

Madam Prosecutor,

Ana Maria Rosa Martins Gomes, BI N. 2358818, Member of the European Parliament, resident at Colares-Sintra, Portugal, notifiable at Rue Wiertz 60, B-1047 Brussels, Belgium, files a criminal complaint against unknown persons.

Considering that the State-led sub-concession of the land and equipment of the Viana do Castelo Shipyards (ENVC) to the business consortium Navalria/Martifer Energy, announced by ENVC board on October 18th 2013, may entailed the violation of norms punishable under the Portuguese Criminal Code, such as corruption, influence padding, abuse of power, favouring of private interests.

### **I. State investment in ENVC**

1. Between 2006 and 2012, the Portuguese State channelled about 181 million euros in financial transfers and bank loans through the Treasury and Finance and the State-owned defence holding *Empordef*, with the purpose of meeting the financial needs of ENVC. The state did not, however, ensure the sound commercial or technological management to ENVC enabling financial profitability and productivity.

2. According to the offsets agreed in the framework of the contract for the purchase of two submarines for the Portuguese navy, signed in 2004 between the Portuguese State and the *German Submarine Consortium* (GSC), the State had established that 52,2% of the total of the offsets' scheme would benefit ENVC - in orders, equipment, technology transfers -, totalling an amount of 632 million euros. By itself, this could have contributed to the economic and productive viability of the company.

3. However, as stated in the final report of the Financial Audit to ENVC performed by Directorate General of Taxation of May 2009, the offset implementation scheme meant to ENVC had only materialised in an amount of 383,9 million euros, which means about less than 40% of what had been contracted with the GSC. Probably even less, as one of the offsets delivered, the *Flenders* shipyard, despite being initially estimated to be 250 million euros worth, is in fact not worth more than 48 million, according to independent analysis quoted in the Audit report.

### **II. State disinvestment in ENVC and the offset scheme**

4. In October 2012, the Government announced that it had re-negotiated the non-implemented offsets foreseen in the purchase of the submarines. The media reported that the newly agreed projects would focus on the refurbishing of Hotel Alfamar, in Algarve, and on a renewable energy investment. ENVC, previously the main beneficiary of the offsets agreed in 2004, were now totally forgotten by the Government in the offset re-negotiation.

5. Meanwhile, the Government invoked "state secrecy" to avoid responding to formal requests sent by me to the Ministry of Economy requesting access to the re-negotiated offset's contract (attached letter).

6. I did, nonetheless, obtain, through other means, recently exchanged correspondence between the Ministry of Economy and the GSC, which makes reference to the offsets contract negotiated in 2012. This correspondence confirms that the new offsets will not benefit ENVC and, furthermore, will not even benefit the Portuguese State, since the German Consortium has already informed that it does not intend to implement the re-negotiated offset projects!...

### **III. State disinvestment in ENVC - from privatisation to subconcession**

7. In 2012, the Government decided to give up ENVC and privatise the company: through Council of Ministers Resolution 73/12 and Decree DL 186/12, published on August 13th and 29th respectively, the Government outlined the basis for the privatisation process. However, in April 2013, the Ministry of the Defence (MoD) announced that the privatisation process would be cancelled, and, on July 31st, it launched a public competition aiming at sub-conceding the land and equipment of ENVC.

8. According to what has been publicly said by the Minister of the Defence, José Pedro Aguiar-Branco, the cancellation of ENVC privatisation and the opening of a sub-concession process instead had been due to the opening by the European Commission (EC) of an investigation on alleged infringement of EU Competition rules under illegal state aid to ENVC, launched on April 3rd 2013, following an initial EC communication dated January 23rd 2013.

9. The Minister's argument rests on the argument that the EC had reached a decision on the matter and that Portugal would then have only two options: (a) to return the 181 million euros that were transferred as state aid to ENVC, or b) to close ENVC. Actually, in an interview to the newspaper *Diário Económico*, in 9.12.13, the Minister said: "*We launched the re-privatisation process and, unfortunately, when we were about to take a decision, we were notified by DG Competition of the EC about the illegal state aid awarded between 2006 and 2011, totalling a sum of 181 million euros. In such a scenario, we had only two possibilities: either the company gives back the 181 million euros to the Portuguese State or the situation is one where the company closes*".

