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COMMISSION STAFF WORKING DOCUMENT

2020 Rule of Law Report Country Chapter on the rule of law situation in Portugal

Accompanying the document

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

2020 Rule of Law Report The rule of law situation in the European Union

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ABSTRACT

The Portuguese justice system continues to face challenges as regards its efficiency, in particular in administrative and tax courts. Several initiatives are underway to improve the quality and the efficiency of justice, and special attention is being given to the implementation of digital solutions in all types of courts. Important reforms have been undertaken regarding the adaptation of the judicial map and for matching the existing resources with the identified needs. Following allegations of specific breaches in the electronic case allocation system, the High Council for the Judiciary has applied disciplinary sanctions and is investigating possible irregularities in the allocation of cases.

The criminal legal framework to fight corruption is broadly in place. A National Anti-Corruption Strategy is in preparation. Until December 2019, when the Government announced that it will work on a national anti-corruption strategy, there was no coordinated strategic approach to corruption. Policy and legislative responses were largely introduced in a patchwork manner, to address various shortcomings as they were revealed. Progress in the fight against corruption has continued to be achieved by the specialised prosecution and criminal police. Nevertheless, constraints as regards an effective anti-corruption prosecution result from a lack of resources and specialisation of the law enforcement bodies. A legislative package on transparency in public office, asset declarations, and incompatibilities has been adopted in 2019 and has entered into force. Preventive action so far remains limited and the Council for Prevention of Corruption lacks capacity in terms of resources and specialisation, and does mostly awareness work. The newly established Transparency Entity in charge of the monitoring and supervision of asset declarations and conflict of interest is not yet functional.

The Constitution enshrines freedom of expression and information as well as media freedom and pluralism, and a culture of respect for the editorial freedom of journalists prevails. The regulatory authority for audio-visual media - *Entidade Reguladora para a Comunicação Social* (ERC) - is deemed independent and effective. As regards the remaining areas of concern criminal sentences for defamation have been considered by the European Court of Human Rights as violating freedom of expression. The legal system includes provisions regarding the disclosure of media ownership and financing, as well as the transparency of state advertising campaigns. Both aspects are monitored by the media regulator. Access to information and documents held by public authorities is safeguarded through specific legislation.

As regards checks and balances, the system of constitutional review provides for the possibility of ex ante and ex post control, and covers the omission to legislate. The Ombudsman has an extensive mandate to safeguard fundamental rights, and unjustified lack of cooperation with the Ombudsman is criminally punished. There are safeguards for the transparency of the legislative process, and the participation of stakeholders is ensured. The High Council for the Judiciary is entitled to propose legislative initiatives regarding the improvement of the judicial institutions. Civil society benefits from an enabling legislative framework and is active.

I. JUSTICE SYSTEM

The Portuguese justice system is characterised by a court system comprising the Constitutional Court, the Supreme Court of Justice and the judicial courts of first and second instance, the Supreme Administrative Court and the administrative and tax courts of first and second instance, and the Court of Auditors¹. The High Council for the Judiciary, the High Council for Administrative and Tax Courts and the High Council for the Public Prosecution exercise disciplinary action over the respective magistrates and are entrusted with relevant managerial functions. Furthermore, they are competent to nominate, transfer and promote judges and prosecutors. Judges and prosecutors are appointed by the respective Council, following an open competition and according to the grades obtained in mandatory training courses at the Centre for Judicial Studies. The public prosecution service is independent from the judicial power and operates autonomously from the executive branch. It has its own governance system in which the Prosecutor General's Office is the highest body. The Bar Association is an independent legal entity governed by public law and, in the exercise of its public powers, performs regulatory functions.

Independence

Changes to the composition of the judicial High Councils are being discussed. The High Council for the Judiciary is composed of the President of the Supreme Court of Justice (who chairs), two members appointed by the President of the Republic, seven members elected by Parliament, and seven judges elected by their peers in accordance with the principle of proportional representation². As the High Councils are endowed with important powers with respect to judicial appointments and careers, the importance of safeguarding their independence from political influence has been highlighted³. A legislative proposal amending the composition of the the High Council for Public Prosecution⁴ to increase the number of lay members was rejected in Parliament in 2018, and the majority of the members of the High Council for Public Prosecution remain prosecutors. A similar proposal regarding changes to the composition of High Council for the Judiciary was informally circulated in 2019⁵, but has not been pursued. While the proposal has not been formally tabled for discussion in Parliament, it is important that any changes take account of Council of Europe recommendations⁶.

¹ Execution of criminal sentences courts, maritime courts, intellectual property courts, competition, regulation and supervision courts, central instruction courts, arbitration tribunals and justices of the peace may also be set up.

² Art. 218 of the Constitution of the Portuguese Republic. Similarly, the High Council for Administrative and Tax Courts is composed of the President of the Supreme Administrative Court (who chairs), two members appointed by the President of the Republic, four members elected by the Parliament and four judges elected by their peers. In accordance with the principle of proportional representation.

³ GRECO, Fourth evaluation round - Evaluation report, paras. 92 ss.

⁴ According to Art. 22 of the Statute of Public Prosecution, the High Council is composed of the Prosecutor General (who chairs), four Regional Prosecutors-General, seven prosecutors elected by their peers, and seven lay members (five elected by Parliament and two appointed by the Government).

⁵ Press release of the Portuguese People's Party, of 30 August 2019. The proposal envisaged reducing the number of members of the Council who are judges elected by their peers.

⁶ GRECO, Fourth evaluation round – Interim compliance report Portugal, paras. 38 ss. See also Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe, para. 27. See also Judgment of the Court of Justice of 19 November 2019, *AK*, Joined Cases C- 585/18, C- 624/18 and C- 625/18, para. 137 and 138.

