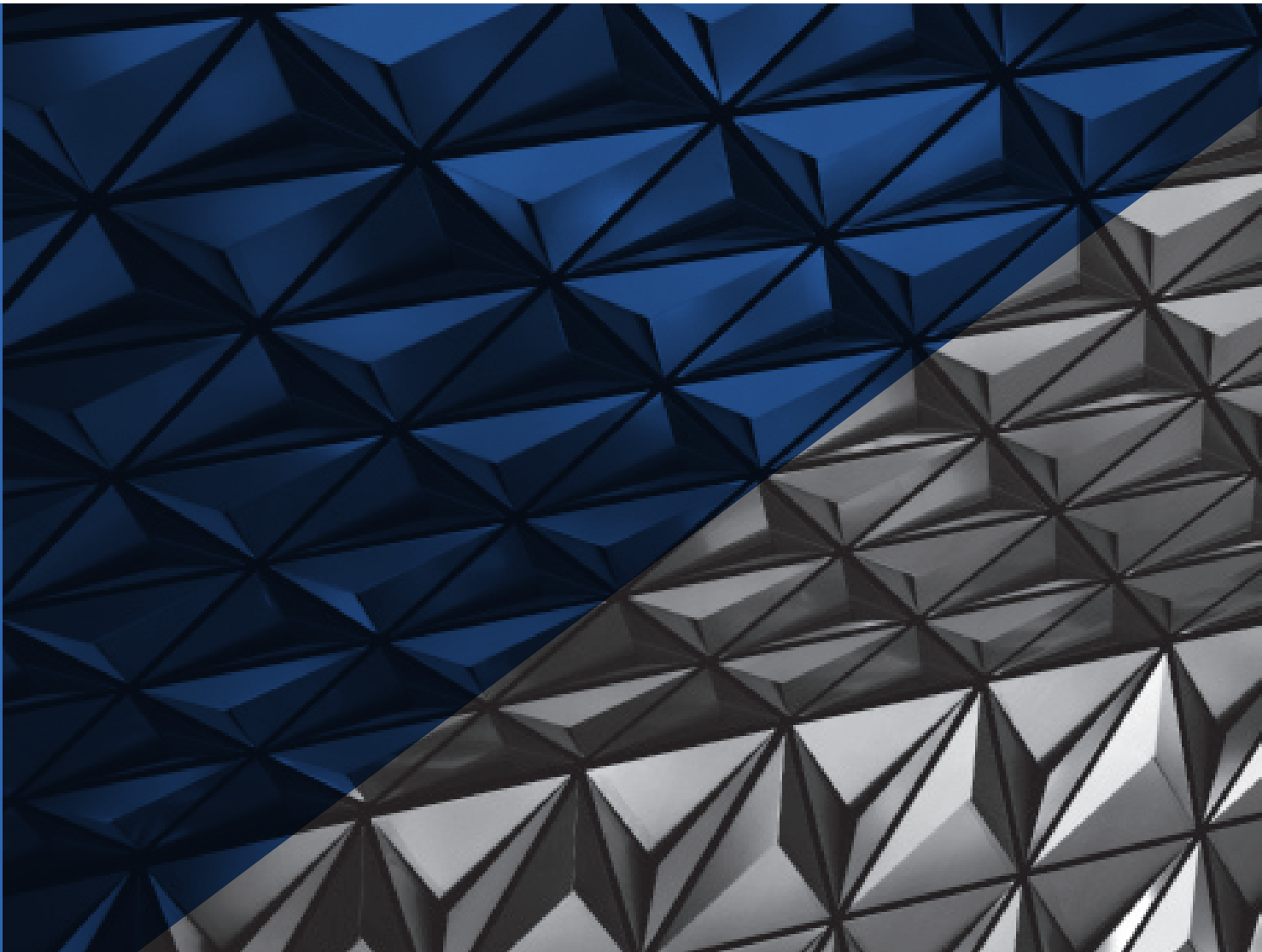


# **THE PORTUGUESE SOCIAL IMPACT BOND PILOT: “JUNIOR CODE ACADEMY”**

A REPORT ON ADMINISTRATIVE LAW QUESTIONS

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**The Portuguese Social Impact Bond pilot: “Junior Code Academy”:**  
***A Report on Administrative Law questions***

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***(Working Paper)***

Summary

This paper will examine the first Portuguese experience with Social Impact Bonds. I will analyze the Portuguese case against the background of elementary education public provision in Portugal. At the outset I aim to stress the advantages and disadvantages of the SIB contractual model and present some comments on how to build and improve from the subject pilot. In particular I will stress several aspects concerning service provision models, procurement mechanisms and governance options. The present paper sets out from a public policy and administrative law perspective as far as these two domains are intertwined in the continental administrative experience. I aimed to analyze the Portuguese Social Impact Bond pilot from the perspective of the lawyer called to advise upon the best or most recommended legal and good governance practices.

