IMPLEMENTING NATIONAL MEASURES ON PUBLIC PROCUREMENT UNDER THE EC DIRECTIVES: THE PORTUGUESE EXPERIENCE

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Abstract By comparing the Portuguese experience of transposing the EC directives on public procurement to making a journey, using those directives as a road map pointing to the desired destination, the authors identify four types of crossroads, which are a metaphor for the implementation techniques chosen in particular moments during that journey.

When facing transposition difficulties, the Portuguese lawmaker considered the following solutions, which led to significantly different legal consequences: (a) asking for directions (about negotiations and the dynamic purchasing systems); (b) choosing a familiar route (regarding the competitive dialogue and the accelerated procedures); (c) taking a risk (related to the suitability of the tenderers and the distinction between the open and the restricted procedures); (d) allowing the journey beyond the map's limits (regarding e-procurement and the award criteria).

This paper intends to report and analyse the most significant crossroads of the transposition of the EC directives into the Portuguese 'Public Contracts Code' (PCC).

1. INTRODUCTION

The experience of transposing EC directives into national regulations is in a sense a journey, during which the EU member state's legislator must use the directive as a road map pointing to the desired destination. Like in any other journey, there are crossroads where the national legislator must make decisions. At those points, the Portuguese lawmaker has considered: (a) asking for directions, (b) choosing a familiar route, (c) taking a risk or (d) allowing the journey beyond the map's limits.

Drawing on this travelling metaphor, some episodes in the journey of the members of the task force assigned by the Portuguese Government to transpose the 2004 EC Directives on public procurement into the Portuguese 'Public Contracts Code' (PCC) are illustrated and analysed from a practical point of view.

2. DISCUSSION

2.1. *No Exit* [1]

According to the Portuguese experience, asking for directions when you are at a crossroad may lead to a no exit road. This situation (literally) happened with regard to the proposal to include a **negotiation stage towards the end of the open procedure**.

Before the PCC came into force, works and services concessions in Portugal were traditionally awarded through a mixed procedure: open or restricted procedure followed by a negotiation phase. Taking into account this practice had proved to be effective in achieving value for money, the Portuguese legislator wondered whether it would go against the EC directives on public procurement to incorporate an optional negotiation stage in the open procedure (not in the restricted one, though).

In fact, the wording of the referred directives does not explicitly provide nor prohibit such a procedural mechanism[2]. Furthermore, allowing for the negotiation of tenders within an open procedure seems unlikely to violate its notion and nature, as it would remain accessible to every interested economic operator (cf. article 1, paragraph 11 (a) Directive 2004/18/EC). Finally, it was not suggested the restricted procedure could benefit from a similar feature because, in such a case, the main difference between the restricted procedure and the negotiated one would disappear. On the

[1] 1954, 1962 and 1995 film adaptations from 1944 play of the same name by Sartre.
[2] Arrowsmith, Sue (1998). "The problem of discussions with tenderers under the E.C. Procurement Directives: the current law and the case for reform", *Public Procurement Law Review* (3): 69.

contrary, placing a negotiation stage towards the end of an open procedure would not have such a consequence as the negotiated procedure would still hold a distinguishable characteristic: the selection stage.

By the time it arrived at this crossroad, the Portuguese lawmaker decided to ask the European Commission for advice. The Commission (represented by the Internal Market and Services Directorate General - DG MARKT), however, firmly stated its opposition to the possibility of negotiating tenders within the open procedure. Despite the Commission's position on negotiations being well-known, the significance of this reluctance has to do with the fact that it reveals the underlying assumptions of the Commission's judgement - in short: negotiations are a danger to competition. This preconception does not seem to take into account the different procurement practices and cultures in the 27 member states[3], or the type of contract in question.

As a consequence, despite previous successful experiences and the conviction that providing for an optional negotiation stage would allow contracting authorities to better use the open procedure to achieve value for money[4], the Portuguese legislator was explicitly prevented from going down that road. The national lawmaker is no doubt aware of the Commission's concerns about transparency and impartiality. Nevertheless, there are alternative solutions (rather than just prohibiting negotiations) to guarantee the compliance with openness requirements and enforce them – e.g. keep records of the negotiations sessions to enable tenderers, potential interested non-tenderers, a judge, etc. to examine whether equal treatment and equal opportunities were offered to all participants in the negotiations.

