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The scope of application of Public-Private Partnerships

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Decree-Law 86/2003, of 26 April, which introduces in our legal system, in a general way, the concept and regime of Public-Private Partnerships, marked a turning point in the relationship between public and private entities and, consequently, a new stage for Administrative Law.

In fact, Decree-Law 86/2003, of 26 April, is part of the wide movement that, in Portugal and in other foreign legal systems with an administrative regime, recognizes the need to expedite the action of the State-Administration and to reduce the burden of public expenditure, by resorting to several legal techniques and procedures, such as the privatization of subjects or activities, the deregulation, the outsourcing or the subordination of the administrative acting to Private Law.

The absolute need to have a cost-contained budget without decreasing the quality of the services being provided is increasingly leading to the resort to the more efficient reputable private initiative, or having greater capacity to provide the means necessary for the indispensable investments. This is how public entities are replaced by private entities, by privatizing unessential activities and their relevant operators, or less radically, by fostering the co-operation between public and private agents under different contractual forms. Therefore, there is a renewed interest in concessions and in other classic legal-administrative business forms, which are being used as an alternative preferable to the unilateral act of authority, whilst other types of administrative contracts are being invented or “transferred” from Private Law to Administrative Law.

As outlined in the preamble of Decree-Law 86/2003, of 26 April, Public-Private Partnerships (PPP) are part of this movement of discovery of new contractual forms of articulation between the Administration and private entities. In fact, the PPP, defined in Article 2 of Decree-Law 86/2003, of 26 April to have a broad application, end up by being consubstantiated in contracts or union of contracts. They are, nevertheless, much more than this. In fact, *a public-private partnership is understood to be the contract or the union of contracts, whereby private entities, designated as private partners, undertake, on a long-term basis, towards a public partner, to ensure the performance of an activity aimed at the satisfaction of a collective need, and assume responsibility, in whole or in part, for the financing and operation thereof.*

At this point, it should be noted that one of the main elements of the concept of the PPP is the partition of risk, the sharing of risks between the public entity(is) and their private partners, and this is made quite clear in the 17 references to *risk* throughout the statute. This very same conclusion may distinctly be drawn from the definition of the PPP which clarifies the scope of responsibility falling on the private contracting parties, not only as regards the investment but also the operation of the activity or service. More specifically, article 7, sets forth that the partition of risks between public and private entities must take into account the capacity of each party to manage such risks and be clearly identified in the contract. Reference must also be made to the fact that the transfer of risks to the private sector must be real and significant, and that the creation of risks having no adequate justification in the substantial reduction of other existing risks should be avoided. Finally, the law further provides that the risk of financial unsustainability of the PPP for a cause not imputable to the public partner or for a reason of force majeure must be, to the extent possible, transferred to the private partner.

We must emphasize that, on the one hand, this need to partition risks and the insistence in the Preamble and in the articles of the statute on the idea that the management and operation of the activities is the goal of the partnership, indicate that we are dealing with agreements of an economic nature, and that the services to be rendered by the private partners

must be totally or partially paid for by the market or by the users. Only thus can one understand that private investments, according to the project and planning made and the management carried out, will probably not obtain the expected return. This is exactly the risk of the contract which must be shared according to the provisions laid down in Decree-Law 86/2003, of 26 April.

Furthermore, it should also be clarified that the object of the PPP is the activity as a whole, which should not be mistaken for the contracts, even administrative contracts, relating to partial aspects of such operation activity and which are instrumental for its materialization, such as, for instance, the continued services agreement. On the other hand, since the PPP are focused on an efficient way of performing public services likely to be user-paid, or on substitute payment schemes that reproduce or are closer to the market conditions, and where the management plays a key role in the maintenance of the financial balance of the service, they accentuate the trend in contemporary Administrative Law to give increasing importance to the activity in detriment of the fragmentary perspective of considering only the act, in particular the administrative act.

