PUBLIC CONTRACTS AT THE EPICENTER OF THE CRISIS: PONDERING THE VARIABLE INTENSITY OF THE COMPETITION PRINCIPLE

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I. BRIEF INTRODUCTION: PUBLIC LAW INSTITUTIONS AS CRISIS FACTORS AND AS THE MAIN MEANS OF IMPLEMENTING MEASURES TO COMBAT THE CRISIS

1. IT SEEMS appropriate that a Portuguese element takes place in this panel - *Public Contracts and the Current Crisis: From Local Government to the World* - in a reunion held in Greece. As you know, both our countries have been bailed out by the troika composed by the IMF, ECB and EC. In Portugal people address these institutions simply by the "friendly" name of "*Troika*". And, in fact, when we found out the theme of our *rapport*, Public Law and the Crisis, we were immediately very relieved, since it meant that there was no lack of material for our work, given that most of the measures to resolve the crisis that are being discussed and that have been implemented in Portugal fall under public law, it also being the case that many public law institutions, long established in our country, are also considered to be factors contributing to the crisis (*e.g.* allegedly, financially unaffordable subjective public rights, oversized administrative structure, PPP concessions in ruinous conditions). Public law is, indeed, everywhere.

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By means of illustration, it should be noted that the protagonism of public law in the framework of the current crisis starts immediately at the constitutional level. In fact, the Constitutional Court has been called upon to rule on the constitutional conformity of some of the most polemical laws which set out austerity measures, as was the case with it declaring unconstitutional the measures of the 2012 Portuguese State Budget eliminating holiday and Christmas bonuses for public employees (rights that have been established by law for over 30 years) according to arguments which were based on the violation of the "*principle of equality in the distribution of public burdens*"[1] (Art. 13 of the Portuguese Constitution). Thereby a serious problem was created for the Portuguese Government, who found itself, bound by the conditions of the Troika, having to find financial measures that have an equivalent effect (which it did, by means of keeping the cuts over the public employees, achieving the "*equal treatment*" by suppressing at least one monthly wage to all workers in the private sector). Another example of the protagonism of constitutional law can be found in the discussed unconstitutionality of the Government's intention to sell the state television channel RTP 1 since it violates the constitutional guarantee of a public television service (Art. 38, Paragraph 5).

2. Funnily enough, it remains interesting how public law and some of its legal principles are often subordinated to the political circumstances of the crisis by means of contrary measures that demonstrate a flexibilization of the principle in question.

And these are the key-points of this paper:

a) The "variable geometry" of some public law principles in the context of a crisis, from the example of the "competition principle" emerging from the public procurement rules;

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[1] See the judgment of the Constitutional Court 353/2012, of July 5, available at http://www.tribunalconstitucional.pt/tc/acordaos/20120353.html.

b) If that variable geometry is or is not desirable - we can ask ourselves if the Justice Court and the Commission should not look at this principle, less as a "sacro-saint" despotic principle and more like one principle among others one should pursue in times of crises.

3. Taking the example of public procurement rules, one should not forget that they were used on two separate occasions for completely contradictory aims.

Thus, as the economic crisis started taking shape in 2008, public procurement was used as an *expansionist mechanism*, while when the financial crisis worsened in 2010, public procurement became an *instrument of austerity*.

4. In fact, in 2008/2009 European institutions clearly signalled to national governments to ease on the achievement of the goals established for the cutting of public deficit and to adopt growth measures supported by increased spending, something that the Portuguese State did, and which resulted in the country's controlled deficit of 3% in 2008 shooting up to a deficit of over 9% the following year.

In this context, the Government approved, with Law-Decree 34/2009, of February 6[2], exceptional public procurement measures that allowed for the adoption of mechanisms to accelerate the procedural deadlines set out in the general legislation (for restricted tender and for negotiated procedure) for the public contracts awarded for areas considered key for economic stimulation, *i.e.* modernization of the school system, promotion of renewable energies, energy efficiency for energy transport networks, moderniza-

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[2] JOÃO AMARAL E ALMEIDA / PEDRO FERNÁNDEZ SÁNCHEZ dedicated a whole monograph to the analysis of the exceptional regime introduced by this bill, having concluded that it is inconsistent with EU law on public procurement, which stems directly from the Treaties, and claiming precisely its violation of the competition principle - *cfr. As medidas excepcionais de contratação pública para os anos de 2009 e 2010*, Coimbra ed., 2009.

tion of technological infrastructures and urban rehabilitation. And especially in the specific case of the rehabilitation of the school system, these measures allowed for the disregarding of internal thresholds for resorting to non-competitive procedures and also allowed for the possibility of resorting to these non-competitive procedures up to the thresholds for application of the public procurement directives.

