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National integrity System Assessment [Potugal]

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EXECUTIVE SUMMARY

The National Integrity System assessment approach provides a framework to analyse the robustness and effectiveness of a country's institutions in preventing and fighting corruption. The concept has been developed and promoted by Transparency International (TI) as part of its holistic approach to countering corruption. A well-functioning national integrity system provides effective safeguards against corruption as part of the larger struggle against abuse of power, malfeasance, and misappropriation.

Corruption is present in the daily life of Portuguese citizens, who are assailed everyday by the media reporting new corruption scandals, recurring obstacles in pending investigations, crimes that go unpunished, and new and ineffective anti-corruption policies. The continuous public exposure of high-profile corruption cases involving figures from the state or private sector, combined with extensive media coverage of how successive governments have failed to deal with this phenomenon, has undermined public confidence.

According to Transparency International's (TI) 2010 Global Corruption Barometer data, most Portuguese citizens (83 per cent) not only feel that corruption levels have increased since 2007, but they also consider that the government is inefficient in fighting corruption. The percentage of citizens with this latter view increased from 64 per cent in 2007 to 75 per cent in 2010. This negative perception regarding the government's role in fighting corruption can also be felt in the international context. Transparency International's Corruption Perceptions Index, which measures the perceptions of businesspeople and foreign experts, confirms this trend. Portugal is 32nd in the CPI global ranking, and in relation to Europe, Portugal is perceived as the 18th most corrupt country.

External evaluations by international organisations also confirm the poor performance of consecutive governments when it comes to fighting corruption. For example, the Group of States Against Corruption's (GRECO) second evaluation round report in 2006,¹ reveals some of the shortcomings and flaws in anti-corruption and anti-financial criminality policies. With regards to the implementation of the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (commonly known as the OECD Anti-bribery Convention) Portugal's performance has lagged behind other OECD countries. The main conclusions from the OECD's progress report, published in October 2009, are assertive. Of the previous recommendations made by the OECD regarding the fight against corruption, Portugal fully complied with only two; the majority of the remaining recommendations were complied with only partially.

The inefficiency of anti-corruption policies is accompanied by a discredited judicial system. The 2011 Quality of Democracy Barometer (obtained through a survey of a representative sample of the Portuguese population) confirms already voiced criticisms in former studies of its kind:² according to the study, 59 per cent of respondents feel that citizens are not treated equally by courts and that

¹ Adopted at the 28th GRECO plenary meeting in Strasbourg, 9–12 May 2006.

² According to the data from the 2006's survey *Corrupção e Ética em Democracia: O Caso de Portugal* (Corruption and Ethics in Democracy: The Portuguese case), Portuguese citizens generally consider that justice is not severe enough towards members of government (87.2 per cent), members of parliament (85.3 per cent), sports directors (85.2 per cent) and mayors (78.7 per cent). The managers of public and private companies are also part of this group, even if with a lower value (72.9 per cent). An Eurobarometer survey performed in September 2009 also supported these findings about the citizens' perspective on the efficiency of justice: 70 per cent of Portuguese respondents considered that courts' decisions in corruption cases are not sufficiently severe.

their social, political or economic status has an important role in their treatment. In addition, 54 per cent considered that the decisions from courts are so slow that in most cases it is not worth resorting to the judicial system.

Regarding the independence of courts, the rule of law seems to resist the influence of political power more than that of economic power: 45 per cent of respondents fear that court decisions may not be independent from financial and economic interests, while 41 per cent have the same perception regarding the influence of political interests. When considering the three dimensions of judicial efficiency – sanctioning, compensation and enforcement – only regarding enforcement is the public opinion more positive (36 per cent) than negative (25 per cent). Indeed, it is considered to be easier to convict a homeless person for stealing a ‘dried octopus and shampoo in a supermarket’ (LUSA, 2012), than ordering the arrest of a mayor, who has already been convicted of corruption related crimes (Morais, 2012).

