

CONTRIBUTION OF TRANSPARÊNCIA E INTEGRIDADE,
ASSOCIAÇÃO CÍVICA (TIAC) TO THE IMPLEMENTATION OF
THE PORTUGUESE MEMORANDUM OF UNDERSTANDING ON
SPECIFIC ECONOMIC POLICY CONDITIONALITY

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This working paper collects the analysis of various experts on reforms envisaged in the Memorandum of Understanding agreed with the Portuguese State and lists a number of concerns and preventive measures for the implementation process.

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INTRODUCTION

Following the meeting with representatives of the European Commission (EC), European Central Bank (ECB) and the Monetary International Fund (IMF) – the Troika – on the 5th May 2011, TIAC hereby submits to these institutions a set of proposals and concerns related to the implementation of the Memorandum of Understanding agreed with Portugal (MOU).

Although the MOU does not establish specific mechanisms against corruption in the public sector or in the Justice system, TIAC strongly supports the proposed reforms, as they will result in increased transparency and control of public spending – including the revision of remuneration schemes and fringe benefits in public bodies, the reduction of management positions and administrative units, the improvement of banking supervision and better accountability standards by the public administration and State-Owned Enterprises (SOE).

However, TIAC is concerned that some of the reforms established in the MOU, i.e., privatisations, renegotiation of PPP contracts and armed forces restructuring, may lead to new corruption opportunities, especially considering the close links between public and private interests in Portugal, as well as the fact that corruption is not usually regarded negatively by society and most times has only negligible legal effects on the perpetrators.

For these reasons, it is essential that both the decision making process and the implementing process be monitored and assessed in order to ensure that the policies' results are accurately measured, so that they not only achieve their stated goals but also reduce corruption opportunities, and strengthen the role of the monitoring units in the field.

NATIONAL STRATEGY AGAINST CORRUPTION

The main weakness of the fight against corruption and associated criminality is the non-existence of a National Strategy Against Corruption, which should include the following:

- A set of principal guidelines;
- An assessment of the risk areas, establishing priorities and different levels of intervention;
- An evaluation of existing means and resources, focusing on performance and coordination problems and setting out the reforms necessary for their improvement ;
- The establishment of targets to be achieved and strategic guidelines to be followed;
- The development of a working timetable to achieve these targets;
- The definition of specific timeframes for the various phases of implementation;
- The establishment of a system for monitoring and assessing progress in implementing the National Strategy, as well as measuring its results.

As far as TIAC is concerned, any discussion on public sector reform should start with the establishment of a National Strategy Against Corruption and Associated Criminality and a four year-plan with specific targets.

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TIAC calls the Troika's attention to three main weaknesses in the national integrity system:

- The national legal framework on corruption (prevention and repression) is not yet in total accordance with international legal standards, it is not codified and shows a very low level of enforcement;
- Public policies against corruption are not consistent (being devised piecemeal, in response to external public pressure, instead of a sustained, proactive focus), are scattered over several dispersed laws and public consultations on these policies often do not take place;
- On the repression side, the institutional environment is atomized, lacks coordination and has low enforcement results; on the prevention side, it is underdeveloped.

TIAC is willing to cooperate with the Government in the development of a National Strategy Against Corruption and Associated Criminality, as well as an action plan.

Currently, a study is being undertaken by TIAC on the various performance levels of the different pillars of the Portuguese Integrity System, i.e., the range of public, private and non governmental bodies with direct or indirect responsibilities in the fight against corruption and the associated criminality. The main purpose of this study is to assess the origins and extent of corruption in Portugal, determining the different types of infringement as well as measuring the effectiveness of the national policies through an in-depth analysis of existing sources, including interviews with different actors (university, public administration, politics, private sector, media and society in general).

The study is part of a project taking place in 26 European countries, under the coordination of Transparency International. Before the end of 2011, TIAC will submit a final report with specific and detailed recommendations for the Portuguese Integrity System. We hope that report may be the base for a wide public debate and for the development of a National Strategy Against Corruption and Associated Criminality by the Portuguese Parliament.

TIAC is also willing to cooperate with the Government and the Troika in monitoring the progress in the implementation of some of the measures established in the MOU.

In that sense, we will be summing up the main areas of concern which require careful decisions regarding their implementation.

TRANSPARENCY AND BUDGETARY DISCIPLINE

The MOU is an opportunity for Portuguese decision-makers to implement fundamental changes in this field and in the management of public resources.

The Budget reveals the fundamental political choices of the Government, in that it shows how the several policy options and goals are translated into specific spending or revenue items. Budgetary transparency is therefore of paramount importance if the Government is to be evaluated and held accountable by the citizens it serves. The quality of a democracy rests on it.