The electronic system of allocation of cases in courts is under scrutiny. The allocation of cases both in judicial and in administrative and tax courts is done electronically, through a system that provides random allocation in accordance with a predefined algorithm, allowing for the consultation of the distribution of cases online. However, allegations of breaches in the system and interference with the random allocation of cases surfaced in the beginning of 2020, when top judges were indicted in a case of high-level corruption, influence peddling and money laundering. The High Council for the Judiciary has applied disciplinary sanctions to two of the judges involved⁷, and is also currently leading an investigation as regards possible irregularities in the allocation of cases⁸. The High Council addressed the situation publicly, highlighting the seriousness of these allegations and the possible damages it may entail for citizens' and companies' perception of justice⁹.

The perceived judicial independence among the general public has decreased. Among the general public, the level of perceived independence of courts and judges is average (40% qualify it as 'fairly good' or 'very good'), but has been decreasing since 2017¹⁰. Companies perceive it more positively (45% qualify it as 'fairly good' or 'very good'), which is an improvement in relation to previous years¹¹.

The Statute of Public Prosecution and the Statute of Judicial Magistrates have been amended¹². One feature of both new statutes is the removal of the previously applicable ceiling to the remuneration of the President of the Supreme Court and of the Prosecutor General, which linked it to the remuneration of the Prime Minister. These amendments ensure parallel careers of judges and prosecutors. The new Statute of Public Prosecution also adapts the structure of the prosecution services to the new territorial organisation introduced by the reforms of the judicial map of 2013 and 2019¹³. It also introduces provisions aimed at clarifying the limits of hierarchical intervention in criminal proceedings¹⁴. The High Council for the Judiciary, the High Council for the Public Prosecution and the relevant professional associations were consulted during the legislative process.

Quality

New reforms on the judicial map and on courts specialisation have been adopted. This reorganisation was implemented as the follow-up to an evaluation of the broad reform of the judicial map of 2013¹⁵, and aims at addressing some of the shortcomings identified¹⁶. In

⁷ The Supreme Court confirmed the disciplinary sanction in the context of an appeal brought by one of the judges.

⁸ Press release of 3 March 2020.

⁹ Press conference of 3 March 2020.

¹⁰ Figure 44, 2020 EU Justice Scoreboard. The level of perceived judicial independence is categorised as follows: very low (below 30% of respondents perceive judicial independence as fairly good and very good); low (between 30-39%), average (between 40-59%), high (between 60-75%), very high (above 75%).

¹¹ Figure 46, 2020 EU Justice Scoreboard.

¹² Law No. 68/2019, of 27 August 2019 and Law No. 67/2019, of 27 August 2019, respectively.

¹³ See below, Section I – 'Quality'.

¹⁴ The issue of legal certainty with regards to instructions has been the subject of a GRECO recommendation, which invited Portugal to ensure that the rules governing prosecutorial hierarchy 'protect prosecutors from undue or illegal interference from within the system'. GRECO, Fourth evaluation round – Evaluation report Portugal, paras. 163-164.

¹⁵ Law No. 62/2013, of 26 August. This reform aimed at achieving three primary objectives: to broaden the territorial base of the judicial districts, to set up specialised courts on a national level and to implement a new management model for the court districts. In 2013, 27 courts were converted into 'proximity sections'. The number of judicial circumscriptions ('*comarcas*') was reduced to 23 (previously 231).

¹⁶ Decree-Law No. 38/2019, of 18 March 2019.

particular, this included the reopening of 20 courts that had been closed during the reform of 2013, in order to increase proximity to the citizens. Moreover, the new reform also provides for further specialisation, with the installation of more specialised courts, in particular in areas of the country where they did not exist before, and the requalification of existing courts. The reform also aims at a better allocation of the existing resources, taking into consideration the caseload of the courts. The authorities expect this reform to have a positive impact on the efficiency of courts. In parallel, amendments to the Statute of Administrative and Tax Courts also came into force¹⁷. These foresee, in particular, the creation of four new types of specialised chambers – public procurement, administrative social chambers, tax enforcement and infraction review chambers. The first specialised chambers will be operational in September 2020, and will be installed in the courts where the highest backlogs have been identified¹⁸.

Measures to improve the digitalisation of the justice system continue to be implemented.

In particular, an amendment to the Code of Civil Procedure implemented the principle of ‘digital by default’ to all civil proceedings¹⁹. The same principle was already applicable to tax and administrative proceedings. In particular, parties and legal counsels are now able to access the files and follow all procedural developments online. The second phase of the ‘*Justiça + Próxima*’ Programme, which is based on four pillars – efficiency, innovation, proximity and humanisation – is being implemented. This programme includes the ‘Tribunal + 360°’ project, which aims at implementing full digitalisation and a paperless system in courts, whilst simultaneously simplifying the contact and communication between citizens and courts. Changes are also being introduced regarding the functioning of courts, in order to simplify the experience of citizens when in court. The authorities expect to fully implement the ‘Tribunal + 360°’ project by 2023²⁰. In parallel, training initiatives are being developed, in order to familiarise magistrates and court clerks with the new tools²¹.

There are discussions on the resources for the justice system. The reduced allocation of budgetary resources to the justice system and the lack of material and human resources is a concern often voiced by stakeholders²². For instance, the total number of judges currently serving in first instance tax and administrative courts is significantly below what is established in the legal framework, a circumstance that stakeholders link to the efficiency issues identified in tax and administrative courts²³. Some announced measures to improve the efficiency of courts remain pending due to budgetary constraints. This is the case for the creation of advisory cabinets to aid judges – while already foreseen in law, the High Council has informed that the implementation of this measure will not be possible in the absence of

¹⁷ Law No. 114/2019, of 12 September 2019.

¹⁸ Order No. 121/2020, of 22 May 2020.

