



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Portugal: Bribery & Corruption (2nd edition)

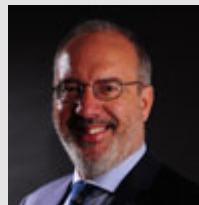
This country-specific Q&A provides an overview to bribery and corruption laws and regulations that may occur in Portugal.

This Q&A is part of the global guide to Bribery & Corruption. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/practice-areas/bribery-and-corruption-second-edition/>



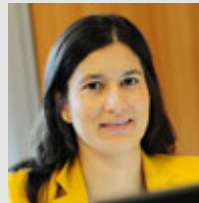
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The Legal 500



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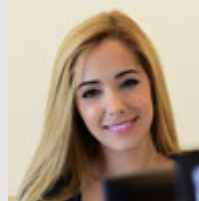
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1. **What is the legal framework (legislation/regulations) governing bribery and corruption in your jurisdiction?**

According Portuguese legal framework, bribery can be prosecuted in many forms such as trading in influence, abuse of function and corruption itself.

Such criminal offenses are regulated in Portuguese Criminal Code (PCC) and also throughout disperse legislation. Such legislation usually enforces EU directives, UN Conventions and other agreements focused against Corruption such as GRECO recommendations(1).

The following legislation relates to Portuguese bribery offenses:

- Article 363 (referring to Articles 359 and 360) of the PCC, regarding bribery per se as a crime against justice;
- Articles 372, 373, 374, 374-A and 374-B of the PCC, concerning different types of corruption in the public sector;
- Articles 375 and 376 of the PCC, regarding embezzlement in the public sector;
- Article 379 of the PCC, concerning graft in the public sector;
- Articles 7 through 9 of Law No. 20/2008 of 21 April regarding corruption in international trade and the private sector.
- Articles 16, 17 and through 18 of Law No. 34/87 of 16 July regarding crimes committed by holders of political office and high public office;
- Articles 36 and 37 of the Military Justice Code (Law No. 100/2003 of 15 November) regarding crimes committed by military personnel;
- Articles 8 and 9 of Law No. 50/2007 of 31 August, concerning crimes committed by sports agents as defined there.

(1) - For instance, Portugal signed international organisations and agreements related to corruption, the most relevant being:

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed on 26 May 1997 and ratified on 10 March 2000;
- the Council of Europe Civil Law Convention on Corruption, ratified on 20 September 2001;

- the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the EU, adopted by the Member States on 26 May 1997 and ratified on 3 December 2001;
- the Council of Europe Criminal Law Convention on Corruption, ratified by Portugal on 7 May 2002 and the Additional Protocol to the Criminal Law Convention on Corruption, ratified by Portugal on 12 March 2015, which entered into force on 1 April 2015;
- the EU Convention on the Protection of the Financial Interests of the Communities and Protocols, ratified by all Member States which entered into force on 17 October 2002;
- the UN Convention against Transnational Organized Crime, signed in December 2000 and ratified on 10 May 2004; and
- the UN Convention against Corruption, signed on 7 December 2007 and ratified on 12 September 2007.

2. **Which authorities have jurisdiction to investigate and prosecute bribery in your jurisdiction?**

Bribery matters are usually pursued by the competent public prosecutor's office - Department of Investigation and Prosecution DIAP assisted by the police authorities (Judiciary Police or tax authorities). In the end of the line stand the court.

Investigations of corruption can also be led by the Central Department for Criminal Investigation and Action (DCIAP), which is a nationwide prosecutor's office.

A National Anti-Corruption Unit⁽²⁾ also takes place, which is a specialized group that conducts preventive actions, prior to any criminal proceedings, in the context of which the police are allowed to collect information related to facts that may reveal that a crime of corruption is being prepared or committed.

(2) - Entitled under Law No. 36/94 of 29 September.

3. How is bribery defined?

In Portugal's legal order there are several different kinds of bribery offenses. Generally speaking, bribery can be defined when a person in a dominant position agrees to receive an undue advantage in exchange for provision of a service.