As Portugal lacks a culture of Budgetary discipline not all Government expenses and revenues are included in the budget. According to the Open Budget Initiative (OBI), Portugal is in the middle of the OBI index, with a score 58%, together with countries like Italy, Croatia and Slovakia. The majority of EU Member States (UK, France, Norway, Sweden, Germany, Spain, Poland and Czech Republic) are, however, better positioned because they provide significant and comprehensive information on their budget to the general public (61% to 100% of relevant information provided).

In Portugal there is neither a significant pre-budget report nor a biannual report on the impacts that the evolving macro economic framework has on the implementation of the budget . No information is provided in an accessible, non-technical language to explain the Government's policy options in a way that can be easily understood by the average citizen.

On the information provided, two sets of failures are identified: firstly, the budget proposal does not take into account the impact of certain policy measures in public revenues or expenses, even when those measures may have a significant impact in the Government's ability to reach its budget goals. Secondly, even where that information exists, it is so minute and difficult to interpret that neither the public nor the politicians themselves can have an accurate understanding of the budget.

Portugal has a lot to improve in order to provide greater budgetary transparency and discipline in all public bodies (including the Autonomous Regions of the Azores and Madeira, local councils and SOE).

Fiscal consolidation being a major concern for the country's future, it is at the same time an excellent opportunity to improve transparency and budgetary discipline. Therefore, TIAC proposes the establishment of a set of requirements that can increase accountability over public funds, spread better quality information and make it easier for international creditors and the general public to monitor the entire budget process.

In order to improve the budget procedures it is necessary to increase the quality of the financial aggregated data provided by the Government in its budget implementation control mechanisms, its public debt monitoring resources or public sector organizations' accounts reports. It is also necessary to publish management indicators by each of the various public bodies.

Firstly, there is a need to establish a monitoring process that covers not only the debt of the public administration but also that of all SOE. This is especially important, considering the creation, over the last decade, of so many money-losing SOE (at the national, regional and local levels), as well as a widespread practice of “de-budgeting” expenses, namely by transforming public hospitals run directly by the Government in SOE with budgetary autonomy whose accounts are therefore taken out of public sector deficit calculations. Only thorough and complete information on the situation of the entire public sector (administrative departments and State Owned Enterprises) will contribute to improving transparency and budgetary discipline.

In this context, it is noteworthy that the EUROSTAT and the Portuguese Statistics Agency (INE) decided to classify SOE as integral parts of the public sector in the national accounting – the effect of which was an increase in the registered Portuguese fiscal deficit and public debt.

TIAC therefore recommends that the calculations reflect not only the gross public administration deficit , as is mandated by Portugal's Stability and Growth Pact, but also show the net public debt, as is done in the UK.

Secondly, in order to be able to detect bad management of public money there needs to be a permanent reporting mechanism in place. TIAC recommends that the Government consider the introduction of productivity ratios, debt ratios, indicators on the efficiency of the services provided, of revenues collected, of maintenance costs, etc. These would allow us to compare the performance of financial management in similar organizations – providing us insight into how different municipal enterprises, or hospitals, or local municipalities compare against each other.

All those ratios should be regularly published and made available on Web sites for easy and free access.

PUBLIC-PRIVATE PARTNERSHIPS (PPP)

PPP have been an example of bad management and of wasted public money. The renegotiation of PPP contracts should go hand in hand with a strengthening of the legal and institutional framework to evaluate the risks of PPP, concessions and other public investments, as well as improving the monitoring and control mechanisms related to their implementation.

The Portuguese Government has used PPP to launch several new public works projects, which are then managed by private investors, through a Government concession. These range from hospitals, waste landfills and motorways to water and sanitation systems, to sports or cultural centres. Invariably, these are very unbalanced contracts that provide ample guarantees to the private parties, while saddling public entities with heavy responsibilities. Generally, the Government assumes the risks of the business while the private parties are entitled to the profits.

The worst example in this respect are the motorways without tolls for the road users – in which the Government agrees to pay a fee to each motorist that uses a road built and operated by a private company under public concession. These have proven to be ruinous contracts that ensure a return on investment of over 14 % a year for the private party. In some contracts, it's not even possible to precisely understand the real amounts involved.

