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Competition in the European and Portuguese Public Procurement

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Abstract Universal access to markets, in particular, the emergence of new economies, is a consequence of the productive and cognitive increase societies and the emergence of new means of communication and information which have emerged from the second half of the twentieth century. The legal framework for public procurement in Portugal is provided in the Public Contracts Code, approved by Decree-Law 18/2008, of January 29, which transposed, to the National Public Procurement System, the EU Directive 2004/18/EC, of March 31, 2004. On February 26, 2014, the European Parliament and the Council of the European Union adopted EU Directive 2014/24/EU on public procurement, repealing EU Directive 2004/18/EC, and allowing the Member States until April 18, 2016, to transpose the new Directive to their national legal frameworks. In Portugal, the legislative procedure to amend the Code of Public Contracts was concluded in 2017, entering into force in January 2018. As for competition, it aims to ensure market balance and efficiency.

Keywords: • market regulation • public contracts • public procurement • competition • free competition

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1 Introduction

Universal access to markets, in particular, the emergence of new economies, is a consequence of the productive and cognitive increase societies and the emergence of new means of communication and information which have emerged from the second half of the twentieth century. Such developments contributed to generate an authentic globalised, networked information system aiming at wealth creation and internationalisation. Societies and organisations started leading the world economy by operating in a different context from what took place throughout the previous century.

By embracing the whole world as a field of action, today's international trade inevitably ends up having to submit to the sphere of intervention by international organisations, whether universal or regional, from the outset, it makes it impossible for the national legislature itself to be able to establish, with complete freedom and autonomy, its market conception and the way of operating, both of public entities and private entities of that same State, thus being subject to legal parameters and principles whose contours, characteristics and rules already transcend its scope of competence.

Concerning the conclusion of public contracts, it is essential to respect the fundamental principles of the internal market, as set out in the Interpretative Communication of the European Commission, published in the Official Journal of the European Union No. C 179/2, of August 1 2006, which states: *"(...) the principles of equal treatment and non-discrimination imply an obligation of transparency, which consists of guaranteeing, for all potential competitors, an appropriate advertising to guarantee the opening of contracts to competition"*.

It results, however, from the provision set in Directives 2004/18 / EC and 2004/17 / EC, a distinction between contracts should be conducted by a public entity of a Member State depending on whether or not the value is above the thresholds therein imposed. Thresholds are updated every two years by the Commission, taking into consideration economic factors.

The legal framework for public procurement in Portugal is provided by the Code of Public Contracts, approved by Decree-Law 18/2008, January 29, which transposed, to the National Public Procurement System, the EU Directive 2004/18/EC, of March 31, 2004. On February 26, 2014, the European Parliament and the Council of the European Union adopted EU Directive 2014/24/EU on public procurement, repealing EU Directive 2004/18/EC, and giving the Member States until April 18, 2016, to transpose the new Directive to their national legal frameworks. In Portugal, the legislative procedure to amend the Code of Public Contracts is on-going.

The Code for Public Procurement (CCP) regulates the procedures required for the formation of contracts. It provides for the creation of an Internet portal dedicated to public

procurement, aggregating information on public procurement. The CCP includes six paramount principles efficiency, simplification, rigour, innovation, monitoring and transparency. One of the Code application corollaries is precisely to promote openness in transactions carried out by the contracting authorities. They are good allies in this objective, the obligation to use electronic platforms in the formation of contracts that, once signed, its publication in the portal BASE.

Some Portuguese Procurement System features are at the forefront of international best practices, namely, electronic tendering and centralisation. The National Public Procurement System (SNCP – *Sistema Nacional de Contratação Pública*) is based on a central purchasing body, ESPAP (*Entidade de Serviços Partilhados da Administração Pública*), in an interrelated system with ministerial purchasing units and a network of contracting authorities and entities. Integration in this network is mandatory for Central Administration and Public Institutions. Municipalities, Regional Authorities, Local Entities and State-owned undertakings may join the SNCP voluntarily.
Direct adjudication and cartelisation are the biggest threats to competition in Public Procurement.

2 The Three Principles of Public Procurement

Regarding the fundamental principles, three stand out, starting precisely with that of competition, followed by transparency and advertising.

The Directives fail to address the first principle as a valid principle but rather as an objective (goal) underlying public procurement and which is, moreover, quite evident when it comes to the lettering of the COMMISSION INTERPRETATIVE COMMUNICATION on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02).