The perception of corruption and inefficiency in the judicial system has a direct impact on the quality of democracy. According to the data of the 2011 Quality of Democracy Barometer, corruption is one of the major challenges in Portugal, alongside a lack of confidence in the executive and politicians, a lack of efficiency in governance and social inequality.

These results reveal that corruption has contributed to a loss of confidence in democratic procedures, institutions and stakeholders. But, it is not always seen as a cause for indignation. In times of plenty, citizens tend to disregard certain practices of politicians, considering them to be ‘small whims of power’ and perfectly tolerable. However, in the context of a financial crisis, decreasing wellbeing results in hostile attitudes towards politicians, parties and representative bodies, and a general attitude of condemnation towards corrupt practices.

The current economic and financial climate is certainly not helpful. Wage cuts and the loss of financial benefits in the public sector increase the likelihood of bribes being paid within the public administration, while in the private sector there is an even greater need and demand to get preferential access to certain public decisions or assets. As stated by M.J. Morgado (2011) regarding the current economic situation, ‘The international crisis worked like the flu in the cancerous body of corruption, which holds the scars of the black market, fraud, tax evasion, and mismanagement of public funds’.

While the enlargement and multiplication of state services and their regulatory function in the economy have played a considerable role in the promotion of corruption, the ever growing permeability of the public sector to market values and interests has also lead to a further weakening of moral costs and an increased tolerance of corruption within society (De Sousa, 2011). The increased gap in social inequalities, mainly resulting from wealth distribution asymmetries, has led Portuguese citizens to the logic of the ‘efficient corrupt official’ – one who ‘steals from the public, but also gets the work done’. Such a short-sighted perspective on political performance promotes a lack of transparency and legal ambiguity, while simultaneously inhibiting public accountability of political actors for their crimes. This ‘Robin Hood’ style of corruption has a great level of acceptance within Portuguese society and is a symptom of a civic culture still founded on the satisfaction of the basic

needs of daily life. In a 2006 survey of Portuguese citizens ca. 64 per cent of the respondents accepted corruption and bribery as long as it would benefit the public.³ Following this, it is not surprising that political candidates with pending corruption-related crimes are re-elected – sometimes with comfortable majorities (De Sousa and Triães, 2009).

The declining levels of confidence in institutional capacity and the increased gap between citizens and political parties (and also between citizens and members of parliament) have resulted in low levels of political participation and reduced social vigilance of the performance of political and administrative bodies.

The ever-growing apathy of citizens towards causes of common interest is a clear symptom of an even bigger crisis of values. The wealth and wellbeing of citizens and the economic development of the last two decades has gradually instilled a mind-set of easy success, obtainable by any means and at any cost. Portugal recovered from a century-long delay in development, modernising its economy and industry quickly and intensely over the last three decades, and has reached levels of organisation, development and education similar to those of its European counterparts. This process of accelerated modernisation not only brought a new set of opportunities for corruption (new groups of interests, structural changes in the relationship between the state and market, increase in state-regulation and intervention, the competitive nature of power etc.), but also induced an extenuation of the values held by individuals. This cutback on moral costs also facilitated opportunities for corrupt practices to occur (De Sousa, 2011).

Furthermore, the civic culture and literacy levels of citizens have not made it easier to achieve an active and vigilant citizenship. Portugal has education levels below the European and OECD averages, and modern society has constantly failed to transmit values of transparency and integrity to younger generations, instead overwhelming them with constant examples of impunity in the media. The absence of a clear and solid normative reference allows citizens to freely do more than what is allowed by law, and less than what should be demanded by ethics (De Sousa and Triães, 2009).

Corruption as an abusive, obscure and privileged access mechanism to public goods and decisions is not only a factor contributing to political tension and instability, but has also reduced the capacity of the political system to respond according to its needs, and had a negative impact on the private sector. According to the Global Competitiveness Index, in just a decade Portugal fell from the 28th position in 2000 to the 46th in 2010. Among other factors, the accelerated decline in competitiveness is directly related to: the mismanagement of public funds and resources; economically biased political decisions; the burden of bureaucracy; the inefficiency of the judicial system; the mismanagement and incompetence observed in acquisitions, public contracts, and public-private partnerships with ruinous consequences for the state; and unclear regulations in these previous fields leading to a high level of discretionary power. All of these factors ultimately result in a rampant growth of public spending and the inevitable increase in taxation, thus resulting in an unattractive economy for private and sustainable investment.