Keywords: social impact bonds; pay-for-results; outcomes commissioning; public procurement;

## **1. The Portuguese Social Impact Bond pilot - “Academia de Código Júnior”**

### ***1.1. The road to the first Portuguese SIB***

Knowing what a SIB legally is makes us understand the importance of the parties in the process of setting up a Social Impact Bond. In the case of the Portuguese pilot four key players were fundamental in bringing it about. The key role was played by the Gulbenkian Foundation and by the Social Investment Laboratory from the Institute for Social Entrepreneurship, now called MAZE - Decoding Impact. In February 2014, the Gulbenkian Foundation launched the Social Investment Laboratory, a partnership with the Social Entrepreneurship Institute and Social Finance UK. At the launch event the Social Impact Bond was presented as a promising model for outcomes-based commissioning. This raised the attention of the Municipality of Lisbon to the SIB model and led the Municipality to consider using it to finance a project that was at the time being discussed internally. Enter the fourth key player: Code for All, a start-up specializing in teaching computer programming to the general public. In 2014 they were launching a service aimed at children, called Junior Code Academy (“Academia de Código Júnior” in Portuguese) and they wanted to be able to offer this service to children attending elementary public schools in Lisbon.

The SIB model brought all four key players together in a way that they would probably never thought of if not for the demands and arrangements that the SIB model called upon. In fact, when the Gulbenkian Foundation, the Municipality of Lisbon and Code for All sat together to discuss how could the programa Junior Code Academy be financed through a SIB, in early 2014, it changed the way the Municipality and Code for All were planning their project but it also gave the newly launched Gulbenkian/IES

Social Investment Laboratory a perfect project to experiment on. Thus the pilot idea was born. The decisive element was to consider that computer coding would be able to create a positive measurable outcome regarding the children being taught computer code. This insight became the focal point of the negotiations and led to the process of deciding which outcomes would be important and to develop a set of metrics to evaluate the results of teaching code to children aged 8-9 years old and achieve those outcomes. “Academia de Código Junior” would be delivered as a public commissioned program in one classroom of three different elementary schools in Lisbon. The Municipality of Lisbon and the Gulbenkian Foundation agreed that the Academia de Código Junior program would meet its goals and be eligible for payment by the public commissioner if two outcomes were achieved regarding students in selected classes (the Treatment Classes) against comparable classes not subjected to the program (the Control Classes): i) Improvement in logical problem solving and ii) improvement in performance on the National Exams in Portuguese and Mathematics at the end of elementary school. The four parties also agreed that the metrics used to evaluate the aforementioned outcomes would use two methodologies: i) the observable method and the scientific method. The first method would be responsible for 90% of the formula to determine the payment by the Public Commissioner and the second method would be responsible for the remaining 10%. These two methods rest on the three different metrics agreed by the parties: i) cognitive skills; ii) problem solving skills and iii) non-cognitive skills.

The cognitive skills would be evaluated comparing the grades of the children, in both groups of classes (the treatment and control classes) in the National Exams of Portuguese and Mathematics at the end of elementary school. Problem solving skills would be evaluated through Raven’s Progressive Matrices used on both groups. Finally,

non-cognitive skills would be evaluated in two areas: cooperation and altruism among colleagues, through a game originally developed by Harbaugh and Krause on “Children’s Altruism in Public goods and Dictator experiments” and self-esteem measurement through a questionnaire meant to apply the Harter Scale. The three different metrics are divided by both evaluative methods. The observable method would focus on the average results for the children in both groups when responding to the Raven’s Progressive Matrices and performance in the National Exams of Portuguese and Mathematics at the end of elementary school. The scientific method would stand on an econometric model developed by Nova School of Business and Economics (Nova SBE) specifically to determine the impact of coding in the outcomes determined by the parties. Thus 90% of the payment to be made by the Public Commissioner if the outcomes were met rested on the ability of the program “Academia de Código Junior” to be able to generate higher average results on the Treatment group than on the Control group evaluated according to the Observable method, over a scale of 10% increase with 1% intervals of repayment. The other 10% possibility of repayment to the up-front investor would rest on the results of the scientific method developed by Nova SBE. The internal rate of return for the Gulbenkian Foundation was approximately 2%.