### **IV. EC investigation on state aid**

10. The EC's investigation, which started with the communication of 23.01.2013, and which was followed by the procedure announced on April 3rd 2013, has its origins in an informal communication sent by the Portuguese authorities to the EC, in 3.10.2012, about the re-privatisation process on-going at the time.

11. The re-privatisation, highlights the EC, "*is not covered by the Memorandum of Understanding on specific economic policy*", signed between Portugal and the Troika (parag. 6). The Commission takes notes that it takes place under "*a direct sale – no tender*" (parag. 8), highlighting that "*ENVC will not become a public limited company and its shares will not be listed*" (parag. 9) and noting that the offers are "*below EUR 10 million, i.e. less than a third of ENVC's registered capital of EUR 30 million, and include a commitment to maintain all jobs, while the State would assume all liabilities of ENVC, estimated to be in the region of EUR 260 million*" (parag. 13).

12. The Commission also clarifies that the investigation is aimed at looking into the financial transfers made to ENVC by *Empordef* or the DG Treasury and Finance, with the purpose of covering ENVC's operational costs and/or losses "between 2006 and 2012" (and not, as the Minister has been saying, until 2011). The EC presents a table (parag. 16) where it demonstrates that over half of the amount under investigation (about 102 million euros) relates to *Empordef*-backed loans borrowed in 2012, at a time when the re-privatisation process was already on-going.

13. In paragraph 27, the EC notes that "*Portugal is of the view that the past measures granted to ENVC do not constitute state aid. However, Portugal has provided very little detail on the measures and very succinct explanations*". Moreover, in paragraph 30, it notes that "*Portugal adds that if EMPORDEF were to take over this debt in order to ensure that ENVC is privatised free of debt, then this support should be considered aid to the privatisation.*" It is, to say the least, bizarre to see the Portuguese Government defending an "aid to privatisation" as admissible under EU Competitions laws!...

14. It is also awkward that the Government invoke, to justify the switch from privatisation to subconcession, a decision about the EC-led investigation that, until this day, has not been taken, according to what was confirmed personally by the European Commissioner and Vice-President of the EC Joaquín Almunia, responsible for Competition, in a meeting with the signatory on December 11th, in Strasbourg, France.

15. In several communications to the media, the Minister sustains that the sub-concession, which entails the extinction of the Viana do Castelo Shipyards, is the only solution to saving the naval construction and repairing sector in Portugal, since ENVC would not have the ability to return the 181 million euros due to having liabilities over 280 million.

16. In the *Expresso*'s newspaper article bearing the title "ENVC have cost 300 million and were never re-structured", the Minister is quoted as saying: "As a lawyer, I have no doubt that the European Commission has no legal basis to demand that Portugal returns this amount. (...) A new company - *WestSea*, controlled by *Martifer* - which has no connection to ENVC, and so the European Commission will easily come to the conclusion that there is no continuity between one and the other. This way, Portugal will not have to return the 180 million". What the Minister does not clarify is that, should the return of the money take place, it would be from ENVC to *Empordef*, or to the Ministry for Finance: that is to say, from the State (ENVC) to the State!

17. The Government claims that it replied to all the questions posed by the European Commission on March 12th 2013, but it did not formally respond to the investigation procedure opened by the EC on April 3rd. In the aforementioned meeting with the signatory, Vice-President Almunia noted that, despite the existence of informal contacts at the staff level, he was still awaiting a formal reply from the Portuguese Government to the questions stemming from the infringement procedure.

18. It should be pointed out that EC's communications of January and April 2013 mentioned an array of possible justifications for financial transfers from the State to ENVC that would be consistent with EU law. Namely, a statement of "company in difficulty" and the presentation of a "Restructuring Plan" for the company.

19. In paragraph 64 of the April communication, the EC sustains that "*Portugal did not notify to the Commission any of the measures identified above as restructuring aid and thus failed to demonstrate that any of the necessary elements for it to be considered as such are present (restructuring plan, own contribution, compensatory measures, etc.)*". And, in paragraph 66, it notes that "Portugal has not put forward any elements that would ensure compliance with the necessary requirements for finding restructuring aid

compatible: restoration of the long-term viability of ENVC, acceptable levels of own contribution, adequate compensatory measures".

