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FIFTH ROUND OF MUTUAL EVALUATIONS  
"FINANCIAL CRIME AND FINANCIAL INVESTIGATIONS"**

**REPORT ON PORTUGAL**

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THE EUROPEAN UNION**

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**EVALUATION REPORT ON THE**  
**FIFTH ROUND OF MUTUAL EVALUATIONS**  
**"FINANCIAL CRIME AND FINANCIAL INVESTIGATIONS"**

**REPORT ON PORTUGAL**

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## 1 INTRODUCTION

At the meeting of the Multidisciplinary Group on Organised Crime (MDG)<sup>1</sup> on 26 February 2008, the Presidency proposed three possible topics for the fifth round of mutual evaluations<sup>2</sup>, two of which received substantial support. At the MDG meeting on 6 May 2008, the majority of delegations were in favour of selecting financial crime and financial investigations. On 17 June 2008, the Group decided that the subject of the fifth round was to be "financial crime and financial investigations". The scope of the evaluation covers numerous legal acts relevant to countering financial crime. However, it was also agreed that the evaluation should go beyond simply examining the transposition of relevant EU legislation and take a wider look at the subject matter<sup>3</sup>, seeking to establish an overall picture of a given national system. On 1 December 2008 a detailed questionnaire was adopted by the MDG<sup>4</sup>.

The importance of the evaluation was emphasised by the Czech Presidency when the judicial reaction to the financial crisis was being discussed<sup>5</sup>. The significance of the exercise was once again underlined by the Council when establishing the EU's priorities for the fight against organised crime based on OCTA 2009 and ROCTA<sup>6</sup>.

Topics relating to the evaluation, in particular the improvement of the operational framework for confiscating and seizing the proceeds of crime, were mentioned by the Commission in its Communication on an area of freedom, security and justice serving the citizen<sup>7</sup>.

Experts with substantial practical knowledge in the field of financial crime and financial investigation were nominated by Member States pursuant to a written request to delegations made by the Chairman of the MDG.

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<sup>1</sup> Since 1 July 2010 the responsibilities for this process have been transferred to the Working Party on General Affairs and Evaluations (GENVAL).

<sup>2</sup> 6546/08 CRIMORG 34.

<sup>3</sup> 10540/08 CRIMORG 89.

<sup>4</sup> 16710/08 CRIMORG 210.

<sup>5</sup> 9767/09 JAI 293 ECOFIN 360.

<sup>6</sup> 8301/2/09 REV 3 CRIMORG 54.

<sup>7</sup> 11060/09 JAI 404.

At its meeting on 17 March 2009 the MDG discussed and approved the revised sequence for the mutual evaluation visits<sup>8</sup>. Portugal was the fifteenth Member State to be evaluated during this round of evaluations.

The experts charged with undertaking this evaluation were Mr Per Justesen (Deputy State Prosecutor for Serious Economic Crime, Copenhagen/Denmark), Mr Eugenijus Usinskas (Head of the Criminal Police Board, Police Department, Riga/Lithuania) and Mr Per G. Hansson (Deputy Chief Public Prosecutor, Swedish National Economic Crimes Authority (*Ekobrottsmyndigheten*, Stockholm/Sweden). Four observers were also present: Mr Christian Tournié (DG Home Affairs, European Commission), Ms Nora Szavov (*OLAF*, European Commission), Mr Filippo Spiezia (Deputy National Member for Italy, Eurojust) and Mr Igor Angelini (First officer, Criminal Finances and Technology Unit, Europol) together with Mr Guy Stessens and Mr Peter Nath from the General Secretariat of the Council.

This report was prepared by the expert team with the assistance of the Council Secretariat, based on findings arising from the evaluation visit that took place between 6 and 10 December 2010, and on Portugal's detailed replies to the evaluation questionnaire<sup>9</sup>.

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<sup>8</sup> 5046/1/09 REV 1 CRIMORG 1.

<sup>9</sup> SN 4016/10 RESTREINT UE.

## 2 NATIONAL SYSTEM AND CRIMINAL POLICY

### 2.1 Specialised units

#### 2.1.1 Investigative authorities

##### 2.1.1.1 Criminal Police (*Polícia Judiciária - PJ*)

Under the Law on the Organisation of Criminal Investigation<sup>10</sup>, the Criminal Police (*Polícia Judiciária - PJ*) has sole responsibility for investigating offences in the field of economic and financial crime, i.e. money laundering, trading in influence, corruption, embezzlement, graft, economic and financial crime, the counterfeiting of currency, securities, revenue stamps, postage stamps and other equivalent assets and the circulation thereof, conspiracy, malfeasance and abuse of power on the part of holders of political office, fraudulent procurement or conversion of grants or subsidies and fraud in obtaining preferential loans, fraud punishable by a sentence of more than 5 years' imprisonment, fraudulent insolvency and maladministration, falsification or counterfeiting of driving licences, vehicle documentation including proof of ownership and registration certificates, educational qualifications and identification or travel documents, computer crime and offences resorting to computer technology.

The Criminal Police is also responsible, without prejudice to the competences of the Tax Unit of the National Republican Guard, the Aliens and Borders Authority and the Securities Market Commission (*Comissão do Mercado de Valores Mobiliários - CMVM*), for investigating tax offences involving sums exceeding EUR 500 000 and securities-related offences.

Pursuant to Article 22 of Law № 37/2008 of 6 August 2008, laying down the organisation of the Criminal Police, the core structure of the Criminal Police comprises:

- (a) the National Directorate;
- (b) the national units;
- (c) the territorial units (North, Centre, South, Lisbon and Tagus Valley);

<sup>10</sup> Article 7(2) of Law № 49/2008 of 27 August 2008.

- (d)
- (e) the regional units (Aveiro, Braga, Funchal, Guarda , Leiria, Ponta Delgada, Portimão, Setúbal);
- (f) the local units;

And furthermore:

- (g) the investigation support units;
- (h) the support units;

Decree-Law № 42/2009<sup>11</sup> lays down the competences of the units of the Criminal Police and its organisational structures. The headquarters and geographical areas of intervention of the Criminal Police units are specified in an order adopted by the Minister for Justice. The Law specifies that the core organisational units of the Criminal Police which contain criminal investigation departments are to be organised into sections and brigades which are not counted among the flexible organisational units.

Pursuant to paragraph 4, the sections are coordinated by criminal investigation coordinators, as laid down by a specific Decree-Law.

The brigades are headed by Chief Inspectors, as provided for in a specific Decree-Law.

The **mission** of the Units derives from the mission and tasks of the Criminal Police and is laid down in Articles 2 and 3 of Law № 37/2008 of 6 August 2008:

"Article 2 – Mission and tasks

1 – The mission of the Criminal Police shall be to assist the judicial authorities with investigations and to develop and promote action for the purpose of prevention, detection and investigation, within its sphere of competence or as directed by the competent judicial authorities.

2 – The Criminal Police shall carry out the tasks defined in this Law in compliance with the Law on the Organisation of Criminal Investigation and the Framework Law on Criminal Policy."

<sup>11</sup> Decree-Law № 42/2009 of 12 February 2009, Article 2.



"Article 3 – Assistance to the judicial authorities

1 – The Criminal Police shall assist the judicial authorities in proceedings relating to crimes which it is tasked with detecting or investigating or when it appears necessary to carry out pre-trial activities requiring specialised knowledge or technical means.

2 – For the purposes of the above paragraph, the Criminal Police shall act in proceedings under the direction of the judicial authorities and functionally dependent on them, without prejudice to its specific hierarchical organisation and independence as regards techniques and tactics."

Furthermore Articles 27, 28 and 31 of that Law specify that the units responsible for matters related to organised financial crime and financial investigations are to be organised as follows:

- (i) the Financial Intelligence Unit (*UIF*), which is a department within the National Directorate (subparagraph (c) of Article 27);
- (j) the National Anti-Corruption Unit (*UNCC*), which is a National Unit (subparagraph (b) of Article 28);
- (k) the Financial and Accounting Expertise Unit (*UPFC*), which is one of the Support Units of the Criminal Police (subparagraph (c) of Article 31).

#### 2.1.1.1.1 *Financial Intelligence Unit (FIU)*

The Financial Intelligence Unit (FIU) was set up in 2003 and is a police-type FIU; before 2003 it was within the structure of the *PJ*'s anti-drug department and identified as *BIB* – Brigade for the Investigation of Money Laundering (*Brigada de Investigação do Branqueamento*). At the time of the on-site visit the FIU had about 30 staff.

While the predicate offences for money laundering are laid down in Article 368-A of the Portuguese Criminal Code, Article 5 of Decree-Law № 42/2009 lays down the tasks and competences of the Portuguese Financial Intelligence Unit (FIU), namely:

collecting, centralising, processing and disseminating, at national level, information on the prevention and investigation of the offences of laundering, terrorism financing and tax offences, while ensuring, nationally, cooperation and liaison with the judicial authorities, the supervisory and oversight authorities and with financial and non-financial institutions, as specified in Law №

25/2008 of 5 June 2008 (the AML/CFT Law) , and, internationally, cooperation with financial intelligence units or equivalent bodies.

The responsibilities of the FIU are without prejudice to the responsibilities in this area of the tax administration bodies.

According to the Law, employees of the Directorate-General for Customs and Excise, the Directorate-General for Taxation and other supervisory authorities or government departments and bodies may be incorporated into the Financial Intelligence Unit, under arrangements to be defined by the relevant ministries.

In the context of preventing money laundering the *DCIAP* - Central Department for Criminal Investigation and Prosecution - also receives STRs in parallel with the FIU, with the purpose to grant that all STRs are processed and analysed.<sup>12</sup>

The latest available statistics for 2006 to 2009, presented during the visit, showed that while on average approximately 1 000 STRs originated from financial institutions, the FIU received between 15 000 to 20 000 reports from non-financial entities (mostly casinos). For 2009 more than 50% of the predicate offences were related to tax fraud. After STRs have received an initial check against police, administrative and commercial databases, approximately 25% of reports from financial institutions lead to the opening of a criminal investigation.

#### 2.1.1.1.2 National Anti-Corruption Unit (UNCC)

The National Anti-Corruption Unit (*Unidade Nacional de Combate à Corrupção - UNCC*) is a structure of the Criminal Police and is responsible for the prevention, detection and investigation of economic and financial crime and for assisting the judicial authorities with regard to offences of corruption, embezzlement, trading in influence and graft<sup>13</sup>.

The *UNCC* is also responsible for preventing and investigating offences of malfeasance and abuse of power on the part of holders of political office, fraudulent procurement or conversion of grants or

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<sup>12</sup> The Portuguese authorities saw it fit to emphasise after the on-site visit that *DCIAP* was not analysing STRs, but that this was solely done by the FIU. When receiving a STR the *DCIAP* if it is the case, only orders the suspension of the reported suspicious transaction -directly or by request of the FIU - and notifying the reporting entity to that effect.

<sup>13</sup> Pursuant to Article 8 of Decree-Law № 42/2009 of 12 February 2009.

subsidies and fraud in obtaining preferential loans, economic and financial crime, counterfeiting of currency, securities, revenue stamps, postage stamps and other equivalent assets and the circulation thereof, securities-related offences, fraudulent insolvency and maladministration, money laundering, tax offences involving sums exceeding EUR 500 000 and related offences.

*UNCC* has competences for economic and financial crime committed in an organised manner or resorting to computer technology and of international or transnational scale.

Furthermore it is competent to fight the following occurrences of economic/financial crime:

- frauds against (a) the financial interests of the EU, (b) the Portuguese State, (c) local and regional administration bodies, (d) public institutes, (e) companies that provide public services, (f) financial and credit institutions, (g) insurance companies;
- money laundering related to the above offences;
- crimes related to or in connection with the above offences.

Pursuant to Article 10 of Decree-Law № 42/2009 of 12 February 2009, the *UNCC* has local offices in the territorial units located away from their respective headquarters, and in the regional units, integrated organisationally into those units. For operational reasons, responsibilities are exercised by the local offices in the geographical area of intervention of the territorial and regional units and are coordinated by the directors of those units, in liaison with the director of the respective national unit, in accordance with the rules laid down by the national director.

The *UNCC* contains the following central sections:

- three central sections - mirroring the structure of the Public Prosecution Service - for the investigation of corruption and economic and financial crime:
- the first *SCICCEF* is competent for conducting inquiries and preventive investigations and for the execution of letters of request that are under the direction of the Central Department for Criminal Investigation and Prosecution (*DCIAP*);

- the second *SCICCEF* is competent for conducting inquiries and preventive investigations and for the execution of letters of request that are under the direction of the Department for Criminal Investigation and Prosecution (*DIAP*)
- the third *SCICCEF* is competent for conducting inquiries and preventive investigations and for the execution of letters of request that are not under the direction of either the *DCIAP* or *DIAP*, but fall within the purview of the municipalities included in the scope of intervention of the Lisbon and Tagus Valley Directorate.
- one central section for the investigation of money-laundering and tax offences (e.g., VAT fraud and smuggling) - *SCIBIT*.
- one central section for the investigation of forged currency - *SCIMF*

The *UNCC* has access to FIU information on a hit-no-hit basis.

#### 2.1.1.1.3 Financial and Accounting Expertise Unit (*UPFC*)

The Financial and Accounting Expertise Unit (*Unidade de Perícia Financeira e Contabilística - UPFC*) is a highly specialised unit within the Criminal Police structure, with 29 staff serving in Lisbon, Porto, Coimbra and Faro. The members of the unit are experts in financial and accounting matters without police officer status. The services of the unit can be called upon to provide this expertise during an investigation and in court hearings. The nucleus of the unit was set up in the 1970s.

Pursuant to Decree-Law № 42/2009<sup>14</sup> the *UPFC* is responsible for:

- (a) drawing up expert opinions on financial, accounting and banking matters, on the instructions of the judicial and criminal police authorities;
- (b) providing technical advice to the criminal investigation departments and assisting with the collection and analysis of documents and other evidence;
- (c) assisting the judicial authorities, in the pre-trial and trial phases, within its sphere of competence.

<sup>14</sup> Article 20, Decree-Law № 42/2009 of 12 February 2009.

The *UPFC* is independent in technical and scientific terms and may, under the technical direction of the Director of the Unit, maintain flexible units in the territorial units.<sup>15</sup>

The unit has some unique features in supporting financial and economic crime investigations. Not only are the *UPFC*'s analysis products directly admissible in court but the entry into force of Law № 5/2002 has introduced a catalogue of economic and financial crimes where documents can be requested from persons or entities under investigation by a Public Prosecutor without prior authorisation from a judge and used for analysis by the *UPFC*.

The experts noted with interest that the present staff was considered sufficient to cope with the present workload of approximately 200 expert opinions per year.

#### 2.1.1.2 Asset Recovery Office (ARO) and other similar bodies, and implementation of Council Decision 2007/845/JHA

At the time of the visit Portugal had not yet implemented Council Decision 2007/845/JHA<sup>16</sup>. However, activities were under way to remedy this deficiency<sup>17</sup>. By order № 11389/2010 of the Ministry of Justice, a working group has already been set up to prepare draft legislation on the creation of an Asset Recovery Office.

The Portuguese authorities explained during the visit that the findings of the working group were to be presented to the Ministry in the week following the on-site visit. The timeline for further implementation was said to depend on whether the legal basis chosen was a Decree Law or a Law entailing Parliamentary approval.

The experts were informed that the ARO would be manned by representatives from the Criminal Police, Customs, Institute for Registry and Notaries and the Directorate General for Taxes in order to ensure the swift exchange of information.

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<sup>15</sup> Article 2(2), Decree Law № 42/2009 of 12 February 2009.

<sup>16</sup> Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, OJ L 332, 18.12.2007, p. 103.

<sup>17</sup> The evaluation team was informed after the visit that Law № 45/2011 creating the national Assets Recovery Office had been approved by the Assembly of the Republic on 6 April 2011 and published in the Official Gazette on 24 June 2011.

With regard to the management of assets, an Institute of Financial Management and Finances will be established under the Ministry of Finance. The whole array of asset management tasks will be governed by this institute, including real estate until the court has taken a final decision.

## 2.1.2 Judicial authorities

### 2.1.2.1 Prosecution services

#### 2.1.2.1.1 Central Department for Criminal Investigation and Prosecution (*DCIAP*)

The Central Department for Criminal Investigation and Prosecution (*DCIAP*) is an interdisciplinary body, incorporating public prosecutors, staff from Criminal Police bodies and judicial officials. It is subordinate to the General Prosecutor's Office (*Procurador-Geral da República*) and is responsible for coordinating and directing the investigation and prevention of violent, highly organised and especially complex crime.

Although this body does not focus exclusively on financial crime, one of the main activities of the *DCIAP* is preventing this type of crime, directing investigation of it and coordinating the direction of investigations usually conducted by the Criminal Police.

### Mission and powers

The mission of the Central Department for Criminal Investigation and Prosecution (*DCIAP*) is to combat violent, highly organised or especially complex crime, in three respects:

- crime prevention,
- directing the investigation of crime extending beyond the boundaries of individual districts (territorial extension),
- coordinating the direction of investigations at national level (devolution of hierarchical coordinating powers).

The *DCIAP* has the power to coordinate and direct investigations into and to prevent crime at national level (throughout all the country).

The function of coordinating the direction of investigations at national level into the offences provided for in Article 47(1) of the Statute of the Public Prosecution Service, which is not in charge of directing the investigation, is an innovation in the Portuguese system to the extent that it involves a devolution of hierarchical powers previously centralised in the General Prosecutor's Office (Circular № 11/99).

It is the task of the Central Department for Investigation and Prosecution to coordinate the direction of investigations into the following crimes:

- crimes against peace and humanity;
- terrorist organisations and terrorism;
- crimes against State security, with the exception of electoral offences;
- trafficking in drugs, psychotropic substances and precursors, apart from direct distribution to the consumer, and criminal association with trafficking;
- money laundering;
- corruption, embezzlement and graft;
- fraudulent insolvency;
- maladministration of an economic unit in the public sector;
- fraudulent procurement or conversion of a grant, subsidy or loan;
- economic and financial offences committed in an organised way, notably by using information technology;
- economic and financial offences with an international or transnational dimension.