An estimated €110.000 were set by the Municipality as the amount available to test the pilot. This means that the Municipality considered this value the threshold beyond which it would be more efficient to try to deliver the same outcomes by direct provision or regular contracting-out. Portuguese law does not make it explicitly mandatory for Public Commissioners to determine the threshold cost to outcomes based commissioning nor does it set out any specific criteria that the public commissioners must follow to determine the cost of the outcomes they want to achieve. There are,

however, special legal frameworks in which the law demands that the public commissioners conduct a study that evaluates the economy, effectiveness and efficiency of the agreement as well as its financial sustainability. This is applicable when commissioning most public health services to charities, under article 6.º/1 of Decree-Law n.º 138/2013, from November 9th, or when entering a Public-Private Partnership. The law does demand, through general principles, that the public commissioners act in an efficient way in delivering public services. In the case of the pilot SIB the Municipality of Lisbon had the amount on budget for innovative projects and the SIB framework offered a good opportunity to try a financial risk-free program which could generate an already desired output and outcome: teaching code to improve problem-solving skills.

It is interesting to note that the Social Investment Laboratory from the Institute for Social Entrepreneurship assumed a role of a special intermediary only possible in a pilot: although the Social Investment Laboratory was legally part of the Institute it was located at the Gulbenkian Foundation and worked with its support. Notwithstanding, it acted, as far as the pilot was concerned, as an independent intermediary advising both the Gulbenkian Foundation, the Municipality of Lisbon and Code for All. It was thus decided that the Gulbenkian Foundation would act as the sole investor, guaranteeing the up-front capital needed for Code for All to deliver the program.

Another interesting feature of the pilot and the nature of the sole investor present was that Gulbenkian actually assured more up-front capital than that which the Municipality would repay in case of complete achievement of the outcomes, that is, a 10% increase in outcomes measured through the Observational method and the Scientific method. The Gulbenkian Foundation invested €120.000 of which € 28,000

was a non-recoverable grant given the pilot nature of the SIB. This is exactly the opposite of what generally happens in a SIB. Usually the investors expect to be repaid in full and with a premium, with charities taking first loss if only a partial payment is entitled. This works as a way to stimulate the financial sector to take the (lower) risk involved in SIB and enter this new market. This was especially clear in the UK pilot of Peterborough, (Nicholls and Tomkinson: 2015; Burand: 2013). In this case the Gulbenkian Foundation was willing to pay more as a way to see the Program through as Code for All estimated the project to cost a little over the available amount from the Municipality of Lisbon.

### ***1.2. The importance of measurement and metrics***

Definition of metrics and measurement methodologies is the most important factor of the success in outcomes-based commissioning and more so in a Social Impact Bond (Warner: 2015). This is true regarding the very early decision to choose the SIB option and it is also true in operation and contract governance (Carter *et al.*:2018).

On the one hand the public sector must be able to ground and justify the option for a Social Impact Bonds. That can only happen if there is a strong evidence-base from where to determine desired outcomes and their costs. This is true for direct service provision by the civil service, social impact bonds or any other kind of service provision by a public administration. It so happens that very few public administrations have standard procedures to justify chosen outcomes, their metrics and their costs in whichever kind of service provision available or in development.

It is very difficult for public commissioners or specialized intermediaries to foster interest in SIBs among social investors if from the very start these investors are not confident regarding the outcomes that will be the condition of the payment mechanism and the metrics that will be used to assess its attainment. Even among social investors from within the social sector, such as foundations and cooperative banks, it is difficult to create interest in Social Impact Bonds if from the outset the investors are not given a clear idea of the outcomes and their metrics and feel confident with the measurement methodologies in a way that enables them to monitor their investment and control the assessment conducive to payment.

One of the earliest insights of the Lisbon SIB pilot was the acknowledgement that an accurate assessment of the cost to improve the performance of elementary school students was needed. As is normal with complex social outcomes this assessment is a difficult one to develop as many variables are at play. One could say that the cost is assessed on probabilities offered by whatever technique or method is considered by the public commissioner. This however is key to stress the importance of another assessment of cost: how much does an elementary school student cost the Municipality at an average constant performance rate over a given period. If this value is available the interested parties can use it against alternative service provisions that propose to offer increased efficiency, such as assuring the same performance for a lower cost or higher performance within a given margin of cost (lower, identical or even higher).