20. In the meeting with the signatory, Vice-President Almunia expressed his surprise regarding the failure of the Government to invoke before the EC the fact that ENVC has been building vessels for the Portuguese Navy, which alone could also justify the financial transfers from the State to ENVC, in line with the TFUE and the competences in the field of Security and Defence, which are still under the sole discretion of Member States. The signatory found that that had been precisely the reasoning that had led the EC to allow the continuation of the Navantia Shipyards in Galicia, Spain, which were also targeted by a state aid investigation.

21. With this in mind, one should highlight that not only did the Government not invoke before the EC a crucial argument that would respond to the Commission's concerns about State aid: in September 2012, the Defence Minister also cancelled the orders for the construction of vessels for the Navy, placed with ENVC since 2004.

22. In sum, the Government artificially excuses itself with Brussels to justify the dismantling of ENVC and the sub-concession of its assets to private entities, while it does nothing to re-structure the company, as Brussels had signalled and encouraged it to do. The Government is not dismantling a public company because of the European Commission: it does so because it so wishes and never wanted to re-structure the company.

23. The Government is dismantling ENVC because it wishes to transfer its assets, free of labor contracts and charges, to a private entity, a transfer which is costly to taxpayers: according to *Expresso*, in an article titled "Portuguese pay for *Martifer* to use ENVC", of 29.11.2013, "*The State will receive a total of 7,05 million euros in rents paid by Martifer to use the land and equipment of ENVC until 2031. Long before that, until January 2014, the State will need to pay about 30 million euros to lay off 609 current ENVC employees. That means that: the deal will cost to each one of the 10.487.289 Portuguese a net cost of 2,18 euros, which corresponds to the difference between the layoff costs against the total amount of rents that the State will cash in. In total, the Portuguese will pay 22,95 million euros for the Martifer Group to exploit ENVC*".

## **V. About the specifications of the tender and the procedure for the subconcession**

24. The International Public Call for the presentation of applications for the sub-concession of ENVC ran until September 23, 2013, with the announcement of the winning group of the competition (*Navalria / Martifer Energy*) by the Directors of ENVC on the 18th of October.

25. Various clauses in the Specification of the tenders<sup>1</sup>, as well as in the Program for the Procedure of the Public Procurement<sup>2</sup>, are likely to harm the public interest of the State and promote private interests:

26. Article 16.1 16 of the Specifications of the tender refers that the State abdicates the direct control of the arrivals and departures of the pier and harbour serving the Shipyards, which it directly delivers to the body awarded with the sub-concession of the land, making the latter commit only to "observe and enforce by users and visitors at the perimeter of the sub-concession, rules and obligations imposed by the Aliens and Borders

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<sup>1</sup> Annex 6.

<sup>2</sup> Annex 7.

Service (SEF) , under the existing legislation relating to access of the pier and the port." However, port security is a vital and inescapable responsibility on national security, for the control of organized crime, including drug trafficking. How can the State abdicate from the responsibility of actual and direct control of the portion of the port given to the winning entity? Is this abdication not a breach of the principle of public interest and national security and, ultimately, violate the Constitution?

27. The "confidentiality *clause*" in Article 39 of the Specification of the tender is a sinister expedient to, even when the contest is finished, ensure opacity and lack of parliamentary and public scrutiny on the sub-concession of ENVC.

28. The damage to the interests of the State and the lack of transparency in the tendering procedures are exacerbated by the fact that in the 19th chapter on dispute settlement (similarly to what happened with the contract for the purchase of submarines and its related offsets programme), the State waives access to State courts, binding itself to have recourse to arbitration in the resolution of "all disputes arising out of this contract or in connection with", as can be read in Article 41.1.

29. Furthermore , according to Article 41.4 , from the decisions of the Arbitration Court eventually assigned to conflict resolution , "no appeal is allowed", which is abusive and damaging, as a clause that deprives the State of appealing to the justice system in case of a breach of the terms the of the sub-concession contract;

30. New resemblance to the contracts of the submarine emerges in the Program for the Procedure of Public Procurement, where Article 2 stipulates that "the sub-concessee is financially assisted by *Banco Espírito Santo de Investimento, SA* " . *BESI* is a part of a financial group, the *GES* with a history of supporting the business of the winning grouping.

