

# PORTUGAL

## Moderate enforcement

0.4% of global exports

### Investigations and cases

In the period 2016-2019, Portugal opened four investigations, commenced one case and concluded no cases with sanctions.

In 2017, the Public Prosecution Service filed charges against seven individuals, including charges of bribery of foreign officials, in a case that linked representatives of **TAP**, the Portuguese airline, with the Angolan oil company Sonangol and two of its subsidiaries, **Sonair** and **Worldair**. According to the Public Prosecutor, the defendants created a sham contract between TAP and Sonair in order to launder money through Portugal.<sup>1</sup> The Portuguese police claimed the scheme was built on the pretence that TAP was providing services to Sonair, enabling Sonair to pay TAP more than €25 million (US\$28.6 million) without any services. This money was then allegedly laundered through Worldair, with Worldair taking extraordinarily high commissions (about two-thirds of the total) and sending the remaining money out of Portugal through offshore companies, before it once again came back to bank accounts in Portugal and was used to buy real estate.<sup>2</sup> In 2018, a judge from the pre-trial chamber dismissed the case, on the grounds that the Public Prosecutor had violated the law and failed to act in an impartial manner.<sup>3</sup> In 2020, a judge reinstated the

indictment, but apparently without the foreign bribery charges.<sup>4</sup>

In other jurisdictions, in 2019 the US Department of Justice (DoJ) and Securities and Exchange Commission (SEC) both concluded settlements with **Fresenius Medical Care AG, (FMC)** in which FMC agreed to pay a total of US\$231 million in penalties, including US\$147 million in disgorgement of profits in relation to a multi-country corruption scheme. The non-prosecution agreement with the DoJ names a subsidiary, **Fresenius Medical Care Portugal**, as having made some of the improper payments in Angola in the scheme run by FMC.<sup>5</sup> Fresenius Portugal handled a network of doctors and public officials in Angola, where bribes were paid between 2010 and 2014, generating more than US\$12 million for its parent company.<sup>6</sup> These bribes were generally paid through “shares in a joint venture, storage contracts and consultancy agreements”. They included “improper payments to government doctors through sham consulting contracts for which no services were ever performed”. The SEC found that FMC and Fresenius Portugal failed to take the necessary measures to prevent corruption.<sup>7</sup>

Deficiencies in Portugal’s anti-money laundering framework were made evident by revelations from the Luanda Leaks, which reported that members of the Angolan elite were reportedly able to use Portuguese banks **Banco de Negócios Internacional** and **Banco Privado Atlântico**, among others, to transfer hundreds of millions of dollars and escape the scrutiny of regulators.<sup>8</sup> Also, in order to evade anti-money laundering restrictions, Isabel dos Santos (daughter of a former Angolan president) allegedly assumed ownership stakes in Portuguese banks **Banco BPI** and **BIC Portugal**, later renamed **EuroBIC**,<sup>9</sup> both of which

<sup>1</sup> Ministério Público, “Corrupção ativa com prejuízo do comércio internacional – branqueamento – falsificação de documentos”, 14 July 2017, [http://dciap.ministeriopublico.pt/sites/default/files/documentos/pdf/ficha\\_de\\_acusacao\\_nuipc\\_121\\_13\\_Otelsb.pdf](http://dciap.ministeriopublico.pt/sites/default/files/documentos/pdf/ficha_de_acusacao_nuipc_121_13_Otelsb.pdf)

<sup>2</sup> <https://www.theportugalnews.com/news/top-tap-director-accused-in-angola-money-laundering-scam/42621>; <https://www.friendsofngola.org/archives/9964>; Franco, Hugo and Rui, Gustavo, “Juiz Ivo Rosa abre guerra ao Ministério Público no caso TAP/Sonangol”, *Expresso*, 23 April 2018, <http://expresso.sapo.pt/sociedade/2018-04-23-Juiz-Ivo-Rosa-abre-guerra-ao-Ministerio-Publico-no-caso-TAP-Sonangol#gs.yWu7h68>

<sup>3</sup> Franco, Hugo and Rui, 2018: 310 (footnote 331)

