

**COMPLAINT
TO THE EC COMMISSION
REGARDING INFRINGEMENT OF THE COMMUNITY LAW**

1. Surname and forename of complainant:

GOMES, Ana Maria Rosa Martins

2. Nationality:

Portuguese.

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5. Field of activity:

Member of the European Parliament.

6. Member State or public body alleged by the complainant not to have complied with Community law:

The Portuguese government, which in 2004 took the decision to buy two submarines from the GSC- German Consortium Group, and specifically the Ministry of National Defence which was responsible for the Contract of Acquisition and the related Offsets Contract.

7. Fullest possible account of facts giving rise to complaint:

7.1. A decision to buy three submarines for the Portuguese Navy was taken by the government led by Prime Minister António Guterres, in 1997. An international tender was opened in 1999.

7.2. In 2003, the government of Prime Minister José Manuel Durão Barroso decided to buy only two, instead of three submarines. Two European consortiums reached the final stage of the competition – a French and a German one.

7.3. In November 2003 the **German Submarine Consortium (GSC)** was selected to supply the Portuguese State with the two submarines.

7.4. The Contract was negotiated and signed in April 2004 by the Defence Minister of the government of Prime Minister Durão Barroso, Mr. Paulo Portas, for the “*global base price*” of EUR 769.324.800, which could be updated, according to a clause inserted in the Contract. An Offsets Contract was celebrated at the same time amounting to EUR 1.210 million. *1- *see attached Acquisition Contract* and *2 – *see attached copy of the Offsets Contract*.

7.5. The Offsets Contract meant that the supplier Consortium undertook to “*provide to the Portuguese economy*” offsets compensating for the acquisition of the submarines, by arranging business opportunities for Portuguese in Germany and facilitating transfers of technology and know-how from German to Portuguese companies. The offsets value – EUR 1.210 million – corresponded, according to the Contract, to “*100% of the value corresponding to three submarines and respective logistical support and the price revision and optional supply relative to the two first submarines*” (clause 4th of the Offsets Contract).

7.6. The **German Submarine Consortium** was formed by the companies **Howaldtswerke Deutsche Werft AG, Thyssen Nordseewerk GmbH** and **MAN Ferrostaal**, the latter being put in charge of the commercial and financial aspects of the contract, including the offset contracts, the identification of offset beneficiary companies in Portugal, the financial institutions and the Portuguese State.

7.7. Judicially authorized wiretaps in the investigation of a corruption case (*Portucale* case) led the Portuguese Public Prosecutor in 2006 to open an enquiry on the purchase of the submarines: intercepted phone calls between top members of CDS-PP, the political party led by the Defence Minister, Mr. Paulo Portas, suggested that the party had received EUR 1 million as kickbacks paid by **ESCOM UK**, a financial consultant company linked to GES (Espírito Santo Group).

7.8. **ESCOM** was hired (for EUR 30 million as fees) by the Defence Minister to engineer the finance project concerning the purchase of the submarines (offsets contract included).

7.9. The judicial investigations have revealed that **ESCOM** had also been hired by MAN Ferrostaal to facilitate the offset contracts. **ESCOM** was, therefore, working for both parties, the **Consortium** and the **Portuguese Defence Ministry**.

7.10. Suspicions arose in the meantime about the integrity of the **Offsets Programme**. There were many problems with the implementation of the offsets, supposed to be complete by 2012. But by early 2010 only 25% had been executed. The abnormal low level of offset implementation led the governmental commission tasked to oversee offset implementation, the **CPC - Comissão Permanente das Contrapartidas** - to advise the

Portuguese government to renegotiate the contract in 2009. *3 – *see attached 2009 Activities Report of the CPC.*

7.11. Currently, two separate judicial investigations are ongoing in Portugal relating to the submarines' purchase:

- one concerns suspicions of fraud and bribery involved in the Contract of Acquisition of the submarines, directed by the German suppliers to Portuguese government officials and military, politicians and political parties, bank consultants, lawyers, etc... to secure the deal and its financial conditions, highly damaging for the Portuguese State.