31. Further, in Article 7, it is not indicated who actually composes the Selection Board or jury of the competition. It merely refers that the jury is responsible for providing clarifications about the competition. However, two of the e-mail addresses listed in the document as a source for clarification belong to employees of *BESI - Banco Espírito Santo de Investimento, SA*, specifically [rsantos@espiritosantoib.pt](mailto:rsantos@espiritosantoib.pt) and [pfragoso@espiritosantoib.pt](mailto:pfragoso@espiritosantoib.pt);

32. Another obvious indication that the State and the public interest that it must represent, are effectively leaving damaged by this sub-concession process is shown in the total absence of clauses on assurances regarding the continuity of contracts and rights of the 609 workers currently employed by ENVC.

33. "*Aguiar-Branco admits collective dismissal at the Shipyards in Viana do Castelo*" highlighted *Jornal de Negócios* on 9/12/2013. And the president of *Empordef*, Vicente Ferreira, explained in the National Parliament that "*the main criterion to be reviewed by the Government was the price and the existence of a bank guarantee that would support that price. But Martifer opted to add the number of workers and, at the time, spoke about investing in ship repair and the creation of 120 jobs*", reports the newspaper *Dinheiro Vivo* on 12/17/2013.

## **VI. Facts about the award of the contract to *Navalria / Martifer Energy***

34. The specifications of the tender is not available for public consultation, even retrospectively, including the proposals received by 23rd of September.

35. *Martifer* - the parent company of the grouping of companies awarded with the contract - had more than 370 million euros in liabilities at the end of 2012, which was higher than the debt of ENVC.

36. *Navalria / Martifer Energy* is a grouping of companies working in the construction, transport, energy services and environment. 37.5% of *Martifer* belongs to the Portuguese group *Mota-Engil* which, in turn, has business of engineering, construction, environment, transport and mining tourism in Portugal, Angola, Mozambique, and several Latin American countries, among others.

37. *Martifer* has commercial and financial links to *GES - Espírito Santo Group* which, as indicated above, through *BESI*, integrated the jury of the competition and advised the Ministry of National Defence in the deal, thereby breaching the most basic rules of ethics and impartiality in public procurement, setting a clear conflict of interest. A similar situation occurred in 2004 in the case of the submarines, where the *GES* not only integrated the consortium of financial support to the contracts, as, through its company *ESCOM*, advised the Ministry of Defence, while also advising the German consortium which was awarded the contract. It is, at minimum, strange that the Government has no qualms about being provided services for a public contract from a financial group under investigation by the Public Prosecutor, in particular for participation in contracts for the acquisition of submarines and their offsets...

38. In its Global Investment Plan, contained in the proposal *Navalria / Martifer Energy*<sup>3</sup>, subscribers of the winning grouping of the tender for the sub-concession of ENVC show concern with the lack of information about the current condition of facilities and equipment, assuming that "the current investment plan may be unfit to the real need".

39. Although the Minister of Defence and the representatives of the winning grouping themselves have on several occasions affirmed to the media that that they would seek to integrate workers from ENVC in the new company, yet to be set up (and to be designated *WestSea*), creating 400 jobs over a period of four years, the Global Investment Plan mentions only 120 "direct and allocated to production " jobs, in " the first three years of activity." Far from the "1000 workers within five years," that, according to the Chairman of the Board of Directors of *Martifer*, Carlos Martins, would be hired by the company *WestSea*, still to be set up (in an interview with *Diário Económico* of December 3, 2013).

40. In addition, and also contradicting public statements made by the Group representatives, the abovementioned Global Investment Plan stipulates that the Group aims to devote itself "initially exclusively to ship repair, building on existing infrastructure to invest on a segment of medium and large dimension and having the international market as the main focus."

