**) – facilitar, mostrar, dar, apresentar / **To offer** - to facilitate, to show, to give, to submit.

<sup>2</sup> See paragraph 19, page 5 of the Draft Addendum to the Compliance report on Portugal – Second Evaluation Round, adopted at the 48 GRECO Meeting, 27/September – 01/October. The proposed provision regarding «institutional gifts» obliges for the public register of all received gifts where its value is up to € 150 and such gifts should be handed over in the public entity or department where the official performs its duties.

*“Directly or indirectly”*

16. The element *“directly or indirectly”* are covered in the bribery provisions through the wording *“Whoever by himself, or through another person...”*. In addition, there are general rules on complicity contained in Articles 26-29 CC. See also below *“Participatory acts”*.

*“For himself or herself or for anyone else”*

17. There is an explicit reference to a third-party beneficiary in the provisions on passive bribery (Article 373 CC) and on undue accepting of advantage (Article 372 (1)): *“for himself or a third party”*. Furthermore, the corresponding provision on active bribery in Article 374 CC includes the expression *“public official, or to a third party”*.

*“To act or refrain from acting in the exercise of his or her functions”*

18. *“To act or refrain from acting in the exercise of his or her functions”* (action and omission) is covered by the wording *“for any act or omission contrary to the duties of his position”*, Article 373 (1) CC. Article 373 (2) CC also covers action and omission, however, in situations where this is not contrary to the duties of the official. This wording is also mirrored in the corresponding part of the active bribery provision (Article 374 CC) which refers to the various purposes mentioned in the previous Article. Article 372 CC covers situations in the course of the official's duties; however, it does not require any action/omission.

*“Committed intentionally”*

19. Active and passive bribery are intentional crimes, according to the general rules of the Criminal Code, Article 13 CC.

Sanctions

*Criminal sanctions*

20. **Active bribery of domestic public officials** is sanctioned with imprisonment from one to five years if the action or omission expected is contrary to the public official's duties (Article 374 (1) CC). If the bribery aims at making the public official commit an act or omission not contrary to his/her duties, the active briber is to be punished with imprisonment of up to three years , or with fines of up to 360 days (*“day fines”*) (Article 374 (2) CC). The correspondent penalties applicable for active bribery of elected public officials are respectively two to five years imprisonment (action or omission contrary to the public official's duties) and up to five years imprisonment (action or omission not contrary to the public official's duties) (Article 18 (1) and (2), Law no. 34/87 as amended by Law no. 41/2010, see *“Bribery of members of domestic public assemblies”*). This law also provides for penalties in situations where an elected official actively bribes another elected official or public official (whether elected or not) envisaging an act or omission contrary to the duties of the public official. Such an offence is punished with imprisonment from two to eight years and if the act or omission is contrary to the duties of the public official, and punished from two to five years' imprisonment if the act or omission is not contrary to the duties of the public official. (Article 18 (3))
21. **Passive bribery of domestic public officials** is punished with imprisonment from one to eight years if the action or omission expected is contrary to the public official's duties (Article 373 (1) CC). If the act or omission is not contrary to the public official's duties, it is punished with

imprisonment from 1 to five years (Article 373 (2) CC). Passive bribery of elected officials envisaging an action or omission contrary to his/her duties is punished with imprisonment from two to eight years (Article 17 (1) Law no. 34/87 as amended by Law no. 41/2010 of 3 September 2010, see below). If the act or omission planned is not contrary to his/her duties, the bribery can be punished with imprisonment from two to five years (Article 17 (2) of Law no. 34/87, see below). This last penalty is also applicable to an elected official who by himself/herself or through another person, with his/her consent or ratification, demands or accepts, for himself/herself or a third party, an undue advantage of economic or other nature, from a person that has, had, or may have in the future any claim that depends on the exercise of his/her functions (Article 18 (3)).

22. **Undue accepting of advantage (active):** Whoever, gives or promises a public official any undue advantage is punished with imprisonment up to three years or with a fine up to 360 days (Article 372(1) CC). The giving or promising of an undue advantage to an elected public official or the holder of a high public office is punished with imprisonment up to five years or with a fine up to 600 days (Article 16 (2) of Law no. 34/87 amended by Law no.41/2010 of 3 September 2010).
23. **Undue accepting of advantage (passive):** Public officials are punished with imprisonment up to five years or with a fine up to 600 days (Article 372 (2) CC). The undue accepting of advantage (active) of elected public officials or the holders of a high public office is punished with imprisonment from one to five years (Article 16 (1) of Law no. 34/87 amended by Law no. 41/2010).
24. Sanctions set forth in Articles 372-374 could be more severe (minimum and maximum limits 25 per cent higher), in case there are aggravating circumstances connected to the offence, such as high value advantages etc., in accordance with Article 374-A CC (added by Law n° 31/2010 of 2 September 2010).

#### *Accessory sanctions applicable corruption offences*

25. In addition to the criminal sanctions there are accessory sanctions applicable in cases of corruption, contained in Articles 66-68 CC:

Article 66 CC

#### **Prohibition of performing a duty**

1 – The holder of a public position, public official or agent of the administration, who, in the performance of the activity to which he was elected or appointed, commits a crime punished with imprisonment of more than three years is also prohibited to perform such duties for a period ranging from two to five years when the act:

Is committed with flagrant and serious abuse of the duty or with clear and serious breach of the inherent duties;

Reveals indignity in the exercise of the position; or

Implies the loss of the necessary reliance for the performance of the duty.

2 – The previous number is correspondingly applicable to the professions or activities whose performance is subject to a public title or to an authorisation or homologation by a public authority.

Article 67 CC

#### **Suspension of the performance of a duty**

1 – The defendant definitely convicted with a sentence of imprisonment, who has not been disciplinarily dismissed from a public duty which he performs, is suspended from the duty while serving the sentence.

2 – The suspensions foreseen in the previous number are connected to the effects which, pursuant to the respective legislation, are a consequence of the disciplinary sanction of suspension of the performance of duties.

3 – The previous numbers are correspondingly applicable to professions or activities whose performance is subject to a public title or to authorization or homologation by a public authority.

Article 68 CC

**Effects of the prohibition and suspension of the performance of a duty**

1 – Except when there is a provision stating otherwise, the prohibition and suspension of the performance of a public duty implies the loss of the rights and privileges granted to the holder, official or agent, for the corresponding time.

2 - The prohibition of the exercise of a public duty does not impair the holder, officer or agent from being appointed to a position or duty which can be performed without the dignity conditions that the position or the duty whose performance was forbidden require.

3 – The previous numbers are correspondingly applicable to professions or activities whose exercise is subject to a public title or to authorization or homologation by a public authority.

*Level of sanctions for other comparable crimes*

26. For comparative reasons the following offences may be mentioned:

*Fraud* (Articles 217 and 218 CC) is punished with imprisonment of up to three years or with a fine. However, if there are aggravating circumstances (property loss of high value etc), the imprisonment may go up to five years or a fine of up to 600 days or if there are particularly aggravating circumstances at hand (property loss of considerably high value, or part of organised crime etc.), the punishment may go up to imprisonment from two to eight years.

*Embezzlement* (Article 205 CC) is punished with imprisonment of up to three years or with fines. However, if the appropriated property is of high value, the penalty is imprisonment of up to five years or with a fine of up to 600 days. In aggravating circumstances, the penalty is imprisonment from one to eight years.

*Abuse of power* (Article 382 CC) is punished with imprisonment of up to three years or with fines, if a more serious sentence is not applicable by virtue of another legal provision.

*Misappropriation of money or property by an official* (Article 375 CC) is punished with imprisonment from one to eight years, if a more serious sentence is not applicable through another legal provision. If the objects are of little value the agent is punished with imprisonment of up to three years or with a fine.