- the second is focused on the offsets contracts signed between **MAN Ferrostaal** and several Portuguese companies, with the agreement from the Portuguese State. Seven Portuguese company executives and three representatives of **MAN Ferrostaal** have been indicted by the DCIAP (Central Department of Investigation and Criminal Action) on 30 September 2009. The Public Prosecutor believes that the Portuguese State was misled and suffered damages amounting to, at least, EUR 34 million. *4 *see attached copy of the Accusation.*

7.13. In the meantime, the Portuguese judicial investigation has stumbled over several obstacles:

a) – a number of relevant documents are missing from the Ministry of Defence archives and from the files of the CPC; specifically, the investigators seek documental evidence relating to the change of the profit margin, requested by **MAN Ferrostaal** and oddly agreed to by the Portuguese government after the main contract had been signed.

b) – the prosecutors were not able to obtain the contract detailing the finance project through which the German Consortium Group was paid – the Ministry of Defense cannot find it in its archives. And that contract is supposed to commit the Portuguese State to reimburse an intermediary financial consortium (involving namely **Espirito Santo Bank**) to the amount of EUR 1.210 million until 2023, as one can conclude from examining the latest Military Programming Law of 2006. *5 *see attachment.*

7.14. It should be noted that the Portuguese Government decided to attribute the contract to the GSC in November 2003, when the offer for the building and sale of both submarines amounted to EUR 844 million. But the negotiations between the Consortium and the Portuguese State resulted, in a first moment, in a reduction of the price to a total of EUR 769.324.800. However, a specific mathematical formula was included in the contract, providing for the daily update of the cost since January 1st 2004 until the contract *de facto* entered into force, thus making the submarines more expensive every day that went by.

The Acquisition and the Offsets Contracts were only signed on April 21, 2004. By then the cost had already reached a total amount of EUR 820 million.

7.15. Moreover, the **Ministry of the Defence** delayed sending the documentation for authorization by the State Controlling Auditors (Tribunal de Contas), which further postponed the entering into force of the contract to September 2004. On the day the contract finally entered into force, the price for two submarines was of EUR 833 million, which amounted to an 8% increase of the price since the beginning of the negotiations with the **GSC** and an extra EUR 64 million to be borne by the Portuguese State.

7.16. An alarming feature of this contract is that the State has neglected to secure compensation for damages in case of eventual failure to comply with the terms agreed by the **GSC**. Also, the State accepted the elimination from the contract of a clause establishing the possibility of judicial procedures in case the **German consortium** failed to keep its contractual obligations. On the contrary, the Portuguese State let the contract establish that, in case of disagreement between the parties, arbitration was the only resort to follow.

7.17. The State failed in securing guarantees from the **GSC** within the Offsets Contract and let it be agreed that, if the **GSC** was to retract from that contract, the State would not be entitled to more than a tenth of the value of the unimplemented offset projects. Plus, should there be grounds for the State to ask for compensation for any failure to comply with the contract, the **GSC** would only be forced to pay 10% of the total amount the contract was worth.

7.18. In Germany a judicial investigation has also been launched by the Munich Public Prosecutor, following investigative demarches to the offices of the German companies involved, which had been requested by the Portuguese Public Prosecutor.

7.19. The German magazine DER SPIEGEL reported in March 2010 that MAN Ferrostaal CEO Klaus Lesker and other top executives were arrested for corrupt practices in multiple deals, and specifically in the submarine contracts with Portugal. The charges followed testimonial evidence presented by one of MAN Ferrostaal employees who mentioned several scams and names of people inside and outside the company participating directly in the fabrication of such scams. *6 - *see attachment*.

7.20. The German investigation has uncovered corrupt practices in the submarines deal with Portugal, including money laundering and tax evasion. The German investigation is also uncovering a network of contacts serving as phony consultants for the **GSC**, and used as channels for the bribes aimed at the Portuguese citizens and entities involved.

8. As far as possible, specify the provisions of Community law (treaties, regulations, directives, decisions, etc.) which the complainant considers to have been infringed by the Member State concerned:

8.1. EC primary law - **Internal Market rules** - have been infringed by the Contract of Acquisition of the submarines and related Offsets Contract.

8.2. In 2004, when the Acquisition Contract and respective Offsets Contract were signed, **Article 296** of the EC Treaty provided for the possibility of derogations to EC primary law on Internal Market for defence related equipment, under certain conditions, if so required by "*essential security interests*" of the Member States. However, such a derogation would only be admissible on a case by case basis, if "*essential security interests*" of the Member States could be identified and narrowly construed. The Portuguese State has not justified such a derogation to EC primary law in the purchase of the submarines, specifying the "*essential security interest*" involved. Moreover, the Portuguese Navy has stressed the technical need for a minimum of three vessels for the surveillance of the extensive maritime area under Portuguese jurisdiction, while the Portuguese State ended up buying just two vessels – therefore, any arguable "*essential security interest*" could never be fulfilled by the purchased equipment.