A typical case of the referred disbelief in negotiation as a competition-friendly tool can be found in, among others, the provisional I Draft Report of the European Parliament – Committee on Legal Affairs and the Internal Market on the proposal for a directive of the European Parliament and of the Council on the co-ordination of procedures for the award of public supply contracts, public service contracts and public works contracts (COM (2000)275

[3] Ignoring that "Member States are in the best position to devise the most appropriate solutions for their own situations", Arrowsmith, Sue (2002). "The E.C. procurement directives, national procurement policies and better governance: the case for a new approach", *European Law Review* (27): 16.

[4] According to Michael Steinicke (2001). "Public procurement and the negotiated procedure - a lesson to learn from US law?", *European Competition Law Review*, (22): 336: "While the European system is primarily concerned with creating equal access to competition on the public markets, and this seems to be an end in itself, the American system is more concerned with creating optimal competition because this produces better results the purchasing authority. In the American system the competition is therefore just a means to an end."

– C5-0367/2000 – 2000/0115(COD)), 20th March 2001: "Abuse of this procedure [negotiated procedure] would seriously jeopardise competition and, in particular, the transparency of contracts, which is one of the Commission's main objectives.". It is relatively clear from such a statement that the focus is on the misuse or abuse of negotiation technique, which is likely to negatively influence the general reaction to it.

Ultimately, this situation illustrates how slim the national lawmaker's margin of discretion can become when it comes to adjust the national procedures for the purposes of the procurement directives (as referred in article 28 Directive 2004/18/EC). Eventually, the Portuguese legislator opted to include an optional negotiation phase solely in the open procedure to award works concessions (very softly subject to the procurement directives) or services concessions (not at all subject).

The **dynamic purchasing systems** represent another crossroad in this legislative journey and, again, guidance was sought in this case by looking into the history behind the origin of this new electronic procurement instrument, which led once more to a no exit road.

The idea of providing for a purchasing technique, which "allows the contracting authority, through the establishment of a list of tenderers already selected and the opportunity given to new tenderers to take part, to have a particularly broad range of tenders as a result of the electronic facilities available, and hence to ensure optimum use of the public funds through broad competition" (recital 13 Directive 2004/18/EC) seems very appealing. In fact, at first sight, these dynamic purchasing systems appeared to play a role similar to that of the qualification systems in the utilities' procurement (Directive 2004/17/EC): for the contracting authority to enjoy a pre-selected list of tenderers from whom to chose whenever a commonly used purchase would be needed (see article 1, paragraph 6 Directive 2004/18/EC). On top of that, this list would be open for the duration of the system, so that potentially interested economic operators (who satisfied the selection criteria an had submitted a tender that complied with the specification) might join in at any time. Furthermore, these completely electronic processes were expected to "streamline public purchasing, particularly in terms of savings in time and money which their use will allow" (recital 13 Directive 2004/18/EC).

On the one hand, however, it should be noticed that dynamic purchasing systems were also included in the utilities directive. So, it was unlikely that they would have the same function as the qualification systems – otherwise, there would have been duplication.

These systems must also not be mistaken for the framework agreements, although they aim at repeating standardised purchases as well. Bearing this in mind, the national lawmaker undertook a thorough analysis of the specific rules laid down for the setting up and operating of such systems only to find out that the most appealing feature of them proved to be virtually non-existent. In fact, the contracting authority cannot invite all tenderers admitted to the system to submit a tender for each specific contract to be awarded under the system without previously publishing a simplified notice inviting all interested economic operators to join the system and become eligible to participate in the imminent awarding procedure.