Therefore, in the turning of 2008 to 2009, we witnessed public procurement emerging as an expansionist instrument, thereby sacrificing the "sanctity" of the competition principle for the efficiency of administrative action and for the public interest in economic growth. At this time EU institutions were saying "spend"! The budget deficit rose from 3% in 2008 to 9% in 2009.

5. On the other hand, with the package of austerity measures imposed on Portugal in 2011 shaped by the Memorandum of Understanding (MoU) signed between Portugal and the Troika on May 17, 2011, the same institutions were used in the opposite sense, producing profound changes to public procurement rules ("strengthening of competition") as an instrument for the "moralization" of public life, the liberalization of the economy and the control of public spending.

Therefore, in the context of public procurement and with a view to strengthening the *now* once again considered fundamental competition principle, the following is essentially advocated:

a) The end of all "special" measures, be they permanent or temporary, that allow the resort to non-competitive procedures for the award of public procurement contracts below the value of application of the EC directives for public procurement (this implies the revocation of the already referred to Law-Decree 34/2009, of February 6);

b) The amendment to the regime that allows the direct contracting of "extra works" in the context of public works contracts and of contracts for provision of services, making the related criteria and the requirements more demanding than

those of the regime for acquisition of "additional works" set out in the public procurement directives (*e.g.* Art. 31, Paragraph 4, point a) of Directive 2004/18/CE);

c) Strengthening of mechanisms for the financial liability of public administrators for not meeting public procurement rules and strengthening of the control mechanisms of the Court of Auditors.

6. However, here one also notices the abovementioned "variable intensity" of the competition principle approach. Since, at the same time that, in its name, there was a demand for an increase in the requirements of public procurement rules, on the other hand there was support for the renegotiation of existing public contracts according to terms that are hard to correlate with stricter readings of this principle.

Indeed, in the MoU we witnessed the consecration in writing of the feelings of aversion against public-private partnerships (PPPs) that had already been raging in the Portuguese public discourse. These contractual instruments, once associated with sophisticated ways of obtaining private financing for public projects, with allocating public risks to private partners and with making the most of the business management skills of market players, are now seen as the main source of the country's woes, as an instrument of encumbrance on future generations for unnecessary infrastructures and of favoring the interests of private *concessionaires*.

Therefore, the MoU advocates, amongst other measures, not only the rigorous independent evaluation of all existing PPPs and suspension of launching new ones, but also analyzes the possibility of renegotiating PPPs with the aim of reducing associated charges.

Obviously, there cannot be any renegotiation of contracts with private companies that does not result in new benefits for the said companies, otherwise the latter have absolutely no interest in renegotiating. And the amendment of public contracts that implies new benefits for private companies is usually viewed negatively from the perspective of the competition principle.

II. The Tyranny of the Competition Principle

7. The finding that, within the framework of analysis of the evolution of the crisis, the competition principle has been (had to be) subjected to *variable intensity* approaches, pragmatically forcing the exceptional retreat of this principle for the sake of other values which became important, at the same time shows the extreme rigidity with which normally the competition principle is dealt with as a rule by the EU authorities and by the Portuguese auditing entities.

To a certain extent, the above description ends up drawing attention to the fact that, in the context of public procurement and of public contracts, there is a tendency towards a *tyranny of the competition principle* over other relevant political legal principles such as the *principle of pursuance of the public interest* and the *administrative efficiency principle*. And, perhaps, that this tyranny becomes more evident and possibly more pernicious during times of crisis which demand more flexibility in the application of the principle.

8. As an example, in the pre-contractual phase it is well known what view the already referred to EU entities have with regard to the so-called "*excluded procurement*", which states that, even when drafting public contracts not covered by EU directives on public procurement, it is not possible to ignore the structuring principles of an internal market, based on a "highly competitive market economy", established in the Treaties, and here we are essentially talking about the competition principle[3].

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[3] Historically, this conclusion was imposed especially clearly in relation to the drafting of concession contracts for public services not covered by EU directives on public procurement. The inapplicability of these directives did not stop, in 2000, the Commission, through the "Interpretative Communication on Concessions under Community Law" (OJ C 121 of 29.04.2000) and the Court of Justice, with the case *Telaustria* (7.12.2000 - Process C-324/98), in considering that, although concessions for public services were not covered by the directives on public procurement, Member States should ensure that pre-contractual procedures respected the fundamental principles of EU law in general and the principle of non-discrimination on grounds of nationality in particular, obliging Member

The Commission has stated several times that the inapplicability of the directives on procurement does not exonerate the adjudicating entities from a duty to transparency, there being a need to not only publicize the opening of the tender in a way that opens the procedure to competition, but also for the impartiality of the adjudication procedures[4].

However, there are not any peremptory norms written into Portuguese law that generally consolidate these principles to be observed, which creates considerable doubts for legal bodies regarding the kind of procedures that must be used in these cases and the values according to which a publicized tender process must be launched.

