

Strasbourg, 12 May 2006

**Public**  
**Greco Eval II Rep (2005) 11E**

## **Second Evaluation Round**

### **Evaluation Report on Portugal**

Adopted by GRECO  
at its 28<sup>th</sup> Plenary Meeting  
(Strasbourg, 9-12 May 2006)

## I. INTRODUCTION

1. Portugal is the 33<sup>rd</sup> GRECO member to be examined in the Second Evaluation Round. A GRECO Evaluation Team (hereafter referred to as the "GET") visited Portugal from 14 to 18 November 2005. The GET comprised Mr Pieter Verrest, Principal Administrator, Ministry of Justice (Netherlands), Mr Edmond Dunga, Deputy Director of the Anti-Corruption Unit (Albania) and Mr Christian Mirabel, Head of the National Financial Investigations Division and the Central Anti-Corruption Brigade, Ministry of the Interior (France), and was accompanied by a member of the Council of Europe secretariat. Prior to the visit the GET experts received a comprehensive reply to the evaluation questionnaire [Greco Eval II (2005) 5F] and extracts from the relevant legislation.
2. The GET met the Minister of Justice, Mr Alberto Costa, and representatives of the following authorities: Economic Affairs Committee of the National Assembly, Ministry of Justice (*European International Relations and Co-operation Office - GRIEC, Criminal Justice Reform Unit, Legislative Policy and Planning Office, General Directorate of Registrars and Solicitors, National Register of Legal Persons – RNPC, Commercial Register - RC - and Judicial Police*); Ministry of the Interior (*National Republican Guard - GNR, Aliens and Frontiers Department - SEF, Public Security Police – PSP, General Inspectorate of Internal Administration – IGAI, European Affairs Office - GAE*), Ministry of Finance (*General Office of Customs and Special Consumption Taxes, General Tax Office, European Affairs and International Relations Office, General Inspectorate of Taxes*); State Prosecutor; Central Criminal Investigation and Prosecution Office (DCIAP); Criminal Investigation and Prosecution Office (DIAP); Criminal Investigation Court (TIC); Court of Auditors; Centre for Judicial Studies; Office of Mediator; Access to Administrative Documents Commission (CADA); General Public Administration Office (DGAP); General Directorate of Local Authorities; National Institute of Public Administration (INA); General Inspectorate of Public Administration (IGAP); General Inspectorate of Local and Regional Administration (IGAT). The GET also met representatives of the Office of Private Auditors, the Office of Private Accountants, CIVITAS and the Judicial Monitoring Centre.
3. At its 10th Plenary meeting (July 2002), in accordance with Article 10.3 of its Statute, GRECO agreed that the second round evaluation procedure would deal with the following themes
  - **Theme I - Proceeds of corruption:** Guiding Principles 4 (seizure and confiscation of proceeds of corruption) and 19 (connections between corruption and money laundering/organised crime), together, for members having ratified the Criminal Law Convention on Corruption (ETS 173)<sup>1</sup>, with Articles 19 paragraph 3, 13 and 23 of the Convention.
  - **Theme II - Public administration and corruption:** Guiding Principles 9 (public administration) and 10 (public officials);
  - **Theme III - Legal persons and corruption:** Guiding Principles 5 (legal persons) and 8 (fiscal legislation), as completed, for members having ratified the Criminal Law Convention on Corruption (ETS 173), by Articles 14, 18 and 19, paragraph 2 of the Convention.
4. This report was prepared on the basis of the replies to the questionnaire and the information provided during the on-site visit. Its main objective is to evaluate the effectiveness of measures adopted by the Portuguese authorities in order to comply with the requirements deriving from the

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<sup>1</sup> Portugal ratified the Criminal Law Convention on Corruption (ETS 173) on 7 May 2002, subject to certain reservations concerning its judicial scope and the partial incrimination of certain offences provided for in the Convention. It came into force in Portugal on 1 September 2002.

provisions indicated in paragraph 3. It contains a description of the situation, followed by critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to Portugal on how to improve compliance with the provisions under consideration.

## II. THEME I - PROCEEDS OF CORRUPTION

### Confiscation

5. Under Portuguese law, confiscation is an ancillary penalty but may also be applied in the absence of a conviction, where an offence has been committed, in the interests of public order or morals or of public safety. Confiscation is obligatory in all cases of corruption and must be ordered by the courts.
6. Article 109 of the Criminal Code authorises the confiscation of objects that have been used to commit an offence, are intended for such use or are the direct or indirect proceeds of an offence and that, by their nature or circumstances, threaten public safety or public order or morals or, alternatively, are likely to be used to commit further offences, which according to the Portuguese authorities is the case with corruption. Under Article 111 of the Code in conjunction with Article 109, confiscation may also apply to: i. any rewards offered or promised to the perpetrators of offences, for themselves or on behalf of others; ii. property, rights or other benefits obtained directly<sup>2</sup> by the perpetrators of offences, which constitute pecuniary benefits in whatever form. When such rewards, rights, property or other benefits cannot themselves be confiscated, confiscation is replaced by payment of an equivalent value to the state.
7. Under Article 110 of the Criminal Code, confiscation may be applied to assets belonging to third parties when the latter have contributed to their use or production, if they have derived benefits from their use or if the assets have been acquired as a result of an offence and the owners are aware of their unlawful origin.
8. Act No. 5/2002, which establishes special measures to combat organised, economic and financial crime, authorises the special confiscation of assets (where appropriate, entire holdings) derived from offences specified in this legislation. This applies particularly to organised/serious crime and economic and financial offences, including corruption (Section 1.1), but not, for example active corruption and financial participation in a business undertaking (taking or receiving a personal interest). For the purposes of special confiscation, in apportioning the burden of proof the Act treats the difference between accused persons' actual assets and those corresponding to their lawful income as benefits arising from criminal activities (Section 7.1<sup>3</sup>). Those concerned may always adduce evidence to refute this presumption. The terms "accused person's assets" and "benefits deriving from criminal activities" are defined in Sections 7.2 and 3 of the Act.

### Interim measures

9. The rules governing seizure appear in Articles 178 ff of the Code of Criminal Procedure. Seizure may be applied to objects that have been used to commit an offence, are intended for such use,

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<sup>2</sup> Confiscation applies to assets obtained directly from an offence or ones that have been negotiated or transferred to a third party, and to derived, transformed, mixed or converted proceeds, in accordance with Articles 110 and 111 of the Criminal Code and Section 7.2 and 3 of Act 5/2002.

<sup>3</sup> This presumption applies to assets belonging to or in the possession of accused persons and of which they enjoy the benefits when the case is opened for investigation or at any subsequent time, ones that have been transferred free of charge or for a minimal consideration in the five years preceding the opening of the investigation, and ones received in that five year period, even where it is not possible to establish their purpose.

or constitute the proceeds of<sup>4</sup>, income from, price of or reward for an offence, any objects left by the perpetrator of an offence at the place where it was committed and any other assets that might serve as evidence, including documents and titles, letters, parcels, securities, telegrams and any other correspondence and degradable, dangerous or perishable goods. Objects that are seized are placed in the care of the judicial authorities. Seizures must be authorised, ordered and confirmed by the courts. Where they are carried out by the police they must be approved by the judicial authorities within 72 hours. Seizure may be applied to the assets of legal persons.

10. Under the special confiscation procedure in Act 5/2002, the courts may order the seizure of goods in connection with convictions for certain offences specified in the Act. The seizure ends with the payment of a surety, such as the equivalent value of an asset to prevent it from being frozen or a bank guarantee. If no such payment is made, the seized assets are confiscated.
11. The Portuguese financial intelligence unit, which is part of the Judicial Police, does not have the power to block suspicious financial transactions under administrative procedure. However, following a declaration of suspicion, the State Prosecutor may order the administrative blocking of suspicious transactions. This occurred four times in 2005 for a total value of € 3 236 262.
12. There is no provision for special financial and asset investigations to identify, locate and freeze the proceeds of crime when corruption offences are identified and investigated<sup>5</sup>. Under Article 180 of the Code of Criminal Procedure, the courts (the prosecution at the investigation stage) may inspect banking and financial registers. Act 5/2002 authorises further special investigation measures to assist the accumulation of evidence, including the lifting of banking secrecy and access to tax records and data, in the case of certain specified offences, including corruption. Special investigation measures may be applied to trading in influence (Section 2m of Act 101/2001) and to identify the proceeds of accounting offences committed by organised gangs or through computer crime.
13. There is no special body responsible for managing seized assets. However, they are placed under court supervision and inventories are drawn up and appended to the report of the proceedings or, when this is not possible, they are allocated to the relevant court official or an official depository (Article 178.2 of the Code of Criminal Procedure). The police and the Aliens and Frontiers Department may make temporary use of certain seized assets.