¹⁹ Decree-Law No. 97/2019, of 26 July 2019.

²⁰ ‘*Justiça mais Próxima 20/23*’, <https://justicamaisproxima.justica.gov.pt/medida/tribunal-360o/>.

²¹ The Commission has provided support in designing and implementing reforms in the judicial sector. A training model has been developed for court staff, both in terms of the methods currently followed and in terms of the training content available and channels used. In addition, Portugal has requested support to increase its capacities to more effectively and efficiently deal with the prosecution of international crimes (specifically crimes of genocide, crimes against humanity and war crimes).

²² See, for instance, intervention of the Prosecutor General in the Opening Session of the Judicial Year, 6 January 2020. http://www.ministeriopublico.pt/sites/default/files/anexos/intervencoes/discurso_ano_judicial_2020.pdf.

²³ High Council of the Administrative and Tax Courts (2019), Annual Report – 2018.

dedicated resources²⁴. Insufficient human and technical resources at the disposal of prosecution services were also identified as a constraint to efficient prosecution²⁵.

Several measures were taken to limit the impact of the COVID-19 pandemic on the functioning of the justice system. In the context of the COVID-19 pandemic, Portugal declared a state emergency²⁶, which was followed by a ‘state of calamity’²⁷. During this period, several measures regarding the functioning of courts were adopted, in particular in relation to enforcement of teleworking schemes, and possibilities to hold hearings and conduct other procedures remotely. Stakeholders highlight the importance of existing digital tools in avoiding the total paralysation of the system during this period²⁸. While the distribution of urgent and non-urgent cases was never interrupted in first instance courts, deadlines in non-urgent cases were suspended, and non-urgent acts were adjourned. In the context of the phasing-out of emergency measures, Portugal foresees a set of measures covering justice. In particular, to deal with potential backlogs and an increase in litigation, a temporary regime of reduction of court fees with the objective of facilitating court agreements has been created. In addition, the staff (judges and court clerks) of the Labour and Commercial Courts will be reinforced, as an increase of cases in the economic and social services is expected.

Efficiency

Despite improvements, the efficiency of the justice system continues to face challenges.

This issue has also been addressed by a country-specific recommendation in the context of the 2020 European Semester, regarding the need to improve the efficiency in tax and administrative courts²⁹. Portugal has made efforts to tackle these issues by implementing a number of measures to improve the efficiency of its courts. In particular, rapid reaction teams have been created to deal with case backlogs in tax and administrative courts³⁰. These efforts lead to some considerable gains in efficiency³¹. Nevertheless, courts still have a comparatively high number of backlog cases, and proceedings remain comparatively lengthy. These problems affect in particular administrative and tax justice, where the country rates among the Member States with the lengthiest proceedings – the disposition time in administrative and tax courts remains above 900 days in first instance, and above 1000 days in second instance³². Moreover, despite the resolution rate having risen above 100%³³, Portugal continues to have one of the highest rates of pending administrative cases³⁴. The

²⁴ Press release of 8 April 2019.

²⁵ Public Prosecution Service – Judicial District of Porto (2020), Annual Report 2019; Public Prosecution Service – Judicial District of Lisbon (2019), Annual Report 2018.

²⁶ Decree of the President of the Republic No. 14-A/2020, of 18 March.

²⁷ Resolution of the Council of Ministers No. 33-A/2020, of 30 April 2020.

²⁸ Information received in the context of the country visit to Portugal.

²⁹ Council Recommendation of 20 July 2020 on the 2020 National Reform Programme of Portugal and delivering a Council opinion on the 2020 Stability Programme of Portugal, available at <https://www.consilium.europa.eu/en/press/press-releases/2020/07/20/european-semester-2020-country-specific-recommendations-adopted>.

³⁰ In its first six months in place, these teams were able to solve over 1600 cases that had entered the system before 2013.

³¹ For instance, the disposition time for civil and commercial cases decreased from 369 days in 2012 to 229 days in 2018 (Figure 6, 2020 EU Justice Scoreboard).

³² Figure 8, 2020 EU Justice Scoreboard.

³³ Figure 12, 2020 EU Justice Scoreboard.

³⁴ Figure 15, 2020 EU Justice Scoreboard.

efficiency challenges in Administrative and Tax Courts have also been highlighted by the Council of Europe³⁵.

II. ANTI-CORRUPTION FRAMEWORK

Competencies to prevent, investigate and prosecute corruption are shared among different bodies. The Department of Investigation and Penal Action (DCIAP) under the Prosecutor General's Office and the National Unit for Combating Corruption of the police are designated to investigate corruption cases. The Court of Audit also plays an important role in fighting corruption. The Council for the Prevention of Corruption, operating within the Court of Auditors and chaired by its president, is the authority responsible for coordination and analysis of corruption prevention activities. Recent legislative revisions established a new Transparency Authority within the Constitutional Court that will be in charge of monitoring and verifying asset disclosure. A national anti-corruption strategy was announced in December 2019, including actions such as a National Anti-Corruption Report.

In the latest Corruption Perceptions Index of Transparency International, Portugal scored 62/100 and ranks 10th in the European Union and 30th globally³⁶. 94% of Portuguese respondents to the 2020 Special Eurobarometer survey on corruption consider corruption widespread in their country (EU average 71%), and 59% of people feel personally affected by corruption in their daily lives (EU average 26%). As regards businesses, 92% of companies consider corruption to be widespread (EU average 63), and 53% of companies consider that corruption is a problem when doing business (EU average 37%)³⁷. 34% of people find that there are enough successful prosecutions to deter people from corrupt practices (EU average 36%) while 16% of companies consider that people and businesses caught for bribing a senior official are appropriately punished (EU average 31%).