³ *Corrupção e Ética em Democracia: O Caso de Portugal* (Corruption and Ethics in Democracy: The Portuguese case).

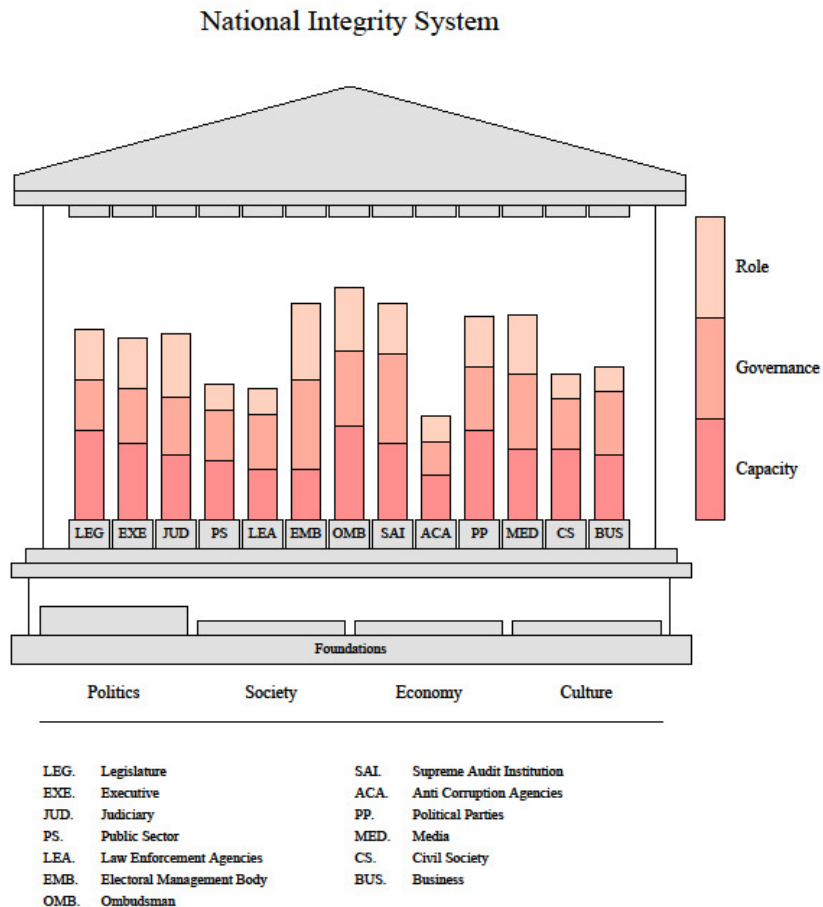
It is common knowledge that Portugal is currently in the middle of a grave economic crisis. It is the result of an excessive and uncontrolled economic deficit, the mismanagement of public funds and corruption, and has led to an increasing loss in the competitiveness of the economy. The current economic climate forced the Portuguese executive to request external financial aid in the context of the European Financial Stabilization Mechanism, and to agree before the European Commission, the European Central Bank and the International Monetary Fund to implement an array of structural policies with the purpose of reducing the deficit of the public administration and the weight of public debt. This set of agreed policies and internal measures was established in a Memorandum of Understanding on Specific Economic Policy Conditionality in May 2011.

Although the Memorandum of Understanding does not foresee mechanisms to combat corruption, particularly with regards to the public or judicial sectors, some of the reforms aim to bring about a more transparent and rigorous control of public spending, including changes to the remuneration schemes of public bodies, cutbacks on management positions, the enhancement of banking supervision and increased financial accountability within the public administration and state-owned private sector. However, some of the reforms, such as the privatisation of state-owned assets, the renegotiation of public-private partnerships or the restructuring of the military, may open several opportunities for corruption, mainly due to the close relationship between private and public interests and the low legal and moral costs associated with illicit transactions. Bearing in mind the severity of the current financial situation, the urgent necessity to raise funds, the tight schedule according to which decisions shall be (and have been) made, and the cooling of financial markets, certain state-managed operations selling assets may not only fail to achieve the objectives and goals outlined in the Memorandum of Understanding, but may also lead to corrupt practices and the illicit enrichment of certain actors with access to privileged information.