### Statistics

14. In 2003 and 2004, the relevant authorities seized assets worth, respectively, € 2 647 537 and € 3 457 232 in financial cases and € 600 (three cases) and €248 696 (four cases) in corruption cases. At the time of the GET visit, there had been no recent confiscations ordered for corruption or trading in influence offences. However, between 2002 and 2005, 1521 police inquiries were launched into corruption cases. In 2003, there were 63 court investigations and 55 convictions<sup>6</sup>. A system for collecting and collating judicial statistics, known as Hermes, is being developed and will gradually be introduced.

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<sup>4</sup> These measures may be applied to the proceeds of corruption, so long as they satisfy the conditions of Articles 109 to 111 of the Criminal Code and of Articles 178 ff of the Code of Criminal Procedure.

<sup>5</sup> Acts 4/83 and 25/95 make it obligatory for certain persons to declare their assets, but this only applies to a limited range of persons, such as elected members and officials, civil governors and members of the Constitutional Court. The declarations are made to the Constitutional Court.

<sup>6</sup> According to the Central Criminal Investigation and Prosecution Office, in November 2005 68 money laundering cases and 305 other corruption-related cases were under investigation.

## International co-operation

15. International judicial assistance, in areas that include seizure and confiscation, is provided for in Articles 229, 234 and 236 of the Code of Criminal Procedure and Act 144/99, as amended in 2001 and 2003, and relevant international treaties apply<sup>7</sup>. The State Prosecutor's Department is the central authority responsible for receiving and issuing such requests. In urgent cases and under the Schengen Agreement and relevant European Union conventions, requests may be transmitted directly between Portuguese and foreign judicial authorities. The reciprocity condition in Section 4.1 of Act 144/99, applicable to European Union non-member countries, may be set aside if a request for co-operation concerns serious forms of crime, or may help to improve the situation of the accused or clarify accusations levelled at Portuguese citizens. About 1500 requests (both directions combined) are made each year, of which about fifty relate to laundering or corruption. During the visit the GET was informed of one single case in which a foreign confiscation order could not be enforced because the dual criminal liability requirement was not fully satisfied. The financial intelligence unit is a member of the Egmont Group.

## Money laundering

16. All corruption and trading in influence offences, including ones committed outside of the country, constitute predicate offences to the offence of money laundering. Sections 13 and 20 of Act 11/2004 on the prevention and suppression of the laundering of the proceeds of crime lists the institutions that are required to declare suspicious transactions. Reports are made to the State Prosecutor, other than in the case of lawyers who submit them to the bar or solicitors' association. They are then passed on to the financial intelligence unit. Between January and October 2005, the unit received 243 reports of suspicions and 44 371 reports of cash transactions above the statutory minimum for such declarations. The unit initiated 237 investigations in 2005 and suspicious transactions were confirmed in 131 cases. The great majority of cases concerned tax fraud. There was only one predicate offence of corruption. The police investigated 135 money laundering cases in 2003 and 54 in 2004. In May 2005, seven money laundering cases were being tried in the courts.

### **b. Analysis**

17. During its visit to Portugal, the GET found that much consideration was being given to the financial aspects of serious crime, financial offences and corruption. There was also an awareness of the financial damage to and loss of earnings for the state, particularly from taxes, and of the social risks attached to a form of crime that would remain highly profitable if no attempt were made to confiscate its proceeds. For example, steps had been taken to quantify the financial sums and other assets involved in relevant judicial cases.
18. The Portuguese authorities seem to have adequate general powers of investigation to acquire necessary financial information and authority to seize assets in corruption cases. Confiscation is possible in two distinct forms: i. ordinary confiscation under the Code of Criminal Procedure, which is always available and may be ordered as an equivalent value; and ii. special confiscation under Section 7 of Act 5/2002 on special measures to combat organised, economic and financial crime. In the event of conviction for one of the offences under this Act, the difference between

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<sup>7</sup> In particular, the European Convention on Mutual Assistance in Criminal Matters (ETS 030), the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS 141), the Criminal Convention on Corruption (ETS 173), the Civil Convention on Corruption (ETS 174) and the Schengen Agreement.

accused persons' actual assets and those corresponding to their lawful income may be confiscated. This difference is then deemed to be a benefit arising from criminal activities.

19. The police have 309 investigators specialising in economic and financial matters under judicial supervision. Thirty-five work in the anti-corruption brigade<sup>8</sup>. The State Prosecutor's Department can also call on the services of the National and Regional Criminal Investigation and Prosecution Offices. The GET was told that the police had started no fewer than 1521 investigations of corruption cases since 2002, of which 407 had been completed<sup>9</sup>. Nevertheless, the number of seizures and the sums involved are fairly minimal. Nor had any confiscation orders been issued in 2005, even though this was obligatory in corruption cases. Several reasons were given for this.
20. Firstly, several of those spoken to said that, despite the satisfactory results achieved by the central directorate for corruption and economic and financial crime inquiries, financial investigations sometimes had to be abandoned for lack of resources or delayed because of inadequate communications with certain public or private agencies or individuals. Sometimes, access to banking or tax data came too late, despite the special powers granted, in particular, under Act 5/2002. The problem of offshore sectors was also mentioned. However, the recent creation of mixed teams within the police and closer collaboration between the Central Criminal Investigation and Prosecution Office and the tax authorities should improve access to tax data. Finally, asset investigations are not carried out systematically because of lack of resources, particularly in the State Prosecutor's Department, and because they are not considered a priority. Yet such investigations are necessary to establish the value of criminal proceeds or the scale of unlawful enrichment. In practice, confiscation is only possible if based on such information. **The GET recommends that more systematic use be made of asset investigations and that all available resources – legal, technical and human – be used to the full and if necessary strengthened to make financial investigations more effective.**
21. In addition, the provisions governing the identification of proceeds, seizure, freezing and confiscation<sup>10</sup> derive from a number of legal sources, are not harmonised and are sometimes ambiguous. Laws such as Act 5/2002 list the offences in connection with which special investigation methods may be applied, banking secrecy lifted and special confiscation ordered or for which legal persons may be found liable. These lists vary and there are sometimes gaps in them. For example, special confiscation applies to cases of passive corruption (receiving bribes) but not to offences of active corruption (offering bribes) or trading in influence, whereas the lifting of banking secrecy and the use of telephone taps are facilitated in the cases prescribed by Act 5/2002. Field staff whom the GET met expressed reservations about the interpretation of Act 5/2002. At the time of the GET's visit, no case had arisen where this confiscation procedure had been used. An assessment of the act is planned, but not before 2007. The GET agrees with the view expressed by some that a comprehensive and immediate assessment is needed of existing laws and regulations on the identification of proceeds and their seizure, freezing and confiscation, and the problems of implementing them, so that they can then be revised and harmonised.

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<sup>8</sup> Following the restructuring of the Judicial Police in February 2006, 3 new specialised teams have been created, replacing the abovementioned anti-corruption brigade. These teams include 18 inspectors each, bringing the total number to 52.

<sup>9</sup> At the time of the GET visit, 439 cases were under investigation, most of which concerned local and regional authorities. The other areas concerned included the security forces, transport, justice, the tax authorities, health services and sport.

<sup>10</sup> In particular, the Criminal Code, the Code of Criminal Procedure, the money laundering acts of 2002 and 2004, Act 36/94 on measures to combat corruption and financial and economic crime, Act 108/2001 amending certain provisions of the Criminal Code on corruption and Act 5/2002 establishing special measures to deal with organised and financial and economic crime.



22. Moreover, continuing (in-service) training is obligatory for police officers but optional for judges, and is provided on a voluntary basis by the Centre for Legal Studies. Such an assessment could also be a basis for guidelines and, if necessary, additional training for practitioners in this field, with a view to encouraging the use of seizures, at the earliest stages of investigations before proceeds are dissipated and special confiscation in corruption and trading in influence cases. **The GET therefore recommends that existing provisions on the identification, seizure and confiscation of the proceeds of corruption and trading in influence be reviewed and, if necessary, guidelines be drawn up and additional training organised to facilitate their application.**
23. The GET has been informed of the recent establishment of a reform of criminal justice unit, with the task of reviewing the legislation governing penal policy and reforming the Criminal Code and the Code of Criminal Procedure. The review will apparently include the consistency and practical functioning of the system described above. Laying down penal policy priorities in legislation might also provide an opportunity to reformulate policy on corruption and the confiscation of criminal proceeds.
24. There is no special body responsible for managing seized assets. Although the Portuguese authorities maintain that the matter is properly dealt with on a case-by-case basis, the GET considers that a specialist body responsible for all aspects of the seizure and management of assets and securities, such as associated expenses and the conservation and use of perishable goods, could simplify judges' task and make it easier to apply confiscation in practice. *The GET observes that a special body responsible for managing seized assets should be established.*
25. Portugal operates a system of indirect declarations of suspicions to the financial intelligence unit via the State Prosecutor's Department. The financial intelligence unit, a Judicial Police department, looks into reports of suspicious transactions sent to it. The unit has a liaison officer with the tax authorities to enable it to access tax data. When firm evidence warrants it, the unit's search section opens an inquiry. However, its inquiries tend to take several months. Under the current system of declarations of suspicion, only two cases of suspected corruption have so far been identified in 2005, which the GET considers might be a consequence, at least in part, of the unit's relatively unstructured relationship with the institutions that are obliged to report suspicious transactions, the State Prosecutor's Department, the police, the financial supervisory authorities and other regulatory bodies. The GET notes especially that the bodies involved in fighting corruption and the institutions and professions subject to the obligation to report suspicions have not been issued with guidelines or typologies or received any training to help them make the connection between suspicious transactions and possible acts of corruption. **The GET recommends that the anti-money laundering arrangements make a greater contribution to combating corruption, particularly by ensuring that bodies involved in combating money laundering, and institutions and professions required to declare suspicious transactions, receive directives and training to assist the identification and reporting of acts of corruption.**