Bribery per se is defined by Article 363 of the PCC as whoever persuades or attempts to persuade another person, through a gift or promise of an equity or non-equity advantage, to falsely testify or to declare something false under oath - Articles 359 or 360 -, when these not being committed.

The crime of corruption involves a combination of several following elements: (i) an action or omission; (ii) practice of a lawful or unlawful act; (iii) the consideration of an undue advantage for him/her/itself or a third party.

Corruption can be active or passive depending on whether the act or omission is committed by the person who corrupts (active) or the person who allows him/herself to be corrupted (passive).

Passive corruption, as provided by Article 373 of the PCC, is defined as the promise, offer or giving, addressed to someone, directly or indirectly, of an undue advantage, for that same person or a third part or entity, in order that the person in question act or refrain from acting in the exercise of his or her duties.

Active corruption, as provided by Article 374 of the PCC, is defined as the solicitation or acceptance by someone, directly or indirectly, of an undue advantage, for that same person or another person or entity, in order that the person in question act or refrain from acting in the exercise of his or her duties.

4. Does the law distinguish between bribery of a public official and bribery of private persons? If so, how is 'public official' defined?

Are there different definitions for bribery of a public official and bribery of a private person?

Portuguese law foresees bribery of public officials as well as bribery of private persons. There is a concept of “public official” specifically designed for criminal law.

The broader notion of Public officials includes the notions of civil servants (defined in Article 386 of the PCC), military personnel (defined in Article 4 of the Military Justice Code), holders of political office and holders of high public office (defined in Articles 3 and 3-A of Law No. 34/1987, of 16 of July).

Public officials:

- Civil servants;
- Administrative officials;
- Arbitrators, jurors and experts;
- Whoever, even temporarily, performs an activity, remunerated or not, falling under the administrative or jurisdictional civil service, performs functions in public-benefit bodies or participates in them;
- Managers, officers of supervisory bodies and employees of public companies;
- Magistrates, officers, agents of public international law organizations;
- Officers who are nationals of other States who commit a criminal infraction (even if partially) in Portuguese territory;
- Whoever acting on behalf of a public international law organization which Portugal is a member of performs functions similar to those of civil servants, administrative officials, arbitrators, jurors and experts or any other activity under the administrative or jurisdictional civil service and commits a criminal infraction (even if partially) on Portuguese territory;
- Magistrates and officers of international courts provided that Portugal has stated it accepts the jurisdiction of such courts;
- Anyone who performs functions within the scope of out-of-court dispute settlement procedures, irrespective of their nationality and residence, whenever the infringement has been fully or partially committed on Portuguese territory; and
- Jurors and arbitrators who are nationals of other States who commit a criminal infraction

(even if partially) on Portuguese territory.

Military personnel:

- Officers, sergeants and other military belonging to the Armed Forces (*Forças Armadas*) and the Republican Nacional Guard (*Guarda Nacional Republicana*);
- Officers in training.

Political office holders:

- The President of the Republic;
- The President of the Assembly of the Republic;
- Members of the Assembly of the Republic;
- Members of Government;
- Members of the European Parliament;
- Members of Government within the Autonomous Regions;
- Members of the representative body of a local authority;
- Holders of political office of public international law organizations and of other States who commit a criminal infraction (even if partially) on Portuguese territory.

Holders of high public office:

- Public managers;
- Holders of management positions in public companies;
- Members of executive bodies in companies which are part of the local public sector;
- Members of the board of public institutes;
- Members of independent public entities established under the Constitution or in law;
- Holders of higher 1st rank management offices and equivalent.

5. **What are the civil consequences of bribery in your jurisdiction?**

Anyone who offers or accepts a bribe may be held civilly responsible for damages

caused by the illicit conduct.

Profits resulting from criminal activity will probably be confiscated by the State.