Performance of the **coordination duties of the Central Department for Criminal Investigation and Prosecution (DCIAP)** includes:

- examining and implementing links with other departments and services, in particular the Criminal Police, with a view to greater simplification, rationality and effectiveness of procedures;
- in cooperation with the Departments for Investigation and Prosecution (DIAPs) of the judicial districts, producing studies on the nature, volume and trends of crime and the results achieved in preventing, detecting and controlling crime.

In the context of the direction of investigations, it is the Central Department for Criminal Investigation and Prosecution's task to direct the investigation and carry out the prosecution:

- with regard to the crimes or offences indicated above, when the criminal activities occur in areas coming under different judicial districts;
- subject to an order from the General Prosecutor, when, in the case of manifestly serious crimes, the particular complexity or territorial extension of the criminal activities warrants centralised management of the investigation.

### **Crime prevention powers of the *DCIAP***

It is the task of the Central Department for Criminal Investigation and Prosecution to take action to prevent the following offences:

- money laundering;
- corruption, embezzlement and graft;
- maladministration of an economic unit in the public sector;
- fraudulent procurement or conversion of a grant, subsidy or loan;
- economic and financial offences committed in an organised way, using information technology;
- economic and financial offences with an international or transnational dimension.

### **Further tasks of the *DCIAP***

The *DCIAP* also has the following tasks:

- in the context of preventing money laundering and the financing of terrorism (pursuant to Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 and Commission Directive 2006/70/EC of 1 August 2006), receiving reports of transactions that may constitute money laundering or financing of terrorism which entities subject to reporting obligations are required to send to it (and to the Financial Intelligence Unit at the same time) and, if such is the case, ordering suspension of the reported suspicious transaction, directly or by request of the FIU, notifying the reporting entity to that effect.

Subsequently, depending on the case, the *DCIAP* may order the investigation to be continued under other procedural forms, whether by carrying out a preventive verification or by ordering the opening of an inquiry;



- the initiative of carrying out covert operations in the context of crime prevention, a decision concerning which is the responsibility of the Central Court of Criminal Investigation, particularly for the following offences: criminal association, money laundering , , corruption, embezzlement, graft and trading in influence, fraudulent procurement or conversion of a grant or subsidy, economic and financial offences committed in an organised way or using information technology, economic and financial offences with an international or transnational dimension, counterfeiting or circulation of currency, securities, revenue stamps, postage stamps and similar securities or offences relating to the securities market (Law № 101/2001);
- the initiative of carrying out covert operations conducted in Portugal by criminal investigation officers from other States, at their request, concerning any of the offences listed in Article 2 of Law № 101/2001 of 25 August 2001 and Article 19 of the Cybercrime Law (Law № 109/2009 of 15 September 2009).

#### **Staff composition of the *DCIAP***

The Central Department for Criminal Investigation and Prosecution (*DCIAP*) consists of a Deputy General Prosecutor (*Procurador-Geral Adjunto*) , who heads it, and a fixed complement of public prosecutors approved by an order of the Minister for Justice, after hearing the Higher Council of the Public Prosecution Service, in accordance with Order № 328/2006 of 6 April 2006

The staff provided for in Article 46 of the Statute of the Public Prosecution Service, published in annex to Law № 60/98 of 27 August 1998, consists of one Deputy General Prosecutor and 12 public prosecutors.

The Central Department for Criminal Investigation and Prosecution (*DCIAP*) is supported by 14 judicial officials and assisted by staff from the Criminal Police bodies appointed pursuant to Article 25 of Decree-Law № 333/99 of 20 August 1999.

Appointments to public prosecutor positions in the Central Department for Criminal Investigation and Prosecution (*DCIAP*) are made on the basis of three names, proposed by the Deputy General Prosecutor as director and coordinator, from among public prosecutors ranked by merit, with the following as key factors:

- experience in the criminal field and especially in the study or direction of investigations into violent or highly organised crime;
- specific training or experience in applied research in the field of forensic science.

The positions referred to in the preceding paragraph are filled by secondment for a period of three years, which can be extended on the basis of a favourable opinion by the Director of the DCIAP.

#### 2.1.2.1.2 *District Departments for Criminal Investigation and Prosecution (DIAPs)*

The Departments for Criminal Investigation and Prosecution in the judicial district offices are headed by Deputy General Prosecutor or by public prosecutors, and staffed by public prosecutors and assistant prosecutors. The specialised sections are headed by public prosecutors (Article 72 of the Statute of the Public Prosecution Service).

Specialised sections in the District Departments for Criminal Investigation and Prosecution: the Departments for Criminal Investigation and Prosecution within the judicial district offices have sections specialising in the investigation of economic and financial crime in the judicial district concerned (Article 68(1)(b) of the Statute of the Public Prosecution Service).

#### **Mission and powers of the District Departments for Criminal Investigation and Prosecution**

The sections in the District Departments for Criminal Investigation and Prosecution which have expertise in economic and financial crime investigate this type of crime within the district concerned.

They have powers of investigation and prosecution with regard to this type of crime at judicial district level (Article 73(1)(b) of the Statute of the Public Prosecution Service).

Sections of the Lisbon *DIAP* are specialised exclusively in investigating and prosecuting offences carried out by officials, market and securities-related offences, economic and financial and tax offences.

**Staff in the district offices**

The District Departments for Criminal Investigation and Prosecution include public prosecutors ranked by merit and assistant prosecutors with at least 7 years' service, ranked by merit and with experience in the criminal field, especially as regards the study or direction of investigations into violent or highly organised crime, or specific training or research in the field of forensic science.<sup>18</sup>

2.1.2.1.3 – *Technical Advice Unit (NAT)*

The investigation of this type of crime is assisted by the Technical Advice Unit (*NAT*), which is organisationally subordinate to the General Prosecutor's Office and staffed by specialists with academic training and professional experience in economics, finance, banking, accountancy or the securities market.

The Technical Advice Unit is responsible for providing technical advice and consultancy to the General Prosecutor's Office and to the Public Prosecution Service as a whole on questions relating to economics, finance, banking, accountancy or the securities market (Article 49 of the Statute of the Public Prosecution Service, approved by Law № 60/98 and Law № 1/97).<sup>19</sup>

2.1.2.2 Judges involved in the pre-trial phase

There are no courts specialising exclusively or mainly in economic and financial crime. However, the Central Court for Criminal Investigation has jurisdiction at national level for crime falling within the field of competence of the *DCIAP* (Article 164 of the LOTJ (Law on the Courts System - Law № 52/2008 of 28 August amending article 73 of Law № 60/98), which includes economic and financial offences under the terms set out above concerning the powers of the *DCIAP*.

<sup>18</sup> Articles 122 and 123 of the Statute of the Public Prosecution Service (Law № 60/98) as amended by Law № 52/2008 – Law on the Organisation and Functioning of Courts.

<sup>19</sup> The Central Department for Criminal Investigation and Prosecution (*Nº*) was established, pursuant to Law № 60/98 of 27 August 1998 approving the Statute of the Public Prosecution Service, on 15 September 1999, in accordance with Order № 264/99 of 12 April 1999 and Order № 386-B/99 of 25 May 1999.

However, in their answers to the questionnaire, the Portuguese authorities emphasised that the scope for judicial intervention in the pre-trial phase is limited to acts related to rights, freedoms and safeguards and the preparatory inquiry - which is optional and is intended to provide judicial corroboration of the Public Prosecutor's decision concerning indictment or closure of the case - since the Public Prosecutor is responsible for criminal prosecution under the Constitution.

### 2.1.3 Directorate-General for Customs and Excise (*DGAIEC*)

The organisational structure of the Directorate-General for Customs and Excise (*Direcção-Geral das Alfândegas e dos Impostos Especiais sobre o Consumo - DGAIEC*) does not include specialised units dealing with financial crime and/or financial investigations.

However, within the structure of the *DGAIEC*, the Antifraud Department (*Direcção de Serviços Antifraude - DSAF*) has been set up, responsible at national level, for the supervision, direction, coordination and execution of the activities with the aim to prevent and fight against customs and tax related fraud, and to conduct criminal investigations.

Within the *DSAF* there are two units: the Northern Operational Division and the Southern Operational Division, which are empowered to:

- investigate customs offences or other offences the investigation of which is delegated to the *DGAIEC*;
- participate in joint operations with other administrative and police bodies aimed at preventing and prosecuting customs and tax fraud;
- collect, process and circulate operational and tactical information necessary for carrying out operational activities.

The *DGAIEC* is also entrusted with investigating fraud against the budget of the EU.

#### 2.1.4 Financial Institutions Supervisory Authority - *Banco de Portugal*<sup>20</sup>

Since 1975 the Bank of Portugal (*Banco de Portugal*) has been responsible for the prudential and market conduct supervision of credit institutions, financial companies and payment institutions with a view to ensuring the stability, efficiency and soundness of the financial system, as well as compliance with rules of conduct and transparency requirements towards bank customers.

The powers and responsibilities of the *Banco de Portugal* as supervisory authority are stipulated in Article 17 of its Organic Law<sup>21</sup>, in the Legal Framework of Credit Institutions and Financial Companies and in the Legal Framework of Payment Institutions and Payment Services.

The range of institutions supervised by the *Banco de Portugal* is wide and diverse and covers credit institutions and financial companies. Payment institutions, as well as holding companies, are also subject to the supervision of the *Banco de Portugal*.

#### 2.1.5 Securities Market Commission (*CMVM*)<sup>22</sup>

The Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários - CMVM*) was established in April 1991<sup>23</sup> with the task of supervising and regulating securities and other financial instruments markets (traditionally known as “stock markets”), as well as the activity of all those who operate within such markets.

The *CMVM*, according to Article 1 of the Statute on the *CMVM*<sup>24</sup>, is an independent public institution, with administrative and financial autonomy, which derives its income from supervision fees charged for services and not the General State Budget.

<sup>20</sup> Cf. the information available on the official website of the Bank of Portugal at: <http://www.bportugal.pt>.

<sup>21</sup> Organic Law, approved by Law №. 5/98 of 31 January 1998, as amended by Decree-Law №. 118/2001 of 17 April 2001, Decree-Law №. 50/2004 of 10 March 2004 and Decree-Law №. 39/2007 of 20 February 2007.

<sup>22</sup> Cf. the information available on the website of the CMVM at: <http://www.cmvm.pt>

<sup>23</sup> Cf. Decree-Law №. 473/99 of 8 November 1999.

<sup>24</sup> Cf. the Statute of the Portuguese Securities Market Commission, approved by Decree-Law №. 473/99 of 8 November 1999, amended by Decree-Law №. 232/2000 of 25 September 2000 and Decree-Law №. 183/2003 of 19 August 2003 and amended and republished by Decree-Law №. 169/2008 of 26 August 2008.

The supervision carried out by the *CMVM* includes *inter alia* the detection of criminal offences. The entities that are subject to supervision by the *CMVM* are obliged to provide all the cooperation requested.

Within the limits of the law, the *CMVM* informs the public of infringements of the law and fines imposed.

The *CMVM* carries out the “on-site” supervision of financial intermediaries and markets, and of the management entities for centralised settlement systems. This supervision is carried out routinely by teams which monitor the activities of these entities, both at their premises as well as through the Internet or electronic means of direct and continuous control.

## **2.1.6 Training**

### **2.1.6.1 Investigative authorities**

Pursuant to Article 62(3) of Decree-Law № 275-A/2000, the career structure in criminal investigation comprises the categories of Senior Coordinator of Criminal Investigation, Coordinator of Criminal Investigation, Chief Inspector and Inspector.

The level of expertise required for entry into a career in criminal investigation is governed by Article 124 of that Law, which provides:

"2 – Positions as Inspector at step 1 shall be filled by trainee inspectors deemed suitable.

3 – Those appointed as trainee inspectors shall be less than 30 years of age, graduates in an appropriate area – at least 35 % of them graduates in Law –, who hold a driving licence for light vehicles and have passed a competition and completed a course of training dispensed at the Criminal Police School (*Escola de Polícia Judiciária*) ."

## 2.1.6.2 Judicial authorities

## 2.1.6.2.4 Prosecutors

The General Prosecutor Office has given special attention to the training of public prosecutors in the investigation of economic and financial crime and has encouraged the implementation of training schemes and the establishment of mechanisms for the pooling of experience between public prosecutors.

Furthermore it was interesting to note that some of the activities arranged for the prosecution services were also aimed at police authorities and other bodies which provide assistance.

**Centre for judicial studies**

There is also a component of in-service training for which the **Centre for Judicial Studies** - a study centre with the task of providing initial and in-service training for magistrates - is responsible. Different training activities have been carried out there in order to give judges and public prosecutors training in investigating and judging this type of crime.

The Centre for Judicial Studies also includes international judicial cooperation as a subject in the curriculum for the joint training of judges and public prosecutors.

The most recent training schemes specifically targeted at economic and financial crime have included:

- a Day against Corruption in Portugal, organised in Lisbon on 6 May 2008 by the *PGR/DCIAP* and *CIES/ISCTE* in partnership, with a public presentation and analysis of the overall results of the study concerning 2002-2003;
- a Conference on Punitive Law and the Financial System, held in Lisbon in January 2010 (*PGR/Banco de Portugal* and the Portuguese Securities Market Commission), organised by the General Prosecutor Office/Departments of the Public Prosecution Service with powers to investigate organised crime;

- training organised by the Centre for Judicial Studies on Markets, Financial Products and Supervision, carried out in coordination with the Portuguese Securities Market Commission (*CMVM*) with the aim of disseminating the rules governing the operation of the securities markets and the role of the *CMVM* in the sphere of supervision of the legality of financial products and market players' operations;
- training organised by the Centre for Judicial Studies in March 2010 on Corruption and Financial Crime - Recovery of assets, confiscation of criminal assets and the proceeds of crime, with the aim of analysing:
  - the framework of substantive law in the sphere of corruption and confiscation of assets as a result of criminal activities, and the specific procedural instruments for investigating offences in the sphere of corruption and, in particular, mechanisms for the seizure and confiscation of criminal assets;
  - the difficulties of carrying out investigations into this type of crime and the blockages found in practice in the investigation and at the stage of the taking of evidence at the trial, and the problems of the identification and seizure of specific assets obtained by an official as a result or consequence of a crime and, in particular, the systems laid down by Law № 5/2002 and Law № 25/2009, and the practical reality and effectiveness of the specific procedural arrangements and structures of the police, the Public Prosecution Service and the judiciary;
- a seminar organised by the Corruption Prevention Council and the National Audit Office: "Prevention of the risks of corruption", Lisbon, 22 March 2010;
- a Conference on Reported Corruption in Portugal - 2nd Day - organised by the PGR/*DCIAP* and CIES/ISCTE with a public presentation and analysis of the results of the study on reported crime, 2004-2008 (Corruption, graft and embezzlement) in April 2010;
- a seminar on organised crime: "Organised crime: characteristics and recent and future trends", in the Auditorium of the *Campus da Justiça* in Lisbon on 18 June 2010, organised jointly by the General Prosecutor's Office and the Criminal Police;



- a training course on Accountancy Law organised by the Centre for Judicial Studies in June 2010, with the aim of making participants aware of the importance of knowledge of technical accountancy rules and all the rules of law governing accountancy, and especially promoting understanding of the concept of accountancy and its functions, accounting methods for registering changes affecting assets, the concepts of debit and credit, cost and benefit, the importance of accountancy in commercial companies, the structure of the balance sheet and the profit and loss account;
- dissemination to public prosecutors, in accordance with the order issued by the General Prosecutor on 19 October 2004 (disseminated, for example, by Ofício-circular № 42 of 26 October 2004 from the District Prosecutor's Office in Lisbon), of notes produced by the General Prosecutor's Office and the *DCIAP* explaining the concept of economic and financial crime, so that the *DCIAP* is informed of all investigations into this type of crime.
- a workshop on corruption in international transactions organized by the Department of International Relations, Directorate General for Justice Policy, in 6 December 2010 for public and private entities, including representatives from the judiciary, criminal investigators and representatives of the private sector.

In this context, it is important to point out that a site devoted to economic and financial crime<sup>25</sup> (open to all public prosecutors and other accredited users) has been made available in the *SIMP* (the Public Prosecutor's Information System) with the aim of creating a common database of specialisation and support for action by public prosecutors in this framework of crime.

In the *SIMP*, concerning economic and financial crime, an attempt is made to identify the areas of greater risk or harm from criminal activity, with information being arranged according to these main areas (rather than types of crime).

The Public Prosecutor's procedural documents included in the relevant module will usually be accompanied by the subsequent judgments, so that they can learn "what works" or not in terms of legal theses, lines of argument or precedents that can be invoked (see, for example, document № 1485).

<sup>25</sup> [https://simp.pgr.pt/intranet/simp\\_tematicos/main.php?nid\\_simp\\_tematico=3](https://simp.pgr.pt/intranet/simp_tematicos/main.php?nid_simp_tematico=3)

### 2.1.6.3 Directorate-General for Customs and Excise (DGAIEC)

No specifically financial training is given to the units of the Directorate-General for Customs and Excise (*DGAIEC*). However, for subjects relating to customs, tax and anti-fraud systems, the most recent annual training plans have included various relevant modules in this area (for example customs procedures, customs debt, excise systems, mutual administrative assistance, criminal investigations and computer audits), taking account of the specific tasks of the *DGAIEC*. The above programmes have also included courses providing further training in English.

## 2.2 Criminal policy

The evaluators were not made aware of any strategic document describing any specific long-term policy towards financial crimes and financial investigations.

However, the experts were informed at the end of their visit that broader aspects were as well reflected in political initiatives, one of them being a parliamentary ad-hoc Commission created with the aim of study and propose legal instruments in order to address the problem of economic and financial crimes and corruption. This ad-hoc Commission work has lead to the approval of a set of legislation on crime prevention published in the Official Gazette on 2 and 3 September 2010.

The strategies for the crime prevention and prosecution priorities are established on a biannual basis by law, defining the objectives, priorities and guidelines for policy against crime where economic and financial crime are included. Law № 38/2009 is in force for the period 2009-2011 and a new legal instrument is under preparation for the period 2011-2013.