### III. THEME II - PUBLIC ADMINISTRATION AND CORRUPTION

#### a. Description of the situation

##### Administrative organisation

26. The term public administration is taken to include national, regional and local authorities (the Azores and Madeira autonomous regions, 308 municipalities et 4259 *freguesias* or parishes). There are also 5 commissions responsible for co-ordination and regional development and 18 districts. Although Article 236 of the Constitution provides that administrative regions are also regional authorities, they have not yet been set up. Lastly, there are a number of other public bodies and private bodies with some public ownership. According to Article 267 of the Constitution, public administration shall be structured in such a way as to avoid bureaucratisation, bring departments and services closer to local people and ensure that interested parties take part in its effective management, particularly via public associations, residents' organisations and other forms of democratic representation. The Constitution also lays down certain rights and safeguards for citizens, the rules governing public service employment and restrictions on the exercise of public officials' rights and responsibilities. For example, officials must abide by the principles of equality, proportionality, justice, impartiality and good faith. These principles are clarified in the Code of Administrative Procedure.

##### Controls

27. Article 268.5 of the Constitution entitles citizens to have their legally protected rights and interests enforced in the courts. They can challenge any administrative decision either by asking the authority concerned to reconsider (Articles 158 to 177 of the Code of Administrative Procedure) or by appealing to the administrative courts (Article 214.3 of the Constitution). There is also a system of public service inspectorates, in particular the Inspectorate of Public Administration, the Financial Inspectorate, the General Inspectorate of Internal Administration and the Local and Regional Inspectorate. Finally, the Finance Ministry Budget Directorate, the Financial Inspectorate, the General Inspectorate of Internal Administration, the National State Internal Audit System<sup>11</sup> and the Court of Auditors all make key contributions to the control of public finance. The Financial Inspectorate is responsible for co-ordinating with the Court of Auditors, sectoral Inspectorates and other national and local supervisory bodies. The local authority accounting system requires local authorities to establish internal control systems to identify unlawful conduct, including corruption.
28. The office of Mediator (*Provedor de Justiça*) was established in Portugal in 1975. The Mediator's activities are governed by a statute (Act 9/91, as amended) and the organisational structure is laid down in Legislative Decree 279/93, as amended (see the GRECO First Round Evaluation Report). The GET was told that in a number of specific cases the Mediator had called on the authorities to introduce effective internal controls to ensure that certain forms of administrative corruption were properly identified, and to impose appropriate disciplinary measures. He had also dealt with cases of abuse of authority and other unlawful acts likely to be linked to corruption, particularly in connection with town and country planning activities, building permits and recruitment at local and regional level. In certain cases, the Mediator had advised the relevant

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<sup>11</sup> The state internal audit system, placed under the supervision of the Government and closely linked with the Finance Ministry, is intended to ensure coherent, co-ordinated application of auditing within the public administration. It incorporates the various general inspectorates in this field, and the General Directorate of the Budget (DGO) and the Social Security Financial Management Institute (IGFSS).



authority, such as the General Inspectorate of Local and Regional Administration, to start disciplinary proceedings and had reported cases to the authorities responsible for administrative offences and to the State Prosecutor. In 2004, he referred two cases of suspected trading in influence to the State Prosecutor.

#### Anti-corruption policy

29. There is no comprehensive anti-corruption action plan or strategy for the public sector laid down in a unique document. However, the Portuguese authorities maintain that the government's anti-corruption policy, which also applies at local level, is reflected in detailed legislation and the allocation of significant resources for both preventive and enforcement activities. The main preventive activity is concerned with training public officials and familiarising them with potential risks of corruption, and with promoting codes of conduct, such as the guide containing police recommendations published in 2005. Anti-corruption measures are evaluated, mainly by analysing the complaints recorded each year by the relevant authorities, particularly by the police central directorate for corruption and economic and financial crime inquiries, reports by public officials of irregular or unlawful actions or decisions in complaints registers (which are obligatory in all public services) and the reports of the various inspectorates.

#### Transparency in public administration

30. The right of each individual and legal person to information is enshrined in the Constitution (Articles 37 and 268), the Code of Administrative Procedure (Articles 61 to 64) and Act 65/93, as amended, on right of access to administrative documents. The Commission on Access to Administrative Documents is an independent body responsible for supervising the application of this Act by advising on whether or not particular documents can be communicated. The law sets out procedures and precise deadlines for the provision of administrative documents requested by any individual. The document must be provided within 10 days of the request if the individual concerned has a direct interest in the procedure. Tribunals can order the release of documents and/or apply constraints. Act 83/95 of 31.8.1995 lays down forms of and arrangements for citizen participation in administrative procedures and grants any citizen the right to take action (*actio popularis*) to prevent or punish offences concerned with public health, the environment, quality of life, consumer protection, the cultural heritage and the public domain.

#### Employment in public administration

31. The Portuguese public service comprises some 300 000 permanent civil servants at central government level and 105 000 permanent civil servants at regional and local level, together with about 60 000 other public officials on temporary or occasional contracts<sup>12</sup>. There is a somewhat disparate body of rules governing public officials' rights and obligations, the most important of which is the disciplinary statute of central, regional and local government staff, which was approved in Legislative Decree 24/84 of 16 January 1984. In principle, the statute applies to all public officials, although some categories of staff are subject to special rules, and it contains several provisions relating specifically to corruption and the penalties incurred<sup>13</sup>. The disciplinary

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<sup>12</sup> These approximate figures exclude health and education.

<sup>13</sup> Legislative Decree 24/84 on the Disciplinary Statute: suspension for favouritism; temporary exclusion for breach of the duty of impartiality in the exercise of one's functions, either deliberately or through major negligence; dismissal for directly or indirectly soliciting or receiving gifts, rewards, profit sharing or other pecuniary benefits or for financial participation or interest in any contract concluded by any department of the public service.

statute is also partially applicable to judicial officials and, on a subsidiary basis, to judges, although the latter also have their own statute.

32. Recruitment and selection of public officials are governed by rules laid down in legislation, particularly Legislative Decree 204/98 and are normally by competitive examination. However, there are special recruitment arrangements for officials with management functions (under Act 2/2004) and for the staff of specific bodies such as the Public Security Police, the Aliens and Frontiers Department and the National Republican Guard, which have their own career structures. At the time of recruitment, the majority of public officials have to undergo admission tests, which include ethical questions. Moreover, it is also a condition of recruitment that those concerned are not banned from holding or deprived of the right to hold public office, which may be checked with the criminal records office. Criminal convictions, including ones for corruption, do not automatically lead to dismissal. Articles 66 to 68, 100 and 102 of the Criminal Code provide for withdrawal or up to five years' suspension of the right to exercise public functions if this is incompatible with the dignity and public confidence required for certain posts.
33. Act 10/2004 establishes an assessment and appraisal system for public officials and is supplemented by Decree 19-A/2004, which lays down the implementation arrangements. This legislation also applies to regional and local government officials, subject to certain specific provisions. According to the Portuguese authorities, integrity is an essential element of the qualities and conduct required of officials. It is apparently the subject of particular attention in connection with the special career categories mentioned above.
34. Under Legislative Decree 54/2000, public officials receive 360 hours initial training, which includes the ethical principles on which public administration is based. In-service training, whose legal basis is Legislative Decree 50/1998, lasts one to two weeks per year and is designed to increase the skill levels, worthiness, commitment and professionalism of staff. This training is provided by a number of organisations specified in law. The national institute of administration offers training modules on the ethical principles and social responsibility of government. Similar courses are provided by the municipal training study centre, for local government officials, the National Republican Guard training college and the aliens and frontiers department. According to the Portuguese authorities, the general directorates of a number of sectors of government undertake training activities and issue instructions on corruption for departments for which they are responsible.
35. There are no general rules on the rotation of officials in order to prevent corruption. However, specific rules and practices concerning rotation do apply to certain officials, particularly in the National Republican Guard, the Aliens and Frontiers Department and the police. Tax and customs officials were formerly subject to two and three year rotation periods respectively. However, this practice has been abandoned (see paragraph 48).