Moreover, according to Law No. 5/2002, of 11 January (Article 7) there is a legal presumption that subverts the *in dubio pro reo* principle in such a way that a suspect has the burden to prove to regularize any revenue other than that which is consistent with that person's lawful earnings.

Failing to prove lawfulness of earnings results in such earnings being considered a product of crime and consequently being confiscated in favor of the State.

6. **What are the criminal consequences of bribery in your jurisdiction?**

As mentioned above by Portuguese legal framework there are different kinds of bribery, with different sanctions depending on the position of the "public official" in the state that commits the crime.

For instance, passive corruption is sanctioned with imprisonment between 1 to 8 years if the act is contrary to the bribed official's duties - Article 373, paragraph 1 of the PCC - and 1 to 5 years, if not - Article 373, paragraph 2 of the PCC. If the agent is a holder of political office or senior public official, passive corruption is sanctioned with 2 to 8 years in prison if the act is contrary to the bribed duties and with 2 to 5 years in prison if not - Article 17 of Law No. 34/1987, of 16 July.

According to Article 8 of Law No. 20/2008, of 21 April, private sector workers can be sanctioned with up to 5 years in prison or a penalty of up to 600 days. If the act or omission is likely to cause a distortion of competition or damage of assets to third parties, the agent shall be punished with imprisonment from 1 to 8 years.

Sports agents can also be punished for passive corruption with imprisonment from 1 to

8 years, suspended from sport events for a period from 6 months to 3 years, denied public subsidies for 1 to 5 years, and prohibited from working as a sports agent.

Active corruption is sanctioned with imprisonment from 1 to 5 years if the intended act is contrary to the bribed party's duties - Article 374, paragraph 1 of the PCC - and up to 3 years if not - Article 374, paragraph 2 of the PCC. If the agent is a holder of political office or senior public official, active corruption is sanctioned between 2 and 5 years in prison if the intended act is contrary to the bribed party's duties and up to 5 years if not - Article 18 of the Law No. 34/1987, of 16 July. There can also be an ancillary penalty which can be the loss of office or prohibition from holding public office or working in the public sector.

According to Article 9 of Law No. 20/2008, of 21 April, private sector workers are sanctioned with imprisonment of up to 3 years in prison or a penalty. If the act or omission is likely to cause a distortion of competition or damage to assets of third parties, the agent shall be punished with imprisonment of up to 5 years or a penalty of 600 days.

Sports agents can also be punished under active corruption with imprisonment from 1 to 5 years, suspended from sport events for a period from 6 months to 3 years, denied public subsidies for 1 to 5 years, and prohibited from working as a sports agent.

All sanctions can be aggravated namely depending on the value of the bribe.

7. Does the law place any restrictions on hospitality, travel and entertainment expenses? Are there specific regulations restricting such expenses for foreign public officials?

The difference between being unacceptable or acceptable in terms of hospitality, travel and entertainment expenses is whether such equities are perceived as compensation for the performance of public duties or not.

What can be seen as an illicit deal (a bribe) depends on the context, the amount

involved or any other circumstances that might be relevant in the case.

The promotion of a good relationship throughout simple acts of courtesy that cannot in any way influence the public official's activity is not criminally relevant.

8. Are political contributions regulated?

Yes. According Law No. 19/2003, 20 July, the funding of political parties and election campaigns, determinate, under which terms political parties may be funded through their own revenues, private funds and public grants.

A limited amount is established for donations coming from individuals.

There are transparency rules prohibiting anonymous donations and requiring the registration of any fund raising.

9. Are facilitation payments regulated? If not, what is the general approach to such payments?

There isn't specific regulation for facilitation payments. As referred to in question No. 7, some offers may be considered acceptable, depending on the circumstances involving them.

The purpose of the offer is also relevant to taken in consideration.

Any type of benefit – small or large - is considered unacceptable when it is an exchange for a specific action by the public official.

There are however Codes of Conduct setting out some rules in this matter.