### 2.2.7 Proceeds-oriented policy

Seizure of the proceeds of crime in the narrowest sense (either directly generated by, or the instrument of, crime) is one of the main focuses of criminal investigations; it is based on conducting searches and making seizures as well as seizing funds in bank accounts in Portugal and abroad (especially offshore accounts).

To that end, the provisions of the Code of Criminal Procedure (CPC) constitute a legal basis for seizure of the proceeds of crime with, as a facilitating instrument, Law № 5/2002 of 6 February 2002, which allows the lifting of banking and tax secrecy by the General Prosecutor's Office, imposes short response times on the financial institutions and makes it legally possible to monitor bank accounts (Articles 2, 3 and 4 respectively).

In the context of organised and economic and financial crime, for the purpose of the confiscation of assets and without prejudice to the application of the general provisions of the Criminal Code (Articles 109 and 111), Law № 5/2002 stipulates that, in the event of a conviction for an offence mentioned in Article 1, the difference between the actual value of the estate of the accused and that consistent with his legitimate income is presumed to constitute the gain from criminal activity.

The attachment (and subsequent confiscation) of that portion of the assets which is not consistent with legitimate income, because it is presumed to constitute proceeds of crime, is also allowed pursuant to Article 7 et seq. of Law № 5/2002.

As regards the liquidation of assets (extended confiscation of assets), Law № 5/2002 applies to the following offences:

- (a) drug trafficking;
- (b) terrorism and terrorist organisation;
- (c) trafficking in weapons;
- (d) trading in influence;
- (e) active and passive corruption;
- (f) embezzlement;
- (g) graft;
- (h) money laundering;
- (i) conspiracy ;
- (j) organised smuggling;
- (k) trafficking in and tampering with stolen vehicles;
- (l) organised incitement to prostitution and incitement to prostitution and trafficking in children;
- (m) currency counterfeiting and counterfeiting of securities equivalent to currency.

The provisions of Law № 5/2002 apply to the offences laid down in points (j) to (n) only where the offence was perpetrated in an organised manner.

The special rules on lifting secrecy and relations with financial institutions laid down in Law № 5/2002 (with cross-reference to the other offences referred to in Article 1(1) of Law № 36/94 of 29 September 1994) also cover the offences of:

- maladministration of an economic unit in the public sector;
- fraudulent procurement or conversion of a subsidy, grant or loan;
- economic and financial offences committed in an organised manner using information technology;
- economic and financial offences with an international or transnational dimension.

Moreover, to prevent money laundering, the practice has been to block any funds once there is suspicion that they have been illicitly gained, and independently of confirmation of whether a trial is pending in relation to the preceding offence.

The Portuguese authorities reported that in various situations this has led to funds being blocked before the trial for the predicate offence was instigated, even in connection with proceedings initiated in other courts.

For instance, significant amounts have been seized in connection with VAT carousel offences committed in the United Kingdom where the seizures were made long before any notification from the UK authorities.

However, some situations have arisen, in relation to crimes with a significant international spread, where Portugal has managed to block funds and identify victims but there has been no jurisdiction prepared to initiate the investigation.

### 2.2.8 Prioritisation of tracing, seizure and confiscation of assets

The Portuguese criminal system does not provide for or punish illicit enrichment, as it is not listed as a criminal offence but only referred to in the Civil Code. Consequently, the answers given in the questionnaire were based on what is termed acquisitive crime (i.e. economic and financial crime/money laundering).

In compliance with the Framework Law on Criminal Policy<sup>26</sup>, the Law defining the objectives, priorities and guidelines for policy against crime for 2009 to 2011<sup>27</sup> includes among the specific objectives of criminal policy the prevention and investigation of the offences of trading in influence, money laundering, corruption, embezzlement and graft.

### 2.2.9 Tracing, seizing and confiscation of assets as a separate objective of criminal investigations

The Portuguese authorities have stated that the tracing, seizing and confiscation of assets is not a separate goal of criminal investigations. The financial investigation is part of the investigation and is conducted by the General Prosecutor Office together with the Criminal Police and other criminal police bodies. The investigation calls on additional resources, in particular consultancies offering financial expertise and international judicial cooperation (with the support of the EJN and Eurojust).

The setting up of specialised units would be warranted in the context of a criminal investigation because in many types of organised crime, evidence of the existence of an offence and of the criminal liability of the perpetrators depends on the collection, analysis and cross-checking of banking and financial information.

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<sup>26</sup> Law № 17/2006 of 23 May 2006.

<sup>27</sup> Law № 38/2009 of 20 July 2009.

## 2.3 Conclusions

### 2.3.1 Investigative authorities

- The structure of the Portuguese law-enforcement and judicial authorities entrusted with tackling financial and economic crime is straightforward. The competences, tasks and role of each body are clearly stated in the law.
- The main problems that arise are related to the implementation phase, in terms of the concrete operational capabilities of different bodies and authorities to successfully investigate financial crimes and to adequately support the prosecution offices. This point was stressed more than once during the on-site visit, by prosecutors and police. A lack of sufficient and good results can demoralise staff and compromise the efficiency of the system, and should be remedied by (a) allocating sufficient human resources and tools, particularly to the Criminal Police, (b) following a managerial approach within the internal organisation of investigative work, by setting clear objectives and internal guidelines.
- In general the Portuguese authorities seem to have developed a number of possibilities for proactive ways of detecting financial crime. The Customs have developed models for screening cargo. Legislation allows the police to engage in intelligence gathering before the start of formal investigations.
- The evaluation team noted that within the Criminal Police (*Polícia Judiciária*) certain specialised units exist that are particularly aimed at dealing with financial and economic crime, one such unit being the Financial and Accounting Expertise Unit (*Unidade de Perícia Financeira e Contabilística - UPFC*), which should be highlighted as an example of good practice. The unit assists the criminal police and prosecuting authorities with financial and accounting expertise mainly in investigations of economic offences. The experts' conclusions and analyses are set out in a report which is used as evidence in trials. In general the expert is also called to testify in the court proceedings about the report. In this context it should be pointed out that the unit has technical and scientific autonomy in order to grant evidential relevance at trials. The evaluators were told that the expertise in form of the reports was very rarely questioned in court by a defendant.

- The experts were informed that in cases of serious tax fraud, multidisciplinary teams with participants from the Criminal Police, Customs and Tax authority were formed to investigate as well; this was also considered to be a good approach. Mixing people in a team with different specialist competences when investigating a complex crime such as VAT fraud seems to provide a sound basis for an efficient fight against organised financial crime.
- The Portuguese FIU does not deal directly with investigations, but collects and enhances the information received by financial and non-financial institutions.

Every year STRs from financial institutions number about 1 000, while approximately 15 000 are received from non-financial institutions.

This occurs because a kind of automatic reporting is in place for the latter institutions (in particular casinos) and concerns transactions above EUR 2 000. Although such reporting creates a huge administrative burden for the FIU, it does not produce any real added value for the prevention system as a whole. In fact, according to the FIU, with more than 15 000 reports received in 2009, the Portuguese FIU opened 634 cases of which only 188 actually resulted in confirmed suspicious/money-laundering activities.

Whilst the evaluation team understands and agrees that it is necessary to have a different reporting system in place for casinos than for other reporting institutions and professions, the criteria for reporting could be re-evaluated in order to arrive at a more focused and useful way of reporting.

Moreover it is not clear which kind of technical/legal constraints prevent the regular exchange of this financial information at international level when it comes to the exchange of information between police bodies in the intelligence phase (i.e. police cooperation).

- According to Article 44 of Law № 25/2008, complete statistics should be available at FIU and Ministry of Justice level in relation to STRs and investigations/prosecutions in the area of money laundering and terrorism financing as well as asset seizure and confiscation. These statistics could certainly provide a greater insight with relation to the actual implementation of policies and regulations in the field concerned.

### 2.3.2 Judicial authorities

- Portuguese judicial organisation in the field of financial and economic crime shows the necessary degree of specialisation.
- The experts noted that important innovations had been introduced into the Portuguese prosecution system, aimed at streamlining the performance of domestic investigations and also facilitating the relationship with foreign judicial authorities and international bodies.
- The *DCIAP* has powers to coordinate and direct investigations and to prevent crime at national level. This is an innovation in the Portuguese system as it involves a devolution of hierarchical powers previously centralised in the General Prosecutor Office (Circular № 11/99).
- Specialised sections dealing specifically with the investigation of financial and economic crime also exist in the District Departments for Criminal Investigation and Prosecution (*DCIAP*)<sup>28</sup>. The powers granted to them seem to be satisfactory in terms of their efficiency, both as regards crime prevention powers, and for the coordination of different investigations.
- Though the *DCIAP* enjoys close cooperation with the FIU, both the Criminal Police and the representatives of the *DIAP* Lisbon regretted a lack of intelligence information which was hampering their work. The *DIAP* in both Lisbon and in Coimbra pointed out that *despite* a generally good legal framework obstacles to their work concerning the investigation of financial crimes existed, created by the general lack of human resources. Furthermore the experts understood that it was difficult to get support from technical or financial experts.
- Another situation of a more general nature was brought up as a problem, namely Articles 356 [admissibility of the reading of procedural records/documents and statements] and 357 [admissibility of the reading of the defendant's statements] of the Code of Criminal Procedure: Under those articles, a defendant is able to refuse to say anything in court. Only where the defendant agrees can the prosecutors refer to what the defendant said during the investigations. Otherwise the prosecutor is not allowed to do so, even when the defendant has confessed during the criminal investigation. The same regulations apply concerning the possibility to refer what a witness has said during a criminal investigation, if he or she refuses to say anything when called upon to testify in court.

<sup>28</sup> Cf. Article 68(1) of the Statute of the Public Prosecution Service.



- Theoretically the abovementioned provisions of the Portuguese CPC may easily jeopardise a trial and might result in an acquittal. Since organised financial crimes, as well as any other organised crime, normally comprise substantial sums of money, a witness can - by inappropriate influence from the defendant or another person - be persuaded not to testify in court. The legal proceedings can in other words be frustrated at a very late stage. The system appears to be unnecessarily susceptible to unfair influence.
- From the interviews with the prosecution services it became apparent that support from the Technical Advice Unit (*NAT*) of the General Prosecutor's Office was limited to few cases given the real needs of the prosecution services for greater support. As this unit is staffed by specialists with academic training and professional experience in economics, finance, banking, accountancy and the securities market, the experts recommend granting more resources to this service so that it can lend an improved level of support to the judicial authorities.

### 2.3.3 Criminal policy

- Despite the legislative activity that was noted, and despite the parliamentary ad-hoc Commission dealing with economic and financial crimes and corruption, the evaluators were not aware of any strategic document describing a specific long-term policy towards financial crimes and financial investigations in Portugal, with exception of the Law defining the biannual priorities in the prevention and fight against crime, where economic and financial crimes are included.

### 2.3.4 Training

- During the visit, representatives from the *Polícia Judiciária* reported that specialised training with regard to matters of economic and financial crime was conducted in various forms, e.g. cooperation with banks and external experts, and that cooperation agreements had been concluded with the Universities of Lisbon and Porto to support training. It was particularly interesting to note that the Portuguese authorities obviously transformed new criminal trends that were detected in the field into new training modules and were also proactively exchanging information on crime phenomena with other administrations.

- The General Prosecutor's Office has given special attention to the training of public prosecutors in the investigation of economic and financial crime and has encouraged the implementation of training schemes and the establishment of mechanisms for the pooling of experience between public prosecutors.
- There is also a component of in-service training for which the Centre for Judicial Studies - a study centre with the task of providing initial and in-service training for magistrates - is responsible. Various training activities have been carried out there in order to give judges and public prosecutors training in investigating and judging this type of crime. The Centre for Judicial Studies also includes international judicial cooperation as a subject in the curriculum for the joint training of judges and public prosecutors. The initial training at the school lasts for one year. The year is followed by a period of 6 to 18 months of continuing training in court. The content of the training is decided one year at a time. During the year, one or two seminars with various topics, e.g. organised financial crime, are arranged. Prosecutors and judges must participate in seminars at least twice a year.
- While prosecutors in Portugal seem to be fairly well specialised in financial and economic crime matters, this apparently does not apply to judges. Such expertise on the bench could be achieved by setting up specialised chambers and/or by allowing cases to be tried at a few centralised courts. A true specialisation of magistrates can be achieved only if they can focus their daily work on such matters (and not merely by attending a few specialisation courses).

### 3 INVESTIGATION AND PROSECUTION

#### 3.1 Information and databases available

##### 3.1.1 Databases and registers

###### 3.1.1.1 Bank accounts

At the time of the on-site visit Portugal was about to set up a centralised register of bank accounts.<sup>29</sup> The Portuguese Parliament had approved Law № 36/2010 of 2 September 2010 - a legislative initiative of the Government included in a package of anti-corruption laws - which amends the General Regulation on Credit Institutions and Finance Companies, creating within the *Banco de Portugal* a centralized database of bank accounts, the “banking system accounts’ database”, in accordance with the procedure provided for in Article 3 of that Regulation.

The above law provides for the addition of a third paragraph to Article 79 of the General Regulation on Credit Institutions and Finance Companies, worded as follows:

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<sup>29</sup> The evaluation team was informed by the Portuguese authorities after the on-site visit that since 1 June 2011, the “banking system accounts’ database” is working and able to provide information to judiciary authorities (Judges and Public Prosecutors), under criminal proceedings, although some of the reporting entities have not yet sent the requested information, and thus the information in the database is still incomplete. According to Law № 36/2010 the database will have information about bank accounts, account holders and persons authorized to manage the accounts. The *Banco de Portugal* has already implemented Law № 36/2010, by issuing the Instruction № 7/2011 of 15 April 2011 that specifies, among other issues, which are the reporting entities, the type of information to be provided by them and the time and deadlines of the reports. According to Instruction № 7/2011, the database includes information from the reporting entities on the following type of bank accounts: deposit bank accounts, financial instruments accounts, credit accounts and payment accounts. The reporting entities are the banks and other credit institutions, financial companies and payment institutions, whose head office is established in Portugal and the branches in Portugal of credit institutions, financial companies and payment institutions established in foreign countries, including branches located in the financial centres (free trade zones) of Madeira and Azores. The information contained in the database on closed accounts will be kept for 15 years as from the date of closure of the accounts.

"3. A database of bank accounts existing in the banking system shall be set up within the *Banco de Portugal* containing the names of the holders of all the accounts, adopting the following procedure for that purpose:

- (a) Within three months of the entry into force of this Regulation, all the bodies authorised to open bank accounts of any kind shall send the *Banco de Portugal* information identifying the respective accounts and holders and the persons authorised to draw on them, including holders of a mandate, and indicating the date on which the account was opened;
- (b) They shall also send to the *Banco de Portugal* information concerning the subsequent opening or closure of accounts, giving their numbers, identifying the holders and the persons authorised to draw on them, including holders of a mandate, and the date of opening or closure. This should be carried out by the 15th of each month with reference to the previous month;
- (c) The *Banco de Portugal* shall take the necessary measures to ensure restricted access to that database, the information stored in it concerning only the identification of the number of the account, the bank, the date on which the account was opened, the holders and the persons authorised to draw on it, including holders of a mandate, and the date of closure. Such information may be communicated only to the bodies referred to in paragraph 2(d) of this Article, in the context of criminal proceedings."

Law № 36/2010 entered into force in March 2011 and will give rise to new procedures for access to information concerning the opening and closure of accounts and the ownership of existing bank accounts, facilitating access by the judicial authorities to information concerning the existence of a bank account and its holders in the context of proceedings. The procedure followed until the entry into force of the new Law, namely consulting the *Banco de Portugal* (which in turn consulted all the financial institutions) about the existence of bank accounts held by a certain body or bodies, has - according to the information given by the Portuguese authorities - not proved to be the most practical, since it results in delays affecting the regular progress of proceedings and also makes it easier to evade justice.

**Retrieving bank account information under the old system**

At the time of the on-site visit the old system with regard to bank account information was still in force. The Portuguese authorities explained that in order to obtain information, during an investigation, of bank accounts, clients of credit institutions or finance companies, the Criminal Police had to follow the legal procedures in force in accordance with the type of crime concerned.

Therefore, a criminal investigation concerning a crime listed in Article 1 of Law № 5/2002 entailed the application of the special system for the collection of evidence, the lifting of professional secrecy and the confiscation of assets with regard to the following offences: trading in influence, active and passive corruption, embezzlement, graft, money laundering, association to commit offences and smuggling. In those cases, Article 2 of that Law allowed access to banking information with the direct intervention of the public prosecutor.

When this legal system could not be applied because the types of crime under investigation were not included on the list, the investigation had to follow the general rules enshrined in Articles 135 and 182 of the Code of Criminal Procedure, which entailed intervention by the competent examining magistrate.

If a judicial authority submitted a request<sup>30</sup> to the *Banco de Portugal* concerning the identification of bank accounts, the internal procedure was to circulate the requests for information as if they were requests for circulation within the banking system. The circulation of judicial notices was based on an obligation to cooperate laid down by law.

The *Banco de Portugal*, making use of its special channel of communication with credit institutions, then circulated requests concerning bank accounts and/or customers that were received from judicial authorities within the banking system. Subsequently credit institutions holding the information requested could provide it directly to the requesting judicial authority.

<sup>30</sup> Cf. Article 3 of Law № 5/2002.

### Retrieving bank account information under the new system

Under the new system which entered into force after the on-site visit, a judicial authority investigating a crime, requests to *Banco de Portugal* information on a specific account or holder providing all details possible. Then, *Banco de Portugal* will search the database and will provide the research result to the judiciary authority (whereas the information requested by the judicial authority relates to a date after 1 March 2011. Otherwise, the old system will be followed).

Consequently, under this new system, it will be always possible to meet an answer deadline of five days, which is the minimum granted by judiciary authorities.

#### 3.1.1.2 Databases under the Institute of Registries and Notaries

The Institute of Registries and Notaries (*Instituto dos Registos e do Notariado*) maintains databases comprising civil registers, real estate, companies and vehicles. Registration services for the databases are either under the responsibility of the central or local registry services. The registry services located in the area of ports also maintain registries of fishing vessels and other commercial boats (IRN).

##### 3.1.1.2.1 Land register

There are databases for property into which data is entered by the Land Registry Offices as well as tax registers. At the time of the on-site visit 80% of the land register had been digitalised.