The Municipality of Lisbon does not have a specific body dedicated to determine metrics to chosen outcomes. This is due mainly to two factors: a) Municipalities in Portugal only have administrative management of elementary schools (the curricula and teachers are managed by the Ministry of Education); and b) these



administrative attributions only recently have been decentralized from central to local governments. So the Municipality of Lisbon can evaluate the existence of improvement in the chosen outcomes for the SIB pilot but cannot estimate the cost in relation to alternative options of service. It should be noted that regarding the chosen outcomes it would be very difficult to make this comparative costs evaluation.

### ***1.3. The choice of private parties in a Social Impact Bond: the matter of public procurement***

The most legally challenging contract in a Social Impact Bond is the primary contract, the one made between the public commissioner and whichever party agrees to try to accomplish the defined outcomes through the provision of a certain service. The first challenge comes about at an early stage, that of choosing the private party with which to contract the desired outcomes. It is necessary to remember that the public commissioner is procuring an outcome in the public interest and as so the commissioned private party will legally act in that capacity. Does the object of such contract fall within the scope of EU and national public procurement rules? And if so, which ones?

At the time when the contracts of the Portuguese SIB pilot were negotiated Directive 2004/18/EC (hereinafter the “2004 Directive”) was in full force so that is where we should begin to look for answers. One could start by questioning if the contract between the public commissioner and the party which promises to assure the outcomes is truly a Public Contract in the sense of Article 1/2/(a) of the Directive. This demands ulterior analysis of the object of the contract. Reading the Directive as framed by the body of ECJ case law addressing the definition of public contracts there is no

doubt that whichever way we look at the object of the contract entered by the public commissioner to assure a certain set of outcomes that contract will be qualified as a public contract under EU law. The decisive criterium is the nature of the public commissioner as “contracting authority” under article 9/1 of the Directive. If a public commissioner wanting to plan, develop and execute a Social Impact Bond is deemed a contracting authority then public procurement rules apply unless exempted by the Directive. Given the broad legal definition of contracting authority virtually all public commissioners are contracting authorities and so one must analyze the Directive to determine which rules of procurement are applicable. In the case of the Portuguese SIB pilot european public procurement rules foreseen in the Directive are applicable through the Code of Public Contracts (Código dos Contratos Públicos in Portuguese, hereinafter the “CCP”) which transposed the EU 2004 Directive.

The Municipality of Lisbon is a contracting authority under article 2.º/1/c of the Portuguese CCP which meant from the outset of the Lisbon SIB that procurement rules had to be applied to the program unless otherwise stated on the Code of Public Contracts. In this respect article 5.º of the CCP (excluded procurement) foresees a number of cases in which public procurement rules are not applicable to certain contracts. Since the Lisbon Social Impact Bond was a pilot and never before had a contracting authority commissioned anything similar it was deemed that the primary contract had an object not subject to competition because the Gulbenkian Foundation was helping to design the procedure, the contract framework and, in word, a new market for outcomes-based commissioning. This experimental dimension of the pilot was considered to exclude competition in the sense of article 5.º/1 of the Portuguese CCP.

However, the next time any public commissioner intended to launch a SIB it would have to use the public procurement rules applicable to the chosen kind of contract, since a contractual framework pilot had already been tried. This came to happen in late 2016 with the current wave of Social Impact Bonds being launched by the Portuguese government task-force for social innovation.

#### ***1.4. The contracts***

As mentioned previously, in a Social Impact Bond typically we can expect at least three contracts: i) one between the public commissioner and the primary private party (investors, service providers, intermediaries or whichever vehicle they create); ii) one between the investors and the social service provider (if the public commissioner does not contract directly with the service provider); and one between both the investors and the public commissioner and an independent evaluator. The Portuguese pilot followed a similar path although we find a fourth contract. Thus we find contracts between:

- (1) the Municipality of Lisbon and the Gulbenkian Foundation; (primary contract)
- (2) the Municipality of Lisbon and the Nova SBE (acting as the independent evaluator);
- (3) the Gulbenkian Foundation and Code for All; and finally
- (4) the Gulbenkian Foundation and the Institute for Social Entrepreneurship, (regulating the intermediary role of the Social Investment Lab).

