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to the United Nations
Convention against Corruption**

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**Review of implementation of the United Nations
Convention against Corruption**

Executive summary

Note by the Secretariat

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II. Executive summary

Portugal

1. Introduction: Overview of the legal and institutional framework of Portugal in the context of implementation of the United Nations Convention against Corruption

According to paragraph 2 of Article 8 of the Constitution of the Portuguese Republic, international conventions duly ratified become immediately and automatically part of the Portuguese legal order. Once they are published in the Official Gazette, they are enforced in exactly the same manner as all other laws. However, when a provision of a convention is not self-executing, its application requires the adoption of domestic law.

As the United Nations Convention against Corruption has already been ratified, it became part of the Portuguese legal order. However, according to the constitutional system, the obligations contained therein as regards to criminalization cannot be considered as self-executing and therefore imply a concretization by means of the adoption of domestic law, which must be approved by Parliament.

All mandatory offences referred to in the Convention against Corruption were foreseen in criminal legislation. These were implemented mainly through the Criminal Code, Law No. 20/2008 with regard to both corruption in the private sector and corruption in international transactions, and Law No. 93/99 with regard to the protection of witnesses. International cooperation for the purpose of the Convention is foreseen in Law No. 144/99 on International Judicial Cooperation in Criminal Matters.

The main institutions involved in the fight against corruption are the following:

The Public Prosecutors are responsible for the criminal investigation and prosecution of all crimes. However, the criminal investigation could be delegated to the Criminal Police and other police forces (for minor offences) which perform their tasks under the direction and supervision of the Public Prosecutor in charge with the criminal file.

According to Statute of the Public Prosecution Service, it is incumbent to the Central Department for Criminal Investigation and Prosecution (*Departamento Central de Investigação e Ação Penal* (DCIAP)) to direct the inquiry and carry out the prosecution of corruption offences, whenever the criminal activity occurs in regions (*comarcas*) pertaining to different judicial districts. The DCIAP is also competent when the Attorney General considers that a centralized direction of the investigation is required, taking into consideration the seriousness of the crime, the particular complexity or the extent of the criminal activity throughout the national territory or extraterritorially.

The Criminal Police (*Polícia Judiciária*), which is the law enforcement competent body for the investigation of corruption offences in Portugal, has within its structure a special unit devoted to the fight against corruption and other economic and financial crimes — the National Unit Against Corruption (*Unidade Nacional contra a Corrupção* (UNCC)).

2. Chapter III: Criminalization and law enforcement

2.1. Observations on the implementation of the articles under review

Bribery and trading in influence (articles 15, 16, 18, 21)

Article 386 of the Criminal Code defines Public Official in a comprehensive manner, that includes the employees, assistants, temporary staff and volunteers working at the public administration, including the temporary staff and volunteers. The concept includes therefore actors who *de facto* are in a position to commit any type of a corruption offence.

The Portuguese Criminal Law deals with active and passive corruption in Articles 372, 373 and 374 of the Criminal Code regarding the public sector and Articles 8 and 9 of Law No. 20/2008 regarding the private sector. The criminalization of the trading in influence was foreseen in Article 335 of the Criminal Code. Those categories of offenses include to give, promise, demand or accept an undue advantage, whether of economic nature or not, directly or indirectly for oneself or a third party. The criminalization of corruption in the private sector is foreseen in Articles 8 and 9 of Law No. 20/2008, of 21 April. Article 7 of this Law also criminalizes the active corruption of foreign public officials and officials of international public organizations; however, the passive form of this latter form of corruption, which criminalization is not mandatory under the Convention, is not criminalized in Portugal.

Money-laundering, concealment (articles 23, 24)

Money-laundering has been criminalized by means of Article 368-A of the Criminal Code which adequately covers the conversion or transfer of property, as well as concealment or disguise; however, it does not seem to cover the acquisition, possession or use of property as considered in Article 23 subparagraph 1 (b)(i).

Attempt and related ancillary offences were provided for, except for conspiracy, which does not exist as such in the Portuguese legal order.

Portuguese criminal law covers “self-laundering” and foresees a wide range of offences (by adopting a combination of list and threshold approaches) as predicate offences to money-laundering; however, certain non-mandatory offenses (article 16 paragraph 2, articles 20 and 22) were not criminalized under Portuguese Criminal Law and were, therefore, not considered as predicate offences for money-laundering.

Concealment and continued retention of property has been criminalized as elements of the offences of laundering and receiving; however, the offence of “receiving” was expressly limited to property “attained by another by means of a typical unlawful act against the property”. Thus, it fell short of Article 24 of the Convention requirement, since most offences established according to the Convention are not property crimes.