9. The truth is that this position of principle (which is however not very consistent) of the EU authorities, has led to the auditing bodies in Portugal (Court of Auditors, General Inspectorate of Finance) making very wide interpretations of the normative consequences of the competition principle, to the point of repressing, by means of sanctions, the conduct of administrative entities without legal basis and completely ignoring other administrative legal principles, which in some cases should reduce the competition principle

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States to ensure, "*for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to competition and the impartiality of the procedures to be reviewed*" (Paragraph 62 of the Decision).

[4] See "*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). Undoubtedly this Interpretative Communication does not constitute a formal legal act with binding effect (hard law). Moreover, on September 12, 2006, the Federal Republic of Germany brought an action for annulment of this Interpretative Communication (Case T-258/06), albeit so far unsuccessfully. Be that as it may, the principle underlying the Commission's view, according to which, regardless of the scope of the EU directives on public procurement, the treaties governing the European Union contain structuring principles of the internal market which are also valid in procurement, can hardly be challenged.

in its strictest reading, as should be the case with the public interest principle and the administrative efficiency principle.

These readings, for example, demand very tough tender procedures even for contracts whose value does not justify it, considering the little relevance they have for the market. Or they are *contra-legem* readings that envision a duty to consult more than one entity in non-competitive procedures where such duty does not exist in law.

10. The recent amendment to the Public Procurement Code in Portugal, following on from the obligations imposed by the Troika, has worsened the situation.

A good example was the decline in value thresholds up to which public authorities can make use of non-competitive procedures for the procurement of public works contracts and for purchasing services.

Therefore, public sector entities who could previously choose this procedure for the award of public works contracts up until €1,000,000 and contracts for acquisition and leasing of goods and services of up to €200,000 are now limited to €75,000 and €150,000, respectively. It should be noted that this is a legislative choice that goes against the grain of EU public procurement law, since the recent Regulation 1251/2011, of the Commission, of November 30, 2011, which amended the public procurement directives, increased the values of applicability to €200,000 instead of €193,000 for contracts for acquisition and leasing of goods and services for adjudicating entities that are not the State, and to €5,000,000 instead of €4,845,000 for public works contracts.

This, therefore, drastically reduces the room for manoeuvring of the Administration, who, even for contracts of small value and without importance to the internal market, is forced to launch tough tender procedures in the name of a vision that to us seems overly positive about the benefits of the competition principle to public interest in these specific cases.

It should be noted that we have not forgotten that the competition principle directly protects private interests which are worthy of protection, as well as the public interest associated with the functioning

of the competitive market that generates economically more advantageous offers. However, the choices the national legislator has made, following the strict readings of EU institutions have ignored that at the basis of the admissibility of non-competitive procedures are considerations of administrative efficiency that cannot be ignored.

Indeed, it is undeniable that not all procurement done by public authorities must be subject to the procurement rules that impose competitive procedures and that, below the thresholds for application of EU public procurement directives, incidentally recently increased, procurement outside competitive procedures does not necessarily call into question the principle of inter-Community competition set out in the Treaties.

On the other hand, as we already mentioned, the recent amendments to the Public Procurement Code, influenced by the Troika, had another consequence in the name of the competition principle, since they strongly limited the possibility of adjudicating extra works and services in the context of public works contracts and of contracts for services, thereby limiting the possibility of procuring these works without the need to launch tenders subject to very strict requirements that go very much beyond the requirements of, for example, Art. 31, Paragraph 4, point a) of Directive 2004/18/CE for extra works and services.

11. The despotic rule of the competition principle is also felt at the level of the execution of public contracts and, in particular, of the possibility of modifying the said contracts. And if we see the problem from the standpoint of contractual amendments determined unilaterally by an administrative act, we believe that it is no exaggeration to say that the iconic "*power of unilateral amendment to administrative contracts for reasons of public interest*" - institution that for over a century acted as incubator of the autonomy of the figure of the *contrat administratif* and that is part of the heritage of public law in continental Europe - is now increasingly "held in check" by the competition principle.

12. For instance, there are many authors who claim the necessity of, in a crisis situation, the possibility of adopting solutions to aid Administration co-contractors facing exceptional financial difficulties that jeopardize their ability to fulfill contracts.

Moreover, these authors also defend the existence of a real *duty* on the part of the Administration to intervene in the execution of public contracts in order to prevent or diminish cases of contract defaulting on the part of the co-contractor, aiding the latter in cases of extreme financial difficulties, this duty being anchored in an administrative competence of "good management of public contracts". This aiming the *protection of the contract itself* in a scenario where its execution is threatened by the extraordinary difficulties faced by private contractors as a result of the crisis[5].