Registration of most of the legal facts concerning property is mandatory. The registers are accessible either via the owner's name (broken down by territorial departments - local authorities and communes) the address, the identification of the respective property register, or the fiscal number of the property, from which it is then possible to access the identity of the owner and subsequently changes in ownership or in other rights subject to registration. It is also possible to identify buildings owned by a certain person in a specific territorial area.

##### 3.1.1.2.2 Companies

Registration in the company register is mandatory for any commercial undertaking, for it to be legally recognised. Information is entered into the database by the Commercial Registry Offices at local level.

Using the name of the company, it is possible to access information concerning its incorporation, head office, share capital formation, the composition of its bodies, the identity of the manager, and termination of the company, among other aspects.

Furthermore the National Registry of Legal Persons (*RNPC*) registers all legal persons and allocates a unique identifying number to the entity which also serves as the fiscal number.

With regard to registers concerning companies, the criminal investigation may obtain direct assistance from the network of registers of companies by means of an official request for memoranda and articles of association, apostils, amendments and other information, or make use of its own databases (*SPO*) concerning legal persons.

It is also possible to obtain such information through open sources, commercial sources (e.g. Dun & Bradstreet) as well as official sources such as the Portuguese Official Gazette (*Diário da República*), or the website of the Official Publication of Company Acts<sup>31</sup> of the Ministry of Justice Acts affecting Assets (*Actos Societários*).

#### 3.1.1.3 Maritime registers

There are no centralised databases on boats. Requests for the identification of boat owners must be addressed to the various captains' offices of the ports, or the local registry offices, where the boats are registered.

When access to registers relating to boats is concerned, use may be made of a tax database in which this property is declared.

Alternatively, the criminal investigation may ask for information from the captains' offices with jurisdiction over the harbour of refuge (Admiralty – Maritime Police), considering that the boat must be registered there (to be established via the logbook) and, in the last instance, by the same means, request information from a notary's database when there is a notarial act concerning the purchase of the boat (with regard to fishing vessels).

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<sup>31</sup> [www.mj.gov.pt/publicacoes](http://www.mj.gov.pt/publicacoes)

## 3.1.1.4 Access to databases

There is not yet any generalised direct access to the available databases. The Public Prosecutors, as well all the judicial and police authorities, currently has direct access to the databases concerning commercial companies (undertakings) and real estate on the basis of agreements between the specific departments and the Institute of Registers and Notaries. Agreements have already been concluded with the *DCIAP* and the Lisbon *DIAP*, and this system is expected to be rolled out to the entire country next year.

With a view to achieving the aims of investigations into tax offences, competence for which and for money-laundering offences is reserved or granted to the Criminal Police, the Criminal Police may request real-time consultation of the databases of the Directorate-General for Taxation and the Directorate-General for Customs and Excise.

In the course of an investigation, when it proves necessary to have access to real estate or land registers, the criminal investigation may seek direct assistance<sup>32</sup> from the network of Land Registries and Notarial Registers by means of an official application or, where the investigation of money-laundering or tax offences is concerned, make use of tax databases including that of the *IMI* (local property tax) held by the Financial Intelligence Unit (Directorate-General for Taxation (*DGCI* and *DGAIEC*)).

## 3.1.1.5 Criminal register

With regard to criminal registers, reference has to be made to the adoption of Decree-Law № 288/09 of 8 October 2009 adapting the regulatory regime governing criminal records to the extension of the criminal liability of legal persons effected by the 23rd amendment to the Criminal Code by Law № 59/2007 of 4 September 2007. In this context, a set of amendments was incorporated into Decree-Law № 381/98 of 27 November 1998, which regulates and develops the legal system for the identification of criminals and persons in contempt of court by adapting it to the requirements of registration and processing of information concerning the criminal situation of legal persons and persons treated as such.

<sup>32</sup> Pursuant to Article 3 of Decree-Law № 93/2003 of 30 April 2003.



## 3.2 Cooperation at national level

### 3.2.1 Identification of bank accounts

#### 3.2.1.1 Legal framework

The legal basis for

- a) the identification of an unknown bank account belonging to a specified person;
- b) the identification of the unknown owner of a specified bank account;
- c) the identification of operations from and to a specified bank account in a specified period in the past,

and in the context of organised crime and economic and financial crime (offences provided for in Law № 5/2002), is Article 2 of Law № 5/2002 as well as the specific rules on the lifting of banking secrecy laid down in Law № 37/2010 of 2 September 2010 which authorise appropriate measures derogating from banking secrecy to combat economic and financial crime.

A precondition for the application of the measures referred to in (a), (b) and (c) is the existence of grounds for believing that the information concerned is relevant to the discovery of the truth.

The legal basis for

- d) the monitoring of operations to and from a specified bank account in the future
- is Article 4 of Law № 5/2002.

This measure may be ordered when it is considered highly relevant to discovering the truth.

#### 3.2.1.2 Types of crimes covered

The aforementioned measures (a), (b), (c) and (d) apply to all the offences covered by Law № 5/2002.

Article 1 of this law limits its application to the offences of drug trafficking, terrorism and terrorist organisations, trafficking in weapons, trading in influence, active and passive corruption, embezzlement, graft, money laundering, criminal association, smuggling, trafficking in and tampering with stolen vehicles, incitement to prostitution and incitement to prostitution involving children, currency counterfeiting and counterfeiting of securities equivalent to currency; in the case of the latter four offences the rules apply only if the offence is perpetrated in an organised manner.

The following offences can be added to that list:

- maladministration of an economic unit in the public sector;
- fraudulent procurement or conversion of a subsidy, grant or loan;
- economic and financial offences committed in an organised manner using information technology;
- economic and financial offences with an international or transnational dimension, by virtue of the cross-reference in Article 1(3) to Law № 36/94.

#### 3.2.1.3 Duration of a measure regarding a bank account

As to the duration of a measure, Portuguese law does not set a time limit; instead the time limit is established by the court in the order enforcing the control measure.

#### 3.2.1.4 Competent authorities

The measures referred to in (a), (b), and (c) only require a duly reasoned order from the judicial authority in charge of the proceedings (General Prosecutor's Office at the inquiry stage, or the judge at the pre-trial stage).

The monitoring of movements to and from a bank account or payment account in the future (point (d)) is authorised or ordered, depending on the case, by order of the court or further to a request from the General Prosecutor's Office.

The criminal police body in charge of the investigation may be delegated by the judicial authority to request the credit institutions, finance companies or payment institutions to provide relevant information and supporting documents or copies of such documents for the enforcement of the measures referred to in (a), (b), and (c).

In relation to the measure referred to in (d), the authorisation may identify a criminal police body responsible for the checks.

### 3.2.1.5 Provision of information to persons affected by the measure

The persons affected by the measures are not informed as long as the proceedings are subject to judicial secrecy.

Members of the bodies of financial and non-financial institutions and persons providing them with services are bound by judicial secrecy (obligation of confidentiality) as regards documents of which they have knowledge, and cannot, *inter alia*, divulge them to persons whose accounts are being monitored or in respect of whom there have been requests for information or documents (Article 5 of Law № 5/2002).

Entities subject to reporting requirements and the members of their respective bodies, those in managerial and supervisory positions, their employees, their proxies and anyone providing them with services in a permanent, temporary or occasional capacity may not reveal to clients or third parties their part in transmitting communications required by law or that a criminal investigation is in progress (duty of secrecy, Article 19 of Law № 25/2008 of 5 June 2008).

### 3.2.1.6 Secrecy obligations or privileges impeding or affecting the measure

The rules governing banking secrecy do not impede the enforcement of measures since, although information may be covered by banking secrecy, Law № 5/2002, applicable to this form of crime, lays down a specific and simplified arrangement for lifting secrecy (Article 3 of Law № 5/2002). Account must also be taken of the measures revoking banking secrecy laid down in Law № 37/2010 of 2 September 2010, with a view to better combating economic and financial crime.

Already the professional secrecy rule associated with the client-lawyer relationship could make it difficult to identify the real holder or beneficiary of the accounts, insofar as the lawyer's duty to cooperate, laid down in Law № 25/2008, is relatively limited by the exceptions for which it provides.

### 3.2.1.7 Enforcement of the measures in practice

In their answers to the questionnaire, the Portuguese authorities described the practice of enforcing measures concerning bank accounts and their relations with the financial institutions as follows:

Once the legal requirements have been checked, a reasoned order is issued by the judicial authority in charge of conducting the proceedings, with the instruction to lift banking secrecy.

The order identifies the persons covered by the measure and specifies the information which must be provided and the documents which must be handed over.

If the person(s) holding the accounts or involved in transactions are unknown, it is sufficient to identify the accounts and transactions about which information is to be obtained.

After the order, the judicial authority or, by delegation, the criminal police body in charge of the investigation, requests the credit institutions, finance companies or payment institutions to provide relevant information and supporting documents or copies of such documents.

The credit institutions, finance companies and payment institutions are required to provide the requested information within a time limit of:

- 5 days, when the information is available in electronic form;
- 30 days, when the supporting documents and the information are not available in electronic form; that time limit is halved when there are accused in detention or in prison.

Pursuant to Article 3(6) of Law № 5/2002, the credit institutions, finance companies or payment institutions communicate to the General Prosecutor's Office the name of a central body responsible for replying to these requests for information and documents.

Experience has shown that banks sometimes delay in forwarding supporting documents for investigations. Such delays constitute a violation of legally imposed deadlines and are the result, in most cases, of insufficient human and other resources being assigned to fulfilling the stated obligations of the financial institutions.

There is a close relationship with the Central Bank (*Banco de Portugal*) and support from the FIU, and the compliance offices in the banks function as contact points. Pursuant to Law № 5/2002 there is a legal obligation for banks to provide mechanisms that serve as contact points.

In cases of monitoring of bank accounts the credit or payment institution notifies any account transactions to the judicial authority or criminal police body indicated within 24 hours<sup>33</sup>.

### 3.3 Cooperation at European level

#### 3.3.1 Legal framework

Portugal has adopted<sup>34</sup> and ratified<sup>35</sup> the Protocol to the Convention on Mutual Legal Assistance between Member States of the EU. It has been in force in Portugal since 12 March 2007.

Following the adoption of that Protocol by the Council of the European Union, Portugal adopted Law № 5/2002 of 11 January 2002 (since amended by subsequent provisions), which contains increased powers of investigation with regard to organised crime and economic and financial crime. It provides *inter alia* for investigative measures corresponding to those laid down in the 2001 Protocol.

Consequently, banking secrecy and tax secrecy may be lifted, by decision of the judicial authority conducting the particular phase of the proceedings (General Prosecutor's Office during the inquiry stage; examining magistrate during the investigation stage; the court after the case has come to trial and at the judgment stage), in relation to offences falling within the scope of this law (cf. the list under 3.1.2.1.2 above).

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<sup>33</sup> Cf. Article 4 of Law № 5/2002.

<sup>34</sup> Resolution № 61/2006 of the Assembly of the Republic of 4 October 2006.

<sup>35</sup> Decree № 119/2006 of the President of the Republic of 6 December 2006.

Furthermore, Law № 5/2002 (Article 2(5)) stipulates, in relation to the accused or legal person, that information can be requested by means of a general order covering the following;

- tax information;
- information on bank accounts or payment accounts, and operations on those accounts, of which the accused or legal person is holder or joint holder, or on which they are empowered to carry out operations;
- information on bank and financial transactions or payment operations in which the accused or the legal person is involved;
- identification of other persons involved in the operations referred to in points (b) and (c) in section 3.2.1.1;
- documents supporting the information referred to in the preceding paragraphs.

When the obligation of secrecy is lifted, members of the bodies of credit institutions, finance companies and payment institutions, their employees and persons providing them with services, as well as tax administration officials, are obliged to provide information.

Those persons are bound by confidentiality, and may not disclose the acts which have come to their knowledge, in particular in relation to persons whose accounts are being monitored or about whom there have been requests for information or documents (Article 5 of Law № 5/2002).<sup>36</sup>

### 3.3.2 Simplified information exchange on bank accounts

The Portuguese authorities cannot provide information on bank accounts as specified under 3.1.2.1 to a law enforcement authority in another Member State through "police cooperation" or under Framework Decision 2006/960/JHA<sup>37</sup>.

<sup>36</sup> The Portuguese authorities have emphasised that this provision relates to financial and economic crime under Portuguese law, while for types of crime which come within the scope of the Protocol to the 2000 Convention but not Law № 5/2002 of 11 January, the provisions of the Code of Criminal Procedure and relevant complementary legislation on access to banking information apply.

<sup>37</sup> Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, OJ L 386, 29.12.2006, p. 89.

Pursuant to Article 2 of Law № 5/2002, the banking information referred to may be obtained only in the course of criminal proceedings (at the inquiry, investigation or judgment stage). Moreover, the information provided by financial and non-financial institutions under the obligation to report introduced for the prevention of money laundering may be used only in criminal proceedings (Article 16 of Law № 25/2008).

Article 3(2) of Law № 74/2009 of 12 August 2009 transposing Council Framework Decision 2006/960/JHA defines the limits of the duty of cooperation in keeping with this arrangement, laying down that the police authorities may only transmit, without the authorisation of the judicial authority, data or information obtained outside the inquiry or investigation, or during the preventive verification procedure referred to in Law № 36/94 of 29 September 1994, as a result of police measures set out in Chapter V of Law № 53/2008 of 29 August 2008 (Law on Internal Security).

That being the case, and since it is not covered by any of the measures referred to in points 3.1.2.1.1, the information in question may be supplied only in the framework of judicial cooperation.

### 3.3.3 Information requests via the ARO

At the time of the visit, Portugal had not yet designated an Asset Recovery Office (ARO).<sup>38</sup>

### 3.3.4 Competent authorities

#### 3.3.4.1 Acting as issuing State

When **asking for the issuing of a request**, the General Prosecutor's Office may ask the competent court for a request for judicial assistance to be issued where it is not the competent issuing body. For **issuing a request** the judicial authority competent to order the measure under Portuguese law may as well issue the request.

<sup>38</sup> The evaluation team was informed after the on-site visit that the Law № 45/2001 creating the ARO had been approved by the Assembly of the Republic on 6 April 2011 and published in the Official Gazette on 24 June 2011.

Consequently:

- at the inquiry stage, in relation to measures (a) to (c) under point 3.2.1.1, the competent authority is the General Prosecutor's Office in charge of the inquiry; in relation to measure (d) under point 3.2.1.1, the competent authority is the examining magistrate (*Juíz de Instrução*) in criminal proceedings, who is also competent for the measure laid down in Article 3(3) of Law № 5/2002: where there are grounds for suspicion that documents or information have been concealed, the documents are seized;
- at the investigation and judgment stages, the competent authority is the judge directing the proceedings.

#### 3.3.4.2 Acting as receiving State

When **receiving a request**, the request is received through whatever channel<sup>39</sup> by the General Prosecutor's Office or by the judge;

The authority competent for **executing a request** is the same judicial authority that is competent to order the measure (the same authority that can issue a request).

#### 3.3.5 Problems encountered

The Portuguese authorities have reported that as a receiving State, they have not encountered any problems.

However, it was noted that requests issued by Portugal to the United Kingdom often meet with late, inadequate replies and in other cases no reply at all, despite reminders through official and unofficial channels.

<sup>39</sup> Article 6 of the 2000 Convention on Mutual Assistance between the Member States of the European Union and Article 152 of Law № 144/99 of 31 August 1999.



### **3.4 Financial investigations and use of financial intelligence**

#### **3.4.1 Legal framework**

Financial investigations in Portugal are carried out as part of normal criminal investigations or in action to prevent money laundering and the funding of terrorism. Alongside the ordinary legal framework, there is a body of specific legislation introducing special measures to combat organised and financial or economic crime.

As already referred to in chapter 3.1.1, Law № 5/2002 of 11 January 2002 involves special rules on obtaining evidence, lifting of professional secrecy and confiscation of assets, with the difference between the actual value of a defendant's estate and its value consistent with his lawful income being presumed to have been earned from crime. Similarly, Law № 25/2008 of 5 June 2008 lays down preventive and punitive measures to combat money laundering and terrorism financing, Law № 15/2001 of 15 June 2001 makes special provision for combating organised tax crime, and there is a body of specific legislation to combat corruption in particular areas (in sport, by political office holders, in international trade and in the private sector) regardless of the provisions set forth in the Criminal Code related to corruption.

#### **3.4.2 Use and effectiveness of financial investigations in specific crimes**

The Portuguese authorities have ascertained that economic and financial aspects are always looked into in investigating crimes suspected of providing sizeable financial proceeds, particularly in cases of money laundering, corruption, embezzlement, breach of trust, fraud, computer fraud, tax evasion, drug trafficking etc.

There was however no assessment of the effectiveness of such investigations.

#### **3.4.3 Continuation of an investigation into the financial aspects of crime after closure of a case**

Once the criminal investigation proper has been completed, the proceeds of crime or its financial aspects more generally can continue to be investigated only until 30 days before the trial opens<sup>40</sup>.

<sup>40</sup> Cf. Article 8 of Law № 5/2002.

### 3.4.4 Involvement of private experts during investigations

The Portuguese authorities maintained in their answers to the questionnaire that it was possible to involve private experts in carrying out inquiries or conducting preliminary investigations.

Where it is not possible or appropriate to have an expert assessment carried out at a suitable official establishment, laboratory or other facility, this will be done by an expert selected from a list of those available in each district or failing that, or should it not be possible in time, by a reputable person known to be competent in the area concerned<sup>41</sup>.

This procedure is often resorted to, owing to the excessive workload of expert assessors or to a special need for particular knowledge.

The expert is appointed in the course of proceedings, after consultation or by drawing on the official list, and is paid a pre-established fee for the assessment.

Where the nature or complexity of the matter so requires or its urgency makes this advisable, the General Prosecutor may give permission for specialist assessment or technical consultancy services to be provided by private auditors<sup>42</sup>.

### 3.4.5 Financial intelligence

#### 3.4.5.1 Financial investigations in the intelligence phase

The Portuguese authorities have stated that financial investigations are conducted already during the intelligence phase, particularly when looking into criminal offences under Article 1 of Law № 5/2002.