Embezzlement, abuse of functions and illicit enrichment (articles 17, 19, 20, 22)

Embezzlement, misappropriation or other diversion of property by a public official was covered by the Criminal Code. Article 376 complemented in this regards Article 375 in the absence of appropriation of the benefits by the public official. Yet,

the offence only extends to movable values. The criminalization of the abuse of function or position is foreseen in Article 382 of the Criminal Code. The offence of embezzlement in the private sector is not foreseen in the Portuguese criminal legislation, yet Article 205 of the Criminal Code contemplates the abuse of trust with regards to movable property.

The possibility of criminalizing illicit enrichment has been considered, and reviewers have been informed by the Portuguese Government that it was currently considering reviewing its legislation in this regards. The experts, therefore, support the current efforts to seek a way to ensure the criminalization of illicit enrichment within the framework of Portugal's Constitution.

Obstruction of justice (article 25)

There is no so-called "obstruction of justice" offence in the Portuguese Criminal Law. However, the goal of Article 25 of the Convention against Corruption can be reached through the application of Articles 143, 144, 153, 154, 155, 363, 359 and 360 of the Criminal Code.

Liability of legal persons (article 26)

Criminal liability of legal persons, foreseen in Article 11 of the Criminal Code, covers a large list of offences including the laundering of proceeds of crime and different types of active and passive corruption. Legal persons could also be subject to civil and administrative liability (through the application of "coimas", which are monetary sanctions). Moreover, the liability of legal persons and equivalent entities did not exclude the individual liability of the respective actors nor depended upon their liability.

However, the criminal liability of legal persons did not extend to embezzlement offences, nor could the civil or administrative liability of legal persons be established for this offence.

Participation and attempt (article 27)

The general part of the Criminal Code establishes as a criminal offence the participation in any capacity, such as perpetrator, accomplice, assistant or public instigator in offences, which encompasses those established in accordance with the Convention against Corruption. As for the preparatory acts, those were not punishable unless stated otherwise.

Unless a specific provision otherwise states, attempt in Portugal was criminalized for offences punishable with a maximal penalty of over three years, therefore not encompassing various offences under the convention such as threats or bribery to render false testimony, trading in influence for the purpose of obtaining a favourable decision, or acts of corruption in the private sector (except in a specific circumstances).

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (articles 30, 37)

The sanctions foreseen in the legislation of Portugal for Convention against Corruption offences seem to be adequate; however, no detailed statistics were provided to assess their effective implementation.

Portuguese law provides for immunity of the holders of certain political and high public offices in the government hierarchy; however, the existence of special procedures ensures that immunities or jurisdictional privileges will not impede the investigation, prosecution and sentencing of offences established in accordance with the Convention.

Portugal's provisions on legal powers related to prosecution, conditions of release pending trial or appeal, parole, removal, suspension or reassignment of an accused public official, disqualification of convicted persons (except for disqualification from holding office in an enterprise owned in whole or in part by the State) and reintegration of convicted persons comply with the provisions under review.

The possibility of mitigating punishment of an accused person who cooperates in the investigation or prosecution of an offence is foreseen for some Convention offences (bribery and money-laundering). Immunity is not provided for in such cases.

Protection of witnesses and reporting persons (articles 32, 33)

Law No. 93/99 governs the enforcement of measures on the protection of witnesses in criminal proceedings whenever their lives, physical or mental integrity, freedom or property of a considerably high value are in danger. This protection is extended to victims insofar as they are witnesses.

This Law also takes into consideration the views and concerns of victims. These can be presented and considered at appropriate stages of criminal proceedings, in a manner not prejudicial to the rights of defence. Moreover, Portugal has initiated negotiations for a bilateral agreement on witness protection which includes the possibility for the relocation of the person.

Of the 59 people who benefited from this protection, in the nine year period ranging from 2003 to 2010, two were witnesses in cases linked to offences under the Convention.

Portugal's legal framework seems to provide adequate protection against any unjustified treatment to employees of the public administration and of State owned companies, though such protection does not explicitly extend to private sectors' employees.

Freezing, seizing and confiscation; bank secrecy (articles 31, 40)

Portugal has an adequate legal framework for the identification, tracing, freezing, seizure and confiscation of proceeds of crime derived from offences, including Convention against Corruption offences, and property of corresponding value, in addition to equipment or other instrumentalities used in or destined for use in such offences. Portugal has also enacted adequate legislation to regulate the administration of such property.

Banking or any other professional secrecy did not seem to constitute an impediment to the investigation and prosecution of corruption-related offences and other offences. Rights of bona fide third parties seem also to be adequately protected.