The PPP, whether contracts or simple unions of contracts, given the activities that are likely to comprise their object, shall have a wide range of application and the expressing of an opinion on their admissibility in concrete will require the weighting of a vast number of variables and a comparison with the advantages of an option exclusively entrusted to the Administration. Such weighting and subsequent decision presupposes a very wide scope of competences, to cover the different fields of activity and aspects that have to be taken into consideration. It is thus understandable that, given their great political importance, these competences will belong to high-ranking administrators and will in principle be entrusted to the relevant sectoral minister with the ever-present intervention of the Minister of Finance, as laid down in articles 8 and following of Decree-Law 86/2003, of 26 April. ■

The *thousand and one* commissions of Public-Private Partnerships

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One of the most outstanding features of Decree-Law 86/2003, of 26 April, which approved the general regime governing Public-Private Partnerships (PPP), is the profusion of commissions therein laid down, which obviously raises doubts as to their compatibility, emphasized by the fact that the rules of procedure imposed by the PPP must be made compatible with the rules set forth in the contracts based on which a PPP is created.

In fact, and although comprised of only 19 articles, Decree-Law 86/2003, of 26 April, provides for the creation of six commissions or entities which are, one way or another, related with the PPP, besides, naturally, the direct intervention of the minister of Finance and of the minister governing the sector concerned.

Therefore, in the first place, article 8 provides for the existence of a *commission to monitor the partnership project in hand, composed of no less than two and no more than five members in representation of the Minister of Finance and the relevant sectoral minister.* This commission must monitor the work being performed by the *entity entrusted by the relevant ministry with the preparation of the project*, and can, in the course of the works, issue such recommendations as are deemed convenient. However, pursuant to article 8.7, the main task of this monitoring commission is to issue *two independent opinions, having no binding effect,* on the advantages of setting up a PPP. With this obligation, the Commission is after all a commission without really being a commission, since the author of these opinions is not the Commission (as a body) but its members (as office holders). In fact, it is the Law that states that the opinions are issued (each one of them) by the members appointed by the ministries to sit in the said monitoring commission.

As to the possibility of a concurrent holding of offices, it seems clear that the members of the entity that prepares the PPP may not be members of the monitoring commission and, likewise, the members of this commission may not hold offices in the Ministries that appoint them, as otherwise they would not meet the necessary conditions to be able to draw up the *independent* opinions regarding the PPP. Therefore, it becomes even more difficult to understand why it is stated in article 8.3 that the members of the monitoring commission are *in representation of the minister of Finance and of the relevant ministry* when in fact such members are (but) members appointed by the ministers and do not act as their representatives.

Once the launching of a PPP is approved by joint ministerial order, (article 9) *a commission of evaluation of the bids* composed of representatives of the minister of finance and the relevant

minister must be set up. In this context, the question is whether or not the members of the commission of evaluation of the bids may have been members of the monitoring commission of the PPP project or of the entity entrusted with the preparation of the project. In principle, it seems there is no incompatibility, since while in the first task (preparation and monitoring of the project) they were only analysing (in the abstract) the advantages and feasibility of the launching of a PPP, in this second task they are analysing (concretely) the various bids, on the assumption that the PPP has been approved by the ministers and was launched. However, instead of providing only that the said Commission must analyse and select the more advantageous bid, article 9.2 provides that the *commission of evaluation of the bids referred to in the preceding paragraph must have, amongst other duties, that of carrying out an assessment, in quantitative terms to the extent possible, of the risks and charges to be incurred by the public partner, directly or indirectly, in addition to assessing the relative merit of the bids.*

In fact, the assessment of the risk of the PPP to be undertaken by the public partner was precisely one of the issues that should be dealt with in the independent Opinion of the representatives of the Ministry of Finance in the Monitoring Commission of the launching of the PPP. Article 8.8 provides that the *opinion of the members appointed by the minister of finance shall analyse, particularly, the conformity of the final version of the partnership project with the provisions laid down in articles 6.1 and 7 of this law and contain a breakdown, in quantitative terms as much as possible, of the implied costs and risks undertaken by the public sector.*

Even so, despite the possible contradiction of results and duplication of tasks, it seems that the members can concurrently hold offices in both commissions, and even useful to have the same persons who evaluated the creation of the PPP to evaluate the best bidder for that same PPP. At this point, reference should be made to the fact that in addition to the commissions provided for in Decree-Law 86/2003, of 26 April, there will be other commissions for each type of procedure prior to the execution of the agreement, according to the type of agreement concerned, as referred in article 9 of the PPP law. For instance, in concessions of public works, the commissions provided for in article 60 of Decree-Law 59/99, of 2 March must be adapted to the provisions set forth in Decree-Law 86/2003, of 26 April.