The criminal legal framework to fight corruption is broadly in place. Passive and active bribery in the public and private sector, influence peddling, as well as trading in influence, embezzlement and misappropriation are criminalised in the Criminal Code³⁸. A reform carried out in 2015 brought several criminal law provisions in line with GRECO recommendations, notably as regards the degree of crime for some offences³⁹.

A National Anti-Corruption Strategy is in preparation. After announcing plans to establish this strategy in December 2019, the Government established a working group responsible for elaborating the strategy. The working group is mandated *inter alia* to prepare a national anti-corruption report and revise the whistle-blower protection framework, fraud-proof legislation, improve public procurement processes, reinforce the transparency of political party financing and ensure that medium and large companies have corruption prevention plans in place. On 3 September, the Council of Ministers launched a public consultation on the National Anti-Corruption Strategy proposal⁴⁰. The 2020 European

³⁵ Portugal is currently under enhanced supervision by the Committee of Ministers for the excessive length of proceedings before both civil and administrative jurisdictions (violations of Art. 6 ECHR) [H46-20 Vicente Cardoso group v. Portugal (Application No. 30130/10)].

³⁶ Transparency International (2020), Corruption Perceptions Index 2019.

³⁷ Flash Eurobarometer 482 (2019).

³⁸ Art. 372, 373, 374, 375 and 335 of Criminal Code. Arts. 8 (Passive corruption in the private sector) and 9 (Active corruption in the private sector) of Law No. 20/2008, of 21 April, establishing the criminal framework to combat corruption in international trade and in the private sector.

³⁹ GRECO, Third evaluation round, Addendum to the Second Compliance Report on Portugal.

⁴⁰ The proposed strategy builds on seven priorities: to improve the knowledge, education and institutional practices regarding transparency and integrity; to prevent and detect corruption risks in the public sector; to

Semester country report for Portugal noted the need for a clear strategy with a view to creating a coherent and robust anti-corruption legislative and policy framework⁴¹.

Prosecution services are making efforts to improve their effectiveness, including as regards the treatment of high-level corruption cases. The Department Investigation and Penal Action together with its regional departments (DIAPs) are chiefly responsible for the investigation and prosecution of corruption. As regards investigation, DCIAP is competent to treat cases which cover several regions or are particularly complex⁴². DCIAP carries out the necessary types of co-ordination between the various departments⁴³. DCIAP is led by a director (assistant attorney general) appointed by the Prosecutor General, 3 deputies and 31 prosecutors and is supported in its work by judicial police, which has a specialised National Unit against Corruption. Efforts to further improve the prosecution track record continued including as regards the treatment of high-level corruption cases⁴⁴. At the same time, a large proportion of the corruption-related investigations are concluded without indictments. As regards the application of sanctions for corruption offences, in 2017 only 10% of those convicted for corruption were sentenced to prison and, 83% had suspended sentences. In 2018, 12.3% were convicted to an effective prison sentence, and 73.6% had suspended sentences⁴⁵. The Public Prosecutors Union cited a persistent lack of resources in the specialised unit of the judicial police to track illicit financial flows, as well as a lack of sufficient specialisation among public prosecutors in investigating economic and financial crime⁴⁶. According to the DCIAP, this may impact the effectiveness of the prosecution. In order to address needs for training and specialisation as well as to empower the regional departments for penal actions and investigations for treating complex investigations more efficiently, some organisational and further capacity-building measures are envisaged⁴⁷.

The Council for the Prevention of Corruption (CPC) is the public authority responsible for developing national actions regarding the prevention of corruption and related offences. The CPC is an independent body that operates within the Court of Auditors and is chaired by the President of the Court of Auditors. The CPC's financial and human resources capacity is very limited⁴⁸. The CPC activities in the area of prevention of corruption focus mainly on providing guidance for corruption risks and carrying out awareness campaigns in schools. The council also cooperates with various Ministries to integrate corruption plans in

engage the private sector in the prevention and repression of corruption; to reinforce the cooperation between public and private organisations; to ensure a more effective application of the legal remedies available, improving the response time of the judicial system and the adequacy and effectiveness of the penalties; to produce and promote quality information on corruption phenomena; to cooperate at the international level on fighting corruption.

⁴¹ European Commission, 2020 Country Report Portugal, SWD (2020) 521 final.

⁴² As a rule, corruption cases are attributed to the relevant regional department, unless they involve more than one judicial district, in which case the Prosecutor General can attribute the case to DCIAP.

⁴³ Departamento Central de Investigação e Ação Penal - <http://dciap.ministeriopublico.pt/>.

⁴⁴ European Commission, 2020 Country Report Portugal, SWD(2020)521 final.

⁴⁵ Direção Geral das Políticas da Justiça (2019), Estatísticas de Justiça: Corrupção. Ministério da Justiça. Other penalties include fines or community work.

⁴⁶ *Público* (2019), “*Queixas de corrupção são arquivadas em 94% dos casos*”, *Público*, Lisboa, 6 July 2019. Retrieved from <https://www.publico.pt/2019/07/06/sociedade/noticia/queixas-corrupcao-sao-arquivadas94-casos-1878985>.

⁴⁷ European Commission, 2020 Country Report Portugal, SWD(2020)521 final.

⁴⁸ European Commission, 2019 Country Report Portugal, SWD(2019)1021 final.

audit exercises and publishes statistics on the treatment of corruption-related complaints, including as regards indictments and final court decisions⁴⁹.