27. Information concerning statistics (the number of cases leading to investigations/convictions) in respect of corruption offences submitted by the Portuguese authorities appears in the tables at the end of the descriptive part of the report.

**Bribery of members of domestic public assemblies (Article 4 of ETS 173)**

28. Active and passive bribery of “political office holders”, i.e. members of domestic public assemblies (Parliament and of local government bodies) or to holders of high public office, are criminalised according to Law no. 34/87, which reads:

**Law no. 34/87, amended by Law no. 108/2001 and Law no.41/2010 of 3 September 2010**

Article 16

**Undue accepting of advantage**

1 – The political officeholder or holder of high public office who, in the course of his duties or because of them, by himself or through another person, with his consent or ratification, either demands or accepts, for himself or a third party, any undue advantage, whether of economic nature or not, is punished with imprisonment from 1 to 5 years.

2 – Whoever, by himself or through another person, with his consent or ratification, either gives or promises to a political officeholder or holder of high public office or to a third party with the public official's knowledge any undue advantage, whether of economic nature or not which the public official is not entitled to in the performance of his duties or because of them, is punished with imprisonment up to five years or with a fine up to 600 days.

3 – The behaviours socially appropriate and which are in accordance with the praxis and customary behaviours are excluded from the preceding paragraphs.

Article 17

**Passive corruption**

1 - The political officeholder or holder of high public office who, in the performance of his duties or because of them, by himself, or through another person, with his consent or ratification, either demands or accepts, for himself or a third party, any undue advantage whether of economic nature or not, or its promise, for any act or omission contrary to his duties, even if prior to that demand or acceptance, is punished with imprisonment from two to eight years.

2 – If the act or omission is not contrary to the duties of his position and if the advantage is undue the political officeholder or holder of high public office is punished with imprisonment from two to five years.

Article 18

**Active corruption**

1 – Whoever by himself, or through another person with his consent or ratification, gives or promises to a political officeholder or to the holder of high public office, or to a third party with the political officeholder's and holder of high public office's knowledge, an undue advantage of economic or other nature, envisaging the goal foreseen by Article 17 (1), is punished with imprisonment from two to five years.

2 - If the bribery aims at the goal foreseen by Article 17 (2), the agent is punished with imprisonment of up to 5 years

3 – The political officeholder or the holder of high public office who, in the performance of his duties or because of them, by himself, or through another person, with his consent or ratification, gives or promises to give to a public official or to another political officeholder or holder of high public office, or to a third party with the knowledge of those, an undue advantage of economic nature or not, envisaging the aims foreseen by Article 17 is punished with the same penalties foreseen in said article.

29. The particular elements/concepts of bribery of political office holders, except the penal sanctions, are the same as those described under bribery of domestic officials (above).

## Sanctions

30. **Active bribery** (committed by “whoever”) of a political office holder or holder of high public office (action or omission contrary to the public official’s duties) is punished with imprisonment from two to five years. An action or omission not contrary to the public official’s duties “(committed by “whoever”) is punished with imprisonment of up to five years. Active bribery (committed by “a political office holder”) of a public official or of another political officeholder (action or omission contrary to the public official’s duties) is punished with imprisonment from two to eight years or two to five years if the action/omission was not against the duties.
31. **Passive bribery** of political office holders (action or omission contrary to the public official’s duties) is punished with imprisonment from two to eight years. Passive corruption for actions or omission not contrary to the public official’s duties is punished with imprisonment from two to five years’.
32. **Undue accepting of advantage by** political officeholders or holders of high public office is punished with imprisonment from one to five years (passive); The giving or promising to a political officeholder or to a holder of high public office is punished with imprisonment up to five years or with a fine up to 600 days (active).
33. In addition to these sanctions, a conviction for bribery committed within the exercise of political functions will disqualify the political office holder from his/her political mandate, according to Article 29 of Law 34/87. The sanctions set forth in Articles 16 to 18 can be aggravated in its minimum and maximum limits according to Article 19 of Law no. 34/97.
34. The GET was informed by the authorities of cases leading to convictions in respect of these offences. The figures appear in the tables at the end of the descriptive part of the report.

### **Bribery of foreign public officials (Article 5 of ETS 173)**

35. *Active and passive bribery of foreign public officials* are covered by Articles 373-374 CC (bribery of domestic public officials) and undue accepting of advantage is covered by Article 372 CC, as Article 386.3 CC, which contains the definition of certain forms of foreign public officials extends these definitions to the former Articles.

#### **Article 386 of the Criminal Code (\*)**

...

3 – For the purposes of Articles 372 to 374, are also equivalent to officers:

- a) The magistrates, officers, agents and equivalents of the European Union, regardless of the nationality and residence;
- b) The officers’ nationals of another Member State of the European Union, when the infringement has been committed, totally or partially, in Portuguese territory;
- c) The arbitrators, jurors and experts; and
- d) All that perform duties equal to those described in no. 1 in the scope of any international organisation governed by public law of which Portugal is a member, when the infringement has been committed, totally or partially, in Portuguese territory; ...

(\*) As amended by Law no. 32/2010, of 2 September 2010

36. The other elements/concepts of these offences, including the sanctions, described under bribery of domestic officials (Articles 373 and 374 CC) and undue accepting of advantage by domestic officials (Article 372 CC) are equally applicable in respect of bribery and undue accepting of advantage by foreign public officials.
37. The authorities informed the GET that there had been no cases in respect of these offences.
38. The authorities add that *active bribery of foreign public officials* is also covered in accordance with Article 7, Law 20/2008, which is specifically aimed at active corruption in *international business transactions* and reads:

**Law no. 20/2008, of 21 April 2008**

Article 7

**Active corruption with damage to international business transactions**

Whoever by himself, or through another person with his consent or ratification, gives or promises to give to a national or foreign public official or official of an international organization, or to a political officeholder, national or foreigner, or to a third party with the knowledge of the latter ones, an undue advantage of economic or other nature, in order to obtain or keep a business, a contract or another undue advantage in international business transactions, is punished with imprisonment from one to eight years.

39. The authorities informed the GET that there had been some cases in respect of these offences; five convictions had been obtained in one single case decided by a 1<sup>st</sup> Instance Court in March 2009.

**Bribery of members of foreign public assemblies (Article 6 of ETS 173)**

40. The authorities refer to Article 3.2 of the Law 34/87, which extends the offences of active and passive bribery of national political office holders or holders of high public office, contained in Articles 16-18 of the same law (see above) to foreign political office holders of the European Union, provided that at least a part of the offence was committed on Portuguese territory.

**Law no. 34/87 of 16 July 1987**

Article 3

(...)

2 – For the purposes of Articles 16 to 19, are equate to national political officeholders the European Union political officeholders regardless of their nationality and residence and whenever the offence was committed in all or in part of Portuguese territory or the political officeholders of other European Union Member States.

41. Other elements/concepts, including the criminal sanctions, described under bribery of members of public assemblies (above) are equally applicable in respect of bribery of members of foreign public assemblies.
42. The authorities also submit that *active bribery of members of foreign public assemblies* is covered by the criminal legislation, in accordance with Article 7 of Law no. 20/2008 (see above), which deals with active corruption with damage to international business transactions and covers “*political officeholder, national or foreigner*, the definitions of which are foreseen in Article 2 of that Law.

43. The GET was informed that there had been no cases in respect of these offences.

#### **Bribery in the private sector (Articles 7 and 8 of ETS 173)**

44. *Passive and active bribery in the private sector* are criminal offences under Articles 8 and 9 of the Law no. 20/2008, which read as follows:

##### **Law no. 20/2008 of 21 April 2008**

###### Article 8

###### **Passive corruption in private sector**

1 –Whoever works for a private sector entity and who, by himself, or through another person, with his consent or ratification, either demands or accepts, for himself or a third party, any advantage of economic nature or not, or its promise, for any act or omission, breaching his duties, is punished with imprisonment of up to two years or with a fine.