41. From these elements we can conclude that the State does not have any formal safeguard that *WestSea* will keep shipbuilding activities in ENVC, which should be strategic for Portugal and the Portuguese Navy; and, not least, that the formulation of the proposal from the winning grouping - as its representatives admit - lacked more and better information to be considered adjusted to the reality of the needs of ENVC. Simply, given

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<sup>3</sup> Annex 8

the exclusion of another competitor, the Government had no qualms about delivering the sub-concession of state assets in ENVC to the only standing proposal!

42. Recently it became public that the certified steel, already acquired by ENVC to fulfil orders to build ships for the Navy - orders which were cancelled by the government in the meantime - was sold by the Directors of ENVC, far below its cost, to a scrap dealer who has, in turn, sold it to *Navalria*, which belongs to *Martifer*. This steel may have served as raw material for the construction of two hotel-ships of company *Douro Azul* by *Navalria*.

43. In turn, the Minister of Defence, who only in September 2013 provided the Shipyards with financial means to buy raw materials to fulfil the contract of asphaltships to Venezuela (a State to State contract in the amount of EUR 128 million), indicated that he is now negotiating the transfer of these contracts from ENVC (State) to *WestSea*, the private enterprise still to be set up...

44. These transfers of public assets to private interests suggest that the Government and the administrations designated by it to act on behalf of ENVC and *Empordef*, did everything to dismantle ENVC, depriving them of capabilities and viability.

45. Through the privatization of ENVC, the Government could still retain some participation and public control of the activities of ENVC. But by dismantling ENVC and sub-conceding its land and infrastructure to private interests, the Government does not guarantee the strategic national interest to maintain the shipbuilding and repair for civil and military use. The Government thus abdicates of a company which provides a national industrial base for the Defence sector, which is considered vital to strengthen in the framework of the Common Security and Defence Policy (CSDP) of the EU.

46. Moreover, without shipbuilding and repair guaranteed by the State, at least in part, the Portuguese Navy will have to resort to overseas acquisition of equipment and services necessary to fulfil their responsibilities in the context of maritime security in Portugal, the European Union and NATO.

47. According to the newspaper "Expresso", in the quoted article "*Shipyards of Viana already cost 300 million and were never restructured*" of 07.12.2013, Admiral Melo Gomes, former Chief of Staff of the Navy, considers: "*If the shipyards are one "strategic asset", the financial question will not be the only one to be considered. Economic and financial alternatives must be studied "(...) " if we add 180 million of allegedly illegal aid, to the millions which will have to be paid in labour agreements, we reach 230 million, which is the value of the programs for ships and patrol ships that the Navy and the country desperately need and which were cancelled.*"

48. And the current Chief of the Navy, Admiral Macieira Fragoso, on 12.09.2013, in his inaugural speech, said: "*The renewal of naval means, which began in the 90s with the armament of frigates of the Vasco da Gama class and LFR Argos class, was continued throughout the first decade of this century with the entry into service of two submarines and two frigates class Bartolomeu Dias. However, the renewal suffered a severe setback when, due to the well-known problems at ENVC, the program for the construction of 8 NPO, 6 CFLs and Ship Multipurpose Logistics which should have been delivered by the end of 2012, only the second NPO was added to the effective equipment of the Navy a few days ago. This created a huge disruption in the fleet maintenance planning, requiring the reinvestment in vessels more than 40 years old with intense operational activity, without any guarantees that there will be any return from that investment.*"

## VII. Interests in the exploitation of land, port and infrastructure of ENVC

49. Given this context, which is contrary to the fundamental interests of the Navy and the country, it seems elementary to identify strategic partnerships that the winning grouping may have with companies and business groups, or groups of international power. Indeed, doubts have been raised about the true identity of who is interested in exploring the land, port and infrastructure of ENVC and about the motivations which may exist regarding an activity that is vital to national security and which will have serious implications on the regional and national economy.

50. It happens that the tender for the sub-concession of ENVC was launched on the same month in which the Minister of Defence, accompanied by a delegation of representatives of *EMPORDEF*, paid an official visit to Angola. There were public statements, both from the Portuguese Minister and his Angolan counterpart, on a potential advancement in the Portuguese-Angolan partnership in the field of military cooperation and, above all, naval. In these statements, the Angolan Minister of Defence showed interest in ENVC and the Cabinet of the Portuguese Minister has confirmed to the Portuguese press that the plans for the sub-concession of the Shipyards were part of the agenda of the official meeting.