Within this difficult cultural, social, political and economic climate, the purpose of the present assessment of the National Integrity System is to evaluate the performance and underlying norms of the most influential bodies and institutions with a holistic approach to the fight against corruption. The goal is not to achieve an extremely detailed analysis over each and every one of these bodies, but to obtain a broad view on their performance as a symbiotic complex, taking into account their competences and institutional practices.

Main Findings

The Greek temple shown below is a graphic representation of the performance of the Portuguese National Integrity System based on the classifications given to the indicators of each of the institutional pillars. From the weakened foundations of this temple it is possible to understand that the political, cultural, social and economic climate in Portugal does not provide a solid ethical basis for the efficient fight against corruption, regarding the civic integrity of citizens, the economic stability of the country and the political will to effectively thwart this phenomenon.



According to the study, the political system (executive and legislature) and the enforcement system (judiciary, law enforcement and anti-corruption agencies) are the most fragile areas of the national integrity system. Without the political will and a capable, unwavering judicial system, the fight against corruption cannot take place.

Corruption in the spotlight

Due to the pressure of domestic and international studies, evaluation mechanisms, and media attention, the issue of corruption has been more closely followed by the Portuguese parliament in recent years. The 2010 anti-corruption law package, which was the outcome of the activities of the 'Temporary Commission for the political follow-up of the phenomenon of corruption and the

integrated analysis of solutions regarding its combat',⁴ is evidence of the growing sensibility of the political power regarding the social perception of corruption. This package provided for several amendments⁵ in the legal framework, such as the addition of a new type of crime (the breach of urban planning norms), the lengthening of statutes of limitation and the creation of a central bank account database at the Bank of Portugal. The recent approval of a bill proposing the criminalisation of illicit enrichment⁶ is evidence that the theme of corruption will continue to be in the spotlight in the near future.

A symbolic agenda

In spite of the positive message echoed by public opinion after the approval of the new laws and policies, the quality and scope of the amendments raise doubts about the true intentions of the legislature. From an external perspective, all the aforementioned laws and bills appear to be merely symbolic, lacking any previously defined and consolidated plans. The absence of strategy and planning has resulted in several operational weaknesses and flaws, mainly at the level of prevention and enforcement, thus resulting in poor results in the evaluation reports of international bodies (OECD, 2007; GRECO, 2006).

Notwithstanding the fact that the issue of corruption has featured in repeated government communications, the obstacles impeding criminal investigation remain unaddressed, namely the problems regarding training, specialisation, computerisation and forensic expertise (e.g. experts on finance). Regarding prevention, the government's activities can be summarised by the adoption of very general professional codes of conduct, without any monitoring within the public administration, and the creation of the Council for the Prevention of Corruption (CPC) which is almost irrelevant in its field.

Legislature and executive

Within parliamentary and the government's regulations and activities, the most pressing issues relate to the declaration of assets and interests by members of parliament, both at a legal level and in practice. In addition, there are severe flaws regarding the control of public spending. This is particularly true in the case of ministerial offices, which have no expenditure ceilings, thus allowing uncontrolled and excessive spending.

Political party financing

There is a lack of regulation of political party financing. The last version of the law regulating political party financing, approved in December 2010, is one of the most severe weaknesses in the national integrity system. The new framework constitutes an attack on the fundamental principles of transparency in political party financing by:

- Allowing the laundering of illegal income or income with questionable origins through special accounting standards for fundraising, sometimes with a surplus or deficit, as long as it respects the double-entry accounting rule.