Back to Decree-Law 86/2003, of 26 April, and pursuant to article 12 thereof, *the powers of supervision of partnerships are exercised by an entity or department to be designated by the Minister of Finance, for economic and financial matters, and by the relevant sectoral minister, for the remaining matters.* However, should it be necessary to carry out an alteration of the PPP, a new *entity entrusted by the relevant ministry with the renegotiation of the project* must be created (article 14.3). Although the law does not specify the commission of negotiation of the PPP where this entity is to be integrated, it is believed that, in the event of a renegotiation of the PPP, the Commission must have an equal number of representatives of both sides, and therefore with members appointed also by the private partner. For the purpose of monitoring this negotiation, the statute provides for a *commission for the monitoring of the alteration of the partnership* which, as the name indicates, it is not the commission entrusted with the negotiation of the alteration of the partnership, but only with the monitoring of such negotiations. This monitoring commission is composed of representatives of the Ministry of Finance and the relevant Ministry, having not less than two and not more than five members.

At the time when the entity entrusted by the relevant Ministry with the renegotiation of the partnership shall consider that the modification may be approved (by the nameless renegotiation commission), the monitoring commission, *rectius,* its members, shall be notified to issue two independent Opinions, with no binding effect, each of them subscribed by the members appointed by each of the Ministries. Finally, *the Minister of Finance issues a binding opinion on the alteration of the partnership, within 30 days, failing which the omitted opinion is deemed favourable.*

Also in this respect it is considered that the members of the monitoring commission may not concurrently hold offices in the commission of renegotiation of the partnership, nor hold offices in the ministries, so as to meet the necessary conditions to be able to issue the independent Opinions. However, nothing prevents the members of the commission entrusted with the monitoring of the partnership project or the commission of evaluation of the bids from being members of the monitoring commission or the commission of renegotiation of the partnership.

In addition to a clear profusion of commissions, the option for the rule requiring the Ministry of Finance to issue a binding opinion on the alteration of the PPP is also criticisable. As a general rule, ministers do not issue opinions, they decide based on opinions. Ultimately, they ratify binding opinions, and the rule is that opinions should not be even binding. It was wrong of the legislator to put the minister of finance issuing binding opinions to himself and to put the sectoral minister in the position of having to ratify an opinion from a colleague. The truth is that the PPP, though worthy of salute, deserved less bureaucracy and greater simplicity, again learning from the type of organization of the private entities. ■

Innovations in administrative litigation in matters of public procurement

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With the approval of the new Administrative and Tax Courts Act (*Estatuto dos Tribunais Administrativos e Fiscais - ETAF*) and the recent Administrative Courts Procedural Code (*Código de Processo nos Tribunais Admnistrativoss - CPTA*), Portuguese administrative litigation has sustained profound changes. This wide reform in Administrative Justice, which entered into force on 1st January 2004 (that is, slightly more than a year ago), also had consequences on contract litigation.

In fact, the scope of procedural action made available to those who enter into contracts with the Public Administration or are involved in pre-contract administrative procedures (ex. public tenders) have significantly been widened. One may state, with absolute justness, that the reform of administrative litigation filled many of the gaps in the previous procedural regime and intensified the judicial safeguards of private entities (also) in terms of public procurement. The following are the main innovations introduced in this field by the new ETAF and CPTA.

To begin with, the actual scope of action of Administrative Courts as regards the contractual activity carried out by the Public Administration was greatly increased.

In the past, the (not always clear) distinction between "administrative contracts" and "private contracts of the Public Administration" set the boundary between the sphere of action of the Administrative Courts and Common Courts. That is - in matters of public procurement - there was a duality of jurisdictions, based on dubious and highly controversial criteria, creating more problems than those which they settled.

The new ETAF entirely redefined the scope of administrative jurisdiction, to avoid the problems of knowing which was the competent jurisdiction to challenge the action of the Administration (thus creating new boundaries and, possibly, new problems of delimitation between the administrative and common jurisdictions). Article 4 of ETAF uses two criteria to define the scope of action of the Administrative Courts as far as contracts are concerned: the criterion of pre-contractual procedure (paragraph e)), whereby Administrative Courts are competent to analyse the contracts subject to Public Law pre-contractual procedures; and the criterion of the legal regime (paragraph f)), whereby Administrative Courts would be competent to analyse contracts subject to a Public Law legal regime. Regardless of the boundary problems that may arise in the future, it is clear that these criteria correspond to a quite significant enlargement of the administrative jurisdiction as regards public markets.