#### Conflicts of interest, incompatibilities, secondary activities and migration to the private sector

36. According to Article 269 of the Constitution, in carrying out their duties, public officials shall "exclusively serve the public interest". The exceptions in terms of incompatibilities and secondary activities are laid down in law. Section 12 of Legislative Decree 184/89, supplemented by Legislative Decree 427/89, lays down certain general incompatibilities designed to secure the independence of government employees and the transparency of their duties. In addition, Legislative Decree 413/93 establishes rules governing multiple public and private office holding. The rules governing multiple office or post holding for public officials are governed by the

exclusivity principle, and it can only be justified if it is in the public interest. The holding of additional public or private sector posts or positions may be authorised by the authorities if the following conditions are met: the other activity is not legally incompatible, the hours for performing the activities concerned do not overlap and the official's impartiality, the public interest and citizens' legally protected rights and interests are not affected. There are other statutory provisions governing incompatibilities in particular cases<sup>14</sup>, and on awareness-raising, prevention and penalisation of conflicts of interests. Articles 44 onwards of the Administrative Code of Procedure provide for the prevention of conflicts of interest and incompatibilities. Multiple office holding that is forbidden or has not been authorised, or a conflict of interests or incompatibility, is subject primarily to disciplinary penalties<sup>15</sup>. During the visit, the GET was informed, as an example, that 4 to 5% of Interior Ministry staff had secondary activities alongside their official duties. The monitoring of possible incompatibilities, secondary activities or conflicts of interest in the public service is not systematic. However, the GET was told that conflicts of interest and the monitoring of incompatibilities and secondary activities were priorities for the National Assembly.

37. There are no general rules governing inappropriate migration of public sector employees to the private sector<sup>16</sup>. However, members of the security forces, to take an example, are not allowed to take up posts in private security firms until a certain time has elapsed. Public officials also have legal obligations concerning professional confidentiality and secrets that continue to apply after they have ceased their duties.

#### Codes of conduct and ethics

38. There are numerous ethical rules governing public officials' conduct, based on the Constitution, the Criminal Code, the disciplinary statute, other relevant laws and decrees and specific ethical codes. In 1997, the secretariat of the administrative modernisation unit circulated to all officials an ethical charter setting out ten ethical principles of public administration, which may be consulted on the internet. Certain professions have their own codes of conduct. For example, the security forces have a police code of conduct, Article 6 of which is concerned with the principles of staff integrity and worthiness. More specifically, in 2005 the central directorate for corruption and economic and financial crime published a guide containing police recommendations to all public officials. This is also available on the internet. The guide identifies situations where there is a risk of corruption and makes recommendations to officials concerning the conduct expected of

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<sup>14</sup> Act 2/2004 lays down specific rules on multiple office holding for central and local government staff in management positions. Act 64/93 lays down the general regime on incompatibilities and impediments for holders of political and higher public offices. Section 28 of Legislative Decree 440/99 establishes incompatibilities for judges and staff of the court of auditors. Act 12/96 does the same for presidents, vice-presidents and members of the governing bodies of public institutes, foundations and establishments. Section 26 of Legislative Decree 80/2001 establishes restrictions concerning staff of the general inspectorate of social security. Section 22 of Legislative Decree 102/2000 concerns staff of the labour inspectorate and Section 8 of Regulatory Decree 36/2002 inspectors of the European Social Fund department.

<sup>15</sup> Legislative Decree 413/93 on incompatibilities provides for *temporary exclusion*, in the case of officials exercising private activities overlapping with or similar to public duties or in conflict with them; *temporary exclusion or suspension* for officials providing third parties with services on which they, or bodies for which they are responsible or have direct influence on, have to make an assessment or decision; *suspension* where there is a conflict of interest concerning decisions or contracts in which bodies for which they are responsible or have direct influence on are involved. Legislative Decree 24/84 on the Disciplinary Statute also provides for *suspension* for favouritism; *temporary suspension* for breach of the duty of impartiality; *dismissal* for directly or indirectly soliciting or receiving gifts, rewards, profit sharing or other pecuniary benefits in exchange for taking unlawful advantage of or conflict of interest with regard to any contract concluded by any public department.

<sup>16</sup> Other than Section 5 of Act 28/95 on the legal arrangements governing incompatibilities and barred positions, which applies to members of bodies exercising sovereign power or political responsibilities.

them<sup>17</sup>. Officials' hierarchical superiors and general inspectorates are responsible for making sure that these ethical rules are applied. Breach of these rules is, in principle, subject to disciplinary penalties ranging from written warnings to compulsory retirement or dismissal.

### Gifts

39. According to the Portuguese authorities, public officials who accept gifts are considered to have breached the duty of impartiality. The disciplinary statute authorises the dismissal of public officials who use their official position to solicit or accept, directly or indirectly, gifts, rewards, profit sharing or other pecuniary benefits, even if these are not intended to expedite or delay any particular action or decision. In addition, the Criminal Code makes it unlawful to accept any unjustified benefit, and Articles 372 to 374 lay down criminal penalties for active and passive corruption (offering or receiving bribes). These obligations are also referred to in the police recommendations guide, though it adds that they do not apply to small gifts<sup>18</sup> and conventional forms of hospitality.

### Reporting corruption

40. Article 242.1.b of the Code of Criminal Procedure and Section 46 of Legislative Decree 511/99 require officials to report any offences that come to their notice in the course of their duties. The Portuguese authorities state that this obligation extends to all public officials and that reports should be made to the State Prosecutor, but it is not clear whether they should be transmitted directly or via the department or service to which the official belongs. Under Article 23 of the disciplinary statute, the penalty for failure to comply with this obligation is a disciplinary fine<sup>19</sup>. Officials reporting offences may be entitled to witness protection measures applicable under criminal procedure, such as keeping their identity secret until the start of criminal proceedings. There are no other specific measures to protect staff making such reports.

### Disciplinary procedures

41. Disciplinary procedures are the responsibility of the disciplinary bodies provided for by law (normally the hierarchical superior). Disciplinary inquiries are not carried out by specialist bodies. However, in the Interior Ministry, the conduct of disciplinary inquiries is assigned to the General Inspectorate of Internal Administration, particularly in case of the more serious infringements of law or individual rights. In the Aliens and Frontiers Department, for most disciplinary action the inquiries are conducted by its inspection unit. As a rule, disciplinary and criminal proceedings are conducted quite separately. In certain cases, though, disciplinary proceedings may be suspended until any criminal proceedings relating to the same circumstances are completed. Any criminal matter that comes to light in disciplinary proceedings must be brought to the notice of the relevant judicial authorities. Although disciplinary and criminal procedures operate independently of each other, criminal investigations may lead to suspension of officials' duties and part of their salary until final conviction or acquittal. When a public official is found guilty of an offence, the court that heard the case must submit a copy of the judgment to the State Prosecutor, to be forwarded to

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<sup>17</sup> Particularly significant examples of risk situations identified in the guide include the absence of documentation to justify expenditure, failure to observe legal public purchasing procedures, awarding contracts without tenders, breach of the rules on the recruitment of officials and multiple post or office holding where this is not permitted in law.

<sup>18</sup> For example, gifts of negligible value such as an ordinary pen.

<sup>19</sup> Article 46.1 of the Disciplinary Statute requires any individual who is aware of a disciplinary offence committed by a public official to bring this to the attention of the official's hierarchical superior. Under article 46.2, officials to whom this obligation applies may be liable to disciplinary action for failure to comply. Article 47 requires senior staff who receive such notifications to produce an immediate official report.

the relevant government department or authority. The latter must then order the immediate application of any relevant court decisions, including any disciplinary consequences, subject to any penalties that might be imposed following subsequent disciplinary proceedings. An exception is formed by penalties imposed on members of the Public Security Police, handled by the department for professional ethics and discipline of the National Directorate (or the inspection unit where the aliens and borders department is concerned). There is no central register of violations of disciplinary rules or penalties applied, other than in the case of penalties imposed on police officers, which are dealt with by the police ethics and disciplinary department. However, all public officials have an administrative file, which is brought into any disciplinary procedure already at the instruction stage.