New rules were introduced in 2019 with a view to increase transparency and integrity in public life. As a response to several controversies reported in the media related to family ties at top government and cabinet level, new rules for the political appointment of cabinet advisors and support staff, senior officials and public managers have entered into force in September 2019⁵⁰. The law introduces stricter rules to prevent nepotism and conflict of interests. Earlier in 2019, a broader legislative process targeting different anti-corruption provisions was finalised. The process, led by an ad-hoc Parliamentary Committee for the Strengthening of Transparency in the Exercise of Public Functions set up in 2016, resulted in revisions of the integrity framework of members of Parliament and senior officials, targeting in particular some aspects of the asset and interest disclosure system and of the rules regarding incompatibilities⁵¹. The new law notably foresees the creation of the Transparency Entity, a new body in charge of monitoring and verifying the declarations of assets and interests submitted by political office-holders and high-ranking appointed officials, attached to the Constitutional Court. The reform aims to address shortcomings in the asset verification system, which were subject also to several GRECO recommendations, in particular as regards members of Parliament⁵². However, its full extent and effectiveness remain to be assessed, as the Transparency Entity is not yet operational⁵³.

As part of the 2019 reforms, the Parliament also adopted a Code of Conduct for Members of Parliament. This is the first document of its kind in Parliament⁵⁴. The Code establishes that, in the exercise of their mandate, members of Parliament should observe the general principles of conduct, namely freedom, independence, the pursuit of the public interest, transparency and political responsibility. The Statute of Members of Parliament has also been reviewed to introduce a new set of public interest, transparency and political responsibility. The Statute of Members of Parliament has also been reviewed to introduce a new set of incompatibilities. In general, members of Parliament cannot combine their position in Parliament with other public functions, including being a civil servant⁵⁵. The recent amendment enlarged the scope of what can be considered public functions to include

⁴⁹ According to the 2019 Annual Activity Report, the volume of reported instances has increased by 31.7%: from 604 reported instances in 2018 to 796 in 2019 (783 judicial instances plus 13 audit reports). In what concerns the 783 judicial instances: 389 instances (49.7%) were dismissed due to lack of criminal evidence; 134 had sufficient criminal evidence (17.1%); and 260 led to the opening of an inquiry (33.2%) (Conselho de Prevenção da Corrupção (2019), Annual Activity Report).

⁵⁰ Law No. 78/2009, of 2 September 2009.

⁵¹ Law No. 52/2019, of 31 July 2019. The new rules foresee *inter alia*: the merging of the previous three separate declarations into a single declaration of income, assets, interests, incompatibilities and impediments; the extension of disclosure rules to magistrates; stricter sanctions for non-compliance; expanding the register of incompatibilities; extending the rules related to gifts and hospitality to all political and senior public office holders. Portuguese authorities have informed that the Committee can now issue a written opinion on conflicts of interest when requested by the declarants or the President of the Parliament; inquire into facts occurring within Parliament that may compromise the honour or dignity of any Member as well as any irregularities or serious breaches of the Members' duties, at the request of the Member or upon the determination of the President of the Parliament; and issue generic statements and recommendations promoting good Parliamentary practice.

⁵² GRECO, Fourth evaluation round – Evaluation report Portugal, paras. 163-164.

⁵³ Article 5 of Organic Law No. 4/2019 of 13 September provides that until the establishment of the Entity for Transparency, single declarations of income, assets and interests continue to be filed with the Constitutional Court and scrutinised under the previous regime.

⁵⁴ Resolution of the Parliament No. 210/2019, of 20 September.

⁵⁵ Law No. 7/93, of 1 March, Art. 20 (1).

positions in state-owned companies, other decentralised and/or autonomous public entities, public-private partnerships or any other company in which the state owns any shares⁵⁶. The Parliamentary Committee on Transparency and Members' Statute has replaced the previous Ethics Committee, while retaining its competences⁵⁷.

New rules have been introduced to strengthen the regime regulating ‘revolving doors’, but lobbying remains unregulated. Changes introduced address state-owned companies’ board members, who now may not hold positions in the acquiring or concessionary entities within three years of the date of disposal or concession of assets in which they have intervened, as well as cabinet members, where a cooling-off period of three years has been introduced during which there is a ban on any functions of subordinate work or consultancy in international organisations, with whom cabinet members have established institutional relations in a public function⁵⁸. However, there appears to be little monitoring of how these restrictions are implemented. As regards lobbying, efforts to promote a bill regulating lobbying activities failed, after the President returned for re-examination a bill approved by Parliament in June 2019⁵⁹. Meanwhile, some parliamentary groups have presented new draft legislation. The need to prioritise COVID-19 related initiatives has led to some delay in their examination.

As regards whistle-blower protection, general provisions for public officials are in place⁶⁰. The provisions foresee that those who report violations of which they become aware during the exercise of their duties, cannot in any way be harmed, including through involuntary transfer or through dismissal. Disciplinary sanctions against whistle-blowers are presumed abusive until proven otherwise, if implemented up to one year after the respective denunciation. Whistle-blowers are entitled to anonymity, until the indictment is produced. They are also entitled to witness protection measures. While the provisions as such are in place, stakeholders⁶¹ stressed that the implementation in practice needs to be strengthened.

III. MEDIA PLURALISM

The Constitution enshrines the freedom of expression and information as well as media freedom and pluralism. In Portugal, a culture of respect for the editorial freedom of journalists prevails⁶². The Regulatory Authority for the Media monitors activities of media outlets⁶³.

The Regulatory Authority for the Media is deemed independent and effective. The Entidade Reguladora para a Comunicação Social (ERC) is an independent administrative

⁵⁶ Law No. 60/2019, of 13 August, which amended Art. 20 (1) of Law No. 7/93, of 1 March.

⁵⁷ Law 60/2019, of August 13, Article 27. °-A. This Committee has the competences of verifying the cases of incompatibility, incapacity and impediment of the members of Parliament, instructing the processes regarding the conduct of members of Parliament and violations of the rules, and issuing opinions and recommendations in several aspects of the activities of members of Parliament, including gifts and hospitality.

⁵⁸ Law No 52/2019, of 31 July.