8.3. The Acquisition Contract is suspected of mismanagement, including overpricing, and it involved the payment by the State of EUR 30 million to an intermediary company (**ESCOM**) for brokering the acquisition and the offsets contracts.

8.4. The Acquisition Contract is also suspected of involving bribes associated with the financing of political parties, money laundering, tax evasion and offsets as vehicles for undue payments. That is why it is being investigated by the Portuguese and German judicial authorities.

8.5. Fraud, tax evasion, corruption and mismanagement mean the deviation of State funds, at a time when Portugal is forced to take draconian measures to balance the State budget, with considerable sacrifices being imposed on Portuguese citizens. The present Portuguese Government has justified these draconian measures with the need to address the budget deficit resulting from the payment of the submarines. *7 - *see media clippings attached*.

8.6. An essential condition for a legitimate derogation to **Article 296** of the EC Treaty is that the defence procurement contract does not affect competition in civil markets. This was not the case with the acquisition of the submarines: the related Offsets Contract, encompassed EUR 1.210 million of direct offsets and projects in the naval, automotive and new technologies industries. That violates the **basic principles of the EC Treaty**: it was not limited to defence industries, and it actually discriminated against civilian economic operators and goods and services from other Member States, impeding the free movement of goods and services.

Also, certain companies were favoured - mostly from the automobile sector - in detriment of fair competition, possibly related to public officials involved in the acquisition. Primary and secondary EU law have, thus, been violated.

8.7. The Portuguese companies aggregated under the **ACECIA GROUP**, which were beneficiaries of the offsets contract, were also recipients of EU funding in the context of their regular economic activities.

These companies are suspected of acting as accomplices to the **GSC** in fraudulent contracts that damage the interests of the Portuguese State, to an estimated sum of at least

EUR 34 million, and directly distort the functioning of the European Internal Market. *8 - *see attached supporting documentation.*

8.8. The use of offsets in the purchase of the submarines completes the corruption cycle within the acquisition: offsets projects were mostly fictitious; under-scrutinised from the beginning and never analyzed by the Portuguese State Auditors (Tribunal de Contas); lacking causality between obligor and the project; without real implementation, leading the German obligor to buy invoices from Portuguese companies, which resulted from projects that were unrelated to offsets, therefore lacking causality; allowing for undue payments and implying fraud and forgery of documents; and implying collusion between the obligor (the German consortium, GSC) and the Portuguese consortium (ACECIA) to include projects lacking causality in the offset programme, in exchange for a fee on the credited sales volume.

8.9. There is an undeniable EU dimension to this case of corruption, which involves Portuguese and German companies colluding to defraud the Portuguese State and to mismanage Portuguese public funding. Ongoing judicial prosecutions both in Portugal and in Germany are shedding light on the corrupt, fraudulent and totally opaque nature of the whole deal involving the purchase of two submarines for the Portuguese Navy and related offsets.

For the above stated reasons, the complainant requires that the Acquisition and Offsets Contract be declared nul and void; that the agents who, intentionally or out of negligence, have damaged the Portuguese State and the Portuguese taxpayers, be identified and made responsible civil and criminally; that parties be compelled to renegotiate the supply of the submarines in a transparent manner and without damaging the Portuguese State and taxpayers, including the related Offsets Programme, determining that it be applicable only to companies from the defence sector, according to Directive 2009/81/CE, on procurements in the defence and security fields, and the Code of Conduct of the European Defence Agency of 2006.

9. Recourse to national courts or other procedures.

Two judicial investigation are ongoing in Portugal, led by the DCIAP (Central Department of Criminal Investigation and Action) of the Portuguese Public Prosecutor, one focusing on the Acquisition Contract, another on the related Offsets Programme. One investigation is proceeding in Germany, led by the Public Prosecutor of Munich.

10. Documents submitted in support of the complaint:

- *1 - Contract on the Acquisition of two submarines
- *2 - Offsets Contract
- *3 - 2009 Activities Report of the CPC
- *4 - Accusation on offsets contract authored by Portuguese Public Prosecutor, on 30/9/2009
- *5 - Military Programming Law of 2006
- *6 - Der Spiegel article
- *7 - Documentation on EU funds received by members of the ACECIA GROUP (data disk).

11. Confidentiality

“ I authorize the Commission to disclose my identity in its contacts with the authorities of the Member State affected by the complaint”.

12. Local, date and signature

Lisbon, 20 December, 2010

Ana Gomes, MPE