This requirement for the publication of a simplified contract notice renders the dynamic purchasing system rather useless[5] because it deprives this procurement instrument of its most significant feature (apart from its completely electronic base): the time saving each time a commonly used purchase is needed, due to the pre-selection work already done in order to set up a list of tenderers. In Sue Arrowsmith's (2006) words: "The concept [of dynamic purchasing systems] might be more useful if the Directives were to omit the requirement for a new notice for each order. It is disproportionate to require this regardless of the size of the order. (…) It would be sufficient to give adequate publicity to the system simply to require the system to be advertised periodically and, possibly, to require a new notice only prior to particularly large orders. This would provide a better balance between competition and an efficient process. As it is, the disproportionate emphasis on competition is likely to be counterproductive, resulting in entities rejecting this system in favour of inherently less competitive forms of procedure"[6].

On the other hand, the administrative resources involved in the maintenance of such purchasing systems (namely in the continuous evaluation at the earliest possible opportunity of the indicative tenders submitted by the potentially interested economic operators) may involve significant costs and delay in awarding contracts under the systems. This probable result is contrary to the objective of saving time and money. Historical reports, however, clarify why dynamic purchasing systems are designed like this. Indeed, according

[5] For this reason, when drafting the revised version of the Model Law, the UNCITRAL Working Group has decided not to require such a notice: the transparency advantages were considered to operate as a significant disincentive to the use of the open framework agreement (the equivalent to the dynamic purchasing system under the EC directives) – see Nicholas, Caroline (2008). "Framework agreements and the UNCITRAL model law on procurement", *Public Procurement Law Review*, (5): NA228.

[6] Arrowsmith, Sue (2006a). "Dynamic purchasing systems under the new EC Procurement Directives - a not so dynamic concept?", *Public Procurement Law Review*, (1): 29.

to the Communication of the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a directive of the European Parliament and of the Council on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts (SEC (2003) 366 final – 2000/0115 (COD)), 25th March 2003: "This [dynamic purchasing] system must be considered in the light of Amendment 78 adopted by Parliament proposing a qualification system in the "classic" Directive. The Commission had rejected it on the grounds that it would involve an unacceptable loss of transparency, as only undertakings with prior qualification would be consulted for the award of contracts. On the other hand, the Commission had stressed in its amended proposal that, if such systems were accompanied by appropriate competition and ensured transparency and equality of treatment, it would be in favour of them". And so the simplified contract notice was born.

Having realised there was no room to improve the new procurement technique in such a way as to avoid the inconvenience caused by the referred simplified contract notice, the Portuguese legislator could either give up the transposition of the dynamic purchasing systems or implement them according to the directives' conditions: it decided to make the most of that no exit road, i.e. the dynamic purchasing systems were implemented (although they have never been used so far).

2.2. *The Road Home* [7]

There were other crossroads where the Portuguese lawmaker, instead of asking for directions and ending up in a no exit road, decided to be on the safe side, i.e. when facing some difficulties in transposing the procurement directives – namely those caused by the peculiar process of drafting the EC directives – chose to remain in its comfort zone.

This was the case of the **competitive dialogue** procedure. Taking into account that the transposition of this procedure was not mandatory, the national legislator restricted its scope in order to draw some parallelism between this new procedure and the 'old ones', to which procurement officers, legal advisers and economic operators could relate.

The truth is, besides being a new procedure with an unprecedented flexibility (consisting in the dialogue phase), the deficiencies in the wording of the relevant directive's rules proved to be a

[7] Zhang Yimou's 1999 film adapted from the novel *Remembrance* by Bao Shi.

transposition's challenge. Steen Treumer (2006) explains the main reasons for this situation: "The elaboration of this new procedure was given particular attention during the negotiation process, but there was considerable disagreement between the negotiating parties when the new procedure was regulated. (…) The high degree of regulation in the Preamble [Recital 31, Directive 2004/18/EC] was most likely the result of a political compromise in the negotiations leading to the new Directive. (…) Another reason for the lack of clarity is the fact that the approach to the EC public procurement rules differs from member state to member state, not only due to the variations caused by the implementation of the Public Procurement Directives, but also due to a difference in the balancing of the relevant interests of the parties involved in public procurement. For example, it appears that the approach in the United Kingdom in general is relatively flexible with higher emphasis on a pragmatic approach and value for money, and thereby puts less emphasis on the principles of equal treatment and transparency than in, for instance, the Nordic countries" [8].