Statute of limitations; criminal record (articles 29, 41)

The length of the statute of limitation depends on the maximum penalty foreseen for the offence at stake. Regardless of their length, it was however a concern, due to the discrete nature of Convention offences, that the time of the commission, and not the time of the discovery of the offence by law enforcement authorities, is considered as the starting point for the statute of limitation.

Portugal does not take into consideration previous foreign convictions for the purpose of using such information in criminal proceedings relating to an offence covered by the Convention. It does, however, use that information to inform the sentencing process once liability is affirmed.

Jurisdiction (article 42)

Jurisdiction principles, including rules of territoriality, as well as passive and active personal jurisdiction, were adequately established in Articles 4 and 5 of the Criminal Code.

The principle *aut dedere aut judicare* was also foreseen in Portuguese legislation.

Consequences of acts of corruption; compensation for damage (articles 34, 35)

According to the Portuguese legislation, any person who has suffered a damage as result of an act of corruption or due to any other offence has the right to initiate legal proceedings against the offender in order to obtain compensation. That person could also submit a request for civil compensation within criminal proceedings. The Portuguese legislation allows for the possibility to annul or rescind a contract in the framework of a criminal procedure, specifically in the framework of the conviction decided by the court; however, no cases have been provided to the reviewers to establish the actual implementation.

Specialized authorities and inter-agency coordination (articles 36, 38, 39)

The Criminal Police/National Unit Against Corruption (PJ/UNCC) was the special law enforcement body competent for the investigation of corruption offences in Portugal, acting under the direction of the Public Prosecutor in charge of the case.

According to the Statute of the Public Prosecution, the Central Department for Criminal Investigation and Prosecution (DCIAP) is charged with directing inquiries and carrying out the prosecution of corruption offences whenever the criminal activity occurs in counties (*comarcas*) belonging to different judicial districts. The DCIAP is also competent when the Attorney General considers that a centralized direction of the investigation is required, taking into consideration the seriousness of the crime, the particular complexity or the extent of the criminal activity throughout the national territory or extraterritorially. In such situations, the other departments of the Public Prosecution Service should promptly send to DCIAP files about suspicions of corruption offences. DCIAP is also competent to investigate corruption in international transactions.

According to Article 203 of the Constitution, the courts — which include judges and public prosecutors — are independent and only subject to the law. As for the Criminal Police, it cannot be subject to influences or undue pressures from the legislative or executive power, according to the principle of separation of the responsibilities.

Pursuant to the Code of Criminal Procedure, all public officials have the legal duty to report all criminal offences that come to their knowledge in the course of or due to their duties. Moreover, the investigative and the prosecution authorities are empowered to request all the information needed in the framework of a criminal investigation, including information from public officials, public authorities and private entities.

The Portuguese authorities responsible for criminal investigation (Criminal Police) and prosecution (DCIAP), as well as the FIU, provide awareness-raising to the public sector on serious crimes, such as corruption and money-laundering. They also hold working meetings and provide training to financial entities in the field of money-laundering and predicate offences, with particular emphasis on corruption.

In recent years, Portugal promoted several actions in order to raise awareness about crime prevention and to encourage its citizens and other persons with a habitual residence in the national territory to report the commission of crimes, including the crimes established in accordance with the Convention against Corruption. An electronic tool was created to facilitate the reporting of corruption by any person to prosecuting authorities.

2.2. Successes and good practices

Overall, the following successes and good practices in implementing Chapter III of the Convention were highlighted:

- The Integration of the Criminal Data System within the Criminal Police, allowing criminal information to be accessed by the DCIAP and public prosecutors.
- The retention of a central database at the Central Bank of Portugal, accessible to all prosecutors and judges, which centralizes information from all banks, such as information on financial transactions, names of persons with access to the account, and the history of the account.
- The existence of a hotline, as well as an online reporting form, allowing the public to anonymously denounce acts of corruption. At the time of the on-site visit, eight investigations had already been launched on the basis of information received through these channels.
- The close cooperation between State and NGOs, such as the project of case law analysis launched between DIAP and the NGO Transparency and Integrity, or the project on monitoring campaign cost of political parties during election campaigns.
- In the framework of the protection awarded to witnesses, the non-retention by the Court of the name of the witness, ensuring anonymity during all stages of proceedings.

- The direct entry by the Courts of figures on criminal cases in an electronic database maintained by the statistics department of the Ministry of Justice, allowing users to receive immediate updates on statistics. Most data is fully and freely accessible by the public, whereas others are password-protected.