As outlined in point 2.1.1 of the Communication above, *"According to the ECJ, the principles of equal treatment and non-discrimination imply an obligation of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to competition"* referring to the case-law of the ECJ in Telaustria (C-324/98), paragraph 62:
That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

and Parking Brixen (C-458/03) paragraph 49:
The principles of equal treatment and non-discrimination on the grounds of nationality imply, in particular, a duty of transparency which enables the concession-granting public authority to ensure that those principles are complied with. That obligation of

transparency which is imposed on the public authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed.

The principle of competition is "*the true backbone of the Public Procurement, a kind of umbrella principle" that* shapes and informs the remaining (Oliveira & Oliveira, 2016: 186). The Principle of Competition in Public Procurement occupies a procedural and non-material plan, as a canon or normative criterion that directs the contracting authority to resort to open, competitive procedures, which allow interested parties, economic operators, equal conditions of access and participation and equal treatment (Gonçalves, 2012: 489).

Transparency is unequivocally one of the legislator's main concerns when it comes to the conclusion of public contracts. With the creation of Directives 2004/18 / EC and 2004/17 / EC, the principle of transparency's role was enhanced. Following the EU legislator, the national legislator refers explicitly to this principle in the Code of Public contracts.

Transparency implies, from the outset, the publication of the tender notice in the JOUE, in the case of an International Public Tender, when the contract value is above the community thresholds. With regard to the evaluation model designed and fixed on the pieces by the contracting authority, it should allow interested parties to obtain necessary information in order to determine *the quid* to be taken into account when evaluating the proposal, namely the "weight" and the "measure" that is attached to the award criteria chosen by the contracting authority.

In the case of a tender procedure, it must be advertised by notice in the National Gazette (Diário da República), in the case of a national public tender, for contracts below the Union's thresholds (135,000 euros for the State, 209,000 euros for other contracting entities, in the case of Acquisition of Goods and Services, and 5,225,000 euros in the case of Public Works Contracts) – as outlined in Article 4 of the "classic" Directive.

The right to information is enshrined in several international agreements, including Article 19 of the Universal Declaration of Human Rights. The right of citizens to access public authorities' information is called freedom of information. This information plays a crucial role in informing the population so that they can make accurate political choices (Vilela et al., 2017: 728). The same applies to undertakings.

There is a close link between the principle of transparency and advertising, and it is moreover challenging to address one without reference to the other as "the advertising principle represents the external face" of the transparency principle. As already mentioned, there is a required degree of publicity right from the training phase's start. Contract to be signed, which must be made in the Diário da República (DR) and / or in

the JOUE, under the Directives' thresholds, and whose non-compliance can generate, depending on the case, nullity, annulability and even ineffectiveness.

In the light of the advertising principle, a corollary to the principle of transparency, the Administration is prohibited from taking any action or omission that may cause the favouring or disadvantage of any of the competitors (Sousa, 1994: 64-75).

Advertising for the conclusion of a contract has a much wider circle of recipients and broader than transparency, restricted to those involved in the procedure. It should be noted that in Portugal, there is an obligation to publicise contracts signed by entities contractors on the public procurement portal at www.base.gov.pt, which is accessible consultation of any citizen, which is, therefore, an excellent example of the importance that the principle advertising takes on public procurement, whose ultimate purpose is undoubtedly transparency. However, it should be clarified at this point that there are different moments of publicity, being that that carried out on the public procurement portal takes place at a stage subsequent to the conclusion of contracts, whether or not they have been previously published in the DR and / or the JOUE.

3 Competition and Public procurement and Government contracts in Portugal

According to the OECD, *"Public procurement refers to the purchase by governments and state-owned enterprises of goods, services and works. As public procurement accounts for a substantial portion of the taxpayers' money, governments are expected to carry it out efficiently and with high standards of conduct in order to ensure high quality of service delivery and safeguard the public interest"*, being one of the most highly legislated and regulated fields of government (Lloyd & McCue, 2004: 3).

Competition aims to maximise consumer welfare and economic efficiency according to the own legislation of the ECJ in Case C-468/06 GlaxoSmithKlein, being considered a "backbone" of market efficiency (Oliveira, 2018: 85), guaranteeing the confidence of competitors allowing the pursuit of public interest based on impartiality and a globalised economy.

Competition may be divided into two aspects: subjective and objective. While the subjective element guarantees that each subject exercises freedom of economic initiative; the second consists of a market that is characterised by the presence of a plurality of economic operators, each of whom buys or sells such a negligible portion of the total product exchanged that he is unable to influence the market price with the conduct (Raimundo, 2013).