Renegotiating these PPP is an urgent necessity. The basis for that renegotiation should be found by confronting the following calculations:

- The updated value of all contracted rents (payments by the state), both those that have already been paid out and those that have been agreed to in the future.
- An independent assessment of the value of the infrastructure, taking into account investment costs, as well as the forecasted demand and maintenance costs during the period of the contract.
- Wherever these amounts should be significantly different, the amount of rents should be revised and renegotiated and the acquisition of the equipment or infrastructure should be considered.

This entire renegotiation process must be closely monitored by a special entity established for that purpose, that must include citizens' participation. All decisions must be rendered public, including the respective justifications and the criteria used to reach each decision. This special entity's conclusions must be published in wide circulation newspapers and be made available on Web sites for easy and free access. A final report and progress reports must be published.

Public procurement procedures are not transparent and are difficult to be scrutinised by the citizens. This applies to all stages of those procedures and to all types of contract, be they PPP, public concessions or other investments made by the Government. Generally, the works and specifications contracted are dubiously defined and the awarding process lacks clarity. Therefore, all contracts above a certain threshold should be available to the public and subject to an implementation assessment every three months that would scrutinize every evidence of cost and schedule overruns, as well as any other substantive changes in the execution process.

The financing framework of the public company responsible for negotiating road concessions (Estradas de Portugal SA) should also be revised in order to increase transparency and contribute to a better allocation of public money, which has been unreasonably spent in the road sector.

Another source of wasting public money and inefficiency is the excessive offer of roads in Portugal. The road network is excessive, taking into consideration the size of the territory, the GNP per capita and the demand from road users.

This is largely a result of the lack of transparency in this sector's governance and its financing framework. In this regard, not to include the accounts of Estradas de Portugal in the Government budget is, by the amounts involved and the importance of the sector, a clear signal of a lack of transparency and a disrespect of budgetary principles. In 2007, the Government determined that a part of the revenue generated by Portugal's tax on oil and energy (Imposto sobre os Produtos Petrolíferos e Energéticos) would be allocated to Estradas de Portugal as revenue, classifying it as a "fee for the road service". Being a tax, this "fee" should have been treated and classified as tax revenue and included in the Government budget. This is another clear example of revenue which should have been included in the Government budget, but is not.

Presenting a tax revenue collected by the tax authorities as a fee service collected by Estradas de Portugal has clear medium term objectives: as it is an autonomous company, Estradas de Portugal is not considered part of the public administration services, as far as Government accounts are concerned. But it is still considered in the public accounts because it does not fulfil a legally established requirement of reaching a certain threshold of "commercial" revenues. When and if that happens, Estradas de Portugal will not be relevant anymore for the national accounts. Therefore, artificially increasing the "commercial" revenues of Estradas de Portugal will have that desired effect of not considering the company's debts as part of the public debt.

CONFLICTS OF INTEREST

The strong promiscuity between politicians and private businesses is one of the main reasons for the waste of public money and the bad management of public affairs.

This link is deeper in the sectors where Government intervention is bigger and more profitable, such as public works, health and the environment.

The most visible manifestation of this promiscuity lies in the many Members of Parliament (MP) who are partners in big law firms, raising the question : whose interests is the MP supporting in Parliament ? The public interest or the interests that his law firm is paid to defend?

Examples abound. Sometimes this democratic institution elected by the people, seems more like a forum for the lobbies of private interests.

Unfortunately, this situation is common even among Government ministers and undersecretaries. There is no shortage of well known situations where a member of the Government, upon leaving his political post, goes to work for private companies in the same sector he/she was working on as a public official, namely in the areas of public works and banking.

It is urgent to effectively regulate and monitor conflicts of interest, in order to put a stop to this rampant promiscuity.

This is a particularly relevant issue at a time when important and sensitive privatization processes and renegotiations of PPP contracts will be undertaken. The people's representatives in those negotiations must be above any suspicion in what regards a possible conflict of interests.

PUBLIC PROCUREMENTS

As an administrative procedure, public procurement is subject to some common principles, such as transparency, non discrimination and free competition.

However, the existing legal framework lacks appropriate mechanisms to ensure proper accountability and effective monitoring of the awarding of contracts.

Various stages of the public procurement process reveal risks which facilitate wrongdoing and opaque, even unlawful, acts:

- At the initial stage, during the development of the contract specifications which determine the scope of the tender;
- At the stage where the different competitor's proposals are evaluated;
- At the stage of negotiation and award of the contract;
- During the implementation of the contract, when additional services and waivers on penalties for undue delays or infringements of the contract may be agreed to.

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As far as transactions of public assets are concerned – namely privatisation processes –, there are also several situations that can result in practises that are detrimental to the public interest, namely:

- The evaluation of public assets;
- The lack of target clients;
- The choice for the right procedures (Initial Public Offering/public bidding);
- The loss of public companies' "identity";
- The management and sale of "toxic assets";
- The lack of monitoring on the implementation of the agreements.