2.3. Challenges in implementation, where applicable

The following steps could further strengthen existing anti-corruption measures:

While noting the considerable and continuous efforts of the authorities in Portugal to achieve full compliance of the national legal system with the Convention against Corruption provisions in the criminalization and law enforcement area, the reviewers identified some grounds for further improvement and made the following recommendations for action or consideration by the competent national authorities (taking into account the mandatory or optional nature of the relevant Convention requirements):

- Consider criminalizing passive corruption for foreign public officials.
- Consider extending articles 375 and 376 of the Criminal Code to embezzlement, misappropriation or other diversion of immovable values.
- Continue the current efforts to seek a way for criminalizing illicit enrichment within the constitutional framework.
 - Adapt the current legislation to establish liability of legal persons for embezzlement offences.
- Consider criminalizing the conspiracy to commit the offence of laundering the proceeds of crime.
- Consider extending the scope of the existing legislation to criminalize the attempt to commit any Convention against Corruption offences.
- Consider extending the scope of the existing legislation to criminalize the concealment or continued retention of any property derived from any Convention against Corruption offences.
- Consider providing or granting immunity from prosecution to a person who cooperates in the investigation or prosecution of Convention against Corruption offences in order to encourage those persons to supply information useful to the authorities.
- Consider a legislative amendment which will take into consideration the time of discovery of Convention against Corruption offences, instead of the time of commission, as starting point for the limitation period.
- Competent authorities are encouraged to further continue to explore the possibility to institute, within the judicial power, specialized judges in the field of corruption/economic and financial crimes, as is already the case with the office of the Attorney General or the Criminal Police. Portuguese authorities are also encouraged to consider the possibility of elaborating a risk management plan on corruption within the public sector.

- Competent authorities are encouraged to continue developing joint projects between State authorities in charge of the prevention and fight against corruption and civil society, including NGOs, universities, etc.

2.4. Technical assistance needs identified to improve implementation of the Convention

None

3. Chapter IV: International cooperation

3.1. Observations on the implementation of the articles under review

Extradition; transfer of sentenced persons; transfer of criminal proceedings (articles 44, 45, 47)

Articles 31 to 78 of the Law No. 144/99, of 31 August, on International Judicial Cooperation in Criminal Matters regulates extradition. Passive extradition was regulated by Article 31, while active extradition was addressed in Article 69, and a simplified procedure of limited scope of application was provided for by Article 74. Portugal has finalized a number of bilateral agreements on extradition and the negotiations of some other agreements are ongoing. One multilateral agreement on extradition within the Portuguese Speaking Countries Community was signed. Another agreement on simplified extradition was signed with Argentina, Brazil and Spain. It is worth mentioning that provisions of Law No. 144/99 establishing limits do not preclude extradition where conventions, treaties or agreements to which Portugal is a party establish lower limits. Law No. 144/99 applies where the provisions of the international treaties, conventions and agreements that bind the Portuguese State are non-existent or do not suffice (Article 3).

Portugal requires dual criminality. Portuguese law incriminates all the mandatory offenses established under the Convention. Yet, Law No. 144/99 makes it possible to extradite an individual based on the Convention against Corruption, in the case where the act is not incriminated by domestic legislation.

Offences punishable with sanctions or measures involving deprivation of liberty for a maximum period of at least one year are extraditable. This covers most of the offences established by Portugal in accordance with the Convention; however, passive trading of influence to obtain a licit favourable decision (as referred to in Article 335 (1) (b) of the Criminal Code) would not be an extraditable offence. The principle *aut dedere aut judicare*, as applied in accordance with Article 10 and Article 32 of Law No. 144/99, requires Portugal to open a case when refusing extradition.

In a limited number of cases, Portugal allows the extradition of its nationals, under the condition that the extradited person would be returned to Portugal to serve the sanction eventually imposed upon him/her.

Portugal did not make extradition conditional on the existence of a treaty. Moreover, the Convention can be used as legal basis by force of Article 8 of the Portuguese Constitution. Article 3 of Law No. 144/99 could also apply in the absence of sufficient treaty provisions.

The law allowed for the provisional arrest of persons in cases of urgency. Article 95 of Law No. 144/99 allowed the enforcement of foreign criminal judgements. When the judgement involves deprivation of liberty, the consent of the sentenced person must be given.

Article 46 of Law No. 144/99 states that all procedures of extradition should be treated as an urgent matter.

The transfer of sentenced persons is foreseen in Articles 114 to 125 of Law No. 144/99. Portugal has concluded a number of bilateral agreements on the transfer of sentenced persons.