Public procurement aims to pursue non-discrimination, transparency and equal treatment, and value for money at the national level. The rules concerning this principle are open,

being confident that they lead to its application, hence leading to pro and anti-competitive results. Still, they are never enough to guarantee effective competition. Public procurement law allows contracting entities to meet their needs efficiently and "is grounded on two starting assumptions: that competition goes first, and that there is room for more competition in public procurement", and also, it is interesting to mention the fact that "that public procurement is currently not as pro-competitive as it could (or ought to) be — or, put otherwise, that current public procurement rules and practices generate distortions in market competition dynamics— and, consequently, that there is room for significant improvement in this area" (Sanchez Graells, 2015).

These two rights (competition law and public procurement law) are related and complementary realities. At a certain point, public procurement law is considered to be a competition law applied to public procurement. The case-law of the ECJ in *Fenin* T-319-99 states that *"according to settled case-law, in Community competition l a w t h e concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed" and* together with other decisions of the Court of Justice of the European Union on the matter such as *Höfner and Elser, Poucet and Pistre, Federation française de societies d'assurances, Job Centre, Albany* and *Dansk Pelsdyravlerforening*, amongst other as well as the subsequent amendments to European directives 23/2014/EU: 24/2014/EU: 25/2014/EU, have reduced the gap between public procurement law and competition law.

It is intended, now, that there are public procurement rules based on the principle of competition (the broader aspect of competition law) in a double perspective: as a factor that demands market appeal and the equal treatment of companies and as a criterion for the position of abuses of agents participating in market relations.

4 Laws governing Competition and Public procurement, and Government contracts in Portugal

Public procurement represents a mechanism of significant importance for any State's economic and social development, constituting an instrument for constructing economic and social policies, emphasising its confrontation with competition law.

It should be noted that this represents that for Portugal, 19.5% of total public expenditure and 10% of GDP, and, if we refer only to the year 2018, public procurement in Portugal reached 6,824 billion euros. As a result, 128,351 were contracts signed.

When inefficient, public procurement leads to the waste of public funds, which could be redirected to other purposes of social interest, being, in this way, competition, fundamental for the promotion of this same efficiency.

The first time the national legislator developed a unique code to deal with public contracts dates back to January 29, 2008, employing the Law Decree 18/2008. This first attempt to codify the national rules on public contracts derives from the EU legislation in the matter; in particular, the EU Directive 2004/18/EC. It is relevant to mention that the Directive was already in force in the national legal order since 31.01.2006, the foreseen deadline for its transposition, as arises from the Principles of EU Law, as Portugal was in breach of its obligation to transpose.

With the entry into force of EU Directive 2014/24/EU on public procurement, repealing EU Directive 2004/18/EC, and giving the Member States until April 18, 2016, to transpose the new Directive to into national legal frameworks, EU Directive 2014/25/EU and EU Directive 2014/23/EU as well as EU Directive 2014/55/EU and in order to increase the efficiency and decrease the waste, in 2018 the New Public contracts code came into force, aiming to the efficient allocation of the governmental funds and the respect for the already mentioned principles of competition, transparency and advertising. Once again, Portugal did not meet the transposition deadline.

The last amendment in the National Legislation concerning Competition law came into force in 2012, Law 19/2012, after the Assembly of the Republic's approval, which revoked Law No. 18/2003.

Even though it imported several amendments to competition law, no changes were made to the articles pertaining to the unlawful competition. The amended sanctions remained purely pecuniary.

After the entry into force of the "New Legislation", The Competition Authority acquired new powers (Vilela & Gomes, 2017: 124): investigative powers would specifically include the possibility for searches and apprehensions of homes, vehicles or other sites belonging to a member, administrative bodies, workers or any other company/association collaborators. Supervision powers were also extended, enabling inspections and audits of company premises, even without a Public Prosecutor's Office or a judge's order, subject to a 10-days' notice, and the collected evidence could be used in other cases, including sanctioning procedures against the company in question. This field of action would be formally guided by a principle of opportunity, which could assign different priorities in the treatment of the issues that were called for analysis.

With the last amendment of the PCC, public contracts were, now, under the scrutiny of Competition Law.

5 Conclusions

The importance of competition for cost-effective public procurement is corroborated by the considerable efforts that undertakings typically devote to business-to-business

commercial transactions to ensure that their procurement departments effectively use competition to reduce the cost increase the quality of inputs (Anderson, 2011).

Regardless of the significant attempts, both by the European legislator and its national peers, *in casu*, the Portuguese legislator, and the considerable amount of legislation, case law, recommendations, etc., issued to tackle the issue of competition in national and EU comprehensive, public procurement, several weaknesses are still identified in this field.

The Portuguese legislator has failed to implement a free competitive market in public procurement regardless of having developed subsequent texts and institutions that aim to tackle the issue.

More legislation can be expected to be developed in the near future. Regardless the authors are convinced that a total swift in paradigm, as well as the imposition of severe penalties to those in breach o competition rules, is necessary.

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