Resolution No. 53/2016 (published on 21.9.2016) of the Council of Government establishes a Code of Conduct for the active Government (the 21st Constitutional Government in Portugal). Article 8 of said Resolution states that an offer of an amount of €150 or more is presumed to affect the integrity and impartiality from the member of Government.

10. **Are there any defences available?**

Yes. Any person who is suspected of committing a crime - whether it is bribery or any other kind - has a set of rights arising from the Portuguese Code of Criminal Proceedings (PCCP).

Amongst the most fundamental rights of any defendant in criminal proceedings (common to democratic States) is the (i) *in dubio pro reo* principle, meaning that the Prosecution has the burden of proof of the facts concerning the crime. Other fundamental rights arise from our laws such as: (ii) the privilege against self-incrimination (known as the right to remain silent); (iii) the right to be assisted by a lawyer (and even to be appointed a defendant if needed); (iv) the right to be informed of the facts relating to him/her before making any statement to any authority; (v) the right to intervene in the investigation, offering evidence and (vi) the right to appeal against any unfavorable relevant decision. All is protected also by the Constitution.

11. **Are compliance programs a mitigating factor to reduce/eliminate liability for bribery offences in your jurisdiction? Please identify any guidance indicating what features a compliance program should have in order to provide an effective defence/mitigation.**

Yes: compliance programs can contribute to reduce/eliminate liability for bribery offences.

Legal persons are held liable for acts of bribery committed in their name or in their interest. But such liability is excluded when the legal person demonstrates that the

agent of bribery acted against explicitly orders and instructions namely written rules and other corporative regulation.

Any compliance program must establish clear instructions, prohibiting any sort of offers to public officials that are intended or may appear to intend to influence in any way the performance of said public official.

Offering a bouquet of flowers or season's greetings cards are examples of what may be considered acceptable.

12. **Who may be held liable for bribery? Only individuals, or also corporate entities?**

Individuals as well as corporate entities may be held civilly and criminally responsible for bribery.

13. **Has the government published any guidance advising how to comply with anti-corruption and bribery laws in your jurisdiction? If so, what are the elements of an effective corporate compliance program?**

Yes. As answered in question No. 9, by September 2016 the Government published a Code of Conduct (Resolution No. 53/2016) setting out rules generally aimed to prevent any sort of action that might be considered against the public interest, transparency and impartiality.

Although expressly applicable to members of Government, this Code of Conduct constitutes general guidelines to be followed by holders of high public office.

Under this Code of Conduct members of Government are obliged to report any effective or potential conflict of interest and take any necessary measures to eliminate

it.

Members of Government must reject any offer (be it goods, services, attendance at social events or any other benefit) that might affect the impartiality and integrity of their public functions, namely those which are valued at €150 or more.

Any offer accepted for institutional reasons (such as gifts from other States) must be registered and may be given to non-profit welfare institutions.

14. **Does the law provide protection to whistle-blowers?**

There is no specific regulation to whistle blowers Although some level of protection is spread in our legislation, v.g. providing for those who testify or get important evidence in criminal proceedings, namely through Law No. 19/2008, of 21 April (setting out legislative measures aimed at tackling corruption) and Law No. 93/99 of 14 July (setting out legislative measures aimed at the protection of witnesses in criminal proceedings).

One of the said measures is the protection of public officials that report crimes committed within the public sector (Article 4 of Law No. 93/99, of 14 July). Such protection includes prevention from being prejudiced in any way (for example, being fired or transferred to another service against their will).

Witnesses may also be granted the privilege of anonymity.

15. **How common are government authority investigations into allegations of bribery?**

Statistics from the General Department of Justice Policy (DGPJ – *Direção-Geral da Política de Justiça*) indicate that from 2007 to 2016 there has been a 43.4% decrease in crimes of corruption registered by the investigative authorities.

16. **What are the recent trends in investigations and enforcement in your jurisdiction?**

The most significant trend in Portuguese jurisdiction is the increase or criminal persecution for the so call white-collar crimes.

