Article 23-bis of law decree No. 112/2008, converted into law No. 133/2008 ("*Article*") introduces significant changes in the discipline applicable to local public services with the aim of ensuring free competition on the market and consistency with the basic freedoms provided under the EC Treaty.

In particular:
(i) the new discipline set out by the Article is intended to prevail over the existing provisions regulating local public services;
(ii) as a general rule, the awarding of local public services shall be the result of public tender procedures called by the relevant public entity;
(iii) should particular circumstances regarding economic, social, environmental conditions arise in the territory wherein the local public service is deemed to be provided, the general rule under point (ii) above may be derogated. Provided however that (a) existence of such circumstance(s) expressly results from the deliberations passed by the relevant public entity to award the services, (b) the Italian Antitrust Authority has issued a non-binding opinion thereon; and (c) the awarding is at minimum consistent with the basic principles laid down by the EC Treaty (e.g. non-discrimination, equality of treatment, etc.). According to some commentators, point (c) would permit awarding to either in-house companies or PPP entities (e.g. mixed-capital companies) save, however, compliance with the principles applicable thereto;
(iv) those companies which run local public services due to direct awarding are prevented, either directly or indirectly, from being awarded further local public services to be rendered in different territories, nor they can provide services to further public or private entities. In sum, such companies shall work exclusively for the public administration which granted the original awarding. Such ban shall not apply to listed companies;
(v) the Italian Government shall implement the reform referred to local public services by means of ad hoc decrees by 180 days. Despite the fact that the Italian Government did not issue such decrees yet, the above discipline has already entered into force;
(vi) the above discipline does not apply to the procedures of awarding already started at the date in which law No. 133/2008 came into force. However, local public services and water services not awarded through public tender procedures are, in any case, subject to the final deadline of the 31st of December 2010.

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Portugal

Expropriations in Portuguese Public-Private Partnerships ("PPPs")

Over the last 15 years Portugal has been very active in setting up PPP in several sectors of activity, *inter alia*, in the road sector and more recently in the rail sector[1].

Given the fact that the majority of Portuguese PPPs were set up in the road sector, it is in this domain that, for obvious reasons, the expropriation experience has been profuse.

The evolution registered in the last years allows to distinguish two main phases: (i) a first phase, in which the expropriation risk was allocated almost exclusively to the Public Partner and (ii) a second phase (the current one), in which the expropriation risk has been transferred to the Private Partner although with limitations resulting from the fact that some authority powers remain utterly in the sphere of the Public Partner.

The responsibility emerging from the expropriation risk assumed by the Public Partner led, in the last years, to strong queries and criticism from our Audit Court ("Tribunal de Contas") given the significant financial burden to the State that results not only from the compensations paid to the expropriated entities (owners of the land), but especially because of the damages caused to the Private Partner, chargeable to the Public Partner, resulting from the delays in the release of the plots of land needed for the execution of the works. Actually, it is persistent, the insufficiency of public allowances for compensations which allied to the dilatory

1 In fact, the Portuguese Government launched several PPP in the context of the so-called "TGV"-High-Speed Train Project.

treatment of the expropriation processes by public bodies causes severe constraints to the execution of the Projects and to the fulfilment – as initially schedule – of the work plans by the Private Partner.

Therefore, in the last concessions and sub-concessions projects launched in Portugal under the PPP legal frame work, entitle by a legislative act – the concession contracts are approved by law – the grantor (Public Partner) opted to "transfer" the expropriation risk to the concessionaire (Private Partner), this way assuring faster proceedings and avoiding high claims of financial rebalance of the concession contracts.

Our understanding, however, is that the expropriation risk is not, exactly, transferred to the Private Partner, but shared with the Private Partner.

In fact, pursuing to the Portuguese Expropriation Code, some authority powers are not lawfully transferable to the Private Partner – namely the Declaration for Public Use ("DUP"), that is of ministerial (or municipal) legal competence –, being that the most solemn and important administrative act of the whole expropriation process. Therefore, the referred "DUP" is the administrative act (*"acto administrativo"*) to be syndicated before the courts *et pour cause* Public Partner is not fully exempted of said risk. On the contrary, our experience has shown, that those acts are being more and more challenged in our courts.

As foreseen in the new Public Contracts Code (approved by the Decree-Law 18/2008, January, 29th and that came into force in July 2008 (the "Code"), *"the concession contracts must involve a significant and effective transfer of the risk to the concessionaire"* (cf. article 413° of the Code).

In the light of this legal provision, some – but not all – of the authority powers connected with the expropriation procedure may be transferred, by means of an express contractual stipulation, to the concessionaires (Private Partners).

To note that the Code is of supplementary application, i.e. in the omission of a specific contractual provision in case of public works concession agreements, the promotion of the expropriation proceedings lies with the grantor, i.e., with the Public Partner (cf. article 351°, n. 2 of the Code).

This also means that, by contract, the Private Partner may assume (only) a significant responsibility in the context of the expropriation activity. Actually, alongside the obligation of presenting all the elements and documents so as to allow the Public Partner to issue the above-mentioned "DUP" (which, as said, remains on the side of the Public Partner and is absolutely key), the Private Partner also bears the responsibility to conduct and control the expropriation procedures necessary to execute the works, putting up with all the respective costs, as well as the payment of compensations to the expropriated entities.

Needless to say, though, that in those situations where the expropriations risk is transferred to the Private Partner (the vast majority of cases) the latter will reflect such risk in the price of the PPP.

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