2 – If the act or omission foreseen in the previous paragraph is qualified to cause a distortion of competition or to cause a patrimonial damage to a third party, the offender is punished with imprisonment of up to five years or with a fine of up to 600 days.

###### Article 9

###### **Active corruption in private sector**

1 – Whoever by himself, or through another person, with his consent or ratification, gives or promises to the person referred to in the previous Article, or to a third party with his/her consent, an undue advantage of economic nature or not, with the purpose mentioned in the previous Article is punished with imprisonment of up to one year or with a fine.

2 – If the conduct set out in the previous paragraph is qualified to cause a distortion of competition or to cause a patrimonial damage to a third party, the offender is punished with imprisonment of up to three years or with a fine.

#### **Elements/concepts of the offence**

*“Persons who direct or work for, in any capacity, private sector entities”*

45. The wording *“persons who direct or work for, in any capacity, private sector entities”* of the *Criminal Law Convention* is captured by the wording *“whoever works for a private sector entity”* in Article 8, Law 20/2008. Article 2 d) of the same law defines private sector worker as *“the person who performs duties, including direction or oversight, through an individual labour contract, a work for hire contract or through any other bound, even if provisory or temporary, upon remuneration or gratuitous, for a private sector entity”*.

*“In the course of business activity”; “...in breach of [their<sup>3</sup>] duties”*

46. In respect of passive bribery in the private sector, Article 8, Law no. 20/2008 contains the wording *“breaching his duties”*. By contrast, active bribery, Article 9, in the private sector does not require a business relation; it may be carried out by *“whoever”*.

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<sup>3</sup> By the persons who direct or work for, in any capacity, private sector entities.

*“Promising, offering or giving” (active bribery)*

47. The elements of “giving” and “promising” are expressly contained in the provision on active bribery (Article 9 of the Law no. 20/2008), but “offering” is not. However, the interlocutors met by the GET confirmed that the words “prometer” and “dar” that are provided in the original text would cover “*promising, offering or giving*” (See also paragraph 13 above).

*“Request or receipt, acceptance of an offer or promise” (passive bribery)*

48. Article 8 of the Law no. 20/2008 contains the words “demands or accepts...any advantage ... or its promise”.

*“Undue advantage”*

49. The provision of active bribery (Article 9) and passive bribery (Article 8) cover “advantage of an economic nature or not” which are not due. The authorities have explained that whether a benefit is due or undue is not related to the value; any undue advantage or benefit or its mere promise may constitute a situation of bribery if the other conditions foreseen in the law are met.

*“Directly or indirectly”*

50. The elements “*directly or indirectly*” are covered in Articles 8 and 9 of the Law no. 20/2008 through the wording “Whoever by himself, or through another person...”. In addition, there are general rules on complicity contained in Articles 26-29 CC.

*“For himself or herself or for anyone else”*

51. There is an explicit reference to a third-party beneficiary in the provisions on passive bribery (Article 8): “for himself or a third party”. Furthermore, the corresponding provision on active bribery includes the expression “person ...or to a third party”.

*“To act or refrain from acting in the exercise of his or her functions”*

52. “*To act or refrain from acting in the exercise of his or her functions*” (action and omission) is covered by the wording “for any act or omission, breaching his/her duties (Article 8). This wording is also mirrored in the corresponding part of the active bribery provision which refers to the purpose mentioned in Article 8.

*“Committed intentionally”*

53. Active and passive bribery are intentional crimes, according to the general rules of the Criminal Code, Article 13 CC.

Sanctions

54. **Active bribery in the private sector** is punishable by imprisonment of up to one year or a fine. Aggravated active bribery in the private sector (distortion of competition or patrimonial damage to a third party) is punishable with imprisonment of up to three years or a fine.
55. **Passive corruption in the private sector** is punishable by imprisonment of up to two years or a fine. Aggravated passive corruption in the private sector (distortion of competition or patrimonial

damage to a third party) is sanctioned by imprisonment of up to five years or a fine, up to 600 days.

56. Accessory penalties are also applicable in respect of private sector corruption, according to the Criminal Code (application of general rules). The authorities have provided the example that natural or legal persons convicted for private sector corruption also run the risk of losing licenses which are necessary for carrying out certain specific activities. For instance, according to Article 57 (1) of Decree-Law no.18/2008 (Code of Public Procurement) when a natural or legal person (including the managers, directors or other representatives) have been convicted for money laundering or corruption crimes, they are not allowed to establish contracts with the Portuguese State or bid in public procurements. In addition, Article 100 CC states that persons convicted for a crime committed with a serious abuse of his/her profession or with a serious breach of duties is to be prohibited from performing his/her professional activities.
57. The authorities informed the GET that there had been no cases in respect of these offences.

### **Bribery of officials of international organisations (Article 9 of ETS 173)**

58. The authorities refer to Article 386.3 CC in respect of active and passive bribery of officials of international organisations as this provision provides that certain categories of foreign and international officials are covered by the provisions of bribery of domestic public officials, contained in Articles 373-374 CC (see above) and by the undue accepting of advantage foreseen in Article 372 CC. Article 386.3 reads:

**Article 386 of the Criminal Code (\*)**

(...)

3 – For the purposes of Articles 372 to 374 [bribery and undue accepting of advantage] are also equivalent to public officials:

- a) Magistrates, officials, agents and equivalents of the European Union, regardless of the nationality and residence;
- b) The public officials who are nationals of another Member State of the European Union, when the infringement has been committed, totally or partially, in Portuguese territory;
- c) The arbitrators, jurors and experts; and;
- d) All those who perform duties equal to those described above in the scope of any international organisation of which Portugal is a member, when the infringement has been committed, totally or partially, in Portuguese territory

(\*) As amended by Law no. 32/2010, of 2 September 2010

59. Other elements/concepts of the offence, including the criminal sanctions, described under bribery of foreign public officials (above) are equally applicable in respect of bribery of officials of international organisations. The sanction in respect of Article 7, Law no. 20/2008 is imprisonment of 1-8 years.
60. Furthermore, the authorities submit that Article 7 of the Law no. 20/2008 on active corruption with damage to international business transactions is applicable, see bribery of foreign public officials and members of foreign public assemblies (above).
61. The authorities informed the GET that there had been no cases in respect of these offences.

### **Bribery of members of international parliamentary assemblies (Article 10 of ETS 173)**

62. The authorities claim that active and passive bribery of members of international parliamentary assemblies are criminalised under Article 3 of the Law 34/87, which applies to national political officeholders and to holders of high public office (Articles 16-19 of the same law, see paragraph 25) the European Union political officeholders, regardless of their nationality and residence, in case the offence is committed at least in part of Portuguese territory.

#### **Law no. 34/87 of 16 July**

##### **Article 3**

(...)

2 – For the purposes of Articles 16 to 19, are equate to national political officeholders the European Union political officeholders regardless of their nationality and residence and whenever the offence was committed in all or in part in Portuguese territory or the political officeholders of other European Union Member States.

63. Other elements/concepts of the offence, including the criminal sanctions, described under bribery of domestic public assemblies (above) are equally applicable in respect of bribery of officials of international parliamentary assemblies. The sanction in respect of Article 7, Law no. 20/2008 is imprisonment of 1-8 years.
64. The authorities also refer to Article 7 of Law no. 20/2008 on active corruption with damage to international business transactions as applicable, see bribery of foreign public officials and members of foreign public assemblies (above).
65. The authorities informed the GET that there had been no cases in respect of these offences.