**b. Analysis**

42. The GET noted during the visit that the Portuguese authorities, particularly the Ministry of Justice and the Judicial Police, had a fairly clear understanding of corruption in public administration and how it operated. Certain sectors appear more vulnerable than others. Those particularly affected include local and regional authorities, public purchasing, the security forces, the issuing of subsidies, licences and permits, the judicial system, the tax authorities, health care and sport. In the course of their control and monitoring activities, certain departments and institutions, such as the Judicial Police, the General Inspectorate of Local and Regional Administration, the Court of Auditors and the Mediator, identify offences or abuses that might be linked to corruption, trading in influence and favouritism. Nevertheless, certain monitoring bodies and inspectorates do not carry out preventive checks and generally speaking there are no specific training or guidelines on types of offences (other than the situations described in the police recommendations guide). Finally, there does not appear to be adequate co-ordination between the different monitoring bodies, particularly when reports of corruption or other offences are or could be made simultaneously to the judicial, administrative, disciplinary and financial authorities. The Portuguese authorities themselves, and in particular the National Assembly's Economic Affairs Committee, acknowledge that closer co-ordination between the various monitoring agencies and greater awareness, at every level, of what constitutes corruption and the need to identify cases, are critical if the problem is to be rooted out. The GET shares the Portuguese authorities' desire to strengthen co-ordination between the various existing bodies, which would then be able to contribute more effectively to combating corruption.
43. More generally, the GET considers that the departments responsible for reforming and modernising government and the public service fail to take sufficient account of the risk of corruption and the ethical challenges this poses. Some of those interviewed said that, outside the police force, regular and satisfactory analyses of corruption risks were not carried out and that the associated ethical issues were not dealt with in an integrated fashion, which meant that there was no comprehensive and structured preventive strategy within the public service.<sup>20</sup> Moreover, anti-corruption arrangements and preventive measures were less well developed and effective at local level, and in certain other public bodies. The GET considers that the authorities' approach to corruption may fail to respond to changes in the public service environment and growing demands for effectiveness and efficiency, unless it is accompanied by a co-ordinated preventive approach focussed on the day-to-day management of public services and organisational ethics.
- The GET recommends that more regular analyses be carried out on the risks of corruption**

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<sup>20</sup> The Portuguese authorities nevertheless indicated following the GET's evaluation visit that an analysis of the corruption phenomenon made by the Judicial police covering the years 2002-2005 affords real knowledge of the position regarding criminal investigations of corruption, specifically by the bodies of the public service in charge of prevention of corruption on the criminal law side.



**and that a more integrated approach be adopted to its ethical aspects, with a view to extending preventive measures to the entire public sector, including local government, and to monitoring their application.**

44. The complex nature of the relevant legislation and administrative delays are also seen as factors that increase the risk of corruption, which is why successive reforms have tried to simplify administrative procedures and increase the use of new information technologies. The modernisation of State institutions since the 1980s and the reform of the Code of Administrative Procedure have also helped to make the decision making process and public service functioning more transparent. The 1993 access to administrative documents legislation and the activities of the access to administrative documents Commission have put an end to the air of secrecy surrounding official transactions and offer citizens an important mean of monitoring government. Nevertheless, their right of access is not always effective in practice. Among the reasons put forward for this on the visit were: i. the excessive time taken by certain departments to supply requested information (for example, concerning public procurement and building permits); and ii. procedural (occasionally protracted) delays, particularly when the access commission is required to give a prior opinion, which can sometimes take up to two months. The Portuguese authorities have nevertheless indicated that the information delivery procedures are not normally slow and that the commission's prior opinion is warranted in certain touchier cases such as access to documents with personal data identifying third parties. *The GET therefore observes that the Portuguese authorities should implement a more proactive policy on access to official documents and review the procedural constraints that lead to delays (occasionally protracted), with a view to giving proper effect to individuals' right of access to official documents.*
45. Existing ethical rules and codes of conduct governing public sector employment are spread over a fairly wide and varied range of sources. The dispersed nature of the rules makes it difficult to become fully acquainted with all the relevant rights and obligations and to make this information available to public sector employees, for example those in the health and education sectors, in other public bodies and agencies or in non-established posts.
46. In principle, recruitment to public service posts is by competition, in accordance with procedures to which appropriate safeguards are attached (Section 5 of Legislative Decree 204/98). However, recruitment is carried out not by an independent authority with overall responsibility but by panels operating under and in accordance with Article 12 of the Legislative Decree 184/89. In particular, decisions relating to competitions and recruitment are subject to appeal to a higher level of authority. Article 26.4c of the disciplinary statute makes it a dismissible offence to negotiate or offer public employment fraudulently. Nevertheless, the GET has been told that public service recruitment, including local government recruitment, is vulnerable to corruption and is not always conducted transparently. *The GET therefore observes that the Portuguese authorities should make existing recruitment procedures, including ones at local level, more transparent and strengthen the arrangements for ensuring compliance with these procedures.*
47. In the absence of adequate information, the GET is unable to assess the procedures for appraising performance and staff integrity. Some of those whom it met had reservations about the checks carried out on public officials' integrity and their criminal and disciplinary records, particularly at local level.
48. The GET was told that staff rotation was standard practice and obligatory in certain sectors considered to be vulnerable, such as the state financial authorities, criminal and traffic police and the customs service, but that it had been abandoned in the customs and taxation services.



Rotation is a way of limiting the risks and effects of the corruption that can otherwise result from extended periods performing the same duties in exposed sectors. *The GET observes that the Portuguese authorities should consider introducing or reintroducing the rotation principle, at least in administrative sectors that might be deemed vulnerable to corruption.*

49. Preventing conflicts of interest was one of the topics discussed during the visit and the authorities seemed determined to find a better legal and practical approach to this problem. The rules governing conflicts of interest, incompatibilities and secondary activities are dealt with in a limited number of scattered sources<sup>21</sup>. Moreover, at the time of the visit there was no satisfactory definition of conflicts of interest or any overall picture or appropriate supervision of multiple office holding and secondary activities. Besides, only the top stream of officials performing political functions, such as directors general and their deputies, are obliged to declare their assets and interests. For local elected officials and members, it is optional. Finally, there are no satisfactory regulations governing or supervision of improper migration of public officials to the private sector. **The GET therefore recommends that appropriate rules be introduced, applicable to all public officials, on conflicts of interest and improper migration to the private sector and that mechanisms be established to ensure that they are properly applied and monitored.**
50. As early as 1997, Portugal adopted a public service ethical charter directed at civil servants. Different professional groups and departments in the Portuguese public service also have their own disciplinary statutes or regulations, and in some cases codes of ethics. However, the GET has been unable to determine precise coverage of these various texts, which means that certain vulnerable professions or sectors, such as health, sport and education, might still be excluded from the scope of appropriate provisions. During the visit, the GET was told that a draft ethical charter was under preparation in the customs service. Moreover, a Council of Ministers Resolution makes it obligatory to distribute a code of conduct to all members of the Public Security Police and the National Republican Guard when they take up their duties but there is no equivalent requirement for other departments. Generally speaking, existing ethical rules are scattered over several documents, sometimes carry no penalties and remain unknown to most officials. This even applies to the police recommendations guide, despite the fact that it is one of the most detailed and recent documents in this field<sup>22</sup>. Such rules are also often too general and do not take sufficient account of preventive aspects and the risks of corruption (as advocated in Council of Europe Recommendation (2000) 10 on Codes of Conduct for Public Officials).
51. Even though the Disciplinary Statute makes receipt of gifts a dismissible offence for all officials, the police recommendations guide authorises small gifts and conventional forms of hospitality, without specifying what sort of conduct is expected of officials receiving such gifts and potential conflicts that practical situations can create. The Portuguese authorities have nevertheless pointed out that public officials are not allowed to accept gifts and this is the construction placed on the provisions of the Penal Code in practice. Following its discussions with staff in various sections of the public service, the GET concludes that the issue of gifts and of how staff should

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<sup>21</sup> Whereas Articles 13 and 81 of the Statute of judges and state prosecutors prohibits judges from performing other public or private duties, Articles 11 and 82 authorise serving judges to be President of the Republic or members of the Government or the Council of State.

<sup>22</sup> The guide identifies certain situations that could lead to corruption and is aimed at all public officials. However, it has not received the necessary support in terms of staff training and familiarisation. It is therefore unknown in certain departments and appears to have had a fairly limited impact, particularly at local level. It has received a mixed reception from a number of institutions that have pointed out that the guide is purely a statement of intent, with no sanctions to make it enforceable. Finally, the GET considers that the guide is still too general and abstract, particularly regarding gifts, conflicts of interest and inappropriate migration to the private sector.

respond to them is not sufficiently clear in administrative practice and could be explained, notably in the context of further training<sup>23</sup>.