51. It is noteworthy to refer, for example, the article entitled "*Empordef proposes building boats in Alfeite and not in Viana*" of 08/06/13 in *Público* newspaper, where it is written that this "*proposal was made during a working visit to Angola from 10 to July 13 of this year*" and that the Minister of Defence took with him the President of *EMPORDEF* "*who took advantage of the trip to defend a joint program to build boats for the navies of Portugal and Angola, (... ) five to Portugal and other five to Angola.*"

52. Moreover *Martifer* itself has investments in Angola, namely through its second largest shareholder, *Mota-Engil*. One example is the participation of *GEFI - Sociedade de Gestão e Participações Financeiras*, an Angolan company founded by the Angolan MPLA Central Committee, in *Martifer/Angola/Metalomecânica*<sup>4</sup>.

53. The connection between *Martifer* and *GEFI* is well described by the Angolan journalist Rafael Marques, in a document entitled "*MPLA, Sociedade Anónima*"<sup>5</sup>: "*In the construction field, the fastest growing sector in the country in recent years, GEFI capitalized 20 % of shares of the Portuguese company Martifer in Angola, in the factory of metal structures located in Viana, Luanda. The latter, in turn, is a subsidiary of Portuguese construction company Mota-Engil, which is in a phase of expansion of its business in Angola, through the establishment of partnerships with influential figures in the regime.*"

## VIII. Legal counselling of EMPORDEF and of the process of subconcession

54. Reportedly *Empordef*, the holding of the State that controls ENVC, has been advised by law firm *JPAB - José Pedro Aguiar-Branco & Associados*. The current Minister of Defence is a senior partner of that firm.

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<sup>4</sup> Annex 9.

<sup>5</sup> <http://makaangola.org/wp-content/uploads/2012/04/MPLASociedadeAno%CC%81nima.pdf>

55. It is thus important to clarify the transfer of the legal representation of *EMPORDEF* to another law firm, *PLMJ*, allegedly as a result of the appointment of José Pedro Aguiar-Branco as Minister of Defence in the current Government.

56. It is known too that Law Firm *JPAB & Associados* has intense, long and historical relations with *GES - Espírito Santo Group*, which, in turn, has an extensive history of relations and support to businesses within the *Martifer* universe (abundantly documented though simple online search). And *Martifer* won the public tender of subconcession of ENVC in which *EMPORDEF* and *GES* intervened in a position of control...

57. Although, under the rules for holding public office, Minister Aguiar-Branco has abdicated the exercise of legal representation activities, numerous reports have been made public, in the media and the blogosphere, about assiduous visits of the Minister to the headquarters of *JPAB & Associados* in Porto, and the conspicuous presence of service cars of the Ministry of National Defence at the door of that office (see for example the article published in newspaper *Correio da Manhã*, on 11.9.2012 , "*Minister's car causes controversy*").

58. It is therefore essential to ascertain the facts stated in the preceding paragraphs 54-57, so that, to the benefit of the Minister's reputation, one can determine if this combination of facts, which, according to general experience, sometimes, but not always, may represent objectively illegal relationships, should fit into the first or second alternative. Indeed, this was the aim of the statement of the signatory, in TVI24, on November 29, 2013, when she said: "*One needs to check which business relations his law firm has with the company Martifer, which has, indeed, tentacles in all political parties.*"

## **Conclusion**

In the opinion of the signatory, the listed facts indicate that public and private economic groups, through their agents, incurred in the commission of crime(s) foreseen and punished by the Penal Code, in particular crimes described in Articles 335 , 373 , 374 , 375 , 382. Should the commission of these crimes, which are of particular gravity and constitute an attack on public assets and interest, be confirmed, the perpetrators should be held liable.

From the above, it is required that the Public Prosecutor:

- . Proceed to the opening of an investigation and consequent criminal procedure, if sufficient evidence of the commission of unlawful acts foreseen and punished by the Penal Code is found;

- . Take notice of the intention of the signatory to become assistant-party in the referred criminal procedure.

Lisbon, 20 December 2013