### **Bribery of judges and officials of international courts (Article 11 of ETS 173)**

66. Active and passive bribery as well as the undue accepting of advantage by *judges and officials of international courts* are criminal offences under Articles 372-374, as Article 386 CC extends the definition of domestic public officials to *“magistrates, officials, agents and equivalents of the European Union, regardless of the nationality and residence...”*.
67. Other elements/concepts of these offences, including the criminal sanctions, described under bribery and undue accepting of advantage by domestic public officials (above) are equally applicable in respect of bribery and undue accepting of advantage by judges and officials of international courts.
68. The authorities informed the GET that there had been no cases in respect of these offences.

### **Trading in influence (Article 12 of ETS 173)**

69. “Passive” and “active” trading in influence are separate criminal offences under the criminal law, covered by Article 335 CC, which reads:

## Criminal Code

Article 335

### **Trading in influence**

1 – Whoever, by himself or through another, with his consent or ratification, requests or accepts, for himself or for a third party, an advantage, whether of economic nature or not, or its promise, to abuse of his influence, actual or supposed, before any public entity, is punished:

a) With imprisonment from six months to five years, if a more serious penalty is not applicable to the offender through another legal provision, and if the purpose is to obtain any unlawful favourable decision;

b) With imprisonment of up to six months, or with a fine of up to 60 days, if a more serious penalty is not applicable to the offender through another legal provision, and if the purpose is to obtain any lawful favourable decision;

2 - Whoever, by himself or through another, with his consent or ratification, gives or promises, an advantage, whether of economic nature or not, to the persons mentioned in the previous number for the purposes mentioned in paragraph a) is punished with imprisonment of up to three years or with a fine.

### Elements of the offence

70. The element “asserts or confirms that s/he is able to exert an improper influence over the decision-making of [public officials]” is covered by the Portuguese law through the wording “Whoever...requests or accepts...a benefit...to abuse his influence, actual or supposed...”. The other elements/concepts of the offence, except the criminal sanctions, described under bribery of domestic public officials (above) are equally applicable in respect of trading in influence. The authorities have added that it is irrelevant whether the influence is exerted or not or whether the intended result is achieved or not for this offence.
71. The GET noted that the law does not cover situations of active trading in influence when the influence is aimed to the commission by the public official of an act or omission not contrary to his/her duties

### Sanctions

72. **Passive trading in influence** is sanctioned with imprisonment from six months to five years if the purpose is to obtain an unlawful favourable decision (i.e. if the action or omission expected is contrary to the public official’s duties); or with imprisonment of up to six months or a fine up to 60 days, if the purpose is to obtain a lawful favourable decision (i.e. when the public official is expected to commit an act or omission not contrary to his/her duties) result.
73. **Active trading in influence** may lead to imprisonment of up to three years or a fine when the purpose is to envisage an unlawful favourable decision (i.e. if the action or omission expected is contrary to the public official’s duties). If not, there is no offence.
74. The authorities informed the GET that seven individuals had been convicted in the period 2004-2009 for these offences.

### **Bribery of domestic arbitrators (Article 1, sections 1 and 2 and Articles 2 and 3 of ETS 191)**

75. Active and passive bribery as well as the undue accepting of advantage by domestic arbitrators are criminal offences in accordance with Articles 372-374 CC, as Article 386 3 c) CC extends the definition of domestic public officials, *inter alia*, to “arbitrators”.

76. Other elements/concepts of the offence, including the criminal sanctions, described under bribery and the undue accepting of advantage by domestic public officials (above) are equally applicable in respect of bribery of domestic arbitrators.

77. The authorities informed the GET that there had been no cases in respect of these offences.

#### **Bribery of foreign arbitrators (Article 4 of ETS 191)**

78. Active and passive bribery of foreign arbitrators as well the undue accepting of advantage in the foreign context are, according to the authorities, criminalised in accordance with Articles 372-374 CC, as Article 386.3 c) CC extends the definition of domestic public officials, *inter alia*, to “arbitrators” in general.

#### **Bribery of domestic jurors (Article 1, section 3 and Article 5 of ETS 191)**

79. Active and passive bribery of domestic jurors as well the undue accepting of advantage are criminal offences under Articles 372-374, as Article 386/3c) CC extends the definition of domestic public officials, *inter alia*, to “jurors”.

80. Other elements/concepts of the offence, including the penal sanctions, described under bribery of domestic public officials and the undue accepting of advantage are equally applicable in respect of bribery of domestic jurors.

81. The authorities informed the GET that there had been no cases in respect of these offences.

#### **Bribery of foreign jurors (Article 6 of ETS 191)**

82. Active and passive bribery of foreign jurors as well the undue accepting of advantage in the foreign context are, according to the authorities, criminalised under Articles 372-374, as Article 386.3c) CC extends the definition of domestic public officials, *inter alia*, to “jurors” in general.

#### **Other questions**

##### **Participatory acts**

83. Articles 26 and 27 CC contain general rules on “perpetration” and “complicity”:

#### **Criminal Code (general rules)**

Article 26

##### **Perpetration**

Whoever commits the act, by himself or through another person, or takes direct part in its execution, by agreement or together with other persons, as well as whoever intentionally induces another to commit an act is punishable as a perpetrator, provided that there is execution or the execution of the act has already been initiated.

Article 27

##### **Complicity**

1 – Whoever, intentionally and by any form, renders material or moral assistance to the commission by another person of an intentional criminal act, is punishable as accomplice.

2 – The sentence determined to the perpetrator is applicable to the accomplice, specially mitigated.

## Jurisdiction

84. The rules of Portuguese criminal jurisdiction are laid down in the general rules of the Criminal Code, Articles 4-7, which in parts pertinent to the current report appear below:

### **Criminal Code (general rules)**

Article 4

#### **Territorial applicability - General principle**

Unless provided otherwise in an international treaty or convention, the Portuguese criminal law is applicable to acts committed:

- a) In Portuguese territory, regardless of the nationality of the agent; or
- b) On board Portuguese ships or aircrafts.

Article 5

#### **Acts committed outside the Portuguese territory**

1 - Unless provided otherwise in an international treaty or convention, the Portuguese criminal law is also applicable to acts committed outside the national territory:

a) When such acts are one of the offences foreseen in articles 221, 262 to 271, 308 to 321 and 325 to 345;

b) Against Portuguese, by Portuguese customarily resident in Portugal at the time of their commission and found therein;

...

e) By Portuguese, or by foreigners against Portuguese, whenever:

i) The agents are found in Portugal;

ii) Such acts are also punishable by the law of the place where they have been committed, unless the place of the act is not subject to any punitive power; and

iii) Such acts constitute a crime permitting extradition and such extradition cannot be granted or it is decided not to hand over the agent in execution of a European arrest warrant or other instrument of international cooperation which bounds the Portuguese State;

f) By foreigners found in Portugal and whose extradition has been requested, when constituting crimes permitting extradition and such extradition cannot be granted or it is decided not to hand over the agent in execution of a European arrest warrant or other instrument of international cooperation which bounds the Portuguese State;

g) By a legal person or against a legal person having its registered office in the Portuguese territory.

2 – The Portuguese criminal law is also applicable to acts committed outside the national territory to which the Portuguese State has, by international treaty or convention, bound itself to decide.

Article 6

#### **Restrictions to the applicability of Portuguese law**

1 – The applicability of Portuguese law to acts committed outside the national territory only takes place when the agent has not been subjected to trial in the country where the act has been committed or if he has evaded from the full or partial serving of the conviction.