Another significant innovation concerns the legal standing in contractual litigation. In the past, and pursuant to article 825 of the Administrative Code, only the contracting parties (that is, only the Public Administration and the other party in the contract) could take legal action regarding administrative contracts, leaving third parties entirely unprotected. In fact, all those who participated in a specific public tender and were illegally or unfairly excluded, or all those who were harmed by the enforcement (or lack of enforcement) of an administrative contract were absolutely prevented from resorting to court to challenge aspects of the contractual relationship.

According to article 40 of the CPTA, the legal capacity to seek the review of both the validity and the enforcement of contracts was widely amplified, currently covering – in addition to the contracting parties – a number of third parties, as well as subjects under a "popular action" and the Public Prosecutor itself.

The CPTA also provides for urgent proceedings in pre-contractual litigation, governed by Articles 100 and following. This is not entirely a new provision, since these proceedings were already provided for, with some minor differences, in Decree-Law 134/98, of 15 May, that made the (late) transposition of the Directive *Remedies*. This Directive requires that all Member-States must create highly expeditious procedural means allowing private entities to challenge the action of the Public Administration within the scope of the public markets. In accordance with said Directive *Remedies*, the legislator now created a main urgent procedure to review pre-contractual acts, which must be initiated within one month (and not, as before, within 15 days). Under a recent ruling of the Supreme Administrative Court (ruling 1/2005, published in the Official Journal last 12 January) this one-month period is also applicable to the challenging of implied acts ("*actos tácitos*") formed in consequence of the inaction of Administration.

The main differences between the urgent administrative remedy laid down in Decree-Law 134/98 and the current pre-contractual litigation urgent proceedings are the following: the scope of application of this procedural means was enlarged,

now covering - expressly – the challenging of acts relating to the formation of contracts of “concession of public works”; it is now possible to directly challenge tender documents (tender programme, conditions of contract etc.) grounded on their illegality; and it is now possible to challenge acts performed by private subjects within the scope of Public Law pre-contractual procedures.

Finally, it should be noted that the CPTA – still in line with the Directive *Remedies* – created, in article 132, a specific injunction relating to the formation of contracts. It is a special precautionary measure, subject to specific criteria of concession (i.e., different from the general criteria laid down in article 120 of the Code), which, – basically – incorporates the interim measures governed by Decree-Law 134/98. The innovation lies in the fact that, when the judge considers established the illegality of the tender documents, he may immediately order the relevant correction, thus settling – in these same proceedings and without further delay – the merits of the claim.

In short, it is unquestionable that the legal protection of those who negotiate with the Administration has been highly reinforced with the recent reform of administrative litigation. ■

Retroactive contracts and Supervision by the Court of Auditors

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In addition to the legal rules governing the adequate contractual procedure in public procurement, it should be noted that contracts involving a public expenditure exceeding certain amounts must be submitted for analysis by the Court of Auditors and subsequent prior approval.

In fact, pursuant to article 5(c) of Law 98/97, of 26 August, the Court of Auditors supervises the legality and inclusion in the Budget of expense generating acts and contracts of any nature whatsoever. In particular, *written contracts of public works, of acquisition of goods and services as well as any other expense generating acquisitions of real property* are subject to prior approval pursuant to article 46 thereof.

In this context, reference should be made to the fact that, pursuant to article 48 of Law 98/97, of 26 August, *budget laws will establish, for each budgeted year, the contractual value, excluding the value added tax due, below which the contracts referred to in article 46(1)(b) are not subject to prior supervision.* Pursuant to article 75 of the State Budget Law for 2005 (Law 55-B/2004, of 30 December) contracts involving an expense not exceeding 1000 times the value corresponding to index 100 of the grading scale of the public service general regime, that is, € 310,330.00, in accordance with Ministerial Order 205/2004, of 3 March, are not subject to approval by the Court of Auditors.