⁵⁹ European Commission, 2020 Country Report Portugal SWD(2020)521 final.

⁶⁰ Law 19/2008, of 21 April.

⁶¹ Information received in the context of the country visit to Portugal.

⁶² Between 2019 and 2020, Portugal climbed two places in the Reporters Without Borders World Press Freedom Index, now registering at 10th position worldwide.

⁶³ Article 6 of the Law No. 53/2005, of 8 November 2005, establishing the Portuguese Regulatory Authority for the Media, Statutes of ERC, states that “[a]ll entities that pursue media activities, within the jurisdiction of the Portuguese State, are subject to the surveillance and intervention of the regulatory board (...)”.

body established by virtue of the Constitution and statutory law⁶⁴. The ERC regulatory mandate extends to all legal persons pursuing media activities within the jurisdiction of the Portuguese State, which includes press agencies, newspapers, radio stations and television providers. The ERC performs the media regulation tasks entrusted by the Constitution independently of any instruction by political authorities. It must inform the Parliament of its decisions and activities, by means of monthly and annual reports as well as the annual statement of accounts. The ERC encompasses the Regulatory Board, the Executive Directorate, the Advisory Council and the Auditor. The Regulatory Board, responsible for defining and implementing the regulatory activities of ERC, comprises the chair, the vice-chair and three board members. Four of the five members of the Regulatory Board are elected by the Parliament, and the fifth member is co-opted by the previously elected four. The chair and the vice-chair are elected from amongst the five members of the Board. The five members of the Board have a 5-year term, not renewable, and remain in office until their effective replacement or termination of service. The Statutes of the ERC detail the conditions for the termination of office of the members and the dismissal of the Regulatory Board. These provisions safeguard the independence of the regulator, in line with the objectives of the revised Audio-visual Media Services Directive (AVMSD)⁶⁵. The 2020 Media Pluralism Monitor Report on Portugal (MPM 2020)⁶⁶ considers the independence of the regulator at a very low risk.

Portugal has a thorough framework for ensuring transparency of media ownership⁶⁷. The obligation of disclosure of ownership and financing of the media appears in the Constitution, and its monitoring is the responsibility of the ERC. The Law 78/2015 of 29 July 2015 regulates transparency of ownership, management and the means of financing of entities that pursue media activities. MPM 2020 assessed media ownership transparency in Portugal to be at low risk⁶⁸.

There are rules in place for regulating the transparency of state advertising. Provisions concerning the transparency of state advertising campaigns are enshrined in law⁶⁹. Advertising campaigns must also comply with the rules of public procurement⁷⁰, obliging contractors to monitor the implementation of contracts, in particular with regard to possible subcontracting relationships and the acquisition of advertising spaces. Law 95/2015 also includes measures for state advertising in the regional press and local and regional radio. The Law further establishes a distribution of advertising campaigns between the press, radio, television and digital media. Supervision of compliance is assigned to the ERC, which has a dedicated web portal where all public advertising campaigns are launched. Anomalies or deviations from the law are to be referred to the Court of Auditors. While MPM 2020 found no evidence of non-transparent rules or situations regarding the distribution of state advertising in Portugal for the period 2018-2019, journalist associations pointed to concerns as regards the criteria for allocating a media support package in 2020⁷¹. According to the

⁶⁴ Portuguese Regulatory Authority for the Media, Statutes of ERC (Law No. 53/2005, of 8 November 2005).

⁶⁵ The transposition of this directive was presented by the Government in June 2020.

⁶⁶ 2020 Media Pluralism Monitor.

⁶⁷ It should be recalled in this regard that the revised AVMSD encourages Member States to adopt legislative measures providing that media service providers under their jurisdiction make accessible information concerning their ownership structure, including the beneficial owners.

⁶⁸ 2020 Media Pluralism Monitor.

⁶⁹ Law No. 95/2015, of 17 August 2015.

⁷⁰ The Public Procurement Code, Decree-Law No. 18/2008, of 29 January 2008.

⁷¹ Information received in the context of the country visit to Portugal. The media support package is an exceptional and temporary regime for the purchase of institutional advertising by the State, during 2020, in

Portuguese authorities, such criteria for choosing media and amounts were set following discussions with the representatives of the media sector and bind the State to purchase time/space for institutional advertisement in media belonging to each group, in line with the specified amounts.

Safeguards are in place to guarantee media independence and to protect the exercise of journalistic profession from interference by state authorities. In particular, the Constitution prohibits any interference, whether political or economic, or any form of censorship. The independence of journalists is also developed in the Statute of the Journalist, adopted by Law No. 1/99, of 13 January 1999. The MPM 2020 assessed the risk of political influence on the media as low⁷².

While basic protection standards for journalists are well established, defamation is punishable with imprisonment. Portugal's framework for journalists' protection is comprehensive and well established⁷³. According to the Constitution, offences committed against journalists in the exercise of their profession are subject to the jurisdiction of the courts and the independent regulatory body. Thus, the ERC is also tasked with ensuring freedom of the press. Regarding basic protection standards, the MPM 2020 estimates the risks as low⁷⁴. However, insult and defamation are punishable with imprisonment⁷⁵, despite judgments of the European Court of Human Rights pointing to violations of freedom of expression⁷⁶. No alerts have been posted in relation to Portugal since the Council of Europe Platform to promote the protection of journalism and safety of journalists was established in 2015.