Analysed financial intelligence is then used as an indicator to initiate a criminal and financial investigation, especially after analysis of reporting by financial and other institutions in the context of preventing money laundering or the financing of terrorism.

Such information is particularly used under the shared responsibility of the Central Department for Criminal Investigation and Prosecution (*DCIAP*) and the FIU for the prevention of money laundering and terrorism financing. In looking into criminal offences covered by the rules in Law

<sup>41</sup> Article 153 of the Code of Criminal Procedure.

<sup>42</sup> Article 4 of Law № 1/97.

№ 5/2002, financial information taken from tax records and approved by the *DCIAP* may also be used.

#### 3.4.5.2 Financial investigations in the intelligence phase - cooperation with other authorities

Apart from case-by-case cooperation with various bodies, particularly with the tax authorities, the public prosecution service also cooperates with and receives information from the following bodies:

- Tax authorities

Once final, a decision assessing indirect taxes has to be reported by the tax inspector to the public prosecution service and also, in the case of officials or holders of posts subject to supervision by a public body, to their supervisor for checks within its sphere of competence<sup>43</sup>.

- General Prosecutor's Office for the Constitutional Court

Under an addition made to Law № 4/83 of 2 April 1983 (Public scrutiny of political office holders' wealth) by Law № 19/2008 of 21 April 2008, the General Prosecutor's Office for the Constitutional Court is each year to assess the returns submitted by such holders at the end of their term of office or on leaving their post<sup>44</sup>.

- General Prosecutor's Office for the National Audit Office

Where National Audit Office inspection reports, or internal bodies' inspection reports and audit reports, show situations which give reason to suspect criminal liability, they are passed to the *DCIAP* for preventive action and, if appropriate, inquiries.

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<sup>43</sup> Article 3, Addition to the tax code, of Law № 19/2008 of 21 April 2008 adopting measures to combat corruption.

<sup>44</sup> Article 5.A, Supervision, of Law № 4/83 of 2 April 1983.

### **3.5 Cooperation with Europol and Eurojust**

#### **3.5.1 Cooperation with Europol**

##### **3.5.1.1 Experience to date**

In their answers to the questionnaire the Portuguese authorities reported that they were not aware of any cases in which Europol support had been requested.

In the field of economic and financial crime Portugal is a member of the Analysis Work File (AWF) SUSTRANS (suspicious transactions and money laundering), AWF MTIC (missing trader intra-community fraud or VAT carousel fraud), AWF SMOKE (illicit tobacco trade) and AWF COPY (products counterfeiting). In relation to the euro and other means of payment, Portugal is also a member of AWF SOYA and AWF TERMINAL respectively.

##### **3.5.1.2 Expectations regarding Europol support**

In their answers to the questionnaire the Portuguese authorities stated that they lacked sufficient knowledge about Europol's capacity to provide support in financial investigations.

This statement was confirmed by the data that Europol has provided with regard to the communication flow via Europol.

#### **3.5.2 Cooperation with Eurojust**

##### **3.5.2.1 Experience to date**

According to the information received from the Portuguese authorities, Eurojust's support for cooperation in general has proved important for simplifying communication between the authorities concerned. This relates not only to the execution of requests - as usually happens in organised crime cases - but also involves the exchange of additional information and requests, contributing to a better understanding between the authorities, better awareness of the judicial arrangements involved and an improved speed in financial investigations or financial aspects of investigations.

### 3.5.2.2 Expectations regarding Eurojust support

The Portuguese authorities expected Eurojust to intervene, not just as a means of transmitting requests and clarifications between the authorities of the Member States conducting the investigations, but also as an active participant in the collection of information and evidence for the case under investigation.

## 3.6 Conclusions

### 3.6.1 Information and data bases

- Financial investigations are supported in Portugal by access to the necessary databases, the contents of which are also indispensable for conducting other investigations which are not purely financial. In addition to their information value, the databases help the competent authorities to recover criminal assets (land register, vehicle database).
- There is not yet any generalised direct access to all available databases, relevant for financial and economic crime cases, for real-time consultation. The experts were of the view that the practice of direct access could be extended to other types of public register useful for financial investigations.
- Furthermore, there is no centralised database for boats in Portugal. When access to registers relating to boats is needed, use may be made of a tax database in which this property is declared. Alternatively, an investigator may ask for information from the captains' offices with jurisdiction over the harbour of refuge, considering that the boat must be registered there (logbook) and, by the same means, request information from notary databases when there is a notary act concerning purchase of the boat (with regard to fishing vessels). Given the topographical situation of Portugal with a long coastline and many harbours the absence of a centralised database for boats and vessels should be considered an obstacle for law enforcement agencies in Portugal concerning financial and economic crime investigations, money laundering investigation and prevention.

- Portuguese Law 36/2010 establishes a national central register of bank accounts within the *Banco de Portugal*. This provision is being implemented in practice and the database is already working. It will enormously facilitate the investigation of the proceeds of crime. However, it has to be emphasised that under the new system only judicial authorities will be able to access the database; furthermore, this will only be possible in the framework of criminal proceedings. The access to the database is not directly available to the Criminal Police and to the FIU for their ordinary duties. However, despite that fact the Criminal Police can accede to the information through the Public Prosecutor in charge with the investigative proceedings. Also, representatives from the prosecution authorities criticised the bureaucracy surrounding the future use of the register of bank accounts.

It should also be noted that the framework introduced by Law 36/2010 does not include sanctions for failing to communicate the proper data to the Bank of Portugal. It is therefore doubtful whether the sanctions laid down in chapter V of Law № 5/2002 (“Establishing measures for the combat against organised crime and economic and financial crime”) could apply, as they do not refer to the specific behaviour of communicating data to be transmitted to the national central register and moreover because the powers described by Law № 5/2002 can only be exercised for a given list of criminal offences.<sup>45</sup>
- The *DCIAP* currently has access to databases concerning commercial companies and real estate on the basis of agreements between the specific departments and the Institute of Registers and Notaries (*Instituto dos Registos e Notariado*). Such agreements have been concluded with the *DCIAP* and the Lisbon *DIAP*. Despite such agreements the Lisbon *DIAP* stated that there had been difficulties in getting access to information regarding real estate, but the difficulties are related exclusively to the insufficiency of elements to request the information.
- The close cooperation between the Criminal Police, Customs and Excise and Tax authorities allows access to the relevant databases necessary for the criminal investigation. However, during the visit the evaluators were told by *DCIAP* and *DIAP* Lisbon that the system of getting banking information in force at that time constituted an obstacle in their fight against serious crimes, *inter alia* financial crimes.

<sup>45</sup> In this respect the Portuguese commented that Instruction № 7/2011, approved by *Banco de Portugal*, states that the failing to report the proper data to the *Banco de Portugal*, as established in the instruction, is considered an infringement punishable under paragraph j) of Article 210 of the General Regulation on Credit Institutions and Finance Companies.

- Furthermore, the lack of a single IT system which would enable the *DIAPs* to get information regarding ongoing investigations from each other was also brought up as an obstacle to more efficient investigations. Today such information can only be obtained with the assistance of the Criminal Police.
- The plan of the Portuguese authorities to establish a single database for the central and local Criminal Investigation and Prosecution departments (*DCIAP* and *DIAPs*) is understood as a possibility, which in the future would allow links to be established between ongoing investigations/prosecutions and create synergies between different investigations and prosecutions.
- The evaluators were told by the Custom and Excise that during 2003 a permanent working group was created involving employees from the FIU and the Directorate-General for Customs and Excise, the Directorate –General for Taxation, and the Criminal Police. The creation of such a group obviously facilitates the exchange of vital information and helps to make the information from the reports more actionable.

### 3.6.2 Cooperation at national level

- In principle the Portuguese legal system has all the necessary provisions in place to allow the investigative and judicial authorities to identify potential proceeds of crime. Besides the provisions of the Code of Criminal Procedure, Law № 5/2002 of 6 February 2002 has to be considered as a facilitating instrument that allows *inter alia* the lifting of banking and tax secrecy by Prosecutors, imposes short response times on the financial institutions and makes it legally possible to monitor bank accounts.
- Moreover, in the prevention of money laundering, the practice has developed of blocking any funds once there is suspicion that they have been illicitly gained, independently of confirmation of whether a trial is pending in relation to the predicate offence.

### 3.6.3 Cooperation at European level

- Portugal has ratified and implemented the main international and EU instruments on international judicial cooperation, and a very good legal framework is in place in this regard.

### 3.6.4 Financial investigations and use of financial intelligence

- The Portuguese national and law enforcement system provides investigators and prosecutors with various effective tools to conduct financial investigations. The legal basis is being constantly improved. An additional objective of financial investigation is the tracing, seizing and confiscation of criminal assets.
- There is no special legal framework for financial investigations, as these are carried out within the framework of regular criminal investigations.
- Tracing, seizing and confiscation of assets is not a separate goal of criminal investigations in Portugal. The financial investigation is part of the investigation and is conducted by Public Prosecutors together with the Criminal Police and other police bodies.

### 3.6.5 Cooperation with Europol and Eurojust

#### 3.6.5.1 Europol

- Given the low level of Europol's involvement in the daily investigative approach of the Portuguese authorities, the experts deemed it necessary to increase efforts to raise awareness of the usefulness of Europol's activities and its analytical capabilities among practitioners in Portugal.
- As concerns the general status of the overall exchange of information by Portugal using the Europol channel, it is important to differentiate between information exchanged through Europol and information exchanged with Europol. The former refers to messages that MS address directly to other MS using the network and the facilities operated and maintained by Europol. In this case the exchange is essentially of a bilateral nature, and Europol projects (AWFs) and Units are not involved. Cooperation with Europol means that an MS specifically requests Europol to deliver one of its products or services, e.g. intelligence analysis, cross-match of information, coordination activities, deployment of mobile offices etc.
- The number of cases in the Europol Case Management System (SIENA) initiated by Portugal at Europol remains low. The same situation is reflected in the contribution of cases to specific Europol projects engaged in supporting Member States' investigations into economic and financial crimes.



- According to the statistics many cases are initiated by Portugal in the field of forgery of money, but a very limited number of these (10) reach the Europol Project concerned (AWF SOYA).
- Given the activity during 2010, based on the (extrapolated) number of messages exchanged, Portugal ranks 12th among Member States and third parties in terms of cases initiated (3% of the total number of cases initiated by Member States and third parties) and 19th among Member States and third parties, in terms of messages exchanged (3% of the total number of messages exchanged by member states and third parties).
- In relation to the illicit tobacco trade (AWF SMOKE), recent efforts have been made by Portugal to improve the quantity and quality of contributions, which have become more regular. However, there is still room for improvement in terms of quality and timeliness of the information, as the early involvement of Europol could provide benefits to the investigation activities and related international cooperation.
- Moreover, most of the time, the contributions contain basic details from individual tobacco seizures and thus AWF SMOKE can only provide hit/no hit results from the database. This aspect limits the ability of the Project Team to provide ongoing analytical support, or to properly enhance the intelligence in a meaningful way. Details and results of any subsequent investigations following the seizure would certainly be very helpful.
- In the field of VAT fraud, Portugal joined the AWF MTIC at the beginning of 2009. Since then just a few cases have been contributed to Europol, although MTIC fraud has become a serious problem and the current threat of Emission Trading System related fraud has been identified there.
- The same limited number of contributions to Europol projects can be reported in relation to payment card fraud (AWF TERMINAL) and product counterfeiting (AWF COPY).
- In the field of money laundering (AWF SUSTRANS) the level of contribution to the project is also very low. No request for coordination, support or analysis concerning investigations of a transnational nature in this field was addressed to Europol in 2010. At the same time technical constraints seem to hinder the possibility of contributing relevant financial intelligence (cash seizures or suspicious transaction reports).

### 3.6.5.2 Eurojust

- Although cooperation with Eurojust is functioning well, the exchange of information is still fragmented and not well-structured and the potential of Eurojust is still far from being fully exploited. This also includes the need for a more structured relationship between the Portuguese FIU and Eurojust, particularly with regard to the information that is transmitted to Eurojust.
- During meetings with Portuguese magistrates, concerns and expectations were raised regarding the ability of Eurojust to support the national authorities in facilitating and speeding up the collection and exchange of information in the field of financial investigations (e.g. bank information from offshore banking facilities).

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## 4 FREEZING AND CONFISCATION

### 4.1 Freezing

#### 4.1.1 At national level

##### 4.1.1.1 Legal basis

Assets may be seized under the general terms laid down in Articles 178 to 181 of the Code of Criminal Procedure; seizure is possible in the specific situations covered in Article 4(4) of Law № 5/2002 (the order to monitor bank accounts and payment accounts may include the obligation to suspend transactions specified therein, when necessary to prevent money laundering) and in Article 17(2) and (3) of Law № 25/2008 of 5 June 2008 ("suspension of operations" on bank accounts and payment accounts).

Precautionary seizure is also possible under Article 228 of the Criminal Procedure Code (CPC) and under Article 10 of Law № 5/2002.

##### 4.1.1.2 Types of crime for which the measure can be obtained

Freezing measures can be obtained for any type of crime as regards seizure and precautionary seizure provided for under the Code of Criminal Procedure, and the types covered under Article 1 of Law № 5/2002 as regards freezing (suspension of operations) and seizure provided for in Article 10 of the same Law.

##### 4.1.1.3 Duration of the measure

The duration of the measure depends on the type of property seized and the purpose of the seizure, which must be lifted if it proves unnecessary for the purposes for which it was imposed, which may be obtaining evidence or guaranteeing the declaration of confiscation.

The seizure of assets to guarantee their confiscation may be lifted if a security is provided equivalent to their value.

The measure may, however, be maintained for the duration of the criminal proceedings (in the case of suspension of bank account transactions, after it has been validated by the judge); it is cancelled when an acquittal is delivered.

#### 4.1.1.4 Other conditions necessary to obtain the measure

The property seized must have served, or have been intended to serve, for the commission of crime, or be the product, proceeds, price or recompense of crime, or must be capable of serving as evidence (Article 178 of the CPC).

Precautionary seizure may be ordered, pursuant to Article 228 of the CPC, when there are well founded suspicions that the property will be disposed of.

In the case of the offences covered in Article 10 of Law № 5/2002, seizure of property with a view to its confiscation is ordered regardless of whether there are well founded suspicions that it will be disposed of, provided there are strong indications of the commission of the offence.

#### 4.1.1.5 Competent authority

Seizures are authorised, ordered or validated by the Public prosecutor at the inquiry stage or by a judge (at the judicial investigation stage).

The criminal police authorities may seize property without a prior warrant from the judicial authorities in an emergency or where delay would create risks, in the framework of precautionary measures; such seizures must be validated by the judicial authority within 72 hours<sup>46</sup>.

Seizure of property with a view to its confiscation, covered in Article 10 of Law № 5/2002, is ordered by the judge at the request of the public prosecutor in charge of the investigation. .

As a rule, criminal police bodies are competent to enforce the measures, although in certain cases enforcement has to be validated by the judicial authority (judge)

The execution of searches with a view to seizure in a bank, lawyers' chambers or medical practice is directed personally by the judge.

The judge is also the first person to see the content of correspondence seized and to decide if it should be used in evidence or returned to its owner<sup>47</sup>.

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<sup>46</sup> CPC, Article 178(3), (4) and (5).

<sup>47</sup> CPC, Articles 179, 180, 181 and 268(1)(d).

Seizure of correspondence or seizures in bank premises, lawyers' chambers or medical practices must be authorised in advance by the examining magistrate, at the request of the public prosecutor in charge <sup>48</sup>.

#### 4.1.1.6 Provision of information to persons affected by the measure

In the case of objects or property seized during inspections or searches, in the presence of their owner, a copy of the seizure order is given to the latter or a person on the premises.

In the case of property seized at the inquiry stage, notification will depend on the purpose of the seizure, and may be omitted in the case of evidence, where the case is subject to judicial secrecy; seizure for the purpose of confiscation must be notified to the person affected by the measure.

#### 4.1.1.7 Legal remedies for the person concerned by the measure

Owners of seized property or rights may ask the investigating magistrate to modify or withdraw the measure.

If the seized objects can be declared confiscated and do not belong to the accused the judicial authority (judge) calls the person to a hearing. The judicial authority (judge) conducts the hearing *in absentia* of the person concerned unless it can be arranged otherwise<sup>49</sup>.

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<sup>48</sup> CPC, Article 268(1)(c) and (d) and Article 269(1)(d).

<sup>49</sup> CPC, Article 178.

Furthermore the defence of the rights of third parties in good faith is laid down in Law № 25/2008 of 5 June 2008.<sup>50</sup>

In all cases, the magistrate's (judge) decision may be the subject of an appeal to a higher court. It depends of the bona fide third party to use or not the right of appeal.

#### 4.1.1.8 Withdrawal of a freezing order

A freezing/seizure order can be withdrawn, either because it proves unwarranted or because it becomes unnecessary to maintain the seizure for purposes of evidence, or where the property seized is not declared confiscated; or in the case of seizure, if a financial security is paid.

#### 4.1.1.9 Management of seized assets

Decree-Law № 11/2007 regulates, in general, and complementing Article 185 of the CPC, the arrangements for the evaluation and use of and compensation for property seized in the context of criminal proceedings. It may be subject to advance selling and operational allocation to criminal police bodies; for example, provisional use of vehicles, weapons, aircraft, boats, telecommunications and IT equipment and other tangible property — and also other objects, materials, equipment and devices covered in the Cybercrime Law, q.v. (and likewise, for tax-related offences, see Articles 38 and 39 of the General System of Tax Offences).

The standard form of "management" involves delivery of the seized property to a depository.

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<sup>50</sup> Defence of the rights of third parties in good faith:

- "1 — If the property seized from defendants in criminal proceedings for an offence concerning the laundering of profits of unlawful origin is found to be entered in a public register in the name of third parties, the holders of such registers shall be notified for the purposes of claiming defence of their rights and summarily demonstrating their good faith; the property may be restored to them immediately.
- 2 — In the absence of a register, a third party invoking good faith in the purchase of seized property may claim the defence of his rights in the proceedings.
- 3 — The rights of a third party invoking good faith may be defended until confiscation is declared; the defence is presented through a petition addressed to the magistrate, and the person concerned must specify all the evidence forthwith.
- 4 — A written record of the petition is produced as an appendix to the proceedings and, following notification to the public prosecutor, who may oppose it, the court takes a decision, taking all the steps it deems necessary for the purpose.
- 5 — The magistrate may refer the question to the civil courts, if it cannot reasonably be decided in the normal course of criminal proceedings by virtue of its complexity or of the delay it would generate therein (Article 6 of Law № 25/2008 of 5 June 2008)."