Pursuant to article 44, the purpose of the prior supervision by the Court of Auditors is to *verify whether the acts, contracts or other instruments that generate expenses or contain direct or indirect financial responsibilities are in conformity with the laws in force and if the relevant costs have been properly entered in the Budget.*

Notwithstanding the need to obtain the prior approval of the Court of Auditors, the contracts may become effective before such approval, except with regard to the payments required to be made thereunder. In fact, pursuant to article 45(1) of said Law 98/97, of 26 August, *the acts, contracts and remaining instruments subject to the prior supervision by the Court of Auditors may be effective before the approval or conformity statement, except with regard to any payments arising therefrom and without prejudice to the provisions laid down hereunder.*

In fact, it is admitted that the refusal of the approval shall only render the relevant contracts ineffective after the date when such refusal is notified, and article 45(3) even allows that *works carried out or goods or services acquired after the execution of the contract or until the date of notification of the approval may be paid for after such notification (of refusal of approval) provided that the relevant amount does not exceed the contractually agreed schedule for the same period.*

Also with relation to the need to submit expense generating contracts to the Court of Auditors, one should bear in mind the rule contained in article 81(2) which sets forth that the *processes relating to acts and contracts effective before the approval must be submitted to the Court of Auditors within 30 days, unless provided otherwise: c) from the date of execution of the contract, in the remaining cases.*

The purpose of this rule, which, on the one hand, does not prevent the execution of contracts with retroactive effect, but requires, in case where there is an anticipation of effect, that the period for submission to the Court of Auditors begins on the effective date, and not, as it is a general rule, on the date of the signature of the contract, has been clarified in Jurisprudence from the Court of Auditors.

Actually, from a literal reading of the relevant provisions it would seem difficult to make the requirement to submit contracts (and not drafts) to the Court of Auditors compatible with the requirement to have such contracts submitted at a time when they still did not exist. In fact, contracts with retroactive effect become effective, naturally, and by the very logic of things, even before the existence of a contract, reason why the same could not be submitted within 30 days after the effective date, since on that date, there was still no contract.

However, it is the understanding of the Court of Auditors that the purpose of this rule is, precisely, to prevent the execution of contracts generating the type of expenses which must be controlled by the Court of Auditors, with a deferred effective date (retroactively) by more than 30 days. The purpose of said rule is to ensure that no more than 30 days elapse between such effective date and the execution of the contract, so that, in case where the Court of Auditors shall refuse approval, no expenses become due (pursuant to article 45(3) after such time period.

This means that if contracts are entered into with effects retroactive to a date 30 days earlier, the time limit for submission of the contract to the Court of Auditors shall have expired at the exact moment when the contract is signed, and the financial responsibility shall fall on the decider that authorizes the expense and the execution of the contract.

This is made quite clear in Ruling 4/2002 – 3rd. section of the Court of Auditors, a true *leading case* in this field. In fact, the appeal heard by the Court of Auditors involved a contract with some months of retroactive effects for the provision of certain services by a private company to a public entity.

In view of this situation, the Court, without arguing in financial terms the possibility of executing retroactive contracts of acquisition of goods and services, ruled that the period for submission of the contracts effective before their approval by the Court of Auditors would be counted from the effective date and not from the date of execution of the contract.

In fact, in the words of the Court, *besides, the legislative option is understandable: once the provision of a service or the performance of works by the private entity begins, the State will enrich, and a payment obligation is generated thereby; therefore, the prior supervision guarantees an expeditious assessment of the financial legality of the procedures, so that any faulty procedure may in due course be stopped and to limit the payments to be made by the State in consideration for the service provided or works performed by the private entity.*

A different solution, allowing for the execution of the contracts with retroactive effect forcing the submission of the same to the Court of Auditors would have perverse effects, since it would *allow the submission of contracts in an advanced stage of performance at the time when the same were being submitted for prior supervision, and even if the same were vetoed, the services had always to be paid.*

In case where an expense generating contract is actually entered into with effects retroactive to a date 30 days earlier, and even if the same is immediately submitted to the Court of Auditors, this submission will always be considered to have occurred untimely. This alone cannot be considered as grounds to refuse the approval but will give rise to the payment of a fine pursuant to article 66(e).

In this context, the Public Prosecutor will lodge proceedings for the imposition of a fine under the terms of article 61 (applicable by remission of article 67(3) against the *author or authors of the action.* The responsibility *may fall on the employees or agents who, in their reports to the members of the Government or managers, senior managers or other directors fail to clarify matters of their responsibility in accordance with the law.* ■

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