Access to information and documents held by public authorities is safeguarded through specific legislation. This legislation aims at facilitating the performance of journalistic functions. While the Constitution guarantees the right of journalists to access sources of information⁷⁷, rules of general application⁷⁸ regulate access to administrative documents and administrative information. Non-respect of the right of access to administrative documents

television, radio and printed press to inform citizens on COVID-19 (Input from Portugal for the 2020 Rule of Law Report). A total of 15 million euro, allocated 75% to national media and 25% to regional and local media. Acquisition is determined by law (Decree-Law 20-A/2020, of 6 of May 2020) and its terms are defined by regulation (Council of Ministers Resolution n° 38-B/2020, of 15 of May). The purchase is governed by the public procurement rules and the legal framework for institutional advertisement by the State (Law n. 95/2015, of 17 of August 2015).

⁷² 2020 Media Pluralism Monitor.

⁷³ In this context, it should also be recalled that, in line with European standards, set out in the Council of Europe Recommendation 2016/4, 'Member States should put in place a comprehensive legislative framework that enables journalists and other media actors to contribute to public debate effectively and without fear'. Recommendation CM/Rec(2016)4 of the Committee of Ministers of Council of Europe, para. I-2.

⁷⁴ 2020 Media Pluralism Monitor.

⁷⁵ Centre for Media Pluralism and Media Freedom (2019), Decriminalisation of Defamation – Factsheet. It should also be noted that suspension of the execution of the sentence of imprisonment is possible in the defamation criminal cases and is applied in practice.

⁷⁶ In particular, in its judgment of 8 October 2019, *L.P. and Carvalho v. Portugal* (applications nos. 24845/13 and 49103/15) the European Court of Human Rights held that 'although the fine imposed on L.P. was small and his conviction did not give rise to a criminal record, the imposition of a criminal sanction in itself had a chilling effect on the exercise of freedom of expression'. The two applications referred to cases brought before the Portuguese courts by two lawyers, who considered that their freedom of expression in the exercise of their professional duties had been violated.

⁷⁷ The Statute of Journalists, approved by Law No. 1/99, of 13 January 1999, contains provisions aimed at ensuring this right (Art. 8).

⁷⁸ Law No 26/2016, of 22 August 2016.

can be appealed to the Administrative and Tax Courts. A complaint may also be filed before the independent administrative Commission for Access to Administrative Documents, but opinions on complaints are not binding on public institutions.

IV. OTHER INSTITUTIONAL ISSUES RELATED TO CHECKS AND BALANCES

Portugal is a representative democratic republic with a directly elected President and a unicameral Parliament. In the semi-presidential regime, the President of the Republic, elected by direct popular vote, has significant constitutional and political powers, including the competence to dissolve Parliament⁷⁹. The Prime Minister has the competences to direct the Government's general policy and to coordinate and orient the actions of all the Ministers⁸⁰. Parliament and the Government share legislative competence. The members of Parliament and the parliamentary groups, the Government, the regional assemblies and a group of at least 20.000 citizens have the right of legislative initiative. The independent Ombudsman is tasked with safeguarding and promoting the freedoms, rights and guarantees of citizens, and has the right to trigger constitutional review.

The Constitutional system provides safeguards for the regime of checks and balances. The Constitutional Court can exercise *ex ante*⁸¹ or *ex post*⁸² control of constitutionality, and can also review the omission to adopt the necessary legislative measures to execute constitutional norms⁸³. While both Parliament and the Government can legislate, the Constitution reserves legislative competence to Parliament in certain matters⁸⁴. The Constitutional Court is competent to declare the unconstitutionality of governmental legislative acts that have breached this division of competences. Moreover, a group of ten members of Parliament can request the legislative acts of the Government to be submitted for review by Parliament⁸⁵.

The legislative process foresees the involvement of stakeholders and there are safeguards for transparency. In certain cases, the involvement of representatives of the civil society in the legislative process is enshrined in the Constitution. The High Council for the Judiciary and High Council for Public Prosecution are not only entitled to issue advisory opinions, but also to propose legislative initiatives regarding the efficiency and improvement of the judicial institutions⁸⁶. The legislative initiative of the Government is subject to impact assessment of the economic costs and benefits of the legislative proposal⁸⁷. While the Constitution foresees the possibility to submit a legislative draft to an urgent procedure, which implies a reduction of the deadlines for discussion and examination of the proposal,

⁷⁹ Art. 133(e) of the Constitution of the Portuguese Republic.

⁸⁰ Art. 201 of the Constitution of the Portuguese Republic.

⁸¹ Art. 278 of the Constitution of the Portuguese Republic.

⁸² The Portuguese regime differentiates between 'abstract' and 'concrete' *ex post* constitutional review. The former can also be triggered by the Ombudsman and the Prosecutor General, whereas the latter can also be triggered by individuals.

⁸³ Art. 283 of the Constitution of the Portuguese Republic.

⁸⁴ Arts. 164 and 165 of the Constitution of the Portuguese Republic.

⁸⁵ Art. 169 of the Constitution of the Portuguese Republic.

⁸⁶ Art. 149(1)(i) and (j) of Law No. 21/85, of 30 July, and Art. 21(2)(f) and (i) of Law No. 68/2019, of 27 August.

⁸⁷ Article 55, Decree-law No. 169-B/2019, of 3 December 2019. Legislative proposals by Parliament should be preceded by gender impact assessment and, whenever possible, accompanied by information regarding the costs and benefits of the application of the legislative proposal (Article 131(2)(g) and (h), Rules of Procedure of the Assembly of the Republic No. 1/2007, of 19 July 2007, as amended).

the submission to the urgent procedure is subject to the opinion of the competent parliamentary commission and to a debate in the plenary.

Emergency powers were used in the context of the COVID-19 pandemic. The state of emergency was declared by the President of the Republic, following consultation of the Council of State and Government⁸⁸, and authorised by Parliament⁸⁹. The state of emergency was subsequently prolonged twice⁹⁰. The Government must submit to Parliament reports on the application of the state of emergency⁹¹, which enable Parliament to exercise also an *ex post* control of the measures adopted, and entitle it to start civil or criminal liability procedures for the violation of the provisions of the declaration of the state of emergency⁹².