2 – Although the Portuguese Law is applicable under the previous number, the act is tried according to the law of the country where the act has been committed whenever such law is actually more favourable to the agent. The applicable sentence is converted to its corresponding sentence in the Portuguese system, or, in the case of no direct correspondence, to the sentence which the Portuguese law foresees for the act.

...

Article 7

#### **Place of the commission of the act**

1 – The act is deemed to be committed in the place where the agent has, totally or partially and under any form of participation, acted or, in the case of omission, should have acted as well as in the place where the typical result or the result not comprised in the type of crime has occurred.

2 – In case of an attempt, the act is also deemed to be committed in the place where, according to the agent's representation, the result should have occurred.

85. The authorities informed the GET that there had been no court decisions/case law in connection with jurisdiction in respect of corruption offences.

#### Statute of limitations

86. The Criminal Code, Articles 118 and 119, regulate the issues relating to statutes of limitations in respect of criminal proceedings. These rules imply that the criminal proceedings against offenders are extinguished following a certain period of time counted from the commission of the offence. The limitation period depends on the maximum penalty foreseen for the offence at stake according to the following:

- a) Fifteen years in case of crimes punishable with an imprisonment with a maximum limit higher than ten years, or in case of the crimes set forth in Articles 372, 373, 374, 374-A, 375(1), 377(1), 379(1), 382, 383 and 384 CC, Articles 16, 17, 18 and 19 of Law 34/87, amended by Laws no. 108/2001, and no. 30/2008 and Articles 8, 9, 10 and 11 of Law no. 50/2007 and also in case of fraud in obtaining subsidies or subventions;
- b) Ten years for crimes punishable with imprisonment with a maximum limit equal to or higher than five years but which does not exceed ten years;
- c) Five years when regarding crimes punishable with sentence of imprisonment with a maximum limit equal or higher than one year, but less than five years;
- d) Two years in the remaining cases.

N.B. The maximum sentence to consider when determining the limitation period is the one pertaining to the type of the crime without reference to aggravating or mitigating circumstances.

(Based on Article 118 CC as amended by Law no. 32/2010 of 2 September 2010)

87. The limitation period may be suspended for a number of reasons, such as when the criminal procedure cannot be initiated or continued for legal reasons (Article 120 CC). Furthermore, the limitation period for initiating criminal proceedings is interrupted with the constitution of the «arguido»<sup>4</sup>, with the notice of the prosecution etc. (Article 121 CC).
88. These rules imply that in respect of offences where the sanction foreseen is less than one year of imprisonment, the period of limitation is limited to two years. This concerns only passive trading in influence concerning a “lawful” favourable decision. The statute of limitation in respect of the offences contained in Articles 372 CC (undue accepting of advantage), 373 CC (passive bribery), 374 CC (active bribery), 374-A CC (aggravation) as well Articles 16 (undue accepting of advantage), 17 (passive bribery), 18 (active bribery) and 19 (aggravation) of Law no. 34/87 is fifteen years. All other forms of corruption offences under the criminal law have limitation periods of either 5 or 10 years.
89. The authorities informed the GET that there were no court decisions/case law in connection with jurisdiction in respect of bribery offences.

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<sup>4</sup> According to Article 58 Code of Criminal procedure (CCP) the constitution of «arguido» is mandatory when an inquiry has been opened against a person that is suspected of an offence, a suspected person has been detained or a «notice act» stating that an identified person committed an offence has been open and that notice has been communicated to him/her. The so-called «arguido» is a procedural position of someone within the criminal procedure between the suspect and the defendant. According to Article 57 CCP, the «arguido» is the individual against whom a criminal accusation was made.

## Defences

90. The special defence of effective regret in respect of corruption offences is regulated in Article 374-B CC (Law 32/2010) in respect of public officials and in Article 19-A of Law no. 34/87 (amended by Law no. 41/2010) in respect of political officeholders. The penalty may not be applied in respect of active and passive bribery offences in case the offender denounces the crime within 30 days after its commission, but prior to the commencement of the criminal proceedings; voluntarily refuses the offer or promise earlier accepted; returns the advantage or before the fulfilment of the act, withdraws the promise or refuses the offer or requests that it be returned. According to the authorities, this defence is not automatic as it has to be argued and proved before the court.

### **Criminal Code**

**Article 374-B** introduced by Law 32/2010 of 2 September 2010

#### **Exemption or mitigation of penalty**

1 – The penalty is not applied if the offender:

- a) Has denounced the crime, within 30 days, at the maximum, after the commission of the act and always before the criminal proceeding commences;
- b) Prior to the commission of the act, voluntarily refuses the offer or promise that he had accepted, or if he returns the advantage, or in the case of tangible property, its value; or
- c) Before the commission of the act, he withdraws the promise or refuses the offer of the advantage or requests that it be returned.

2 – The penalty is specially mitigated whenever the offender:

- a) Gives concrete assistance in the collection of decisive evidence leading to the identification or arrest of other persons responsible, up until the trial hearing, at first instance; or
- b) Has, directly or through a third person, committed the act at the request of a public official.

**Law no. 34/87** as amended by Law no. 41/2010 of 3 September 2010

Article 19-A

#### **Exemption or mitigation of penalty**

1 – The penalty is not applied if the offender:

- a) Has denounced the crime within 30 days, at the maximum, after the commission of the act and always before the criminal proceeding commences;
- b) Prior to the commission of the act, voluntarily refuses the offer or promise that he had accepted, or if he returns the advantage, or in the case of tangible property, its value; or
- c) Before the commission of the act, he withdraws the promise or refuses the offer of the advantage or requests that it be returned.

2 – The penalty is specially mitigated whenever the offender:

- a) Gives concrete assistance in the collection of decisive evidence leading to the identification or arrest of other persons responsible, up until the trial hearing, at first instance; or
- b) Has, directly or through a third person, performed the act at the request of a political officeholder or holder of a high public office, with the exception of the case foreseen in article 18(3).

## Data

91. The Portuguese authorities have provided the following official statistics:

### Defendants (*arguidos*) in criminal procedures in trial stage closed in the Courts of 1st Instance Years 2004 – 2009

YEAR CRIME		2004	2005	2006	2007	2008	2009
Trading in influence	Trading in influence	(*)	(*)	(*)	(*)	(*)	(*)
Corruption	Passive corruption illicit act				20	38	47
	Passive corruption licit act				5	3	4
	Active corruption				53	67	55
	Attempted active corruption				4	3	
	Non specified corruption	69	89	147			
	TOTAL	69	89	147	82	111	108

(\*) Due to rules imposed to statistics (3 or less than 3 cases), the information is protected by statistics secret and could not be provided in an annual basis.

### Convicted persons in criminal procedures in trial stage closed in the Courts of 1st Instance Years 2004 - 2009

YEAR CRIME		2004	2005	2006	2007	2008	2009
Trading in influence	Trading in influence	(**)	(**)	(**)	(**)	(**)	(**)
Corruption	Passive corruption illicit act				10	25	33
	Passive corruption licit act					3	4
	Active corruption				32	30	32
	Attempted active corruption				4		
	Non specified corruption	49	60	71			
	TOTAL	49	60	71	48	59	71

(\*\*) From 2004-2009 7 individuals have been convicted in respect of the trading in influence offence.