<sup>4</sup> <https://observador.pt/2020/01/31/ivo-rosa-perde-pela-12-a-vez-na-relacao-num-caso-que-envolve-a-sonangol/>

<sup>5</sup> <https://www.justice.gov/opa/press-release/file/1148951/download>

<sup>6</sup> <https://www.justice.gov/opa/press-release/file/1148951/download>; <https://www.sec.gov/litigation/admin/2019/34-85468.pdf>

<sup>7</sup> <https://www.justice.gov/opa/press-release/file/1148951/download>; <https://www.sec.gov/litigation/admin/2019/34-85468.pdf>

<sup>8</sup> <https://www.occrp.org/en/investigations/how-angolan-elites-built-a-private-banking-network-to-move-their-riches-into-the-european-union>

<sup>9</sup> <https://qz.com/africa/1787255/how-isabel-dos-santos-sidestepped-a-crackdown-by-western-banks/>

have come under scrutiny by Portuguese authorities since the revelations.<sup>10</sup>

## Recent developments

On 10 January 2020, the European Commission announced that Portugal had yet to notify Brussels of any implementing measures regarding the 5th EU Anti-Money Laundering Directive, which should have been fully transposed by that date.<sup>11</sup> In May 2020, a draft bill to transpose the directive (Bill 16/XIV) was approved in an initial vote by Parliament. Final approval depends on discussions in the Budget and Finance Committee and a further vote by the Portuguese Parliament.<sup>12</sup>

## Transparency of enforcement information

Official enforcement statistics published by the Council for the Prevention of Corruption<sup>13</sup> and the Directorate-General for Justice Policy do not incorporate specific information on foreign bribery. Statistics on requests for mutual legal assistance are not published.

Case decisions at the appeal level (Court of Appeal, Supreme Court of Justice) are available online in the Legal and Documentary Database of the Ministry of Justice,<sup>14</sup> but as foreign bribery cases are not classified separately, it is very difficult to trace them. Trial court sentences are accessible after they are issued.<sup>15</sup> The Public Prosecutor may, on occasion, issue press releases about an investigation.<sup>16</sup>

## Beneficial ownership transparency

The Beneficial Owner Central Register<sup>17</sup> was created in August 2017 by Law n° 89, which transposed the 4th EU Anti-Money Laundering Directive. The law

establishes the obligation, for a very broad range of legal entities (including companies, funds, trusts, associations, foundations and representations of non-resident entities developing an activity in Portugal) to file a new form annually, with the purpose of disclosing the identity of their beneficial owners, and other relevant information. While the information in the register is accessible to the public, this requires registration and any search conducted can be traced to its author. It is also not possible to execute searches by a company or an individual's name, but only through their taxpayer's registration number.<sup>18</sup>

## Inadequacies in legal framework

Provisions in relevant legislation are not clear, which produces legal uncertainty. There is wide room for interpretation of the legal definition of foreign bribery and the available defences. Many of the concerns over the foreign bribery offence were identified by the OECD WGB in its Phase 3 Report on Portugal in 2013.

The OECD WGB also suggested that the "effective regret defence" be removed from the active foreign bribery offence.<sup>19</sup> In addition, the upper limit on sanctions for corruption-related crimes committed by legal persons is too low for the large-scale corruption cases addressed in foreign bribery enforcement. The legislation on the liability of legal persons also has deficiencies. The OECD WGB noted that the current legislation does not expressly state that state-owned enterprises can be held criminally liable for foreign bribery. It also found that the defence that an employee acted against express orders or instructions is vaguely defined and could lead to attempts to limit liability by issuing a blanket prohibition on foreign bribery, or even issuing specific prohibitions directed at individual transactions, regardless of the actual level of the

<sup>10</sup> <https://www.icij.org/investigations/luanda-leaks/portugal-likely-to-freeze-proceeds-from-isabel-dos-santos-bank-sale/>

<sup>11</sup> <https://www.lusa.pt/article/HhapT3HFk91xFSwiWWwkizMSZM5iuS11/portugal-government-finalising-anti-money-laundering-directive>

<sup>12</sup> <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailIniciativa.aspx?BID=44542>