The Ombudsman holds important prerogatives to safeguard fundamental rights. The Ombudsman (*Provedor de Justiça*), who is also the national mechanism for the prevention of torture, was reaccredited with ‘A’ status by the UN Global Alliance of National Human Rights Institutions (GANHRI)⁹³. Its mandate includes the defence and the promotion of the fundamental rights and freedoms, ensuring, through informal means, the justice and the legality of the exercise of public powers. The Ombudsman is entitled to demand any information and proceed to all investigations and enquiries deemed necessary. The unjustified lack of cooperation with the Ombudsman constitutes crime of disobedience. The Ombudsman also has the competence to request a constitutionality review of laws (both for acts and omissions), and to make recommendations to the Parliament. The Ombudsman reports on the respect by public authorities regarding the independence and integrity of the institution in the performance of its duties⁹⁴. In 2019, the UN Committee on the Rights of the Child recommended Portugal to allocate adequate resources to the Office of the Ombudsman for promotion and protection of the rights of the child⁹⁵.

⁸⁸ Decree of the President of the Republic No. 14-A/2020, of 18 March 2020.

⁸⁹ Resolution of the Assembly of Republic No. 15-A/2020, of 18 March 2020.

⁹⁰ Decree of the President of the Republic No. 17-A/2020, of 2 April 2020; Decree of the President of the Republic No. 20-A/2020, of 17 April 2020. The state of emergency ceased on 3 May 2020. In this context, the exercise of several fundamental rights was partially suspended - Article 4 of the Decree of the President of the Republic No. 14-A/2020 includes an exhaustive list of the rights subject to limitation; Article 5 of the same diploma list the rights that cannot be affected by the declaration of the state of emergency.

⁹¹ The Government is competent to execute the declaration of the state of emergency, and is under the duty to keep the President of the Republic and Parliament informed of all the acts adopted (Article 17 of Law No. 44/86 on the State of Siege and State of Emergency, of 30 September 1986). Article 29(1) of Law No. 44/86 on the State of Siege and State of Emergency, of 30 September 1986.

⁹² The Government submitted to Parliament three reports, relative to each period of the state of emergency (Portuguese Government – Ministry of Interior (2020), Report on the application of the declaration of the state of emergency, 19 March to 2 April 2020; Report on the application of the second declaration of the state of emergency, 3 April to 17 April 2020; Report on the application of the third declaration of the state of emergency, 18 April to 2 May 2020), which have been approved (Resolution of the Assembly of Republic No. 49/2020, of 5 June 2020; Project for a Resolution of the Assembly of the Republic No. 586/XIV, of 23 July 2020; Project for a Resolution of the Assembly of the Republic No. 587/XIV, of 23 July 2020).

⁹³ Global Alliance of National Human Rights Institutions (GANHRI), Sub-Committee on Accreditation (SCA) (2017), Accreditation Report – November 2017.

⁹⁴ European Network on National Human Rights Institutions (2020), The rule of law in the European Union – Reports from National Human Rights Institutions.

⁹⁵ United Nations Committee on the Rights of the Child (2019), Concluding observations on the combined fifth and sixth periodic reports of Portugal; European Union Agency for Fundamental Rights (FRA) (2020), Contribution from FRA for the 2020 Rule of Law Report.

Portuguese laws protect civic participation. The civil society space is considered to be open⁹⁶. Given their important role in the implementation of social, cultural, environmental, civic and economic programs, cooperation and development NGOs are granted a special legal status⁹⁷. Associations representing women, migrants, youth, and persons with disabilities, and those involved in environmental protection, are also subject to specific legislation. The existing framework appears to ensure the open space for civil society organisations, and allow them to operate without particular risks to their autonomy and security⁹⁸. However, it is reported that NGOs face challenges related to the availability of funding and the reduced diversity of funding sources⁹⁹.

⁹⁶ Rating by CIVICUS; ratings are on a five-category scale defined as: open, narrowed, obstructed, repressed and closed.

⁹⁷ Law No. 66/98, of 14 October.

⁹⁸ European Network on National Human Rights Institutions (2020), The rule of law in the European Union – Reports from National Human Rights Institutions.

⁹⁹ See previous note.

Annex I: List of sources in alphabetical order. *

* *The list of contributions received in the context of the consultation for the 2020 Rule of Law report can be found at (COM website).*

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Virtual country visit to Portugal in the context of the 2020 Rule of Law Report.

Annex II: Country visit to Portugal

The Commission services held virtual meetings in June 2020 with:

- Academic expert
- Bar Association
- Central Department of criminal action and investigation (DCIAP)
- Court of Audits
- Council for the Prevention of Corruption
- Regulatory Authority for the Media
- High Council for the Magistracy
- High Council for Administrative and Tax Courts
- High Council for Public Prosecution
- Inspectorate-General of Finance
- Journalists' Professional License Committee
- Journalists Union
- Ministry of Foreign Affairs
- Ministry of Justice
- Office of the Prosecutor General
- Ombudsperson
- Prosecutors Union
- Supreme Administrative Court
- Supreme Court of Justice
- Transparency International – Portugal

* The Commission also met the following organisations in a number of horizontal meetings:

- Amnesty International
- Civil Liberties Union for Europe
- Civil Society Europe
- Conference of European Churches
- EuroCommerce
- European Center for Not-for-Profit Law
- European Centre for Press and Media Freedom
- European Civic Forum
- Free Press Unlimited
- Front Line Defenders
- ILGA-Europe
- International Commission of Jurists
- International Federation for Human Rights
- International Press Institute
- Lifelong learning Platform
- Open Society Justice Initiative/Open Society European Policy Institute
- Reporters without Borders
- Transparency International EU