**Acquitted persons in criminal procedures in trial stage closed in the Courts of 1st Instance  
Years 2004 - 2009**

YEAR CRIME		2004	2005	2006	2007	2008	2009
Trading in influence	Trading in influence	(*)	(*)	(*)	(*)	(*)	(*)
Corruption	Passive corruption illicit act				5	13	14
	Passive corruption licit act					3	
	Active corruption				19	34	23
	Attempted active corruption					3	
	Non specified corruption	17	28	75			
	TOTAL	17	28	75	24	53	37

Source: Official Statistics of Justice

Note: In 2007 the methods used for the collection and treatment of statistic data changed, allowing for the identification of the different types of corruption crimes

**Legal amendments etc**

92. The criminal law legislation concerning corruption offences in Portugal has been subject to criticism for a number of years and there is currently broad political consensus to update certain parts of the Criminal Code, in particular in the light of Portugal's international commitments in this particular area (United Nations Convention against Corruption, "UNCAC", and the Council of Europe Criminal Law Convention on Corruption (ETS 173)). The *Ad hoc* Commission on the Political Follow-up of the Phenomena of Corruption and on a Comprehensive Analysis with a View to Combating this Phenomenon ("Ad hoc Commission") was created by Parliament (Resolution no. 1/2010 approved on 10 December 2009). The objective of this Commission was to collect information from experts of public bodies as well as academics and civil society representatives to analyse the measures to combat corruption, in particular, within the framework of the Criminal Code and the crimes under the responsibility of political officeholders (Law no. 34/87). Furthermore, the Commission was mandated to propose legislative action in this area within a period of 180 days and the GET was informed that the *Ad hoc* Commission would present its final activity report to Parliament in July 2010. In order to assist the Portuguese authorities in the imminent process of legislative reform of the criminal legislation, the GET agreed to submit preliminary findings and concerns prior to the adoption of the Evaluation Report by GRECO. To this end, the Secretariat of GRECO submitted to the Ministry of Justice the preliminary findings of the GET on 9 July 2010. In September 2010, Parliament adopted a pack of amended/new legislation proposed by the *Ad hoc* Commission and by the Government. The new legislation contains changes to the Criminal Code, the elements of corruption offences in the public sector as well as sanctions, to a large extent in line with the preliminary findings of the GET. The current report reflects the Portuguese criminal corruption legislation, as amended in September 2010.<sup>5</sup>

<sup>5</sup> Law no. 32/2010 (Criminal Code), adopted on 2 September 2010, will enter into force on 2 March 2011; Law no. 34/2010 (professional careers, public officials etc), adopted on 2 September 2010, entered into force on

### III. ANALYSIS

93. Portugal ratified the Criminal Law Convention on Corruption (ETS 173) (hereinafter: the Convention) in 2002 and the GET noted at the time of its on-site visit (May 2010) that all the offences contained in the Convention were reflected in the criminal legislation of Portugal. However, the Additional Protocol to the Convention (ETS 191), which was signed by Portugal in 2003, had not been ratified and not all of the offences contained in the Protocol were criminalised under Portuguese law. Moreover, the GET discovered a number of possible shortcomings in elements of the legislation as compared with the requirements of the Convention; most notably, that the sanctions in respect of certain corruption offences were very soft. The GET also found that there was limited case law available in respect of corruption and that the few cases existing to a large extent concerned bribery of domestic public officials for the so called “lawful” or “licit” actions (no breach of duty) by the official. Furthermore, the GET noted during the visit that the anti-corruption legislation was subject to criticism from civil society as well as by academia and that the authorities were in the process of updating the legislation. As described above, the *Ad hoc* Commission of Parliament was, at the time of the visit by the GET, in the process of preparing fundamental amendments to the criminal legislation concerning corruption offences. At the request of the Portuguese authorities, the GET submitted a brief summary of its preliminary findings to the Government, shortly after the on-site visit, in order to assist the authorities in a timely manner in their work towards making the legislation more compliant with the Convention and the Additional Protocol thereto. The GET was pleased to note that in September 2010 a pack of legislation elaborated by the *Ad hoc* Commission and the Government had been adopted by Parliament, as the amended/new legislation remedy a number of shortcomings in the previous legislation. Having said that, the GET notes that some weaknesses and/or inconsistencies remain in the Portuguese legislation as compared to the requirements of the Criminal Law Convention.
94. The notion of public official is defined in Article 386 CC. The definition is *broad and covers civil officers, administrative agents and “whoever”* (including provisionally or temporarily employed staff, paid or on a voluntary basis etc) who perform public administrative or judicial functions and out of court procedures. Employees of national and State owned companies and the like are also covered. Furthermore, paragraph 4 of Article 386 CC covers public officials who perform political duties (i.e. elected officials). The definitions include officials such as mayors, ministers and elected representatives of various types of assemblies. Interlocutors met by the GET confirmed that, in practice, no difficulty was encountered with regard to the notion of public official. The case law available, although limited, justifies such a position.
95. Concerning the elements of bribery of public officials, the GET notes that Article 374 CC expressly includes “giving” and “promising” an advantage but does not contain the term “*offering*” (in Portuguese “*oferecer*”). The same is mirrored in the wording of passive bribery and undue accepting of advantage (Articles 373 and 372 CC) where the acceptance element does not refer to an offer. The GET noted also that the wording is similar in all other corruption provisions (Article 18 of the Law no. 34/87 amended by Law no. 108/2001 and Law no. 41/2010, Article 7 of Law no. 20/2008 in respect of active corruption with damage to international business transactions and Article 9 of the same law for active bribery in the private sector). In addition, the

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1 November 2010; Law no. 36/2010 (credit institutions etc), adopted on 2 September 2010 will enter into force on 2 March 2011. Law no. 37/2010 (banking secrecy), adopted on 2 September 2010, entered into force on 3 September/1 November 2010; Law no. 38/2010 (political officeholders), adopted on 2 September 2010, entered into force on 1 November 2010; Law no. 41/2010 (liability of political officeholders), adopted on 3 September 2010, will enter into force on 3 March 2011; Law no. 42/2010 (witness protection), adopted on 3 September 2010, entered into force on 8 September 2010.

GET was informed that the Convention, as translated into Portuguese, does not contain the term. The GET has concerns about this possible lacuna as the notion of “offering” in the meaning of the Convention has a wider meaning than “giving” or “promising” and would, for example, cover situations where a suggestion of a bribe was made rather than a definite promise. However, the authorities claim that the wording contained in the original Portuguese text — “dar” — would encompass both “giving” and “offering”. This was also confirmed by several interlocutors met on site.

96. Turning to active and passive bribery of *foreign* public officials (Article 5 of the Convention), members of foreign public assemblies (Article 6 of the Convention), officials of international organisations (Article 9 of the Convention), members of international parliamentary assemblies (Article 10 of the Convention) and judges and officials of international courts (Article 11 of the Convention), the GET notes that the corresponding provisions contained in the criminal legislation of Portugal are more restricted than the Convention. The definitions of what constitutes foreign public officials, which are contained in paragraph 3 of Article 386 CC and Law no. 34/87 (concerning members of foreign public assemblies), limit the scope of foreign public officials to officials belonging to the European Union (EU), to EU Member States or to officials performing duties in international organisations of which Portugal is a member. All foreign officials mentioned in Articles 5, 6, 9, 10 and 11 of the Convention who are not officials in EU Member States, EU institutions or international organisations of which Portugal is not a member are not covered by the above bribery provisions (Article 386 CC and Law no. 34/87). To this should be added that there is yet another additional requirement contained in Article 386 CC, namely that the bribery offence by an official of an EU Member State or an official of an international organisation must have been committed at least partly in Portugal. Consequently, the narrow approach of Article 386 CC further limits the scope of the application of the bribery offences in the foreign context. In addition, the authorities have stressed that *active* bribery of foreign public officials, members of foreign public assemblies and officials of international organisations is also covered by Article 7 of Law no. 20/2008. However, the GET notes that these offences are limited to the context of international business transactions and, consequently, are narrower than the Convention provisions on active bribery in the foreign context. The GET also notes that no court decisions/case law have ever been registered for bribery of foreign or international public officials. To sum up, it appears that the purpose of the aforementioned provisions is merely to deal with Portugal’s obligations in respect of the European Union and those under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Thus, Portugal does not comply with the broader requirements of the Council of Europe Convention. Therefore, the GET recommends **to enlarge the scope of application of the legislation concerning active and passive bribery of foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies as well as judges and officials of international courts, in order to fully comply with the requirements of Articles 5, 6, 9, 10 and 11 of the Criminal Law Convention on Corruption (ETS 173).**
97. The offences of active and passive bribery in the private sector are criminalised under Articles 8 and 9 of Law no. 20/2008. Furthermore, the term “private sector worker” (Article 8 of the aforementioned law), which according to the interlocutors met is to be taken in its widest sense does not, in the view of the GET, limit the scope of this offence in comparison to the requirements of Articles 7 and 8 of the Convention. Moreover, the elements “in the course of business activity” are not reflected in Portuguese law but nothing prevents a contracting party from implementing this provision of the Convention without such a restriction, thus enlarging the scope of active bribery in the private sector. Similarly, Article 9 of Law no. 20/2008 is also broader than the Convention, since it does not require a business relation; the active bribery may