⁴ The Interim Commission's Micro-Website, containing reports, minutes and an archive of initiatives, can be consulted at: <http://www.parlamento.pt/sites/com/XILeg/CEAPFCAISVC/Paginas/Default.aspx>.

⁵ These amendments were put in place, respectively, by Law 32/2010, 2 September, which amended the Criminal Code, and Law 36/2010, 2 September, which amended the General Framework of Financial Institutions.

⁶ Bill-proposals 4/XII (BE), 11/XII (PCP) and 72/XII (PSD, CDS-PP).

- Creating mechanisms that allow political parties to align their assets to their own activities (e.g. a political party rents its building for its own campaigns and fundraising activities).
- Introducing new sources of private funding that may include all types of illicit funding without the possibility of control by the Entity for Political Funding and Accounting. For example, the contributions (without maximum ceilings) of electoral candidates.
- Institutionalising indirect donations as a mechanism to hide campaign spending. Among the identifiable campaign expenses (such as office materials, room and vehicle hire, advertisements, communications, honorary fees, etc.) most can be changed to indirect donations of the campaign.
- Providing for an interpretative norm with retroactive effect, which concedes a self-pardon to political parties for unjustified amounts of funds or illegal subsidies received through regional assemblies. Notwithstanding the fact that the Constitutional Court considered those subventions to be illegal, having even recognised the competence of the Supreme Audit Court to file a criminal complaint to the Public Prosecutor's Office, the fact is that to date this situation has not been resolved and ca. 4 million euro are still to be recovered by the state treasury. Bearing in mind the current climate of austerity, the continuation of such activity reveals in the least some insensibility of political parties to the transparency of their funding and their respect for the rule of law.

National Electoral Commission

The National Electoral Commission (CNE) has lost many of its competencies, particularly with regard to controlling electoral spending and accounting, which is now under the remit of the Unit for Political Financing and Accounts (ECPF). However, it still retains a residual power of control and sanctioning when it comes to electoral litigation. The CNE receives claims of vote buying, the impartiality of the media and the neutrality of public institutions during the electoral period. Its ability to sanction has limited application in practice. The issue of vote buying is a rare practice, but may become more commonplace with the increase in economic hardship. In addition, according to the law, this type of crime does not include the promise of job posts or the offer of social benefits, nor does it include certain payments by third parties to members of a political party during primary elections.

The neutrality of public institutions is also nigh on impossible during local elections. The fact that the current mayors may be candidates while still on political and executive duties has led to some abuses, namely the use of privileged information from the local administration offices (such as City Halls), or the usual openings and inaugurations during electoral campaigns, or even the illicit use of human and material resources of these local administration offices. Although the CNE has the authority to sanction this behaviour, its performance has been limited to educational activities and the issuing of opinions and recommendations. Currently this body acts merely as a consulting institution, and does not even monitor or follow up any potential crimes that have been referred to the Public Prosecutor's Office.

Public sector

Regarding the public sector, independence is the major problem identified by the assessment. Although legally considered neutral and impartial, the public administration is still using less than transparent practices for recruitment: be it through the political nomination of directors – ‘jobs for the boys’ – resulting in the practical legitimisation of the public administration’s politicisation through discretionary criteria, often based on political client relationships (a similar situation also occurs in the state-owned private sector); or through the possibility to engineer public competitions to best serve previously chosen candidates. This is a very common practice in the local administration, where there is a recurring relationship between politics and the promise of public offices to third parties.

The current government has publicly included the establishment of an independent recruitment system for the selection of high political officials in its agenda. This means to promote selection based on merit and quality criteria, thus removing bias and ensuring the principles of competence, impartiality and transparency. In practice, however, the government provided for a recruitment mechanism that still guarantees the political control of recruitment profiles, selection of the jury, and final decisions. The attempt to reduce the political and partisan influence in this area resulted in a series of scandals, from promises of political offices to local political leaders (Sapage, 2012) to the nomination of public administrators with obvious conflicts of interest.⁷

The Supreme Audit Court

The Supreme Audit Court is responsible for controlling the management and expenditure of public funds in the political and administrative system. However, its independence is not completely assured due to the political nomination of its president. The performance of the Supreme Audit Court does not meet expected standards, not due to the amount of control action or audits carried out, but due to the fact that it merely controls the technical accounting of public spending, sometimes even helping audited institutions to better fit their uncontrolled spending within the technical accounting standards, instead of analysing the adequacy of public funds management based on social impact and opportunity.