In more complex Social Impact Bonds there might be a contract between the investors and an intermediary that deals with public commissioners, social service provider(s) and independent evaluator during the duration of the SIB. This did not happen in the Portuguese pilot and the Gulbenkian Foundation had, in fact, internalized the intermediary through the Social Investment Laboratory and the agreement made with the Institute for Social Entrepreneurship.

Given the typical framework for a SIB there are two contracts that deserve some specific remarks. On the one hand, the contract for the provision of monitoring and evaluation services, as the Gulbenkian Foundation was not a party to this contract. One of the lessons regarding contractual framework that one can gather from the Lisbon pilot is the importance of binding all the parties in the primary contract in a specific contract with the entity responsible for the evaluation of the service provision and the attainment of outcomes. Since the results of the evaluation are a potential focal point for dissent among the parties to the primary contract it is very important for these parties to regulate how will they relate to the evaluation entity and monitor its work.

In the case of the Lisbon pilot, however, it was foreseen in the primary contract, between the Municipality of Lisbon and the Gulbenkian Foundation, that the latter, albeit not being a party to the evaluation services' contract, must had accepted the technical evaluation proposal submitted by Nova SBE to the Municipality of Lisbon in accordance to the referred secondary contract.

On the other hand the contract between the Gulbenkian Foundation and the Institute for Social Entrepreneurship (regarding the work of the Social Investment Lab) can only be understood in the context of a pilot or where there is a very high degree of trust between the parties, as the intermediary provides a neutral role to all other relevant

parties. The Municipality of Lisbon had no contractual rights over the work of the Social Investment Lab.

We shall from hereon for the rest of the present point concentrate our analysis on the contract between the Municipality of Lisbon and the Gulbenkian Foundation, as the primary contract to the SIB and the one that states the outcomes used as legal conditions for service payment.

### ***1.5. The Governance Model***

Besides the primary contract and the three secondary contracts, the Lisbon SIB pilot had an umbrella agreement destined to set up its governance mechanism. The umbrella agreement was thus signed by all the relevant parties of the SIB, including one party not present in the primary and secondary contracts. From the public side, the Municipality of Lisbon and the three Groups of Schools to which each one of the three schools belonged (under Portuguese law public schools are treated as incorporated public law bodies as a Group of Schools, so that each of the schools chosen belonged to one specific Group with administrative autonomy). From the private side, the Gulbenkian Foundation, Nova School of Business and Economics, the Institute for Social Entrepreneurship and Code for All.

The umbrella agreement instituted a Monitoring Committee where all parties were represented and which was the primary ad-hoc body responsible to govern the Lisbon SIB with executive support from the Social Investment Laboratory. The Committee assembled once a month and was presided by the Municipality of Lisbon. It

discussed the evaluation reports, decided upon necessary changes under the contracts and/or to the contracts and decided on the communication strategy for the disclosure of information regarding the SIB.

In reality the Monitoring Committee received and discussed information gathered and presented by the Social Investment Lab working alongside the schools and Code for All. It then decided on any course of action within the boundaries of the SIB contracts.

The chosen governance model, composed by an ad-hoc administrative body and a virtual executive body assured by the intermediary responded well to the challenges of the pilot, namely to the unforeseen necessity to change one of the metrics during the pilot, due to the Portuguese government having eliminated the final exams at the end of elementary education.

## **2. Commentary**

### ***2.1. Service provision design model***

In Portugal, almost all elementary schools are run by local governments - the Municipalities - while classes are taught by (civil service) professors working for the Ministry of Education, which also defines the adopted curricula. The most common model of public elementary education is therefore direct mixed public provision.

Thus the legal and political responsibility to improve the results in Portuguese and Mathematics rests primarily with the Ministry of Education (hereinafter “MEdu”) and

also, on a minor degree, with the local authorities. Primary responsibility rests with MEdu because legally it is the entity that must answer for the curricula and the teacher's performance. Since Municipalities only recently have been called to manage public elementary schools they are also considered legally responsible for the schools performance although on a lesser scale since they have less influence in students' results. This means that for the Municipalities to influence schools results they must do so through extra-curricular activities since they do not manage the teachers and the curricula.