be carried out by “whoever”. Overall, the Portuguese criminal provisions on bribery in the private sector meet the standards of Articles 7 and 8 of the Convention and even go beyond the requirements of the Convention in some respects.

98. Trading in influence is criminalised both in its active and passive forms. Furthermore, Article 335 CC, is rather broad in scope, which is confirmed by the use of terms like “whoever” (both in the active and passive forms of the offence), “advantage” (“undue” is not included) and “abuse of his influence”. However, it follows from Article 335 CC – also confirmed by interlocutors met on site – that this provision constitutes only a domestic offence. The term “any public entity” relates exclusively to entities governed by Portuguese law and does not go beyond the domestic context. This may also be concluded *a contrario* from paragraph 3 of Article 386 CC, which extends the criminal law definition of “official” to EU officials and officials of EU Member States and international organisations, since it refers only to bribery and undue accepting of advantage offences (Articles 373, 374 and 372 CC) and not to trading in influence. Consequently, while the categories of officials referred to in Articles 2, 3 and 4 of the Convention would be covered, the foreign officials as mentioned in Articles 5, 6, 9, 10 and 11 of the Convention are not covered by the current trading in influence provisions. Therefore, the GET recommends **to criminalise active and passive trading in influence in respect of foreign/international officials in conformity with Article 12 in conjunction with Articles 5, 6, 9, 10 and 11 of the Criminal Law Convention on Corruption (ETS 173)**.
99. Following legal amendments adopted in September 2010, active and passive bribery of arbitrators and jurors are criminalised under Articles 373 and 374 (as well as in respect of undue accepting of advantage, Article 372 CC), as Article 386.3/c CC (amended by Law no. 32/2010) extends the definition of public officials, *inter alia*, to “arbitrators or jurors”. The authorities claim that active and passive corruption of foreign arbitrators and jurors are criminalised under Portuguese legislation as Article 386.3/c refers to arbitrators and jurors. The GET has doubts as to whether this general wording would cover arbitrators and jurors in the foreign context. Portugal has signed (15 May 2003) but not yet ratified the Additional Protocol to the Convention. The GET furthermore notes that the internal ratification procedure is ongoing and is expected to be concluded before the end of 2010. In the light of the foregoing, the GET recommends **to ensure that bribery of foreign arbitrators and jurors is criminalised under Portuguese law in conformity with Articles 4 and 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191); and to proceed swiftly with the ratification of this Instrument**.
100. A particularity of the Portuguese criminal legislation concerning the offences of *active and passive bribery* in the public sector was, prior to the adoption of new legislation in September 2010, the distinction between two situations: “lawful” and “unlawful” acts. A “lawful” (licit) act was at stake when the action/omission of the public official was not contrary to his/her duties and an “unlawful” (illicit) action/omission was at hand when the official acted in breach of his/her duties. The GET discussed at length the borderline between the two concepts with all pertinent interlocutors and it appeared that there was some uncertainty about what constitutes a licit or illicit act, when, for example, a public official is bribed to “speed up” the process to reach a lawful decision. Moreover, “unlawful” situations were difficult to prove and there was a tendency to prosecute for bribery which did not presuppose “unlawful” action or inaction. However, the main consequence of this distinction was the considerable difference between the sanctions for unlawful and lawful acts, the latter being extremely lenient. The GET notes that following the amendments to the Criminal Code, (Law no. 32/2010 and 41/2010), the label “unlawful/lawful” action in bribery offences has disappeared<sup>6</sup>, although the breach of duty concept prevails;

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<sup>6</sup> The term “unlaw/lawful” still prevails in the offence of trading in influence, Article 335 CC.

however, the sanctions have been considerably adjusted to adequate levels in respect of actions which do not comprise a breach of duty. Currently, in the public sector, the criminal sanction for active bribery is imprisonment<sup>7</sup> of up to three years or a fine<sup>8</sup> of up to 360 days when the action or omission is not contrary to the duties of the position of the public official and between one and five years' imprisonment when the action or omission is contrary to the duties of the position of the public official. Passive bribery in the public sector may lead to imprisonment from one to five years in case the action or omission is not contrary to the duties of the official and in case it is contrary to the duties between one and eight years (Article 373 and 374 CC). Active bribery of members of domestic public assemblies is sanctioned with imprisonment up to five years where the action or omission is not contrary to the duties of the official and between two and five years' imprisonment where the action or omission is contrary to the duties. Passive bribery of members of domestic public assemblies is sanctioned with imprisonment from two to five years when the action or omission is not contrary to the duties of the official and between two and eight years' imprisonment where the action or omission is contrary to the duties. The sanctions for trading in influence, the passive offence (obtaining a favourable lawful decision) may lead to 6 months' imprisonment or to a fine of up to 60 days and an offence to obtain a favourable illicit decision between 6 months' and 5 years' imprisonment. While the active trading in influence (obtaining a favourable illicit decision) is sanctioned with imprisonment of up to three years or with a fine, the action to obtain a favourable "lawful" decision is not criminalised at all. Furthermore, the GET notes that the sanctions in respect of private sector bribery may amount to a fine or imprisonment of up to one year for the active offence and up to three years if aggravated. The passive private sector bribery offence may lead to a fine or imprisonment of up to two years or a fine, and if aggravated, up to five years of imprisonment or a fine of up to 600 days.

101. The sanctions for a number of corruption offences under Portuguese law, following the recent amendments to the legislation, are now in line with GRECO's established requirements for sanctions to be effective, proportionate and dissuasive. However, the sanctions in respect of private sector bribery offences, which have not been subject to any recent changes, are in comparison with the public sector bribery offences considerably weaker. In this connection, the GET wishes to stress that the Explanatory report to the Convention expresses a clear preference for limiting the difference between the sanctions of public and private sector bribery, which is also a trend that can be seen in many GRECO member States. Moreover, the sanctions for trading in influence, (which also remain unchanged) are considerably weaker than those foreseen for public sector bribery. In the light of the practice established by GRECO, the GET is of the firm opinion that these sanctions do not appear to be effective, proportionate and dissuasive and are therefore not in compliance with Article 19 of the Convention. Furthermore, active trading in influence for a favourable lawful decision is not sanctioned at all although the authorities claim that this lacuna could possibly be covered under Article 372.2 CC. The GET does not accept this argument as Article 372.2 does not cover all elements of trading in influence. Moreover, the statute of limitations for each offence is calculated on the basis of the severity of the sanctions provided (Article 118 CC). The limitation period for corruption offences under Portuguese law is between five and 15 years, except in respect of one offence, namely passive trading in influence, where there is no breach of duty, the limitation period is two years. This period, which falls short of the standards established by GRECO, is clearly insufficient and needs to be adjusted. Having in mind what has been said, the GET recommends **(i) to increase the criminal sanctions in respect of bribery in the private sector and trading in influence in order to ensure effective, proportionate and dissuasive sanctions as required by Article 19 of the Criminal**

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<sup>7</sup> The minimum of imprisonment term is provided in the general provisions of the Criminal Code as 1 month (Article 41 CC).

