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LAW REVIEW

SPECIAL ISSUE: SUSTAINABLE PROCUREMENT

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Sustainable Public Procurement in Portugal – State of the Art and Future Prospects

Manuel da Silva Gomes*

I. Introduction

This report comments on the most relevant issues of Sustainable Public Procurement (“SPP”) in the Portuguese legal system, looking in particular at the social and environmental criteria used in the context of public procurement.¹ Generally speaking, in Portugal, “social” criteria have not, so far, achieved the success that the “environmental” criteria have known, which, although relatively recent, has effectively contributed to the progressive and sustained development of Green Public Procurement (“GPP”).² In order to evaluate the most relevant factors in this area, we will address: (I) the National Strategy for Green Public Procurement of 2007; (II) the Portuguese Public Contract Code (the “PCC”),³ both in respect of the (more developed) environmental criteria and in respect of the social criteria; (III) individual pieces of legislation that have contributed to completing the panorama of the Portuguese SPP; (IV) succinct reference to the recent trends in the World Trade Organization (“WTO”) and to the modernisation of the EU’s policy on public contracts, which may give rise to the

prospect of development of sustainable procurement in Portugal.

II. The National Strategy for Green Public Purchasing (“NSGPP”)

1. The background of the NSGPP

The Resolution of the Council of Ministers No. 65/2007 of 5 July 2007 defined strategic guidelines for green purchasing for the three-year period 2008–2010: the NSGPP. On the one hand, this initiative arose in the wake of the well-known Communication to the Council and to the European Parliament in relation to the Integrated Product Policy [COM (2003) 302 final], by which the European Commission asked the Member States to prepare green purchasing action plans by the end of 2006.⁴ On the other hand, it was kicked off in the context of the incoming transposition of Directive 2004/17/EC and 2004/18/EC. For this purpose, a working group was set up in June 2006 which concluded the NSGPP project in December 2006.

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1 As is common knowledge, the concept of ‘Sustainable Development’ was popularised in the Brundtland Report of 1987 in which it was defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” Recently, Gro Harlem Brundtland emphasised that it is vital to adopt carbon standards and promote sustainable public procurement as catalysts for change, to redirect unsustainable production and consumption patterns (“Sustainable Development Dialogue Days”, Rio de Janeiro, Brazil, UN Conference on Sustainable Development (UNCSD or Rio+20), 16–19 June, 2012). It should also be noted that the concept of “sustainable development” was introduced into the Portuguese Constitution of 1976 (“CPR”) by Constitutional law 1/97 of 20 September 1997, either by reference to environmental law (Article 66(2) CPR), or by reference to the priority responsibilities of the State in the economic and social context (Article 81(a) CPR). On the ambiguity of the formula “sustainable development” in the CPR, see Carla Amado Gomes, “Constituição e Ambiente: errância e simbolismo”, in Carla Amado Gomes, *Textos Dispersos de Direito do Ambiente (e matérias relacionadas)*, Lisbon, 2008, p. 23–44 (particularly p. 29).

2 It is not insignificant that Portuguese doctrine has centred its attention on the topic of GPP by integrating individual references to SPP. On this point, see Maria João Estorninho, *Curso de Direito dos Contratos Públicos – por uma contratação pública*

sustentável, Coimbra, 2012. The author dedicates a specific chapter of the book to GPP under the heading “Green Public Procurement: As considerações ambientais e sociais na adjudicação de contratos públicos”, (pages 415–441). Also on this topic see Filipe Brito Bastos, “A escolha de critérios ambientais de adjudicação de contratos públicos – reflexões de Direito Administrativo nacional e europeu”, undated (available at www.icjp.pt). Specifically from the perspective of EU law, see Diogo Duarte de Campos, “A Admissibilidade de Políticas Secundárias na Contratação Pública: a consideração de factores ambientais e sociais”, in PLMJ, *Estudos de Direito Público*, PLMJ Collection Vol IV, Coimbra, 2011, p. 127–170.

3 The PCC approved by Decree-Law 18/2008 of 29 January (as amended) establishes the legal framework applicable to public procurement and results specifically from the transposition of Directives 2004/17/EC and 2004/18/EC. It also establishes the substantive rules for public contracts which take on the nature of the administrative contract. On the Public Contract Code, among others, see Mário de Esteves de Oliveira and Rodrigo Esteves de Oliveira (with the collaboration of Miguel Neiva de Oliveira), *Concursos e outros Procedimentos de Contratação Pública*, Coimbra, 2012. Please note that there is free access to the Portuguese legislation at the official site of *Diário da República* (www.dre.pt).

4 See point 5.3 of the Commission Communication COM (2003) 302 final/2.