In practice, in the *DCIAP* large sums in seized bank balances are sometimes placed in secure deposits/applications that are more profitable than demand deposits, so as to minimise the effects of the seizure (pre-empting, for instance, any request for compensation, should the seized property not be declared confiscated), the accused being entitled to a hearing.

The Portuguese authorities noted that in cases of "freezing" pure and simple (i.e. suspension or prohibition of transactions on the account), no such "management" appeared to be possible.

#### **4.1.2 Cooperation at European level - Implementation of Framework Decision 2003/577/JHA**

Portugal has implemented Council Framework Decision 2003/577/JHA<sup>51</sup> by Law № 25/2009 of 5 June 2009.

This is a specific law relating to the general framework of the Criminal Procedure Code and applicable supplementary legislation, and to Law № 144/99 of 31 August 1999 on international judicial cooperation in criminal matters.

Within the general legal framework for international judicial cooperation in criminal matters, the execution of requests for seizure has been carried out without requiring recognition and execution of foreign courts' decisions.

The recognition and execution of foreign courts' decisions is reserved for sentences or judgments that involve (in the context of economic and financial crime) definitive confiscation of the property, with the application being heard by a court of second instance.

Under Law № 25/2009, recognition of court decisions is applicable to interlocutory (i.e. provisional) decisions. Article 11 of that Law lays down that competence lies either with the court with jurisdiction for criminal inquiries for the area where the property or piece of evidence that the seizure decision concerns is located on the date of the decision, or with the court with jurisdiction for the largest number of items of property or pieces of evidence; or, if this cannot be determined, the court first seized of the seizure decision.

As in the general mutual legal assistance regime, the General Prosecutor's Office may issue and may execute foreign requests for seizure of property, if it has competence to do so domestically.

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<sup>51</sup> Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196, 2.8.2003, p. 45.

The differences in this new procedure for recognition and execution, carried out on the basis of the principle of mutual recognition, are reflected *inter alia* in the following:

- no requirement for a check on dual criminality in relation to various areas of crime listed in Article 3 of the Framework Decision and Law № 25/2009;
- provision, though not on obligatory basis, for a standard period of 24 hours for communicating the decision on seizure (Law № 25/2009, Article 12(6));
- express legal provision that the foreign issuing court take a decision in the procedure for contesting a seizure recognised and executed in Portugal, as well as on applications to modify or revoke the measure (Article 15(3));
- in formal terms, the execution of requests has been accelerated by the introduction of a certificate, attached to the request, which puts the request in a uniform format, enabling the executing authority to identify and assimilate its content quickly.

With regard to deadlines the introduction of a standard 24-hour period for notifying the seizure decision, which, although not obligatory, is expected to contribute, in line with the Joint Action on good practice, to creating a dynamic of speedy cooperation in the courts.

#### **4.1.3 Mutual assistance in the area of freezing**

##### **4.1.3.1 Statistics**

The expert team was informed by the Portuguese authorities that most requests for assistance are dealt with directly, and that therefore the central authority for processing requests for mutual judicial assistance (the General Prosecutor's Office) does not systematically gather data on such requests nor analyse them statistically.

Nor have cases of assistance based on the application of Framework Decision 2003/577/JHA and on Law № 25/2009 that transposed it into domestic law been reported by the competent departments of the public prosecution service.

There are requests for assistance in this matter which are based on older established legal instruments (in the *DCIAP* framework).



#### 4.1.3.2 Experience when acting as an issuing State

##### 4.1.3.2.3 *Competent authority*

Pursuant to Law № 25/2009, Article 4, the competence for issuing a decision to seize property or items of evidence located in a different Member State lies with the Portuguese judicial authority with the same competence for property located in Portugal.

##### 4.1.3.2.4 *Guidance on freezing orders*

The Portuguese authorities have stated that, apart from the legal provisions transposing Framework Decision 2003/577/JHA, there are no practical instructions, guidelines or models for the application of the implementing law and the completion and use of the attached certificate that forms an integral part of it.

Bearing in mind that the implementing law (Law № 25/2009) has been in force since July 2009 only, no problems or differences of interpretation and practical application have yet been detected. The Law refers to the transmission of the seizure decision, accompanied by the certificate and where appropriate by a specification of the procedures and formalities to be followed that are essential to ensure the validity of the items of evidence sought. There are no references to other material (Article 5(1)).

In this context the Portuguese authorities reported that the General Prosecutor's Office of the Portuguese Republic, along with Portugal's Criminal Police, Spain's *Fiscalía General* (the general prosecutor's office) and the Netherlands' ARO (BOOM, *Bureau Ontnemingswetgeving openbaar Ministerie*), is developing a project named FENIX on improving the judicial system regarding asset recovery. The FENIX Project will involve the production of documents describing recommended practice in this matter, to be distributed to judicial actors and other bodies with an interest in the subject; they could form part of future training programmes for magistrates and other actors in the justice system.

4.1.3.2.5 *Securing the validity of evidence in the executing State*

With regard to formalities and procedures referred to in Article 5(1) of Framework Decision 2003/577/JHA, which must be observed in the executing State in order to ensure that evidence taken is valid in Portugal, the experts have received the following information:

In abstract terms, the requirements of Portuguese law essentially concern the exclusive competence of the judicial authority to carry out certain acts; the requirement of dual criminality, in relation to one of the offences not on the list; and the requirement of dual admissibility of the seizure measure for confiscation.

Thus:

seizure of documentation in credit institutions, finance companies and payment institutions requires a judge (181 CPC) or the judicial authority who holds the process direction (Article 3(3) Law № 5/2002)

- order or authorisation<sup>52</sup>;
- likewise, bank account surveillance requires a judge order or authorisation<sup>53</sup>;
- in the case of seizure of correspondence, the judge must in the first instance note the content of the intercepted correspondence and determine its relevance to the proceedings<sup>54</sup>;
- seizure from a lawyer's chambers or doctor's practice must respect professional or medical secrecy, on pain of invalidation: documentation covered by professional secrecy can be seized only if it is itself the object of evidence in a crime<sup>55</sup>;
- under Law № 25/2009, the dual criminality requirement applies to crimes not covered by the list (Article 3(2)); in accordance with the additional requirement of dual admissibility in cases of seizure for confiscation, the measure must be admissible for the acts in question in terms which would also be admissible under domestic law (Article 3(3)).

It is for the competent judicial authority to decide whether to impose these formal requirements in a particular case, and also to decide on the best way to express them: in the seizure order and in the appropriate part of the certificate (section (e)(3)) or only in the latter.

<sup>52</sup> CPC, Article 3(3) of Law № 5/2002 and Article 181 of the CPC.

<sup>53</sup> Law № 5/2002, Article 4(2).

<sup>54</sup> CPC, Article 179(3); Article 189 for communication by e-mail and other forms of telecommunications, even if stored on a digital medium.

<sup>55</sup> (CPC, Article 180)

4.1.3.2.6 *Preferred transmission channels*

Article 6 of Law № 25/2009 provides for direct communication, provided the executing authority is known.

If it is not known, the law and judicial practice provide for use of the EJN or other channels, specifically Eurojust, to transmit the request.

The Central Authority is not involved in the transmission or receipt of requests. Its intervention may, however, be requested for the purposes of translation or to facilitate informal contacts.

Similarly, the Central Authority's contact point in the EJN may have a supporting role in completing the certificate and in promoting knowledge and application of Community law.

Problems locating an authority would as a rule in Portugal be resolved via the European Judicial Atlas. Frequently, the representative of the Central Authority in the EJN clarifies who the competent judicial authorities are, providing support and facilitating consultation of the EJN Atlas.

The Portuguese authorities noted that the future Asset Recovery Office may have a role in this respect.

In summary, the Portuguese authorities reported that to date there was not enough experience in the application of Law № 25/2009 and there were no cases on record of transmission of a freezing order issued under Framework Decision 2003/577/JHA and Law № 25/2009 of 5 June 2009.

4.1.3.3 Experience when acting as an executing State

4.1.3.3.1 *Mechanisms of receipt*

E-mailing and faxing are encouraged and accepted in the context of Law № 144/99 of 31 August 1999, which approved the law on international judicial cooperation in criminal matters, and which has been reinforced, and had its value demonstrated, in relation to the European Arrest Warrant. This experience is likely to be replicated in the transmission of other types of request, including the execution of seizure on the basis of mutual recognition.

The law requires only that communication between judicial authorities be effected by means that allow a written record to be kept and, in the case of transmission of the seizure decision, accompanied by the certificate that confirms its authenticity (Law № 25/2009, Article 14).

The certificate must be drafted in Portuguese, as Portugal has not made a declaration to the contrary (see Article 5(2)).

4.1.3.3.2 *Additional information required by Portugal*

No cases have been recorded of transmission of a freezing order issued under Framework Decision 2003/577/JHA and Law № 25/2009 of 5 June 2009.

In traditional judicial cooperation the commonest cases concern requests for confirmation of the basis for seizure, in connection with property discovered in the executing State's investigation, or property not sufficiently clearly identified in the request, or else questions concerning property that appears to belong to third parties (persons other than those directly under investigation).

4.1.3.3.3 *Competent authorities and role of ARO*

The competent authority is the court having jurisdiction to carry out a criminal investigation in the area in which the property or the evidence covered by the seizure order is located on the date of the decision, the area in which the largest number of items of property or evidence are located, or, failing that, the court first seized of the seizure order<sup>56</sup>.

The request, however received, is forwarded by the body or authority receiving it to the Public Prosecutor in the court having jurisdiction (Article 12(1)) so that the court can order what it deems necessary.

Presently, the absence of an ARO affects not only the role of the ARO but also the role of the Central Authority.<sup>57</sup>

In either case, as stated above, direct transmission obviates the need for Central Authority intervention, allowing it to maintain a supporting role in requesting and obtaining additional information or clarification, in providing translations, disseminating the legal rules applicable and explaining them and, above, all providing assistance in the completion of the certificate.

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<sup>56</sup> Cf. Law № 25/2009, Article 11.

<sup>57</sup> As already stated in the report the national ARO has been set up by Law 45/2011 of 24 June.

4.1.3.3.4 *Additional information requests*

The regularity and completeness of the request are checked at the stage of recognition and execution of the decision, in the first instance in the form of verification of compliance with the formal and substantive conditions.

Law № 25/2009 provides that the request from a foreign authority must be presented to the Public Prosecutor in the court having jurisdiction (Article 12(1)). Should additional information be requested, it must be communicated in such a way as to leave a written record (Article 14).

The request is made in Portuguese, with a translation into the language of the judicial authority to which it is sent or into a language accepted by that authority.

The practice is that in simpler cases additional information is requested informally, by e-mail. When the EJM contact in the Central Authority is involved, a common language is used (English, French or Spanish).

4.1.3.3.5 *Difficulties observed*

As the Portuguese authorities had not yet have any experience of freezing orders issued under the terms of Framework Decision 2003/577/JHA and Law № 25/2009, they only reported difficulties that had occurred in the context of traditional cooperation.

There have been some instances of defective translations of the original decision (translations which seemed to be largely automatic), and of references to judicial bodies which do not correspond to Portuguese bodies or do not exist under Portuguese law; such problems are nevertheless resolved via subsequent clarification and the use of a judicial body that best meets the objectives and purpose of the measure requested.

In the context of traditional cooperation, there has been at least one case in which the authority in the issuing State was requested to provide additional information on the suspicions existing regarding the involvement of the owner of the property to be seized in criminal activity, in order to provide a basis for seizure.

The property was not seized but there was an exchange of information and clarification regarding the form in which the requesting State could obtain seizure, and it was suggested that the procedure in Framework Decision 2003/577/JHA and Law № 25/2009 of 5 June 2009 be used; that has not yet happened (Netherlands).

In cases where additional communication becomes necessary the normal practice is either to contact the issuing State's authorities directly (a procedure nearly always used with Spain) or to contact its liaison officer in Portugal or using the Eurojust channel. The European Judicial Network has also been used in some instances.

#### 4.1.3.3.6 *Legal remedies*

The legal remedies for interested parties regarding frozen property are the same as laid down in point 4.1.1.7 of this report and in Article 15 of Law № 25/2009 of 5 June 2009 ("Appeals and applications").

Under Framework Decision 2003/577/JHA and Law № 25/2009 of 5 June 2009:

- An appeal against a decision by a Portuguese judicial authority to seize property or evidence located in another Member State, and any request to modify or repeal the measure, takes place under the terms set out in the Code of Criminal Procedure.
- An appeal against a decision to seize property or evidence recognised and enforced in Portugal in accordance with the provisions of this law may be made to the Portuguese courts under the terms set out in the Code of Criminal Procedure.
- An appeal lodged in Portugal and the reasons adduced for it are notified to the judicial authority in the issuing State so that it can reply within 10 days.
- The case is assigned to the court having jurisdiction as soon as a reply is received from the judicial authority of the issuing State or when the period for submission expires.
- The judicial authority in the issuing State is informed of the outcome of the appeal.
- An appeal in respect of the substantial reasons for issuing the seizure order may be brought before the Portuguese courts only when Portugal is the issuing State.
- The appeals referred to in this Article do not have suspensory effect.

## **4.2 Confiscation (including Framework Decision 2005/212/JHA and Framework Decision 2006/783/JHA)**

### **4.2.1 Confiscation at national level**

#### **4.2.1.1 Legal basis**

The legal basis for confiscation in Portugal are Articles 109 to 112 of the Criminal Code, Articles 7 and 10 of Law № 5/2002 of 11 January 2002 and Article 10 of the Law on Cybercrime (Law № 109/2009 of 15 September 2009), and Articles 18 to 20 of the general regime for tax offences (RGIT) (approved by Law № 15/2001 of 5 June 2001).

#### **4.2.1.2 Types of crime for which confiscation is possible**

Confiscation is never possible without a conviction. Confiscation is available for any type of crime as provided for in Articles 109 to 112 of the Criminal Code.

Furthermore, it is available for:

- the types provided for in Article 1 of Law № 5/2002 as regards extended confiscation under Articles 7 and 10 of Law № 5/2002.
- the types provided for in the Law on Cybercrime (Law № 109/2009) as regards confiscation as provided for in that law.
- the types of customs crime (e.g. smuggling ) as regards confiscation as provided for in the RGIT.

#### **4.2.1.3 Competent authorities**

The authority competent to decide on the confiscation is the criminal court.

The General Prosecutor's Office is the authority competent to enforce the sentence if there has been no financial security or attachment of sufficient assets.

#### **4.2.1.4 Provision of information to persons affected**

The persons affected by a confiscation measure are notified by the court about the ruling.

#### 4.2.1.5 Legal remedies for a person affected

All means of defence of the person's rights can be employed in the proceedings, up to the declaration of confiscation.

The sentence is open to appeal to a higher court.

In the procedure provided for in Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 and transposed into Portuguese legislation by Law № 88/2009 of 31 August 2009, there is provision for opposing the recognition and execution of a confiscation order, under the terms set out in Article 17 of the Law which provides that:

- "1. — All those involved in the proceedings, including bona fide third parties, may appeal against the recognition or execution of a confiscation order in order to preserve their rights.
2. — The appeal shall be governed by the general rules for criminal procedure and shall have suspensory effect.
3. — Where an appeal is filed against the recognition or execution of a confiscation order made by a Portuguese court, the court shall inform the competent authority of the issuing State.
4. — No appeal shall be admissible against the substantial reasons for issuing a confiscation order when the executing State is Portugal."

#### 4.2.1.6 Involvement of the ARO during this procedure

At the time of the on-site visit Portugal had not yet set up an ARO.



4.2.1.7 Additional information related to possibilities for confiscation referred to in Article 3(2) of Framework Decision 2005/212/JHA

Portugal has transposed Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property<sup>58</sup>. The measures of transposition have been communicated to the General Secretariat of the Council in September 2009. The related provisions are articles 109-112 of the Criminal Code, Law № 5/2002 and Law Nº 15/2001 of 15 July.

In the context of organised crime and economic and financial crime, Law № 5/2002 provides that in the case of conviction for a criminal offence referred to in Article 1 of that Law, and for purposes of confiscation of property, any difference between the value of the estate of the accused and the value consistent with his lawful income is construed as advantage deriving from a criminal activity.

For the purposes of this Law, the estate of the accused means:

- (a) property owned by the accused, or property under his control or to his benefit, at the time he is charged or subsequently;
- (b) property transferred to third parties free of charge or for a derisory consideration during the five-year period prior to his being charged;
- (c) property received by the accused during the five-year period prior to his being charged, even if the disposal thereof has not been determined.

In cases of economic and financial crime, confiscation on the basis of a partial reversal of the burden of proof (on the principle that any difference between the value of the accused's estate and the value consistent with his lawful income is construed as advantage deriving from a criminal activity) may affect the following property or rights (Article 7 of Law № 5/2002):

- property owned by the accused, or property under his control or to his benefit, at the time he is charged or subsequently;
- property transferred to third parties free of charge or for a derisory consideration during the five-year period prior to his being charged;

<sup>58</sup> OJ L 68, 15.3.2005, p. 49.

- property received by the accused during the five-year period prior to his being charged, even if the disposal thereof has not been determined.

In cases of partial reversal of the burden of proof the confiscation can be ordered only following a conviction for one of the offences referred to in Article 1 of Law № 5/2002.

Any interest, profit or other benefits derived from property complying with the requirements set out in Article 111 of the Criminal Code are always considered advantages deriving from criminal activities.

#### 4.2.1.8 Confiscation of property owned by corporations

In Portugal it is possible to confiscate property owned by corporations in a case where the corporation has not been prosecuted, but the court assumes the property is owned by beneficial owners who have been convicted.

The only condition for seizure in the general system (Article 178 of the Code of Criminal Procedure) is that the objects are the proceeds, profits, price or reward for an offence, regardless of their ownership.