<sup>13</sup> <http://www.cpc.tcontas.pt/documentos/analises.html>

<sup>14</sup> <http://www.dgsi.pt/>

<sup>15</sup> <http://www.dgsi.pt/>, <https://jurisprudencia.csm.org.pt/>

<sup>16</sup> <https://de.reuters.com/article/us-portugal-corruption-utilities/ceo-of-portugals-edp-a-suspect-in-corruption-inquiry-idUSKBN18T2Q9>

<sup>17</sup> <https://justica.gov.pt/Servicos/Registo-de-Beneficiario-Efetivo>

<sup>18</sup> <https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/anonymous-company-owners/5aml-d-patchy-progress/>

<sup>19</sup> <https://www.oecd.org/daf/anti-bribery/Portugalphase3reportEN.pdf>, pp.46-47.

company's supervision, oversight and control over employee or intermediary behaviour.<sup>20</sup> Lack of whistleblower protection remains a serious problem, especially in the private sector.

There is a lack of a clear legal framework for taking jurisdiction over the “demand side” of foreign bribery and related money laundering cases where there is a nexus with Portugal. This prevents law enforcement authorities from effectively investigating and prosecuting all parties involved in foreign bribery cases.

## Inadequacies in enforcement system

There are serious concerns about Portugal's enforcement of the foreign bribery offence. The OECD WGB stated that it was “gravely concerned that Portuguese authorities repeatedly fail to investigate foreign bribery allegations thoroughly and proactively”.<sup>21</sup>

While the main inadequacies in the enforcement system do not relate specifically to foreign bribery, they do impact it severely. There is a lack of human and financial resources for investigations and in the court system, as well as a lack of expertise and training on the enforcement of economic crimes. The sluggishness and complexity of the judicial system is also an obstacle to the effective prosecution of corruption.<sup>22</sup>

The lack of resources impacts prevention and enforcement efforts against money laundering. The Financial Action Task Force observed in 2017 that “Portugal should allocate appropriate means and resources to the Financial Intelligence Unit so that it can adequately manage and investigate the increasing volume of suspicious transaction reports, and conduct strategic analysis to identify ML/TF [money laundering/terrorist financing] trends and patterns”.<sup>23</sup>

## Recommendations

- Systematically collect and publish statistical data on enforcement of foreign bribery and money laundering
- Improve the Beneficial Ownership Central Register by implementing beneficial ownership data standards, in order to ensure the register's accessibility and utility as an anti-money laundering and anti-corruption tool
- Implement the OECD WGB's recommendations on the definition of the foreign bribery offence and related provisions, and on corporate criminal liability
- Establish a legal framework for jurisdiction over the “demand side” of foreign bribery and related money laundering cases where there is a nexus with Portugal
- Transpose the EU Whistleblower Protection Directive into the Portuguese legal framework and comprehensively regulate the protection of whistleblowers in both the public and private sectors
- Implement and update the Central Department of Criminal Investigation and Prosecution 2014 Action Plan, which aims to strengthen the resources and training of investigators and prosecutors in the fight against corruption
- Increase human and financial resources for the court system
- Increase the use of special investigative measures and exchange information with foreign government agencies about vulnerable sectors
- Engage more actively in awareness-raising activities in high-risk sectors and highly relevant professions (e.g. auditors and accountants)
- Implement the anti-corruption recommendations of the Council of Europe's Group of States against Corruption, especially those addressed to members of parliament, judges and prosecutors.<sup>24</sup>

<sup>20</sup> <https://www.oecd.org/daf/anti-bribery/Portugalphase3reportEN.pdf>

<sup>21</sup> <https://www.oecd.org/daf/anti-bribery/Portugal-Phase-3-Written-Follow-Up-Report-ENG.pdf>

<sup>22</sup> See, for example, the OECD's Economic Surveys: Portugal 2019, which has a chapter on “Enhancing judicial efficiency to enhance economic activity”. This discusses a range of problems, including insufficient resources of the Public Prosecutor's Office and Criminal Investigation Police, and reinforcement of specialised training.

<sup>23</sup> <https://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-portugal-2017.html>

<sup>24</sup> <https://econews.pt/2020/06/03/portugal-non-compliance-with-grecos-anti-corruption-recommendations/>