In light of these weaknesses, the following measures should be adopted:

- Development and implementation of an appropriate mechanism to control and monitor contracts awarded under public procurement rules. Such a mechanism is currently being developed by TIAC in partnership with, and under the coordination of, INTEL;
- Establishment of a list of qualified and certified specialists that can be hired to evaluate proposals submitted during public procurement procedures, according to credible, integrated evaluation models;

- Establishment of a comprehensive , well organized and clear database encompassing all the procedures applicable within public procurement processes, in order to improve competition, investment and transparency;
- Equipment of regulatory and monitoring authorities (Court of Auditors, Stock Exchange Supervisor, Competition Authority) with integrated systems running appropriate software applications to support their decision making, allowing them to immediately evaluate the effects of each public measure, thus providing these regulatory and monitoring institutions with the tools they need to be more effective;
- Adoption of a new legal framework that allows for the monitoring and control of the criteria used to award contracts and to transact Government-owned real estate or public concessions.

PRIVATISATIONS

The MoU determines an ambitious programme of privatisations of SOEs. It is not for TIAC to debate the merits of that policy, but it is our responsibility to reflect on the legal and institutional conditions under which the reduction of the Government's role in the economy will take place.

The sheer volume of privatizations planned, the financial values involved and the short amount of time in which to execute them pose a real risk of corruption and other forms of abuse. That risk is highly dependent on a series of conditions, such as:

- The method and procedures chosen;
- The political situation and the ability to govern effectively;
- The private sector's level of autonomy and independence from politics;
- The legal and institutional framework ;
- Access to information. Privatizations are highly complex financial operations, not easily understood by the common citizen. Therefore, they require very close attention from the media and civil society, which should be included in the monitoring body.

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The risk of corruption is of special significance during the following stages:

- Developing the privatisation programme and establishing the applicable legal framework;
- Recruiting the evaluators (consultants and experts);
- Evaluating the assets and market value of the SOE ;
- Consulting, evaluating, negotiating and selecting the buyer;
- Negotiating and concluding the final terms of the contract;
- Monitoring and evaluating the privatisation process.

Therefore, TIAC suggests the following measures and procedures:

- The establishment of a specialised body to monitor and supervise privatisations. Special consideration should be given to its composition, its internal rules and procedures, its independence, powers and its coordination with other supervisory and monitoring bodies;
- The strengthening of supervisory and regulatory institutions' capacities and resources (Parliament, the Court of Auditors, the Stock Exchange Supervisor, the Competition Authority);

- The establishment of a list of qualified and certified specialists that can be hired to evaluate prospective buyer's proposals according to credible, integrated evaluation models;
- The establishment of an organised and structured data base accessible to the public with all the information regarding the procedures followed in all the privatisations, with the aim to increase transparency and competition.

GRANTING OF NATIONAL INTEREST PROJECT (PIN¹) STATUS OR OTHER EXCEPTIONAL LICENSING RULES

Bureaucracy is a feature of the process to get a license for new installations, i.e., residential, touristic and industry. The lack of transparency and simplified procedures constitutes a good field for unlawful acts, where small and big bribery are a form of compensation to get smooth and quick permits.

There is a need to reorganise licensing procedures at the national, regional and local levels. Doing that requires appropriate levels of staff, but in particular it requires the use of new technology and applications to reinforce the implementation of "multi geo-referenced" systems covering the entire territory.

These systems will allow licensing authorities to evaluate, analyse and assess the impact of projects in an objective and automatic way, in particular where the bigger projects are concerned.

All the data on spatial planning, including risks of natural or made-man disasters, that applies to public or private bodies should be readily and easily accessible by the citizens.

All licensing applications should be included in a geographical spatial geo-referenced database (at the national, regional and local levels), in order to ensure clarity and transparency. This data should also clearly identify the land owned by the Government, whether as public land or private land owned by public entities.

The existence of these databases and a better management of staff would allow licensing processes to be simple, swift and transparent, eliminating the need for PIN-like "shortcuts" that often generate corruption and inequity.

¹ PIN are, in accordance with current Portuguese legal provisions, investment projects, usually involving real estate, such as resorts or hotels, which, taking into consideration some criteria, are allowed to have an exceptional, fast-track licensing regime, by which the general rules concerning the permit of new installations or environmental rules are derogated (for example, the prohibition to construct in a natural reserve) and special governmental economic incentives, such as tax benefits, are received by the investors.