Major difficulties reported arise from:

- the opaque nature of companies registered in certain offshore centres;
- fraud and violation of the rules by financial institutions with regard to the records of preferential clients residing in offshore centres in third countries;
- the highly restrictive protection of lawyers' professional secrecy which classifies as "correspondence" all documents relating to any potentially pending business between the lawyer and the client.

#### 4.2.2 Confiscation at European level

The body competent to issue a confiscation order within the meaning of Framework Decision 2006/783/JHA is the court which makes the confiscation order in Portuguese proceedings<sup>59</sup>.

The court having jurisdiction to enforce a confiscation order in Portugal is the local court for the area in which the property or the major part of the property is located (paragraph 2), or the court first seized of the confiscation order (Law № 25/2009, Article 11). The system is different from the system laid down in Law № 144/1999 for the recognition or enforcement of a foreign order since under that law the request for enforcement relating to criminal offences is handled by a court of second instance and more stringent conditions of admissibility are applied.

The Portuguese authorities expect that experience with and conclusions drawn from Project FENIX, together with the establishment and operation of a Portuguese ARO, will enable them to evaluate the need for practical guidelines for issuing a confiscation order and for the use of the certificate.

With regard to judicial assistance under the general law, the Portuguese experience of cooperation in the field of enforcing confiscation orders forming part of a criminal judgment shows that the lack of understanding of aspects of the other country's legislation, particularly with regard to assessing the double criminality aspect, and practical reasons such as insufficient grounds for the request, may lead to a refusal or, at least, make the request more difficult to execute.

#### 4.3 Conclusions

- As far as freezing and confiscation are concerned, the Portuguese law seems to have all the necessary provisions and mechanisms. Seizure in financial investigations is facilitated by a wide and comprehensive legal regime concerning (a) the proceeds of crime, (b) their instrumentalities and (c) the income and goods exceeding legitimate income.

<sup>59</sup> Law № 88/2009, Article 7, which sets out the judicial arrangements for issuing and executing confiscation orders relating to the instrumentalities, proceeds and benefits of crime, transposing Framework Decision 2006/783/JHA as amended by Council Framework Decision 2009/299/JHA of 26 February 2009.

The confiscation procedure also has a good clear legal basis in appropriate provisions of the Criminal Code, the Law on Cybercrime and the RGIT (general regime for tax offences).

- While in theory the Portuguese system can be viewed as complete and well structured, more measures should be taken, from a practical point of view, in order to guarantee its effectiveness. There is for instance a lack of reliable official reliable statistics concerning measures confiscating the proceeds of crime. This represents a shortcoming, if the system and its efficiency are to be properly assessed.
- Implementation of the relevant Framework Decisions is deemed to be appropriate. However there is no practical use of the relevant framework, such as Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property and evidence.
- Portugal has transposed Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property.
- Although Law № 5/2002 of 11 January 2002, which implemented Framework Decision 2003/577/JHA, provides the investigating authorities with the possibility of extended confiscation in cases concerning the investigation of very serious crimes, the practical use of the law has been very limited. The evaluators were informed that both prosecutors and judges have hesitated to use the law because it is regarded as violating the presumption of innocence. The establishment of an ARO seems necessary in order to make progress with and improve the practical use of the Framework Decisions.
- At the time of the visit Portugal remained one of the few EU Member States not to have set up an Asset Recovery Office. However implementation was underway and a working group had been set up to prepare draft legislation on the creation of an ARO. The evaluators were informed that three wider problems had been identified in relation to asset recovery. The first was the absence of a central database register of bank accounts (a problem due to be resolved after the visit, as its inception was underway)<sup>60</sup>; the second was the management of assets and the second was the way in which assets can be transferred into the community's ownership.

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<sup>60</sup> At the time of the on-site visit the central data base of bank accounts had already been approved by Law № 36/2010 of 2 September.

- The General Prosecutor's Office of the Portuguese Republic, along with Portugal's Criminal Police, Spain's prosecutor's office (*Fiscalía General*) and the Netherlands' ARO, is developing the FENIX project on improving the judicial system regarding asset recovery. The FENIX Project will involve the production of documents describing recommended practice in this matter, to be distributed to judicial actors and other bodies with an interest in the subject and which could form part of future training programmes for magistrates and other actors in the justice system.
- The Portuguese authorities (in particular the central and local Criminal Investigation and Prosecution Departments) complained that information which was forwarded by them to some other Member State authorities received insufficient follow-up, and sometimes even no follow-up at all. Important cases of financial and tax fraud committed in other Member States thus remained unpunished. However, the European Union can only truly effectively fight financial crime if Member States cooperate well with each other and follow up the leads which are provided to them by the prosecution/police authorities of other Member States.
- Portugal seems to have developed a very effective way of dealing with companies that are not providing their yearly financial statements to the competent authorities. As such companies are often conduits for fraudulent operations, it is important that effective action be taken against them. Portuguese law allows the winding up or liquidation of companies that have not provided their balance sheets for two years in a row. Furthermore, the criminal conviction of companies or legal persons is possible as well, *inter alia* through Article 11 of the Criminal Code and Article 4 of Law № 20/2008 of 21 April.
- According to Article 7 of Law № 5/2002, in the event of conviction for an offence referred to in Article 1, and for the purpose of the confiscation of assets by the State, the difference between the value of the defendant's actual property and one that is consistent with his lawful income is considered as benefit from a criminal activity.  
This conviction-based confiscation seems to be practised in very few cases in Portugal as a consequence of articles and opinions spread in the academic environment which questions the constitutionality of the article in question, insofar as it seems to create a kind of reverse burden of proof.

## 5 PROTECTION OF THE FINANCIAL INTERESTS OF THE COMMUNITIES

### 5.1 Available mechanisms, particularly cooperation with OLAF

#### 5.1.3 Measures to ensure proactive transmission of information to OLAF

In order to ensure the proactive transmission of information to OLAF, Portugal has entrusted a number of agencies and entities with the task of cooperating with OLAF.

However, in the fight against fraud, Portugal designated for the purposes of administrative and judicial investigation, national authorities of contact, which, if applicable in a particular case, naturally assumes the coordination of assistance, provided by OLAF for other national authorities.

##### 5.1.3.1 General Inspectorate of Finances (IGF)

The General Inspectorate of Finances (*Inspecção-Geral de Finanças - IGF*) is an entity under the Ministry of Finance and Public Administration which is responsible for coordinating all auditing with regard to the use of the EU's financial resources. It is independent from the institutions that benefit from EU funding.

There is close and regular cooperation between the General Inspectorate of Finances (*IGF*) and OLAF. The *IGF* acts as national interlocutor<sup>61</sup> for the European Commission in the areas of auditing, financial control, financial irregularities and the protection of financial interests under the Community budget.

<sup>61</sup> Under the terms of Article 12(3)(d) of Decree-Law № 205/2006 of 27 October 2006 (Organic Law on the Ministry of Finance and Public Administration) in conjunction with Article 2(2)(d) of Decree-Law № 79/2007 of 29 May 2007 (Organic Law on the *IGF*).

In the context of the EU's financial interests, the *IGF* fulfils the following functions:

- it provides the national representative on Community committees and working parties chaired by OLAF – COCOLAF, the Working Group on Irregularities and Mutual Assistance – Agricultural Products, and the Risk Analysis on Fraud and Irregularity Group;
- it coordinates the response to the annual questionnaire on the protection of the financial interests of the EU and the fight against fraud, as provided for in Article 325 of the Treaty on the Functioning of the European Union (TFEU);
- it is the national interlocutor for OLAF for on-the-spot checks and inspections carried out by the Commission to protect the EU's financial interests against fraud and other irregularities, as provided for in Regulation (EC) № 2185/1996 of 11 November 1996;
- it informs OLAF of irregularities and suspected fraud.

#### 5.1.3.1.1 *Agricultural funds*

Cases concerning agricultural funds are dealt with by an interministerial committee (*CIFG*) comprising representatives of the bodies in the Ministry of Finance and Public Administration and the Ministry of Agriculture which are involved in managing, executing and controlling funds, and chaired by the General Inspectorate of Finances (*IGF*)<sup>62</sup>;

#### 5.1.3.1.2 *Structural and Cohesion Funds and Financial Instruments*

The *IGF* coordinates the processing of information relating to communications resulting from management and control activities by the various participants.

Concerning the programming period 2000-2006 the legal references are: Article 9 of Decree-Law № 168/2001 of 25 May 2001 and Article 15 of Order № 684/2001 of 5 July 2001 with regard to CSF III, together with Article 6 of Decree-Law № 17/2002 of 29 January 2002 and Article 14 of Order № 37/2003 of 15 January 2003 with regard to projects supported by Cohesion Fund II;

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<sup>62</sup> RCM № 101/2007 of 1 August 2007 for the EAGF and the EAFRD, and previously RCM № 10/91 of 4 April 1991 for the EAGGF Guarantee.

Concerning the programming period 2007-2013 it is for the auditing body (the *IGF* for all operational programmes) to coordinate the processing of information relating to irregularities in the context of the National Strategic Reference Framework (NSRF), in accordance with Article 25 of Decree-Law № 312/2007 of 17 September 2007, and other operational programmes in force in this programming period.

With regard to notifications of the irregularities referred to, which were sent in electronic format from 2002 onwards via the Anti-Fraud Information System (AFIS) following specific training provided by *OLAF*, it should be noted that when *OLAF* promoted the introduction of the Irregularity Management System (IMS) to replace AFIS, it selected *IGF* representatives (both for the agricultural funds and for the Structural and Cohesion Funds and Financial Instruments) on grounds of merit, together with representatives of three other Member States, to carry out the two pilot schemes.

This training in the use of IMS was later extended and made available to representatives of all 27 Member States.

#### 5.1.3.2 General Prosecutor's Office

Article 11 of Law № 36/2003 of 22 August 2003 (Eurojust) transposed Article 26(4) of the Eurojust Decision<sup>63</sup> to the effect that the national member of Eurojust is to be regarded as the competent national authority *inter alia* for the purposes of Regulation (EC) № 1073/1999 and Regulation (Euratom) № 1074/1999 of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF).

Article 2 of this Law provides that the General Prosecutor's Office responsible for the investigation must inform the national member of those cases notified to it by OLAF which fall within the competence of Eurojust in accordance with Article 8(5) of the Law.

<sup>63</sup> Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA), OJ L 63, 6.3.2002, p. 1.



The General Prosecutor's Office has been forwarding information directly to *OLAF* on its own initiative, via the magistrate operating in the legal and judicial advice unit there and, in cases in which *OLAF* requested information of any kind directly from the judicial authority, the response from the Portuguese judicial authorities has always been prompt collaboration with no conditions or constraints of any kind. Preference has always been given to direct contact as a way of shortening delays and simplifying procedures, and that approach has proved practical.

However, in the Public Prosecution Service, by order of the General Prosecutor of 11 April 2007, a letter dated 19 March 2007 from Portugal's national member of Eurojust to the Director General of *OLAF* on the procedures for receiving and transmitting information between *OLAF* and Portugal's national member of Eurojust was circulated to all magistrates.

#### 5.1.3.3 Customs administration

The collection and exchange of information between *OLAF* and Portuguese Customs is a matter for the Information Division in the Anti-Fraud Services Directorate, which, under the terms of the organic law, is responsible for:

- centralising and full processing of customs and tax data of a strategic nature which are necessary for defining policy measures to prevent and punish fraud;
- centralising and full processing of information of a tactical or operational nature with a view to preventing and punishing customs and tax fraud, specifically trafficking in goods whose trading is subject to a ban or to restrictive measures, and passing on such information directly to decentralised operational services in order to indicate the direction their activities should take;
- centralising and processing information on checks, fraud and irregularities to be forwarded to the Commission under the terms of Community law;
- managing information on cash movements at the European Union's external border;
- centralising and passing on information in the framework of national, Community and international anti-fraud systems in accordance with the regulations applying to each;
- defining criteria, applying risk analysis methodologies to the processing of the information collected and direct, targeted forwarding of the results to the relevant services;

- issuing opinions and coordinating the necessary action to implement customs cooperation agreements and mutual administrative cooperation at Community and international level which have a direct impact on the prevention and suppression of customs and tax fraud;
- promoting administrative cooperation between the Directorate-General for Customs and Excise (*DGAIEC*) and other public or private bodies with a view to regular exchanges of information on combating fraud.

#### 5.1.4 Provision of information to OLAF on the outcome of relevant cases

The appropriate authorities have informed the evaluation team that Portugal has taken a number of measures to ensure that information is provided to *OLAF* on the outcome of criminal cases related to fraud against the financial interests of the EU:

- In the context of the rules applicable to the notification of irregularities and suspected cases of fraud, such instances are notified to OLAF by the *IGF* (Ministry of Finance), and where there is evidence of fraud the Public Prosecutor's Office is informed for the criminal investigation.
- Subsequently, in line with developments in the administrative procedure for recovering amounts, where the beneficiary of the fraud or other act adversely affecting the financial interests of the EU is convicted, the outcome of the criminal proceedings is notified.
- The Portuguese authorities noted, however, that full recovery of amounts paid in error terminates the administrative recovery process, so that *OLAF* is not notified of possible results of criminal cases relating to fraud adversely affecting the financial interests of the EU if they are delivered after the recovery process has concluded.
- There are no systematic notification mechanisms in place with the General Prosecutor's Office since the information requested by *OLAF* is supplied in the course of its monitoring and following up of the case.
- Within the areas of *DGAIEC* competence, no specific measures have been taken for the purpose of notifying the outcome of criminal proceedings since they are notified by the services responsible via the OWNRES Community database.

### 5.1.5 Possible role of the European Commission in a criminal investigation

In their answers to the questionnaire, the Portuguese authorities elaborated on the possible roles of the European Commission in a criminal investigation involving fraud against the financial interests of the EU. They have, however, emphasised that no such case had occurred up to the date of the on-site visit.

#### 5.1.5.1 Involvement in proceedings as a civil party

The Commission can act as a civil party in the proceedings, pursuant to Article 68 of the Code of Criminal Procedure, and has the right to intervene inherent in that role as described in Article 69 of the same Code. In that capacity, the Commission collaborates with the General Prosecutor's Office in the investigation, providing evidence, requesting the steps it deems necessary and providing information on the operation of the funds in question and specialist technical assistance in the matter.

For damages occasioned by fraud the Commission can also enter a request for civil compensation, thus becoming a civil party to the proceedings with a view to obtaining compensation or reparation for damages, up to the completion of the inquiry (Article 75 of the Code of Criminal Procedure) or after notification of the charges brought or the indictment (Article 77 of the CPC). If the European Commission is not informed of the possibility of applying for civil compensation in the criminal proceedings and of the formalities to be observed, the application may be made separately before a civil court (Article 72(i) of the CPC).

### 5.1.6 Participation of OLAF officials in a criminal investigation

OLAF officials may take part in national investigations as technical consultants, but not as experts, due to the special arrangements provided for in Article 152 of the CPC.

There have been instances of such participation, in the context of technical support, both at the inquiry stage in national investigations and at trial stage, with positive results.

*OLAF* support has also been requested by the *DCIAP* to collect information in various EU Member States and to provide assistance to Portuguese investigators for the execution of letters rogatory abroad.

#### **5.1.7 OLAF participation in a joint investigation team (JIT)**

Portuguese legislation does not impose any limits on joint investigation teams (JITs) but uses them in particularly complex investigations or where coordinated and concerted action with other States is essential.

Persons who are not representatives of the competent judicial and police authorities in the Member States involved may take part in joint investigation teams.

*OLAF* may therefore take part in a Joint Investigation Team by agreement between the authorities which set up the team, pursuant to Article 13(12) of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and Article 145-A(8) of Law № 144/99 .

Portugal considers their participation in a JIT as beneficial because of their highly specialist knowledge of matters relating to the EU's financial interests.

The limits are those ensuing from the fact that their participation is subordinate to the management of the team and the status conferred on them in practice (end of Article 15(8)).

#### **5.1.8 Experience with JITs dealing with fraud against the financial interests of the EU**

While theoretically JITs are considered as being beneficial by the Portuguese authorities, there has been no experience with a JIT dealing with matters within the competence of *OLAF*.

#### **5.1.9 Coordination of contacts with OLAF**

Pursuant to Article 15 of Order № 348/2007 of 30 March 2007, one of the tasks of the Tax Inspectorate's Fraud Investigation Services and Special Activities Directorate (*DSIFAE*) is to ensure Portuguese participation or cooperation with the European Anti-Fraud Office (*OLAF*).

The *DSIFAE* has delegated powers to investigate, without prejudice to having the case taken over at any time by the Public Prosecutor's Office, which it must notify immediately of the initiation of an inquiry.

The Inspectorate General of Finance (*IGF*) acts as national interlocutor for the European Commission in the areas of auditing, financial control, financial irregularities and the protection of financial interests under the EU budget on the expenditure side, pursuant to Article 12(3)(d) of Decree-Law № 205/2006 (Ministry of Finance and Public Administration organic law) in conjunction with Article 2(2)(d) of Decree-Law № 79/2007 (*IGF* organic law) referred to earlier.

The Directorate-General for Customs and Excise (*DGAIEC*) is responsible for the contacts with OLAF concerning the “community own resources” that it is competent to collect, VAT on importation and harmonised excises.

#### **5.1.10 Expectations with regard to support from OLAF**

The Portuguese authorities have listed a number of examples where they would expect support from *OLAF* in cases dealing with fraud against the financial interests of the Communities. These include:

- enhanced technical assistance by *OLAF* officials, particularly at the inquiry stage;
- qualitative analysis of cases of irregularities and suspected fraud, since *OLAF* has confined itself to producing statistical analyses of cases, with no guarantee of homogeneity in the data or of the quality of the checks which led to detection;
- organisation of training courses in Portugal with the participation of *OLAF* officials so as to provide information not only about their mission but also about their competences;
- the possibility for *OLAF* to invite Portuguese magistrates to take part in training courses organised either at its headquarters or in other countries;
- improved linkage and cooperation with national authorities whenever cross-checks are necessary outside the national territory;
- disclosure by Member States of the *modus operandi* in a larger number of cases of irregularities and fraud and other acts adversely affecting the financial interests of the EU.