The process of drafting the directives, as well as the different legal traditions the member states come from, are responsible for the difficulty in implementing some legal solutions, mainly when they consist in a new procurement procedure such as the competitive dialogue, which lacks an European common past life (like the open, the restricted and the negotiated procedure). Hence, the Portuguese legislator opted to closely follow the EC directive on the grounds for using the competitive dialogue and the concept of 'particularly complex contracts'. The legislative margin of discretion was used to shape the (rather uncertain[9]) procedural rules.

As a consequence, the Portuguese version of the competitive dialogue bears some specific features (all resulting from a restrictive interpretation and application of the EC directive). For example: by the end of the dialogue phase, the contracting authority must choose only one solution to go ahead with, which will be described in a unique set of specifications, although the directive allows it to proceed with more than one solution and more than one set of specifications. The difficulty in tolerating such flexibility has to do with the accurate comparison of the submitted tenders in view of different solutions, taking into account the PCC's rules on award criteria and evaluation methodology. Another example is related to the reduced margin to change the winning tender after the award decision has been made, because the national legislator considered there was a risk of distorting competition or causing discrimination.

[8] Treumer, Steen (2006). "The field of application of competitive dialogue", *Public Procurement Law Review* (6): 307-308.

[9] See: Arrowsmith, Sue (2004). "An assessment of the new legislative package on public procurement", *Common Market Law Review*, (47): 1291.

This meant to be a practical approach to transposition, whose motivation was based on both the anticipation of typical problems of the Portuguese procurement practice and culture, and the inputs from contracting authorities and economic operators during the public consultation on the PCC. So, in this case, the Portuguese lawmaker showed a preference for adapting the European procedure to its 'home' standards - i.e., in terms of the competitive dialogue's implementation technique, it opted for a "translation" of the directive's rules into the national legal context, instead of a verbatim transposition[10].

For similar reasons, the PCC does not comprise any reference to the so-called **accelerated procedures** provided in the EC directives on public procurement. According to article 38, paragraph 8 Directive 2004/18/EC: "In case of restricted procedures and negotiated procedures with publication of a contract notice referred to in Article 30, where urgency renders impracticable the time limits laid down in this Article, contracting authorities may fix (…)" reduced time limits for the receipt of requests to participate and for the receipt of tenders. Unlike the urgency ground for using the negotiated procedure without prior notice (cf. article 31, paragraph 1 (c) Directive 2004/18/EC), the urgency justification for using an accelerated procedure has no conditions attached to it (e.g. 'extreme urgency', 'events unforeseeable', 'not in any event be attributable to the contracting authority'). Therefore, there is a margin of discretion to be used wisely[11]. However, in the past, the Portuguese contracting authorities have proved to struggle to find a balance between two tendencies: the fear of discretion (not knowing what to do when there is no explicit rule about it) and the abuse of discretion (the misuse of discretion or the use of discretion for the benefit of other than the public interest). Ultimately the Portuguese legislator decided not to provide for such accelerated procedures in view of the probability of discretionary problems arising.

2.3. *The Last Frontier* [12]

On the contrary, the national lawmaker pushed the EC directives to the limits regarding the **verification of the suitability of the economic operators**. For efficiency reasons, namely in order to save

[10] Prechal, Sacha (2005). *Directives in EC Law*, Oxford University Press, 76.
[11] In fact, "the optimum level of discretion left to the procurement officials" varies in different states, Arrowsmith, Sue (2006b). "The past and future evolution of EC procurement law: from framework to common code?", *Public Contract Law Journal*, (35): 352.
[12] 1955 and 1986 films of the same name by different directors.

time, the PCC states that the suitability of the participants in any public procurement procedure is checked just by looking at their solemn declarations. Only the winning tenderer is asked for evidence/documents on its own suitability after the award decision is made and notified. If the winning tenderer fails to supply the required evidence/documents, it shall be imposed a fine and a sanction to prevent its participation in future public procurement procedures for the maximum period of two years, and the contracting authority must award the contract to the second rated tenderer (who will then have to supply evidence/documents on its own suitability).