This trend is an echo of increasing social reprobation of such crimes.

Such a tendency is producing a profound impact in accusations and jurisdictional decisions in terms of the aggravation of penalties.

In such an environment it is also becoming increasingly difficult for defendants to exercise their defense, often seen as illegitimate or abusive.

17. **Is there a process of judicial review for challenging government authority action and decisions?**

Yes, the PCCP sets out the legal framework for appeals against any unfavorable relevant decision.

However due to successive legislative reforms, the right to appeal has been subject to more and more restrictions. The second degree of appeal has been challenged frequently.

18. **Are there any planned developments or reforms of bribery and anti-corruption laws in your jurisdiction?**

There is no ongoing legislative process, but there is a regular attempt on create the so called crime of unjustified wellness, taking the burden of proof to the defendant instead

of the prosecutor.

19. **To which international anti-corruption conventions is your country party?**

Portugal joined the following conventions:

a) OECD Convention on combatting bribery of foreign public officials in international business transactions - Adopted by the Negotiating Conference on 21 November 1997;

b) European Union Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union - Official Journal C 195, 25/06/1997 P. 0002 - 0011;

c) Council of Europe Criminal Convention on Corruption - ETS No.173;

d) United Nations Convention against Corruption - General Assembly resolution 58/4 of 31 October 2003 United Nations Convention against Corruption.

20. **Do you have a concept of legal privilege in your jurisdiction which applies to lawyer-led investigations? If so, please provide details on the extent of that protection.**

The Portuguese Bar Association Statute establishes attorney-client privilege that covers all facts that become known as a result of offering of legal services and also the correspondence (all kinds of it).

The concept of Lawyer-led is not regulated in Portuguese law.

21. **How much importance does your government place on tackling bribery and corruption? How do you think your jurisdiction's approach to anti-bribery and corruption compares on an international scale?**

Nowadays, more than ever, tackling bribery and corruption is on the agenda of Portuguese political makers.

That agenda, and more penalizing laws, have increased, and several corruption cases have got up to speed in the last few years.

22. **Generally how serious are organisations in your country about preventing bribery and corruption?**

We consider that the last 5 years have shown that bribery and corruption are becoming more and more sophisticated and involving high-profile persons. So the public opinion is strongly mobilized to prevent bribery and corruptions and both public and private entities are making an effort to achieve better results by creating co of conduct and enforcing awareness campaigns.

23. **What are the biggest challenges enforcement agencies/regulators face when investigating and prosecuting cases of bribery and corruption in your jurisdiction?**

Cases of bribery and corruption in Portugal are investigated and prosecuted well, although, in some cases, there are difficulties in finding means of action to carry out with sophisticated matters, methods and intervenient.

We consider that though communications and judicial assistance are getting better every year, the truth is that Portuguese authorities still struggle to gather evidence, particularly when the cases involve several jurisdictions.

24. **What do you consider will be the most significant corruption-related challenges posed to businesses in your jurisdiction over the next 18 months?**

We consider that the biggest tasks for companies operating in Portugal are, in the near future, the implementation of adequate compliance programs and policies, in order to comply with an increasingly demanding regulation, not only in relation to anti-bribery and corruption, but also to anti-money laundering.

Since May 2018, companies operating in Portugal are obliged to keep files of necessary information as set forth and required by regulations affecting the protection of personal data under the penalty of a fine.

25. **How would you improve the legal framework and process for preventing, investigating and prosecuting cases of bribery and corruption?**

The obligation to keep files of necessary information as set forth and required by regulations affecting the protection of personal data, since May 2018, has been positive in order to disclose the handling of information.

However, we consider that current legislation does not clearly state the legal benefits for a company that creates and implements adequate compliance programs and policies in anti-bribery and corruption matters. For this reason, new legislation regarding these matters would improve the legal framework and process for preventing, investigating and prosecuting cases of bribery and corruption.