Council for the Prevention of Corruption

In response to the requirements of the United Nations Convention against Corruption, the government created the Council for the Prevention of Corruption (CPC), which is joined to the Supreme Audit Court. This is an independent administrative body responsible for developing activities to prevent corrupt practice, as stated by the Law 54/2008, September 4. In practice, however, the CPC is characterised as an invisible and unresponsive institution, without a truly active role in the fight against and prevention of corruption.

The CPC has recommended that all institutions in the public sector (including central and local administrations) and the state-owned private sector prepare plans to manage corruption-related risks. About 900 of these plans have been submitted to the CPC for approval. Although this is only the first approach to gather information on the possible risks of corruption, there are methodical issues that gravely undermine the purpose and the quality of the exercise. Due to a lack of a culture of self-evaluation, many institutions resorted to hiring consultancy companies or even using model plans to

⁷ See: RTP, 2012, ‘Manuel Frexes está em litígio com a empresa “Águas de Portugal”’, 12 January 2012, available at: <http://www.rtp.pt/noticias/index.php?article=517559&tm=9&layout=122&visual=61>.

comply with the CPC's request. Some even prepared the plan along with the CPC: for example, the Risk Management Plan of the National Association of Municipalities.

In most cases, the process of preparing the prevention plans was neither transparent nor did it have broad participation. For example, at the level of local administration, few political parties in power invited the opposition parties to participate, and fewer still voluntarily submitted the plans to public debate at municipal assemblies. To increase the futility of the exercise the CPC will not publicly evaluate the seriousness and quality of the corruption risk management plans and to date no evaluations of the reports have been published.

The principle of this exercise was virtuous and educational in the sense that it sought to create a risk management tool through the introspection of institutions regarding their compliance and the effective implementation of their plans. In practice the effort was no more than a symbolic measure which sought to elude public awareness through an 'official' notion of prevention with a dual purpose – to tranquilise public opinion and assure external evaluators that recommendations to intensify prevention strategies are being duly fulfilled.

Not only does the CPC have few competences, but it cannot even avail itself of those it has. The information collected is not analysed or treated, there is no activity in the public sector and in the field of awareness-raising among citizens, its work replicates that of NGOs or is limited to scarce seminars. The body has also failed to develop connections and exchange information with other institutions, such as the judiciary, police or the public prosecutor's office. Until now, it has not presented any long-term prevention and education plans with regards to the public administration, and it has not reported on the activities that it has developed through the publication of an annual report, which should be submitted to parliament for debate.

Judiciary & Law Enforcement

Regarding the repression of corruption, the results achieved have been quite limited, and the way in which the judiciary has dealt with media-sensitive cases involving high-profile names, such as bankers or political office-holders, has contributed to its own discredit. The enforcement and sanctioning system reveals various obstacles impeding the prosecution of corruption. On the one hand, there are extreme difficulties in the detection of corruption, which are aggravated by the absence of adequate whistleblowing mechanisms, and on the other, there is a lack of financial resources to hire external experts and inadequate resources for investigation purposes, such as immediate computerised access to public sector databases. All these factors result in a lack of capacity to investigate and collect evidence.

Furthermore, the complexity of and delays in the judicial system represent one of the most significant obstacles in the effective prosecution of corruption. The lack of adequate judicial organisation, specialised training for judges on economic and financial criminality, and specialised courts for corruption crimes lead to constant delays in criminal proceedings, which in turn may result in the prescription of crimes (such as in the cases of Isaltino Morais and Fátima Felgueiras) due to the expiry of the statute of limitations, thus serving the interests of corrupt criminals while simultaneously instilling a perception of impunity to citizens aware of the inefficiency of the judicial system.