<sup>8</sup> The fines under these provisions are so called "day fines" which are calculated in respect of the severity of the offence (number of days) and the financial situation of the offender. The minimum number of day-fines is 10 days and the maximum 360 days (art. 47 CC).

**Law Convention on Corruption (ETS 173); (ii) to criminalise trading in influence (active form for “licit” act) in conformity with Article 12 of the same Convention and (iii) to adjust the limitation period for trading in influence to that of public sector bribery.**

102. Jurisdiction is established over all offences under the Criminal Code of Portugal when committed, in whole or in part on the territory of Portugal or on Portuguese ships or aircrafts, by Portuguese or foreign citizens (Article 4 in conjunction with Article 7 CC – territorial jurisdiction). Furthermore, Article 5, (1) and (2) CC provides for the application of criminal law to acts of bribery and trading in influence committed outside the Portuguese territory; regarding trading in influence, Article 5 (1) a) CC refers to offences set forth in Articles 325 to 345, which means that the Portuguese criminal law is applicable to such acts committed outside of the Portuguese territory. In addition, paragraph 2 of Article 5 CC states in a general way that the Portuguese criminal law is also applicable to acts committed outside the national territory in relation to which the Portuguese State has bound itself to abide by international treaty or convention, for example, the Criminal Law Convention on Corruption. The authorities have explained that this means that Article 17 of the Convention, which has been ratified without reservation, is applicable to Portuguese law. Noting the particular reference to international treaties and conventions made in Article 5, paragraph 2 CC, and in the light of GRECO’s case law, the GET accepts the explanation of the Portuguese authorities but notes that criminal acts under the Additional Protocol would currently fall outside this general rule as Portugal has not yet ratified that instrument (see above).
103. The criminal legislation provides for the special defence of effective regret in certain situations in respect of the offences of bribery of public officials and bribery of members of public assemblies in the domestic and foreign/international context. Such situations may arise when the offender denounces a crime of corruption within 30 days of its commission, but prior to the commencement of the criminal proceedings; voluntarily refuses the offer or promise earlier accepted; returns the advantage or before the fulfilment of the act, withdraws the promise or refuses the offer or requests that it be returned. The GET recalls that GRECO has repeatedly been very critical of the application of the special defence of effective regret which leads to an “automatic” and total exemption from punishment, where there is no possibility for judicial review and where there are obvious risks of misuse and, as a consequence, serious cases of corruption may go totally unpunished. However, in the Portuguese context, this defence is not “automatic”, but is to be considered by a court. In the light of this, the GET recommends **to analyse and accordingly revise the mandatorily total exemption from punishment granted to perpetrators of bribery offences in the public sector which is conceded in consequence of effective regret.**
104. Considering that Portugal has very recently updated its criminal legislation in respect of corruption offences, the GET takes the view that the legislative framework needs to be accompanied by measures to promote its use in practice and to analyse to what extent it would require further adjustments, in addition to the shortcomings highlighted in the current report. The development of guidelines and training appears to be necessary for, in particular, the law-enforcement bodies and the prosecution but also with regard to the judiciary. This appears to be particularly important as there is only limited case law available. The GET is of the opinion that an in-depth evaluation of how the new legislation works in practice would be useful. To prepare for this, it would be beneficial to systematically collect information, including statistics. Consequently, the GET recommends **to establish guidelines and training for the professionals who are to apply the criminal legislation on corruption and to collect information in order to assess how the legal framework operates in practice.**

#### IV. CONCLUSIONS

105. Following the adoption of new and amended criminal legislation in Portugal in September 2010, all the various types of domestic offences contained in the Criminal Law Convention on Corruption (ETS 173) and the Additional Protocol thereto (ETS 191) are criminalised under Portuguese legislation; however, not all offences in the foreign/international context are fully covered. Apart from that the Portuguese authorities should be commended for having put in place a rather complete legislative framework, which to a large extent complies with the requirements of the Criminal Law Convention and its Additional Protocol, with the exception of bribery of arbitrators and jurors in the foreign context. It is to be noted that Portugal ratified the Convention in 2002 and that the ratification of the Additional Protocol is expected to happen in the near future. Furthermore, other shortcomings in various respects have been identified in the legislation, which need to be remedied in order to make Portugal fully compliant with the requirements of the Convention and its Additional Protocol.
106. As stated above, while all corruption offences at the domestic level are covered, this is not the case with certain corruption offences in the foreign/international context. In particular, the legislation is, in respect of offences such as bribery of foreign public officials and of officials of international organisations, limited to such offences involving officials of the European Union or its member States. This is a major shortcoming in relation to the Criminal Law Convention which prevents Portugal from prosecuting such offences when they are committed against officials outside the European Union or its member States. With the recent adoption of new criminal legislation, Portugal has updated its legislation, in particular as regards the criminal sanctions for bribery offences in the public sector. As a consequence, these sanctions appear to be effective, proportionate and dissuasive and would thus comply with the requirements of the Criminal Law Convention. However, the sanctions pertaining to private sector bribery and trading in influence, which have not been revised, are considerably weaker and do not comply with the requirements of the Convention. Furthermore it is noted that the criminal law contains far reaching provisions in respect of the special defence of effective regret, which is applicable both in relation to active and passive corruption. Finally, considering that Portugal has recently amended its legislation substantially and that only limited practice is available in relation to the previous legislation, it would appear useful for the new legislation to be accompanied by guidelines and opportunities for training for those who have to apply the law. Moreover, an evaluation of the legal system as applied would provide a useful basis for any further necessary adjustments to the law in the future.
107. In view of the above, GRECO addresses the following recommendations to Portugal:
- i. **to enlarge the scope of application of the legislation concerning active and passive bribery of foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies as well as judges and officials of international courts, in order to fully comply with the requirements of Articles 5, 6, 9, 10 and 11 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 96);**
  - ii. **to criminalise active and passive trading in influence in respect of foreign/international officials in conformity with Article 12 in conjunction with Articles 5, 6, 9, 10 and 11 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 98);**

- iii. **to ensure that bribery of foreign arbitrators and jurors is criminalised under Portuguese law in conformity with Articles 4 and 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191); and to proceed swiftly with the ratification of this Instrument (paragraph 99);**
  - iv. **(i) to increase the criminal sanctions in respect of bribery in the private sector and trading in influence in order to ensure effective, proportionate and dissuasive sanctions as required by Article 19 of the Criminal Law Convention on Corruption (ETS 173); (ii) to criminalise trading in influence (active form for “licit” act) in conformity with Article 12 of the same Convention and (iii) to adjust the limitation period for trading in influence to that of public sector bribery (paragraph 101);**
  - v. **to analyse and accordingly revise the mandatorily total exemption from punishment granted to perpetrators of bribery offences in the public sector which is conceded in consequence of effective regret (paragraph 103);**
  - vi. **to establish guidelines and training for the professionals who are to apply the criminal legislation on corruption and to collect information in order to assess how the legal framework operates in practice (paragraph 104).**
108. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the Portuguese authorities to present a report on the implementation of the above-mentioned recommendations by 30 June 2012.
109. Finally, GRECO invites the authorities of Portugal to authorise, as soon as possible, the publication of the report, to translate the report into the national language and to make this translation public.