52. Finally, although professional training is obligatory for staff, training on ethical issues does not extend to all officials and often treats the risk of corruption and responses to gifts in a very abstract fashion.
53. In view of the previous paragraphs, **the GET recommends that existing codes of conduct be expanded to include explicit references to ethical issues and risks of corruption (such as the issue of gifts) for all public officials and prescribe appropriate sanctions for non-compliance with these codes. Training programmes on these topics should be modified to include practical examples of potential conflicts of interest and provided to all public officials (civil servants and others).**
54. Portuguese law provides mechanisms for the protection of both collaborators of justice and witnesses, as well as an obligation for public officials to report suspicions of offences. However, according to the GET whistleblowers who report suspected cases of corruption in good faith do not receive satisfactory protection against possible retaliatory measures. Nevertheless, the Portuguese authorities claim there has been a significant rise in complaints from the public, who are making increasing use of complaints books placed at their disposal, and even of reports of suspected corruption from public officials. However, these reports do not always result in criminal or disciplinary action. According to the Portuguese authorities, all suspicions of corruption relating to public officials are acted upon when grounded or proven. In practice, the problem is probably more one of how such reports are dealt with and the effectiveness of procedures (particularly for investigation in connection with the disciplinary inquiry and the co-ordination between disciplinary, administrative, financial and criminal procedures). **The GET recommends that appropriate protection be offered to whistleblowers and that methods of dealing with allegations of corruption within the public service be re-examined, to ensure that appropriate procedures are followed as rapidly as possible.**
55. The GET has insufficient information to enable it to establish the scale of disciplinary proceedings or measures against public officials, or their effectiveness. It is recalled that there is no central registry of disciplinary proceedings or sanctions. According to the Portuguese authorities, disciplinary procedures are monitored through a national system of internal audits undertaken primarily by general inspections. Nonetheless, the GET notes that more systematic checks could be carried out on whether the sanctions imposed are adequate or proportional in the case of corruption or related offences. *The GET observes that the authorities should examine whether current disciplinary procedures enable them to carry out proper investigations of alleged corruption and other abuses (such as accepting gifts or failing to report offences or conflicts of interest) and impose appropriate sanctions.*

#### **IV. THEME III – LEGAL PERSONS AND CORRUPTION**

##### Definition of legal persons

56. There are several types of institution with legal personality under Portuguese public or private law. Under the Civil Code, private law legal persons includes associations<sup>24</sup> (article 167 ff),

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<sup>23</sup> For example, the pharmaceutical industry frequently offers gifts to public officials.

<sup>24</sup> Political parties, associations of students, parents and families, consumers and Catholics, private social self-help institutions, women's associations, trade unions and sports associations are governed by their own legislation.

foundations (article 185 ff) and civil law, or non-commercial, partnerships (article 980 ff). The Commercial Companies Code provides for commercial partnerships, private limited companies, public limited companies, limited partnerships with or without shares, and one-person businesses with limited liability. Other institutions include co-operatives, governed by the Co-operative Code (Act 51/96), and joint enterprises, or consortiums. Apart from the state and local and regional authorities, public law legal persons include public associations, professional associations, public institutes and foundations, "personalised" public services and establishments, such as public hospitals, and national and municipal public enterprises. More than 2 646 000 entities were recorded on the central index of legal persons on 31 October 2005, including 853.514 legal persons of which 4 656 were public law entities, 27 488 public limited companies, 502 962 private limited companies (86% of all commercial companies) and 32 342 so-called "irregular" companies<sup>25</sup>.

### Constitution and registration

57. The conditions governing the constitution of legal persons vary according to their form and are laid down in the rules governing each of these categories. After commencing activities, all commercial companies are required to apply for a certificate of admissibility to the National Register of Legal Persons (the National Register). This is part of the General Directorate of Registers and Solicitors of the Ministry of Justice and is responsible for organising and managing the Central Index of Legal Persons and ensuring that their commercial names are not already in use (Section 1 of Legislative Decree 129/98). The certificate of admissibility shows that a company or business name has been approved. Certificates are valid for ninety days from their date of issue. At the same time the national register gives each body recorded on the central index an identification number, based on a tax identification number issued by the tax authorities. The partners or members of companies must then appear before a solicitor, or notary, who draws up the legal instrument establishing or constituting the company before expiry of the certificate of admissibility. New companies must then register their headquarters with the local office, or registrar, of the commercial registry. There are more than 300 such offices, at least one and sometimes more per municipality. Only twenty are computerised. Since July 2005, it has been the duty of the notary and the registrar of commerce to ensure that company objectives are compatible with public policy. Final registration follows presentation to the local registrar of the certificate of admissibility and the relevant notarised instruments. The local registrar then communicates all the information at his or her disposal to the national register so that any information recorded provisionally when the certificate of admissibility was issued can be updated<sup>26</sup>. New companies' statutes, or articles and memorandum of association, are published in the official journal. Before legal personality is granted, each of the stages described above must be completed. They do not include checks on the judicial and commercial records of the individuals involved in forming the relevant company.
58. Very similar arrangements apply to associations and foundations. They are registered with the national register but only have to be registered with their local commercial registrar if they are declared to be of public interest.

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<sup>25</sup> According to the Portuguese authorities, the latter are operational companies that have not been officially recorded, or notarised, but have still been issued with a tax identification number.

<sup>26</sup> Information on the national register's data base on commercial companies includes their company or business name, legal person identification number, legal form, capital and type of economic activity and the local registration office where they are registered.

## Professional disqualifications

59. There is no automatic ban on persons who have been guilty of criminal offences, particularly corruption or trading in influence, from holding senior management or directorial positions in companies or other legal persons. However, there is legislation allowing unlawful conduct on the part of managers of institutions to be taken into account if it has an influence on their activity. Legislative Decree 28-84 makes disqualification from management an accessory penalty for active or passive corruption in the private sector or active international corruption<sup>27</sup>. Section 47 of Act 11/2004 on money laundering also makes disqualification from management an accessory penalty for those found guilty of breaching this legislation. Article 100 of the Criminal Code establishes an accessory penalty of one to five years' disqualification from practising, with a possible extension of three years, for individuals convicted for offences relating to the abuse of their profession, business or industry. Finally, Articles 65 to 68 establish similar accessory penalties for public officials found guilty of corruption<sup>28</sup>. Breach of any of these accessory penalties is punishable under Article 348 of the Criminal Code on failure to comply with decisions of the courts. The penalty is one year's imprisonment<sup>29</sup>.

## Liability of legal persons

60. The principle of the civil liability of legal persons is mainly based on Article 165 of the Civil Code, under which legal persons are civilly liable for the acts or omissions of their representatives or agents, just as principals are liable for the acts and omissions of their subordinates. Such liability generally leads to the payment of damages and compensation, but not in principle to other measures or penalties. It also extends to public bodies under Articles 22 and 271 of the Constitution and Legislative Decree 48 051 of 21.11.1967. The procedure for establishing the civil liability of legal persons for corruption, trading in influence and money laundering in various circumstances depends in part on the courts, and there have not yet been any court judgments of this sort. Nevertheless, in accordance with a strict interpretation of Article 483 of the Civil Code, some legal theorists would argue that legal persons have direct liability for the unlawful actions of their managers, so long as they have acted in that capacity. Under Article 501 of the Civil Code, this theory would not apply to the state or to other public legal persons.
61. Turning to the administrative liability of legal persons, criminal law provides for administrative offences (*contra-ordenações*) that are liable to fines that are not penal in character (*coima* and not *multa*). Legal persons are liable for administrative offences committed by their representative bodies in the exercise of their duties. However, corruption and trading in influence are not administrative offences.
62. The Portuguese penal system only provides for legal persons' criminal liability in very exceptional circumstances. Legal persons such as companies and simple *de facto* associations can only be found criminally liable for certain offences specifically laid down in legislation. In particular, under Legislative Decree 28/84, as amended by Acts 13/2001 and 108/2001, these include active corruption harmful to international trade (Section 41.A) and passive and active corruption in the private sector (Sections 41.B and C), when the offences are committed by their bodies or

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<sup>27</sup> This stems essentially from Portugal's ratification of the Convention of the OECD combating bribery of foreign public officials in international business transactions.

<sup>28</sup> Article 52 also provides for professional disqualifications, including for those whose conviction entailed a suspended sentence.

<sup>29</sup> The Portuguese authorities informed GRECO that the Council of Ministers have adopted new legislative measures regarding professional disqualification. They are currently before Parliament for approval.

representatives, in their name and in the corporate interest. At the time of the GET visit, therefore, legal persons could not be held criminally or administratively liable for all active corruption offences or trading in influence. Sections 36 and 37 of Act 11/2004 do establish the possibility of legal persons' criminal liability for money laundering, but the former section restricts its scope to financial institutions and legal persons subject to a particular duty of care under section 20. In the case of other legal persons, covered by Section 37, the law does not specify the nature of this liability and the penalties that may be imposed<sup>30</sup>. In the case of offences such as those specified above where Portuguese law does allow for legal persons' criminal liability, it makes no specific provision for cases where the corruption apparently resulted from an absence of oversight on the part of managers. There is no system of criminal records for legal persons with criminal convictions. Nor does domestic legislation make any provision for institutional changes, such as the establishment of a new company or the resumption of activities, that might prevent the application of penalties imposed. However, the courts appear to hold that institutional changes do not cause legal persons' liability to lapse.