This legal solution challenges the literal interpretation of article 44, paragraph 1 Directive 2004/18/EC, which assumes that evidence/ documents about the participants' suitability are produced and verified in the beginning of each procedure. However, in the Portuguese legislator's opinion, there is no direct or indirect prohibition to adopting such a measure – for this reason it was willing to run the risk of the Commission or the ECJ considering it had possibly gone too far… just past the last admissibility frontier.

Along the transposition journey, there was another crossroad where the national lawmaker took the non-safe road: regarding the **procedural distinction between the open procedure and the restricted one**. Traditionally, articles 44 to 48 Directive 2004/18/EC have been interpreted in the sense that qualitative selection is a stage of both the open and the restricted procedure. However, if that were so, it would mean that the open procedure is less open than its notion implies (cf. article 1, paragraph 11 (a) Directive 2004/18/EC), which might indicate that, after all, it is a semi-restricted procedure instead of an open one. Bearing this in mind, when using an open procedure, the PCC only allows contracting authorities to check the personal situation (article 45) and the suitability to pursue the professional activity (article 46) of the tenderers. Whenever the contracting authority is interested in assessing the level of technical/professional ability or the economic/financial standing, then the adequate procedure is the restricted one. This measure does not seem to violate the EC directives' rules and, at the same time, provides guidance for the contracting authorities to choose between the open and the restricted procedure, whose contents appear now more coherent with the respective concepts.

2.4. *Revolutionary Road* [13]

[13] Sam Mendes' 2008 film based on the 1962 novel of the same name by Richard Yates.

Finally there are some illustrations of crossroads where the Portuguese legislator picked the revolutionary road, i.e. created a new and more sophisticated legal route beyond the map's limits. **E-procurement** is one of the most significant examples of such crossroads. As far as it is known, Portugal is the only EU member state where all public procurement procedures, as a rule, must be done electronically. Besides providing for some electronic tools, such as the electronic reverse auctions and the dynamic purchasing systems, the PCC established a mandatory e-procurement rule: all contracting authorities' documents must be produced, published, notified and stored electronically; all economic operators must submit their requests for participation, tenders, documents, questions, claims, etc. electronically; all communications between the contracting authorities and the economic operators must be done electronically as well. This e-procurement measure is still being implemented but is already considered a revolutionary achievement in public purchasing, whose benefits (namely in terms of time saving) are expected to largely compensate for the initial investment in new technology. Regarding this issue, the PCC was more ambitious that the EC directives and surpassed their objectives.

The Portuguese legislator was also innovative regarding the **award criteria and the tenders' evaluation methodology**. In line with the 2004 directives and the previous ECJ case law, the PCC allows the most economically advantageous tender criterion to include non-purely economic sub-criteria (e.g. environmental and social criteria) as long as they are linked to the subject matter of the contract. It also clearly states that attributes related to the tenderers, rather than the tenders, must not be taken into account by the award criteria and the tenders' evaluation methodology [14] . However, the Portuguese lawmaker took a step forward by adding rules on the evaluation methodology. Firstly, when determining the sub-criteria, the contracting authority cannot refer to an attribute of a forthcoming tender (e.g. scoring the price sub-criteria with reference to the lowest price). Secondly, the contracting authority must disclose in advance not only the sub-criteria and respective weightings, but also the methodology for evaluating the tenders including the scoring system, in particular the rating scales and the value functions for each of the sub-criteria. Thirdly, when the sub-criteria refer to qualitative issues, the contracting authority must also disclose the quality levels against which the tenders will be measured/evaluated.

[14] After the PCC had been drafted, the prohibition on using selection/qualification criteria at the award stage was confirmed by the ECJ judgement on the Lianakis case (C-532/06, 24th January 2008).

