

## PUBLIC PROCUREMENT MEASURES INCLUDED IN THE MEMORANDUM OF UNDERSTANDING

### PUBLIC LAW

The Memorandum of Understanding agreed between the Portuguese Government and the International Monetary Fund, the European Central Bank and the European Commission, which establishes the conditions for the provision of financial assistance to Portugal<sup>1</sup>, provides in chapter 8, dedicated to “*Competition, public contracts and business environment*”, several measures relating to the legal framework of public procurement in Portugal.

As a global measure, the Portuguese Government undertakes to modify the national public procurement legal framework and improve award practices to ensure a more transparent and competitive business environment and improve efficiency of public spending

In particular, the Portuguese Government will have to:

- With regard to public foundations, to eliminate all exemptions permitting the direct award of public contracts above the Public Procurement Directives thresholds to ensure full compliance with the Directives. This measure will be implemented by the end of the fourth quarter of 2011.
- Eliminate all special, permanent or temporary exemptions, permitting the direct award of public contracts below the Public Procurement Directives thresholds to ensure full compliance with the principles of the TFEU by the end of third Quarter of 2011 wherever this does not entail amending the Public Procurement Code, and by the end of fourth quarter of 2011 otherwise.

<sup>1</sup> This briefing was based upon the Portuguese version of the Memorandum of Understanding provided by the Ministry of Finance and Public Administration internet portal, therefore, in case of any contradiction, the English version prevails (which is available on the International Monetary Fund website <http://www.imf.org/External/NP/LOI/2011/PRT/051711.pdf>).

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*Elimination of all special, permanent or temporary exemptions, permitting the direct award of public contracts below the Public Procurement Directives*

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- Amend the Portuguese Public Procurement Code provisions on errors and omissions and additional works/services in accordance with the Public Procurement Directives. This measure will be implemented by the end of the fourth quarter of 2011.
- Implement appropriate measures to address the currently existing problems with regard to direct awards for additional works/services and to ensure that such awards occur exclusively under strict conditions foreseen by the Directives. This measure will be implemented by the end of the fourth quarter of 2011.
- Take measures to render contracting authorities' administrators financially responsible for lack of compliance with public procurement rules as recommended by the Portuguese Court of Auditors. This measure will be implemented by the end of the fourth quarter of 2011.
- Ensure ex-ante auditing/checks on public procurement by the appropriate national bodies (most notably the Portuguese Court of Auditors) as a tool to prevent and counteract the practice of illegal award of additional works/services and increase transparency. This measure will be implemented by the end of the third quarter of 2011.
- Upgrade the national Public Procurement Portal (BASE) based on Resolution nº 17/2010 of the National Parliament in order to improve transparency of award procedures. This measure will be implemented by the end of the fourth quarter of 2011.
- Modify Art. 42 (7) (8) (9) of the Public Procurement Code, which sets out a requirement for investment in R&D projects on all public contracts worth more than EUR 25 million, to ensure full compliance with the Public Procurement directives, in particular by:
  - i) eliminating the condition for the R&D project to be carried out in national territory;

*Contracting authorities' administrators financially responsible for lack of compliance with public procurement rules*

- ii) requiring the R&D investments to be directly relevant for the performance of the contract; and
- iii) ensuring that all amounts to be spent on R&D projects are linked and justified by the subject-matter of the contract. This measure will be implemented by the end of the fourth quarter of 2011.

The above-mentioned measures have a very tight timetable for completion and compliance of the Memorandum of Understanding will require an enormous effort for the new Government. However, due to the used language (English) and terminology, interpretive questions may rise on the scope and extent of some measures, especially those regarding to the exact meaning of some concepts, as the concept of “*direct award*”.

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