#### Penalties and measures applicable to legal persons

63. As already noted, legal persons can only be held criminally liable for certain offences. In the cases covered by Legislative Decree 28/84 (private corruption and active international corruption), the legislation provides for main penalties (warnings, fines and dissolution) and accessory ones (temporary disqualifications, loss of financial assistance and grants and so on). In the cases contemplated by Legislative Decree 28/84, the amounts of fines are determined by the court according to the corporate body's economic and financial circumstances. The court orders payment of day-fines; 20-200 of these are imposed according to the seriousness of the offence. The daily rate can vary from 5€ to 5.000€ (section 7.4 of Legislative Decree).<sup>31</sup> Moreover, in the case of the offence of money laundering, apart from certain specific penalties laid down in Sections 43 to 49 of Act 11/2004, the penalties applicable come within the scope of the general system of fines and minor offences in Section 34. The penalty (payment of fines) provided for in Section 49 is intended to ensure the payment of fines and procedural costs jointly and severally with the natural person, even where the legal person has committed no offence, but it does not specify a maximum amount. However, according to the Portuguese authorities, for legal persons in the regulated sector the fine may be up to 2.500.000€. Under Section 47, the accessory penalties stipulated in this Act are only applicable to individuals, not to legal persons<sup>32</sup>. However, the Portuguese authorities have emphasised that public disclosure of the final decision ordering the culprit to pay costs may be applied to legal persons as an accessory penalty.

#### Accounting requirements

64. Article 115.1 of the Legal Persons Taxation Code requires commercial companies and partnerships, co-operatives, public enterprises and other bodies whose main activity is

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<sup>30</sup> In 2004, the Council of Ministers approved two bills and modifications to the Criminal Code that would extend the scope of legal persons' liability for criminal offences but they were unable to complete their passage through parliament because of successive changes of government. Council of Ministers Resolution 138/2005 of 29 July 2005 instructed a Criminal Justice Reform Unit to review, among other things, the legal system governing the liability, including possibly the criminal liability, of legal persons. The Portuguese authorities indicated, after the visit, that this reform unit in March 2006 approved the reform bill for the Penal Code, establishing the liability of legal persons for offences of active corruption and trading in influence.

<sup>31</sup> The Portuguese authorities indicated, after the visit, that according to the available statistics 23 legal persons were convicted of economic crimes in 2004, but it could not be ascertained whether these cases included a conviction for private corruption or active corruption damaging to international trade.

<sup>32</sup> The draft legislation to extend the liability of legal persons for criminal offences was also intended to harmonise and extend the system of penalties. This matter will also be dealt with by the Criminal Justice Reform Unit.



commercial, industrial or agricultural operating in Portugal to have a proper accounting system for taxation monitoring purposes. Under Article 116 of the Legal persons Taxation Code dealing with tax on corporate income, there is a simplified accounting system for bodies whose headquarters or place of effective management are in Portugal, whose main activity is not commercial, industrial or agricultural and which do not have a full accounting system. These bodies must maintain a register of income and expenditure. However, if these bodies derive accessory income from these activities they must make corresponding accounting arrangements to allow checks to be made on any surplus income received. Section 31 of the Commercial Code requires all traders, whether individuals or legal persons, to maintain account books. There is also a legal obligation to retain accounting documents for ten years.

65. Portuguese law lays down criminal penalties for tax and accounting offences, such as various forms of tax fraud (maximum three years' imprisonment or 360 day-fines), serious fraud (one to five years' imprisonment for individuals and 240 to 1200 day-fines for legal persons), falsifying or altering important tax documents (€ 500 to 25 000 fines), omissions or inaccuracies in tax declarations and other important tax documents (€ 250 to 15 000 fines). Articles 256, 257 and 259 of the Criminal Code also lay down criminal penalties for falsifying documents and damaging or concealing technical documents and assessments. The general tax offences system also establishes fines for refusal to return, produce or present customs documents (€ 100 to 10 000), refusal to return, produce or present important tax entries or documents (€ 250 to 50 000) and failure to maintain important tax accounts or books (€ 150 to 15 000).

#### Tax deductibility

66. National tax laws prohibit tax deductions for facilitation payments, expenditure linked to bribes and any other expenditure associated with corruption offences. Under Articles 23.2 of the Legal Persons Tax Code and 33.7 of the Personal Income Tax Code, unlawful expenditure, particularly in connection with conduct in breach of Portuguese criminal legislation, even if it has been incurred outside the country, is not deductible or considered as costs. Tax deductions also require justification of expenditure and costs incurred. Under Articles 42.1.G of the Legal Persons Tax and 32 and 128.1 of the Personal Income Tax Codes, costs that are not properly justified and expenditure of a confidential nature are not included for the purposes of determining taxable income. Under the current tax legislation, such confidential or unjustified expenditure is subject to a distinct rate of tax, with the application of a higher rate of 50%. In the case of legal persons this rate may even be raised to 70% if the expenditure is incurred by bodies that are totally or partially exempt from paying taxes, or whose main activity is not commercial, industrial or agricultural (Articles 81.1 and 2 of the Legal Persons Tax and 73.11 of the Personal Income Tax Codes).

#### Tax authorities

67. The tax authorities can do much to ensure that legal persons do not serve as means of concealing corruption. Article 242.1.b of the Code of Criminal Procedure requires the tax authorities to inform the prosecution authorities of any offences, including that of corruption, that come to their attention in the course of tax inspections. Apart from this general reporting obligation, Section 31 of Act 11/2004 on money laundering requires them to report suspicions of unlawful activities to the State Prosecutor. The tax authorities offer no specific guidelines or training aimed at detecting corruption. As noted earlier under theme II, in the case of offences under Act 5/2002 of 1/1/2002 (passive corruption and money laundering), tax officials' obligation of confidentiality ceases to apply during the police and judicial inquiry stages and when cases are



before the courts. The tax authorities also co-operate with the police in operational matters, via a standing liaison group in the police financial intelligence unit.

#### Role of accountants and auditors

68. The role of accountants and auditors is laid down in law and their respective statutes. Under Article 522 of the Companies Code, firms with a turnover of more than € 150 000 must use the services of an accountant. An auditor is obligatory in the case of companies with a balance sheet exceeding € 1.5 million, or at least 50 employees or a € 3 million turnover. Auditors check to ensure that the accounts provide a true and correct statement of the situation. Auditors intervene in the control of the accounts of some public establishments<sup>33</sup> and at the time of the visit the government was considering a draft legislative decree that would also make local authority accounts subject to audit. This proposal, which would modify the statute of the auditors, would also establish a non-renewable seven year term of office for the auditors of companies quoted on the stock exchange, to safeguard their independence *vis-à-vis* the managers and directors of the companies concerned.
69. Auditors and accountants must supply the State Prosecutor with any information that comes to their attention in the course of their duties that might indicate that a "serious public offence", including corruption and associated offences, has been committed (Articles 158 of Legislative Decree 487/99 and 58 of Legislative Decree 452/99, respectively). However, these two regulated professions may only report such facts to the State Prosecutor via their respective professional associations. According to the representatives of these associations whom the GET met, practically all of these reports are immediately forwarded to the prosecution authorities. The accountants' association apparently forwards about fifteen reports each week, or about 750 per year, while the auditors' association has forwarded about fifty a year over the last two years. The majority of these reports concerned tax or social security frauds or invoicing offences, but practically never corruption. In addition, the anti-money laundering Act, No 11/2004 of 27.3.2004, requires auditors, accountants and tax advisers to report any suspected cases of money laundering to the State Prosecutor. Under Section 34 of the Act, failure to comply with this reporting requirement may make the professionals concerned liable to a fine or additional administrative penalties. At the time of the GET visit, there had been no reports of corruption (as a predicate offence of money laundering) under this legislation. There are no guidelines or training for auditors or accountants on the identification and reporting of corruption.

#### **b. Analysis**

70. The GET considers that Portugal is well equipped to prevent legal persons from concealing corruption offences. However, improvements to the existing arrangements are still possible.
71. The procedure for constituting and registering legal persons is not totally satisfactory. Admittedly, all Portuguese companies, associations and foundations, including ones in Madeira and the Azores, are registered with the National Register of Legal Persons and in one of the associated 308 local commercial registers, but the latter are only partially computerised and information on specific legal persons and individuals is not readily accessible throughout the country. In practice, the police use a more easily accessible private computerised data base, which contains additional information on companies' real activities, on a pay-for basis. In addition, no checks are carried out on the criminal and commercial law records of partners, shareholders and managers

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<sup>33</sup> The Portuguese authorities have informed GRECO that for the purposes of the penal code, auditors are considered as public officials when they check the accounts of public establishments.

of enterprises registered with the national register<sup>34</sup>. Nor are any such checks carried out subsequently during the lifetime of these legal persons. The Portuguese authorities have stated that draft legislation is being prepared to permit the collection and centralised computerised storage in the national register of all relevant information on businesses. This would offer a better nation-wide overview of the situation regarding these undertakings and their managers. More proactive checks could also be carried out on the so-called "irregular" companies registered in the National Register of Legal Persons and for the purpose of combating letter-box companies that might act as screens to conceal corruption offences. The GET has been informed that a new law, presently under preparation, will reinforce the monitoring of companies, including the so-called "irregular" companies.