When one considers a Social Impact Bond that aims to improve results in public elementary schools one would think, given this scenario, that, notwithstanding the management responsibilities of Municipalities, it would be for the Ministry of Education to assume the role of public commissioner. This is a key feature of Social Impact Bonds from which the Portuguese pilot departs. On the one hand it would be expected that the public commissioner both having the legal responsibility for delivery of a certain public services and the most information concerning such service would take up the role of (primary) public commissioner and contracting authority. And on the other hand given the full or almost complete transfer of risk to the private parties on a Social Impact Bond it is expectable that these parties would want to be legally bound to the public commissioner which is politically responsible for the service provision and has the ability to provide the necessary information and/or means for the fulfillment of delivery. The pilot showed however that although involvement of relevant public authorities is key the initiative may come from a secondary public commissioner and have positive results allowing for positive insights on how a SIB may foster integration across different public administrations (Carter, E. *et al.*:2018)

Thus, regarding only schools managed by the Municipality of Lisbon, which however offer direct provision of services through teachers and curricula determined by the MEdu, a first immediate option would be to try new learning methodologies regarding the two subjects in those classes (Portuguese and Mathematics). But that would have implied having the Ministry of Education as a party to the primary SIB contract, which is the one that establishes the risk transfer and full obligations. That however was not the choice in the Portuguese SIB pilot. In fact, the Municipality of Lisbon wanted to improve problem solving skills that would affect the grades in Mathematics and Portuguese but not necessarily through any change in the curricula or methodologies of these two subjects, which it could not control, at least directly. So the Municipality was left with the option of assuring an extra-curricular activity that could accomplish those outcomes and was also left with the task of defining metrics to measure them.

The first challenge would be to set a base case scenario in which a certain amount would be considered the standard unitary cost per student in order to achieve a certain average value within a problem solving skills grid. This alone is a difficult task to perform. Afterwards, an average for a determined period could be assessed for a specific universe (for instance the public elementary schools of Lisbon). However that had never been done before and there was no time to wait for a sample over an appropriate period of time (for example five years). The option was to choose a scientific methodology to assess problem solving skills and compare the results not to a given previous period but to a reference group that was be evaluated at the same time as the children in the classes under the Program. This however solves only part of the administrative problem presented to the public commissioners. Public commissioners



must start by determining the (unitary) cost of the service provision. Regarding the outcomes wanted out of the SIB pilot that would mean knowing how much does it cost to have the average problem solving skills developed to a certain average value in Lisbon public elementary schools. However neither the Municipality of Lisbon nor the MEdu had previously determined this (unitary) cost. This meant that the value set by the Municipality was an estimate of how much it would be willing to pay to improve over 10% on an unknown value and cost of problem solving skills. This is explained by the novelty of the outcomes chosen but also by an incipient administrative structure aimed at determining and measuring outcomes.

From a legal perspective this was one of the most important lessons from the Lisbon pilot. In continental administrative law, one of the two main areas is the law of administrative organization. This branch deals with principles and rules aimed at assuring maximum organizational efficiency in the pursuit of the public interest. This means that all administrative approaches to novel public interest regimes must search for an optimum design for public service delivery. Outcomes-based commissioning puts a lot of pressure over administrative bodies insomuch as it mandates that within public administration a legal body must have the competence to determine or recognize politically defined outcomes, devise or choose appropriate metrics for provision of services and evaluate performance. This implies an enormous shift from a public administration which is used to monitor services outputs for cost decisions but hardly monitors outcomes and less yet their (unitary) costs. Social Impact Bonds insofar as they are the more complex example of outcomes-based commissioning demand effective planning and monitoring of outcomes. What the Lisbon pilot shows is that the transition to a standard use of SIBs must be accompanied by the design of

administrative bodies that specialize in outcomes-based administration in order to support the decision for outcomes-based commissioning and especially SIBs. The administrative bodies should be central to the main public administration divisions (cabinets, departments, municipalities and so forth) and be able to support public commissioners and/or deploy personnel within public bodies planning SIB. In the case of the Lisbon pilot and referring to the same subject matter in order to scale the pilot it would be proper to design within the Minister of Education a body that would center on outcomes-based administration, targeting certain determined outcomes that would enable Groups of Schools and Municipalities to have a base case scenario from which to start the process of choice regarding types of provision, with corresponding metrics and methodologies.

What we have explained above means that one cannot compare the SIB pilot to the direct provision scenario, as in this latter case there were no autonomous outcomes and related metrics similar to the ones used in the pilot (Floyd and Croome:2017). The public elementary school system aims at teaching and improving problem solving skills but it does not measure specifically how this is accomplished and how much it costs. (although PISA reports have integrated evaluation of problem solving skills in older students). The same rationale is applicable to any contracting decision taken by a public commissioner regarding these outcomes.