These detailed rules the tenders' evaluation aim at promoting an effective competition, as well as at meeting the principles of non-discrimination, objectivity and transparency. Indeed, in countries such as Portugal (where contracts were often awarded on account of subjective reasons), stricter rules on tenders' evaluation are expected to act as an instrument to prevent preferential and discriminatory award decisions. In spite of resulting in a limitation of the contracting authority's discretion, a variable degree of flexibility was left to the construction of each evaluation model, in order to accommodate the considerations the contracting authority reckons the most suitable, according to the subject matter of the contract or the procedure in question.

Furthermore, the disclosure of the tenders' evaluation model in the contract documents allows the potential tenderers to be aware of all the attributes the contracting authority will consider when evaluating the tenders, and that enables them to prepare their offers more effectively, which benefits the contracting authority.

3. CONCLUSION

If the Portuguese experience of transposing the EC directives on public procurement into national regulations were to be compared to making a journey using the directive as a road map pointing to the desired destination, four types of crossroads could be identified: (a) those which led to a 'no exit road' (e.g. the inclusion of a negotiation stage in the open procedure and the improvement of the dynamic purchasing systems' effectiveness); (b) those where the legislator chose to take 'the road home' (e.g. the implementation of the competitive dialogue and the non-implementation of the accelerated procedures); (c) those where the lawmaker decided to push the directives' rules to 'the last frontier' (e.g. the verification of the suitability of the economic operators and the distinction between the open and the restricted procedures); (d) those which inspired the legislator to pick the 'revolutionary road' (e.g. the mandatory e-procurement means and the detailed rules on the award criteria and the tenders' evaluation methodology).

NOTES

[1] 1954, 1962 and 1995 film adaptations from 1944 play of the same name by Sartre.

[2] Arrowsmith, Sue (1998). "The problem of discussions with tenderers under the E.C. Procurement Directives: the current law and the case for reform", *Public Procurement Law Review* (3): 69.

[3] Arrowsmith, Sue (2002). "The E.C. procurement directives, national procurement policies and better governance: the case for a new approach", *European Law Review* (27): 16.

[4] According to Michael Steinicke (2001). "Public procurement and the negotiated procedure - a lesson to learn from US law?", *European Competition Law Review*, (22): 336: "While the European system is primarily concerned with creating equal access to competition on the public markets, and this seems to be an end in itself, the American system is more concerned with creating optimal competition because this produces better results the purchasing authority. In the American system the competition is therefore just a means to an end."

[5] For this reason, when drafting the revised version of the Model Law, the UNCITRAL Working Group has decided not to require such a notice: the transparency advantages were considered to operate as a significant disincentive to the use of the open framework agreement (the equivalent to the dynamic purchasing system under the EC directives) – see Nicholas, Caroline (2008). "Framework agreements and the UNCITRAL model law on procurement", *Public Procurement Law Review*, (5): NA228.

[6] Arrowsmith, Sue (2006a). "Dynamic purchasing systems under the new EC Procurement Directives - a not so dynamic concept?", *Public Procurement Law Review*, (1): 29.

[7] Zhang Yimou's 1999 film adapted from the novel *Remembrance* by Bao Shi.

[8] Treumer, Steen (2006). "The field of application of competitive dialogue", *Public Procurement Law Review* (6): 307-308.

[9] Arrowsmith, Sue (2004). "An assessment of the new legislative package on public procurement", *Common Market Law Review*, (47): 1291.

[10] Prechal, Sacha (2005). *Directives in EC Law*, Oxford University Press, 76.

[11] In fact, "the optimum level of discretion left to the procurement officials" varies in different states, Arrowsmith, Sue (2006b). "The past and future evolution of EC procurement law: from framework to common code?", *Public Contract Law Journal*, (35): 352.

[12] 1955 and 1986 films of the same name by different directors.

[13] Sam Mendes' 2008 film based on the 1962 novel of the same name by Richard Yates.

[14] After the PCC had been drafted, the prohibition on using selection/qualification criteria at the award stage was confirmed by the ECJ judgement on the Lianakis case (C-532/06, 24th January 2008).

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