The transfer of criminal proceedings to Portugal is foreseen in Articles 79 to 94 of Law No. 144/99.

Mutual legal assistance (article 46)

Mutual legal assistance provisions, which are broad in terms of application, are set forth in Law No. 144/99, Articles 145 to 164. Portugal provides legal assistance to the broadest extent possible for both legal and natural persons.

Judicial authorities are able to cooperate directly with counterparts on the basis of the multilateral and bilateral treaties or the previously mentioned Law No. 144/99. The existing judicial networks — European Judicial Network (EJN), Ibero-American Judicial Network (IBERRed) and Portuguese Speaking Countries Judicial Network (RJCPLP) — can also be used to facilitate cooperation.

United Nations instruments have previously been used as a basis for international cooperation. At the same time, a number of bilateral agreements have been signed in areas such as extradition, mutual legal assistance and the transfer of sentenced persons. In the absence of mutual legal assistance treaties (multilateral or bilateral), Law No. 144/99 is applicable. Dual criminality is a condition to provide such assistance; however, article 4 of the Law states that Portugal could provide international cooperation in criminal matters on the basis of reciprocity.

Law No. 144/99 allows for the transfer of persons in detention for providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by the Convention. The domestic legal provisions establishing a safe conduct guarantee that a person will not be prosecuted, detained, punished or subjected to any other restriction in accordance with paragraph 12 of Article 46 of the Convention.

The Attorney-General's Office (*Procuradoria-Geral da República*) is the Portuguese central authority for international judicial cooperation in criminal matters. Confidentiality of mutual assistance requests can be ensured on the basis of Article 149 of Law No. 144/99.

Law enforcement cooperation; joint investigations; special investigative techniques (articles 48, 49, 50)

Regarding law enforcement cooperation, such cooperation is directly possible with counterparts on the basis of multilateral and bilateral treaties or the previously mentioned Law No. 144/99, of 31 August. At the police level, Portugal cooperates bilaterally with other countries and through EUROPOL and INTERPOL. In the

absence of such legal instruments, Law No. 144/99 could be applicable and Portugal could provide international cooperation in criminal matters on the basis of reciprocity.

These provisions allow for very close international cooperation, in accordance with the Convention against Corruption. It is also interesting to note that INTERPOL red notices have in Portugal the value of requests for provisional arrest, and are directly enforceable.

Law No. 144/99 provides that “joint investigation teams shall be set up by mutual agreement between the Portuguese State and a foreign State, in particular where: (a) in the framework of a foreign State’s criminal investigation, especially complex investigations having links with Portugal or with another State, are required”. This provision allows for the possibility of creating joint investigation teams on a case by case basis. Portugal has participated in joint investigation teams on various occasions.

Law No. 144/99 includes provisions related to the use of special investigative techniques in Articles 160-A, 160-B and 160-C. Law No. 101/2001 of 25 August established the legal regime for the use of undercover operations. Concerning the interception of communications, apart from reference to Article 160-C of Law No. 144/99, Articles 187-189 of the Code of Criminal Procedure regulate telephonic interceptions within the framework of criminal proceedings and Articles 11-19 of the Law No. 109/2009, of 15 September, on Cybercrime, establishes the legal framework for the interception of telephone and e-mail communications, traffic data, computer systems and computed data, as well as undercover actions.

Portugal has concluded a number of bilateral agreements on the fight against crime and on law enforcement cooperation, where the use of special investigative techniques is foreseen; however, due to their nature, the use of a special investigative technique, even in a situation of international cooperation where an offence of transnational nature has been committed or there is a suspicion that one has been committed, is to be decided on a case-by-case basis and where necessary.

3.2. Successes and good practices

Overall, the following points are regarded as successes and good practices in the framework of implementing Chapter IV of the Convention:

- INTERPOL red notices have the value of requests for provisional arrest and are directly enforceable.
- The use of a United Nations instrument as a basis for international cooperation.
- The obligation in Portugal to open a case when the request of extradition is not legally possible, regardless of whether or not this is asked for by the requesting State.

3.3. Challenges in implementation, where applicable

The following points could serve as a framework to strengthen and consolidate the actions taken by Portugal to combat corruption:

- Consider a legislative amendment to make passive trading of influence to obtain a licit favourable decision (as referred to in Article 335 (1) (b) of the Criminal Code) an extraditable offence. As is it currently punished with six months of imprisonment, it is not an extraditable offence.
- Continue seeking the negotiation of international agreements on extradition and mutual legal assistance in the framework of the Convention against Corruption both at bilateral and multilateral level.

3.4. Technical assistance needs identified to improve implementation of the Convention

None