From a legal planning capacity there was a difference in the provision model, when compared to the direct public provision, as the planning and monitoring on the public commissioner side was not performed as it regularly would - by the schools themselves - but by an ad hoc committee which integrated officials from the Municipality, whom supervised the strategic planning of the pilot from the public

commissioner's side. This aspect is not relevant when we look at the SIB pilot from a contractual framework perspective but offers interesting lessons from an administrative organization law perspective. Social Impact Bonds given their novelty demand organizational integration similar to the expertise once needed to build up for classic Public-Private Partnerships (Warner, M.:2013), this means a high level planning that has to be near decision makers or at the very least count with its regular support and monitoring. That was what happened in the Portuguese pilot: the Municipality steered the planning phase at a very high level. Future Social Impact Bonds having the Municipality of Lisbon as the public commissioner will tend to incorporate this activity into a specific administrative unit as a lesson learnt.

## ***2.2. Procurement issues***

Procurement is an important issue when Social Impact Bonds are concerned given that this contractual model offers a great challenge to public authorities regarding the information they can disclose to potential bidders in a competitive process. On the one hand it is important that the tender starts as early as possible so that it overlaps other phases in the SIB flowchart but on the other hand it cannot start so soon that the public commissioner does not have enough information to enable the design of adequate proposals (GO Lab:2018). This concern that was at the forefront of the conception of the new procurement mechanism of the 2014 Directive, the innovation partnership and it is what makes it a very good addition to the toolkit of procurement solutions (Villeneuve-Smith and Blake:2017).

As we have explained above, the Portuguese SIB pilot was considered exempt from procurement procedures given its pilot nature, in which the service provision designed created its own market, but had it now been developed the endeavor would prove to be on one of the far areas of the Social Impact Bond procurement procedures spectrum (GO Lab:2018).

At the time of the Lisbon pilot the new 2014 Directives on public procurement were already being discussed and their texts were known. The innovation partnership included in Directive 2014/24/EU (hereinafter the “2014 Directive”) seemed especially tailored to serve as a procurement mechanism for a SIB.

Regarding procurement rules, as we have seen, a SIB always rests upon a contract between a public commissioner and a private party in which the latter agrees to be paid only by the achievement of certain outcomes which will be met through the provision of (an innovative) service that must be known (even if only through a technical description) to the public commissioner at the time of the signature of the contract, although its object may be unknown during the procurement phase. Otherwise one could say that there would be a violation of the legal definition of “public service contracts” as stated in the Directive under article 1/2/(d). A Social Impact Bond encompasses the provision of a service that may not have been provided before, either in absolute terms or to any public commissioner (Edquist, C. et al.:2015). Legally, the service, even if innovative and thus unknown at the time of procurement, is the main object of the contract, not the outcomes. The (achievement of) outcomes act as a condition for payment, which may result in the provision of non-payable service. The public commissioner wants the outcomes and it is willing to procure an unknown service to achieve them. Nevertheless the end result of the procurement will be a certain

described service. That is why the emergence of the novel procurement mechanism called innovation partnership on the latest EU Directive on Public Procurement is so important to our subject matter. It allows to procure an unknown service (or product) based on minimum requirements of expected performance (outcomes) and taking into account elements related to the bidders, such as track-record (cf. article 31 of the 2014 Directive).

What is explained above is also applicable to any contract established between the public commissioner and another private party such as the one monitoring and evaluating the service provision.

The SIB procurement procedures spectrum is determined mostly according to the information the public commissioner possesses at the time when it needs or decides to start the procurement process. On one of the sides of the spectrum we find the cases in which the public commissioner knows the service to be provided very well and can easily disclose information related to the desired service which means using an open or restricted procedure under the 2014 Directive. On the opposite side of the spectrum we find the innovation line where the public commissioner does not know which service may accomplish the desired outcomes. The new procedure called innovation partnership is especially equipped to deal with these cases. In the middle of the spectrum, according to the information possessed by the public commissioner we can find the other procedures, mainly the competitive dialogue and the negotiation procedure (Telles and Butler:2014).