## 5.2 Conclusions

- In general terms cooperation between the Portuguese authorities and OLAF is functioning well.
- Portugal has a number of entities that are entrusted with protecting the financial interests of the European Union. This appears to be however balanced as in the fight against fraud, Portugal designated for the purposes of administrative and judicial investigation, national authorities of contact, which, if applicable in a particular case, naturally assume the coordination of assistance, provided by OLAF for other national authorities.
- In the absence of an established protocol of best practice regarding cooperation between the national judicial authorities and OLAF, direct contact and information exchange between the parties could be facilitated by a Portuguese legal advisor working in OLAF.
- During the meetings with the Portuguese authorities many expectations were expressed in relation to OLAF which will most probably be addressed by the proposed modification<sup>64</sup> of Regulation 1073/99 which primarily aims, among other things, at reinforcing cooperation with the Member States.

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<sup>64</sup> SEC(2011) 343 final: Amended Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) № 1073/1999 concerning investigations conducted by the European Anti-fraud Office (OLAF) and repealing Regulation (EURATOM) № 1074/1999, cf. also: Council document 7897/11.

## 6 RECOMMENDATIONS

### 6.1 Recommendations to Portugal

Given the present legal and organisational set-up, while taking into account the specificities of the Portuguese national and administrative bodies, the evaluation team came to the conclusion that cooperation between the different players works very well in general terms. All practitioners met by the team seemed to be highly motivated and dedicated to their duties. Nevertheless the evaluation team thought fit to make a number of suggestions for the attention of the Portuguese authorities.

The experts would like to summarise their suggestions in the form of the following recommendations.

Portugal should:

1. consider elaborating a governmental policy towards financial crimes and financial investigations; (cf 2.3)
2. consider mechanisms/ways to allow for more specialisation by judges in financial crimes; (cf. 2.3)
3. review and redevelop the personnel management policy in order to strengthen existing units, foster inflow and promotion of individuals having particular experience or knowledge, and motivate investigators and prosecutors to acquire additional knowledge related to financial investigations. (cf. 2.3.1)
4. consider granting more resources to the Technical Advice Unit (*NAT*) in order to better support the prosecution services; (cf. 2.3.2)
5. reconsider its legislation, policy and law enforcement practices regarding currency transaction reports (CTRs); (cf. 2.3.1)
6. swiftly implement its plans for establishing a single database for the central (*DCIAP*) and local Criminal Investigation and Prosecution Departments (*DIAPs*); (cf. 3.6.1)
7. develop a clearly visible process throughout the criminal justice system in order to track the process of confiscating criminal assets right from the outset of the investigation and collect the appropriate statistics; (cf 2.3.1 and 4.3)
8. enhance mutual access to databases, especially between law enforcement agencies. (cf. 3.1.1.5 and 3.6.1)
9. reconsider and improve cooperation with Europol; (cf. 3.6.5.1)

10. improve the international exchange of information, especially by using the capabilities of Europol; (cf. 3.6.5.1)
11. review the mechanisms in transmitting information to Eurojust; (cf. 3.6.5.2)
12. when setting up the national ARO, endow it with some operational competences in order to coordinate asset tracing investigations in real time.
13. promote the wider use of extended confiscation as provided for in Article 7 of Law 5/2002; (cf. 4.3) through an adjustment or amendment of the wording of this provision, in order to make it more enforceable.
14. review the recommendations given in this report eighteen months after the evaluation and report on progress to the Working Party on General Affairs, including Evaluations (GENVAL).

## **6.2 Recommendations to the European Union, its Member States, institutions and agencies**

15. Other Member States are encouraged to develop similar models/legislation allowing proactive investigation, as this can be very effective in the fight against financial crime; (cf. 2.3.1)
16. Member States should cooperate proactively and follow up the leads which are provided to them by the law enforcement authorities of other Member States; (cf. 4.3)
17. Member States are invited to study the experience of the Financial and Accounting Expertise Unit (*Unidade de Perícia Financeira e Contabilística - UPFC*) as a highly specialised support unit with expertise in financial and accounting matters; (cf. 2.1.1.1.3)
18. Member States are encouraged to study and follow the Portuguese approach in dealing with companies that are not providing their financial statements to the competent authorities; (cf. 4.3)
19. Member States that do not have a centralised data base of bank accounts should study the Portuguese approach and are encouraged to set up similar systems; (cf. 3.1.1.1 and 3.6.1)
20. Member States involved in the ongoing project FENIX on improving the judicial system regarding asset recovery are invited to disseminate its results (cf. 4.1.3.2.2).



## ANNEX A: PROGRAMME FOR VISIT

December 6		
<i>Time</i>	<i>Meeting</i>	<i>Place</i>
08H15	Departure from the hotel	
08H45 – 09H30	Welcome meeting with the Director General for Justice Policy	Av. D. João II, nº 1.080.01E, Torre H, Campus Justiça (Sala do IGFIEJ)
09H30 – 10H30	Preparatory meeting with representatives of the Ministry of Justice	Av. D. João II, nº 1.08001E, Torre H, Campus Justiça (Sala do IGFIEJ)
11H00 – 12H30	General Directorate for Customs and Excise of the Ministry of Finance and Public Administration. Anti-Fraud Department	DGAIEC - Rua Terreiro do Trigo, nº 1 - 2º andar. Edifício da Alfândega
12H30 – 14H00	Lunch break	
14H30 – 17H00	Attorney's General Office <ul style="list-style-type: none"> <li>• Central Department for Criminal Investigation and Prosecution (DCIAP)</li> <li>• Department of Criminal Investigation and Prosecution – Lisboa (DIAP Lisbon)</li> </ul>	Rua Alexandre Herculano, 60  Campus da Justiça - Av. D. João II, nº 1.08.01 - bloco C, D, E
17H15 – 18H15	Institute of Registries and Notaries	Av. D. João II, nº 1.8.01D Edifício H, Campus da Justiça

December 7		
<i>Time</i>	<i>Meeting</i>	<i>Place</i>
09H00	Departure from the hotel	
09H30 – 13H00	Criminal Police <ul style="list-style-type: none"> <li>• National Unit Against Corruption (UNCC)</li> <li>• Financial Intelligence Unit (FIU)</li> </ul>	Polícia Judiciária Rua Alexandre Herculano, 42-A Rua Luciano Cordeiro, 77
13H00 – 14H30	Lunch break	
14H45 – 15H45	Unidade de Perícia Financeira e Contabilística	Rua Gomes Freire, 213
16H30 – 17H30	Centre for Judicial Studies	CEJ - Largo do Limoeiro
20H00	Dinner organised by the Ministry of Justice	

December 9		
<i>Time</i>	<i>Meeting</i>	<i>Place</i>
09H00	Departure from the hotel	
09H30 – 10H30	General Inspectorate of Finances	Rua Angelina Vidal, 41 Lisboa
11H00 – 12H00	High Council of the Judiciary	Rua Mouzinho da Silveira, n.º 10 Lisboa
12H00 – 12H30	Lunch break	
12H30	Departure to Coimbra	
15H00 - 17H00	Department of Criminal Investigation and Prosecution Coimbra (DIAP Coimbra)	Rua da Sofia, 175 Coimbra

December 10		
<i>Time</i>	<i>Meeting</i>	<i>Place</i>
09H00	Departure from the hotel	
09H30 – 10H30	Bank of Portugal	Av. Almirante Reis, 71, 3º andar
11H00 – 12H30	Final round for debriefing and pending questions with representatives of the Portuguese entities, as requested by the evaluation team.	DGPJ/GRI – Av. Óscar Monteiro Torres, 39 (Room Coreto)
12H50 – 14H00	Lunch break	
14H15	Departure to the airport	

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## ANNEX B: LIST OF PERSONS INTERVIEWED/MET

<b>Criminal Police (<i>Polícia Judiciária – PJ</i>):</b>	
<b>• National Unit Against Corruption (UNCC)</b>	
<b>Name</b>	<b>Function</b>
Mr Moreira da Silva	Juiz e Director da UNCC
Mr Saudade Nunes	Coordenadora Superior de Investigação Criminal da UNCC
Ms Patrícia Silveira	Coordenadora de Investigação Criminal, na UNCC
Mr Vítor Paiva	Coordenador de Investigação Criminal, na UNCC
Ms Manuela Marta	Coordenador de Investigação Criminal, na UNCC
Mr Pedro Fonseca	Coordenador de Investigação Criminal e Ponto Focal nesta visita
<b>• Europol National Unit (Unidade Nacional da Europol - UNE)</b>	
Ms Ana Moniz	Coordenadora Superior de Investigação Criminal, na UNE/PJ (EUROPOL)
<b>• Criminal Police Training School (Escola de Polícia Judiciária – EPJ)</b>	
Ms Carla Falua	Coordenadora Superior de Investigação Criminal e Directora da Escola de Polícia Judiciária
<b>• Financial Intelligence Unit (Unidade de Informação Financeira - UIF)</b>	
Ms Sílvia Pedrosa	Coordenadora Superior de Investigação Criminal e Directora da UIF
Mr Fernando Jordão	Inspector-Chefe na UIF
<b>• Financial and Accounting Expertise Unit (Unidade de Perícia Financeira e Contabilística – UPFC)</b>	
Mr Egídio Cardoso	Director

<b>Attorney's General Office (<i>Procuradoria Geral da República – PGR</i>):</b>	
<b>• Central Department for Criminal Investigation and Prosecution (<i>Departamento Central de Investigação e Acção Penal - DCIAP</i>)</b>	
Ms Maria Cândida Guimarães Pinto de Almeida	Procuradora-Geral Adjunta e Directora do DCIAP
Mr António Joaquim Moreira	Procurador da República;
Ms Maria Antonieta Carrasco Serrano Ramos Borges	Procuradora da República
Mr Jorge Humberto Gil Moreira do Rosário Teixeira	Procurador da República
Ms Joana Antónia Ribeiro Gomes Ferreira	Procuradora da República, Directora do GDDC (Gabinete de Direito Comparado da PGR)
<b>• Department of Criminal Investigation and Prosecution – Lisbon (<i>Departamento de Investigação e Acção Penal - DIAP Lisboa</i>)</b>	
Ms Maria José Morgado	Procuradora-Geral Adjunta e Director do DIAP de Lisboa
Ms Teresa Almeida	Procuradora da República
M. Sérgio Pena	Procurador Adjunto
Mr José Ranito	Procurador Adjunto
Ms Cristina Ribeiro	Procurador Adjunto
Ms Susana Figueiredo	Procurador Adjunto
Ms Ana Margarida Santos	Procurador Adjunto
Mr Hugo Neto	Procurador Adjunto
<b>• Department of Criminal Investigation and Prosecution - Coimbra (<i>DIAP Coimbra</i>)</b>	
Mr Euclides Dâmaso Simões	Procurador-Geral Adjunto e Director do DIAP de Coimbra
Mr José Luís Trindade	Procurador da República e Coordenador da área da investigação da corrupção e criminalidade fiscal
Mr Jorge Leitão	Procurador da República

<b>General Directorate for Customs and Excise of the Ministry of Finance and Public Administration. Anti-Fraud Department (<i>Direcção-geral das Alfândegas e dos Impostos especiais sobre o consumo - DGAIEC</i>):</b>	
Mr João António Canha Barreto	Director dos Serviços Antifraude
Mr José Baião Santos	Núcleo de Apoio Técnico da DSAF
Ms Cristina Trovão	Chefe da Divisão Operacional do Sul da Direcção de Serviços Antifraude (DSAF)
Ms Judite Couto	Chefe da Divisão de Informações da DSAF
Mr Carlos Órfão	Coordenador da Unidade Central Investigação Criminal da Divisão de Planeamento e Controlo da DSAF
<b>General Inspectorate of Finances (<i>Inspecção-Geral de Finanças - IGF</i>)</b>	
Mr. Carlos Trigacheiro	Inspector de Finanças, Director da Inspecção-Geral de Finanças
Ms. Custódia Martins	Inspectora da Inspecção-Geral de Finanças
<b>Centre for Judicial Studies (<i>Centro de Estudos Judiciários - CEJ</i>)</b>	
Ms. Helena Leitão	Magistrada do Ministério Público, Docente do CEJ e membro do Departamento de Relações Internacionais do CEJ
Mr. Pedro Verdelho	Magistrado do Ministério Público e Docente do CEJ
<b>High Council of the Judiciary (<i>Conselho Superior de Magistratura – CSM</i>)</b>	
Mr José Manuel de Sepúlveda Bravo Serra;	Juiz Conselheiro e Vice-Presidente do CSM
Mr António Gama Ferreira Ramos	Juiz Desembargador e Vice-Presidente do Tribunal da Relação do Porto
Mr José Manuel Duro Mateus Cardoso	Juiz Desembargador e Chefe de Gabinete do Vice-Presidente do CSM
Mr Luís Miguel Vaz da Fonseca Martins	Juiz de Direito e Juiz Secretário do CSM
Mr José Manuel Costa Galo Tomé de Carvalho	Juiz de Direito e Vogal do CSM
Ms Patrícia Helena Leal Cordeiro da Costa	Juiz de Direito e Vogal do CSM
Mr Rui Francisco Figueiredo Coelho	Juiz de Direito e Vogal do CSM
Mr Joel Timóteo Ramos Pereira	Juiz de Direito e Adjunto do Gabinete de Apoio ao Vice-Presidente do CSM

<b>Institute of Registries and Notary (Instituto dos Registos e do Notariado - IRN):</b>	
Mr. José Ascenso Maia	Conservador de registo e Vice-Presidente do IRN
Mr. Abílio Silva	Conservador de registo e Chefe de projecto da Empresa na Hora e da Casa Pronta
Ms. Paula Galhardas	Conservador de registo e Chefe de projecto do registo predial on-line
Ms. Filomena Rosa	Conservador de registo e Coordenadora do nosso serviço SIR - Soluções Integradas de Registo
Ms. Cláudia Crispim dos Santos	Conservador de registo do Sector jurídico e de contencioso do Departamento Jurídico do IRN
Mr. Manuel Osório	Instituto das Tecnologias de Informação da Justiça
Mr. Ilídio Pinto	Instituto das Tecnologias de Informação da Justiça
<b>Bank of Portugal (Banco de Portugal):</b>	
Ms. Maria Célia Ramos	Coordenadora de Área do Departamento de Serviços Jurídicos
Mr. Carlos Lopes	Técnico do Departamento de Supervisão Bancária
Mr. Pedro Lobo Xavier	Técnico do Departamento Jurídico
<b>General Directorate for Justice Policy (Direcção Geral de Política de Justiça – DG PJ):</b>	
Ms. Ana Vargas	Directora-Geral
Mr. João Ribeiro	Director
Mr. António Folgado	Chefe de Divisão UJ Penal
Ms. Fátima Russo	Técnica Superior
Ms. Mónica Gomes	Técnica Superior
Mr. Pedro Gonçalves	Consultor

## ANNEX C: LIST OF ABBREVIATIONS/GLOSSARY OF TERMS

ACRONYM ABBREVIATION TERM	ORIGINAL LANGUAGE	ENGLISH TRANSLATION/EXPLANATION
ARO	-/-	Asset Recovery Office
AWF	-/-	Analysis Work File
AWF MTIC	-/-	Missing trader intra-community fraud or VAT carousel fraud
AWF COPY	-/-	Products counterfeiting
CARIN	-/-	Camden Assets Recovery Inter-Agency Network
CIES	<i>Centro de Investigação e Estudos de Sociobiologia</i> <a href="http://www.cies.iscte.pt/">http://www.cies.iscte.pt/</a>	
CMVM	<i>Comissão de Mercado de Valores Mobiliários</i>	Securities Market Commission
CPC	<i>Código de Processo Penal</i>	Code of Criminal Procedure
CTR	-/-	Currency Transaction Report
DIAP	<i>Departamento de Investigação e Acção Penal</i>	Department for Criminal Investigation and Prosecution
DGAIEC	<i>Direcção-Geral das Alfândegas e dos Impostos Especiais sobre o Consumo</i>	General Directorate for Customs and Excise of the Ministry of Finance and Public Administration
DCIAP	<i>Departamento Central de Investigação e Acção Penal</i>	Central Department for Criminal Investigation and Prosecution
DCICCEF	<i>Direcção Central de Investigação da Corrupção e Criminalidade Económica e Financeira</i>	Central Directorate for Combating Corruption and Economic and Financial Crime
DSIFAE	<i>Direcção de Serviços Anti-fraude</i>	Fraud Investigation Services and Special Activities Directorate
EJN	-/-	European Judicial Network
FIU	<i>Unidade de Informação Financeira</i>	Financial Intelligence Unit
ISCTE	<i>Instituto Superior de Ciências do Trabalho e da Empresa</i>	

ACRONYM ABBREVIATION TERM	ORIGINAL LANGUAGE	ENGLISH TRANSLATION/EXPLANATION
MDG	-/-	Multidisciplinary Group on Organised Crime
NAT	<i>Núcleo de Apoio Técnico</i>	Technical Advice Unit
UNCC	<i>Unidade Nacional de Combate à Corrupção</i>	National anti-corruption Unit
UPFC	<i>Unidade de Perícia Financeira e Contabilística</i>	Financial and Accounting Expertise Unit
OCTA	-/-	Organised Crime Threat Assessment
OLAF	<i>Oficina Europeia de Luta Antifraude</i>	European Anti-Fraud Office
PC	<i>Código Penal</i>	Criminal Code
PGR	<i>Procuradoria-Geral da República</i>	Attorney's General Office
PJ	<i>Polícia Judiciária</i>	Criminal Police
RNPC	<i>Registo Nacional de Pessoas Colectivas</i>	National Registry of Legal Persons
ROCTA	-/-	Russian Organised Crime Threat Assessment
SCICCEF	<i>Secção Central de Investigação da Corrupção e Criminalidade Económica e Financeira</i>	Central Division for Combating Corruption and Economic and Financial Crime
SAR	<i>Relatório de actividade suspeita</i>	Suspicious Activity Report
SIMP	<i>Sistema de informação do Ministério Público</i>	Public Prosecutor's Information System
SUSTRANS	-/-	Suspicious transactions
SPO		Database used for criminal investigation purposes
STR	-/-	Suspicious Transaction Report
UCLAF	<i>Unidade de Coordenação da Luta Antifraude</i>	Task Force for the Co-ordination of fraud repression



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