72. The courts have the power to impose an additional penalty of disqualification from managing a business on persons convicted of certain offences. The offences include private corruption, international active corruption and certain violations of the anti-money laundering legislation. Under Article 100 of the Penal Code, it is also possible to disqualify the convicted person from engaging in his activity if he has committed an offence involving serious abuse of the profession, business or industry engaged in or a gross breach of the duties which it carries. It was not clearly established during the visit of the GET that persons, including public officials, convicted of corruption are banned from founding companies and/or being registered on the commercial register. The Portuguese authorities suggest that the measures already in place can lead to this result, but they accept that these measures could be made better known. In the light of the foregoing, **the GET recommends that a) the existing system of professional disqualifications be made better known; b) closer supervision be exercised over private law legal persons – including "irregular" companies – and their managers during and after their registration, particularly concerning their prior judicial records, and c) that priority be given to enacting and implementing the draft legislation to reform the commercial register.**
73. The GET believes that there are certain weaknesses in the system of legal persons' liability for criminal offences committed by their representatives: i. legal persons' civil liability results in the payment of damages but not, in principle, other measures or sanctions; ii. they may be found criminally liable for certain types of offences, particularly private and active international corruption, but active corruption, trading in influence and some forms of money laundering are not included; iii. there is no specific legislation to cover cases where corruption could have resulted from lack of management supervision or institutional changes concerning a legal person to prevent the imposition of sanctions; iv. sanctions that are theoretically applicable, including accessory penalties, to give effect to existing forms of criminal liability, are not harmonised and do not appear to be effective (see paragraphs 61 and 62); v. the absence of any convictions since 1984 makes it impossible to determine how the courts apply the relevant legislation; and vi. there is still no criminal records system for convicted legal persons. The GET was informed during the visit that the Portuguese authorities were fully committed to introducing legislation to achieve full compliance with the requirements of the Criminal Law Convention on Corruption in this area<sup>35</sup>. It considers that such legislation should be accompanied by appropriate training on the subject for all those involved in this area. **The GET therefore recommends that an appropriate system of liability be introduced for legal persons involved in the offences of active corruption,**

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<sup>34</sup> According to the Portuguese authorities, such information is not requested in these situations as it concerns sensitive data whose collection and processing is governed by legislation. It would therefore be necessary to give a legal basis to such processing, in accordance with data protection principles. The civil status register does include information on disqualifications from managing commercial enterprises, as a result of bankruptcy or liquidation, but it is not yet computerised and the information is therefore difficult to access.

<sup>35</sup> The Portuguese authorities have informed GRECO that this reform was adopted in the Council of Ministers on 27 April 2006 and is currently before Parliament, awaiting approval.

trading in influence and money laundering; that effective, proportionate and dissuasive sanctions be introduced, in accordance with the Criminal Law Convention on Corruption; that appropriate training be organised to ensure the effective enforcement of this liability and the application of sanctions; and that consideration be given to establishing a criminal records system for legal persons on whom penalties have been imposed for criminal offences.

74. The existing arrangements governing accounting obligations, non-tax deductibility of bribes and co-operation between enforcement agencies and tax authorities generally appear to be satisfactory. However, there do not seem to be many reports of suspected corruption from the tax authorities. Tax officials have received no directives or training concerning the identification and reporting of suspected corruption. The GET thinks that the Portuguese authorities might wish to draw on the example of the OECD Bribery Awareness Handbook for Tax Examiners. **It therefore recommends the introduction of training for tax officials on the detection of corruption offences.**
75. Despite accountants' and auditors' obligation to notify the State Prosecutor of criminal offences that come to their attention in the course of their duties and the fact that there are numerous reports of certain offences, there have been few if any reports of corruption offences. The judicial authorities have even identified a number of cases of failure to fulfil this obligation<sup>36</sup>. The GET takes the view that accountants and auditors could make a greater contribution to combating corruption, particularly since under proposals they have submitted to the government auditors might also be called on in the future to audit the accounts of local and regional authorities. The auditors' association hopes to introduce training for its members in 2006 aimed at making them more aware of corruption and more prepared to report cases of it. *The GET observes that the authorities should explore, in consultation with the accountants' and auditors' professional organisations, steps to take to improve the reporting of suspected corruption, for example through directives and training on the detection and reporting of corruption.*

## V. CONCLUSIONS

76. Steps have been taken in Portugal to combat financial crime and corruption and to deprive offenders of the proceeds from such offences by means of detailed legislation, extended powers of confiscation and seizure and the establishment of specialist departments, particularly within the Judicial Police. However, the generally satisfactory legislation appears in a variety of specific and scattered sources, relating particularly to banking secrecy, the use of special investigation measures, the management of seized and confiscated assets and legal persons' liability. These need to be harmonised to provide greater overall cohesion and clarity, in order to facilitate the work of all those – judges, prosecutors and investigators – concerned. The latter also lack the necessary material, financial and human resources, and sometimes training, to carry out more effective financial and asset investigations. The activities of the Criminal Justice Reform Unit in the Justice Ministry and parliamentary progress towards a proper legal framework for national penal policy may help to give a firmer underpinning to policy on corruption and recovering the proceeds of crime.

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<sup>36</sup> According to the auditors' professional association the courts have referred two cases of failure to report corruption to the association to enable it to take the appropriate disciplinary measures. It was unable to take action on these cases because the one year time limit for such action had expired. However, the association's new draft Statutes include changes to the time limit for disciplinary measures.

77. Portugal adopted a public service ethics charter for civil servants as early as 1997. In 2005 the central directorate for corruption and economic and financial crime inquiries (DCICCEF) published a guide containing police recommendations to all public officials. In addition, the country has a developed inspection system. Still, the fight against corruption within the public service calls for a more structured preventive strategy based on more regular analyses and an integrated approach to corruption risks and ethical issues. These issues are particularly relevant in the light of current developments in the public service environment and increased pressure for efficiency and effectiveness. Improvements must be made to existing regulations, particularly on conflicts of interest, inappropriate migration of public sector employees to the private sector, protection for whistleblowers and greater transparency.
78. Finally, to ensure that legal persons are not used to perpetrate or conceal corruption, appropriate measures must be introduced to monitor such bodies and clarify their liability, and to make the provisions on professional disqualifications better known. There is a need for action by the authorities and active collaboration with professionals in the private sector, such as accountants and auditors as well as private enterprise, to encourage ethical practices in the business world to a greater extent.
79. In view of the above, GRECO recommends to Portugal that:
- i. **more systematic use be made of asset investigations and that all available resources – legal, technical and human – be used to the full and if necessary strengthened to make financial investigations more effective** (paragraph 20);
  - ii. **existing provisions on the identification, seizure and confiscation of the proceeds of corruption and trading in influence be reviewed and, if necessary, guidelines be drawn up and additional training organised to facilitate their application** (paragraph 22);
  - iii. **the anti-money laundering arrangements make a greater contribution to combating corruption, particularly by ensuring that bodies involved in combating money laundering, and institutions and professions required to declare suspicious transactions, receive directives and training to assist the identification and reporting of acts of corruption** (paragraph 25);
  - iv. **more regular analyses be carried out on the risks of corruption and that a more integrated approach be adopted to its ethical aspects, with a view to extending preventive measures to the entire public sector, including local government, and to monitoring their application** (paragraph 43);
  - v. **appropriate rules be introduced, applicable to all public officials, on conflicts of interest and improper migration to the private sector and that mechanisms be established to ensure that they are properly applied and monitored** (paragraph 49);
  - vi. **existing codes of conduct be expanded to include explicit references to ethical issues and risks of corruption (such as the issue of gifts) for all public officials and prescribe appropriate sanctions for non-compliance with these codes. Training programmes on these topics should be modified to include practical examples of potential conflicts of interest and provided to all public officials (civil servants and others)** (paragraph 53);

- vii. **appropriate protection be offered to whistleblowers and that methods of dealing with allegations of corruption within the public service be re-examined, to ensure that appropriate procedures are followed as rapidly as possible (paragraph 54);**
  - viii. **a) the existing system of professional disqualifications be made better known; b) closer supervision be exercised over private law legal persons – including “irregular” companies – and their managers during and after their registration, particularly concerning their prior judicial records, and c) that priority be given to enacting and implementing the draft legislation to reform the commercial register (paragraph 72);**
  - ix. **an appropriate system of liability be introduced for legal persons involved in the offences of active corruption, trading in influence and money laundering; that effective, proportionate and dissuasive sanctions be introduced, in accordance with the Criminal Law Convention on Corruption; that appropriate training be organised to ensure the effective enforcement of this liability and the application of sanctions; and that consideration be given to establishing a criminal records system for legal persons on whom penalties have been imposed for criminal offences (paragraph 73);**
  - x. **training for tax officials on the detection of corruption offences be introduced (paragraph 74).**
80. GRECO also invites the Portuguese authorities to take account of the *observations* in the analytical parts of this report (paragraphs 24, 44, 46, 48, 55 and 75).
81. Finally, pursuant to 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 November 2007.