In the case of the Portuguese SIB pilot, if the contract between the Municipality of Lisbon and the Gulbenkian Foundation would not have been considered exempt from procurement procedures the adequate choice would have been an open procedure under

article 27 of the 2014 Directive. The point here is that the Municipality, although contracting outcomes as the fundamental payment condition is in fact contracting a provision of known services. The description of the services was known in advance, although determined during informal negotiations with the Gulbenkian Foundation and Code for All, and could have been used to offer potential bidders enough information to enter a classic competitive process. However this disclosure of information by the service provider only happened because of the pilot. In a way, Code for All presented an unsolicited proposal that was used by the Municipality, through the Social Investment Laboratory to design the service provision. In the case of an unsolicited proposal the best course of action under the 2014 Directive and in the absence of specific national legislation to accommodate such type of proposals (which, unlike Italy and Spain, is the case with Portugal and the UK) should be determined according to the proposal's degree of development, ranging from a simple Prior Information Notice (article 48 of the 2014 Directive) to a Design Contest (article 78/a of the 2014 Directive).

Let us imagine that the Municipality would not have approached the SIB mechanism through a coding experiment in public elementary schools but as a way to improve problem solving skills in public elementary schools students without equating previously any type of service provision. The Municipality focus would be on the outcomes and not on certain service's outputs. It would be impossible for the Municipality to launch an open or restricted procedure under EU and Portuguese procurement law for it would not have enough information to disclose to the bidders according to what is prescribed in the 2014 Directive and would only be able to set minimum requirements to be met by all tenders as far as the new service was concerned. In this case we would be in a situation fully encompassed by the innovation partnership

under article 31 of the 2014 Directive. This gives us a clear picture of the importance of perspective taken by public commissioners regarding service provision mechanisms as well as their planning and evaluating conditions, especially between outputs and outcomes. In this respect the Lisbon SIB pilot was very conservative as far as procurement is concerned since the Municipality was in fact using the SIB model to acquire a service that was already known and whose specifications could be determined and disclosed to potential bidders with a minimum effort. This is not, however, the typical context in which a SIB is considered. Rather, due to setup costs the Social Impact Bond mechanism is more efficient when the service being procured is innovative and cannot therefore be easily procured as a regular (direct) service provision.

### ***2.3. Contract management***

As a pilot the Lisbon Social Impact Bond had from the very beginning a great concern with governance which was designed by the Social Investment Lab in their capacity as intermediary. Contract management therefore came as a natural consequence of the implemented governance model which combined an administration ad hoc body - the Monitoring Committee instituted by an umbrella agreement - with the monitoring function of the Social Investment Lab. The execution of the contracts that made the Lisbon pilot was thus coordinated by the designated intermediary with the administration body intervening only to evaluate performance and act on any unpredicted event. Such occasion came to pass as the Portuguese Government terminated the national Portuguese and Mathematics exams at the end of elementary

school, thus eliminating one of the metrics to measure the outcomes of the SIB pilot. A test to contract management the Monitoring Committee convened and decided to replace the national exams with custom exams similar to the ones being terminated. An addendum to the primary contract was made to reflect this change. The Social Investment Lab although an intermediary close to one of the parties performed an important role regarding contract management.

### **3. Impact**

The Portuguese Social Impact Bond pilot was developed on one of the key social areas of our time: education. It chose two of the most important subjects in any elementary education - native language and mathematics - and it aimed at improving the results of such matters among a determined cohort of students. Its social impact can hardly be understated but its financial return, notwithstanding its pilot nature, would be hard to achieve. Savings from change in current service provision - Portuguese and Mathematics classes - would have to be sufficient to cover the cost of the SIB. Although no data is available to calculate this scenario this goal would be difficult to attain. This must not come as a surprise and above all must it be accepted as normal in a SIB which must be understood as a mechanism to raise upfront private impact investment in more efficient ways than the alternative public origins. This finding demonstrates the key importance of having a knowledgeable team on the side of public commissioner, able to justify the SIB option and see it through as the best choice for achieving the desired public interest outcomes. In the pilot, as we have seen, the Social Investment



Laboratory performed this task but it is desirable that such role be internalized if SIBs are to be taken up by central and local governments. Internalization need not mean a bureaucratic, rigid public administration service but delivery units tailored to the features of a SIB involving cross-administration officials as well as relevant connected parties (Azemati, H.:2013). According to the Evaluation Report of the Portuguese SIB Pilot (Maze:2018), out of a contracted 10% increase in measured results by the Treatment Classes over the Control Classes, an aggregate 2,2% increase was achieved which led to a 25% repayment by the Municipality of Lisbon to the Gulbenkian Foundation for partial achievement of the contracted outcomes. The independent evaluator, as previously discussed among the parties, confirmed that a one year intervention, such as the Pilot, was a very small period to achieve the kind of contracted outcomes. There were no conclusions regarding the adopted and required public administration framework which recommends that autonomous further attention be directed to this field on subsequent SIBs.

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