Possible solutions here include extending the contract's due date (*e.g.* in the case of concessions), the taking over of the contract (step-in), giving an advance on the price, restraining the exercise of sanctioning powers (*e.g.* resolution in insolvency scenarios where there is a recovery plan).

13. From another point of view, the problem of the need to amend a public contract *in the direct interest of the Administration* can also be considered very carefully.

This way, the financial constraints of the State may lead the public contractor to extend the timeline of the execution of the contract with the aim of attenuating the financial burden during the crisis period.

In Portugal, for example, the State has considered reducing the objects of contracts in order to generate savings, this naturally implying a reduction of the obligations imposed on the private contractor.

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[5] *Cf.* PEDRO GONÇALVES, *Gestão de contratos públicos em tempo de crise*, Estudos de Contratação Pública III, Coimbra, 2010, pp. 5-50. PHILIPPE BURGER / JUSTIN TYSON / IZABELA KARPOWICZ, IMF Working Paper, WP/04/2009, *The Effects of the Financial Crisis on Public-Private Partnerships* 2009, p. 19 ss.

Another important example is the introduction of real tolls in highways previously subject to a shadow toll regime: the Portuguese State unilaterally decided to introduce real tolls but found itself faced with the (legal) contingency of having to assign the tolling services to operators without carrying out a competitive procedure otherwise the *concessionaires* (and the financing banks) might allege a violation of the object of the contract and of the exclusive right inherent to the concession.

14. As it happens, these measures are seen with great suspicion by EU entities and by national audit bodies, who consider the measures to be an obvious threat to the sacrosanct competition principle.

The *principle of safeguarding the integrity of the competitive procedure* is invoked in order to deny, or at least to place very tight limitations on (unilateral or negotiated) amendments to public contracts. Indeed, by demanding the strict adherence to the *substantial identity* of the contract, there is evidence of a clear preference for the competition principle to the detriment of the public interest.

On this matter, see the positions taken by the ECJ Judgments *Pressetext*, of June 19, 2008, case C-454/06, *Wall Ag*, of April 13, 2010, case C-91/08 and *Commission vs. Spain*, of April 22, 2010, case C-423/07.

In the same vein, see the restrictive character of Art. 313, Paragraph 2 of the Portuguese Public Contracts Code: "*... unless the enduring nature of the contractual relationship and the course of time warrant it, an amendment is only allowed when it is objectively demonstrable that the ordination of evaluated bids in the procedure of formation of the contract would not be changed if the specifications had contemplated this amendment.*"

Finally, see also the rigidity on this matter of the *proposal for the adoption of a directive on public procurement* proposed for discussion by the European Commission with the COM(2011) 896 final, of December 20, that, with Art. 72, imposes very strict requirements for amending contracts, unacceptably reducing the scope and foundation of the "*power to amend administrative contracts for reasons of public interest*". In light of this normative text, we believe that the Portuguese State would be unable to introduce real tolls in

highways previously subject to a shadow toll regime, which would be a complete subversion of the hierarchy of principles in light of the public interest.

15. In conclusion, keeping in mind the specific cases presented above, it seems to us that an excessive rigidity (or even a supremacy) of this principle may lead to compromising principles that are equally, if not more, important in the current circumstances, as is the case with the *principle of pursuance of the public interest* and with the *administrative efficiency principle*. Moreover, it seems to us that the Portuguese State will inevitably have to resort to these principles in order to address the severe financial difficulties the country is in, mainly regarding the renegotiation of public contracts.

ABSTRACTS / RÉSUMÉS

It remains interesting how public law and some of its legal principles are often subordinated to the political circumstances of the crisis by means of contrary measures that demonstrate a flexibilization of the principle in question. And these are the key-points of this report: *a)* The "variable geometry" of some public law principles in the context of a crisis, from the example of the "*competition principle*" emerging from the public procurement rules; *b)* If that variable geometry is or is not desirable - we can ask ourselves if the Justice Court and the Commission should not look at this principle, less as a "sacro-saint" despotic principle and more like one principle among others one should pursue in times of crises.

Il est intéressant de constater comment le droit public et certains de ses principes juridiques sont souvent subordonnés aux circonstances politiques de la crise au moyen de mesures contraires qui montrent que ces principes peuvent devenir flexibles. Et ce sont là les points clés de ce rapport: *a)* la "géométrie variable" de certains principes de droit public dans un contexte de crise, à partir de l'exemple du "*principe de concurrence*" qui émerge des règles des fournitures publiques; *b)* pour ce qui est de savoir si cette géométrie variable est souhaitable ou non, on peut se demander si la Cour de justice et la Commission ne devraient pas considérer ce principe moins comme principe despotique "sacro-saint" que comme un principe parmi d'autres à appliquer en temps de crise.

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