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Environmental Risk on Public-Private Partnerships

As it is well known, the corner stone of Public-Private Partnerships (PPP) is the principle of the effective transfer of risk to the private partner. Among us, the mentioned principle is expressly established in article 7 of Decree-Law no. 86/2003, of April 26, 2003, which sets out the Portuguese legal framework of PPP.

On the environmental policy, Portugal has been following the trend that is being implemented around the world, since the 70s of last century, to duly protect the environment as a good which deserves a specific legal care.

So, as expected, also in the PPP domain, the issue of "environmental risk", as a *threat of degradation or destruction, serious or irreversible, of natural environmental goods*[1], is key.

Moreover, in terms of the implementation of PPP contracts for infrastructure, particularly in the road sector, the practice of recent years has revealed that most financial rebalances were directly related to environmental problems arising from the so-called procedure of environmental impact assessment.

With a view to mitigating the significant environmental risk that the bulk of infrastructure PPP presents, the Portuguese legislator enacted specific legislation in 2006, through the Decree-Law no. 141/2006 of 27 July, i.e., amending the referred Decree-Law 86/2003.

With such legal amendment, PPP legal statute now imposes that an environmental impact statement ("DIA") must be in place as a condition to the issuing and procurement of a PPP. Thus, special attention shall be given also to Decree-Law no. 69/2000 of 3 May[2], which approved the legal framework of environmental impact assessment of projects likely to produce significant effects / damages on the environment[3]. Needless to say, that the vast majority of PPP projects are subject to the procedure of environmental impact assessment[4].

Additionally, it is worth while saying that such legal modification which has come to be qualified as l*egislative management* and as an *a posteriori* management of PPP[5], introduced a useful mechanism to reduce the financial impact of environmental risk in the State Budget[6]. Indeed, it is not surprising that the failure to obtain prior environmental impact statements would be considered a risk with greater financial impact on PPP projects[7].

In fact, the lack of previous legal obligation to (prior) obtain environmental impact statements, before the launch of a PPP, led in some cases, to extra costs of construction and consequent losses of very significant revenue to the concessionaires.

Often the environmental impact statements are expressly subject to the implementation of concrete measures to minimize the negative environmental impacts[8]. These measures should necessarily be

1 In accordance with the concept of "environmental risk" argued in Portuguese legal theory by Carla Amado Gomes,("Subsídios para Quadro Principiológico dos Procedimentos da Avaliação e Gestão do Risco Ambiental", in RJUA, N°17,2002, p. 35 e ss). Note, however, that this is a narrow concept, which is possible to envisage a wider scope.

2 Amended by Decree No. 74/2001 of 26 February, by Decree No. 69/2003 of April 10, Law No. 12/2004 of 30 March and, finally , by Decree No. 197/2005 of 8 November. Note that the previous system of environmental impact assessment was included in the Decree-Law No. 186/90 of 6 June, amended by Decree-Law No. 278/97 of 8 October.

3 System of environmental impact assessment that follows, in essence, the implementation at the national level of the objectives laid down by Directive No. 85/337/EEC of 27 June on the assessment of the effects of certain public projects and private environment, as amended by Directive No. 91/11/CE, the Council of 3 March and, finally, the partial transposition of Directive No. 2003/35/EC of the European Council of May 26, on public participation in drawing up plans and programs relating to the environment.

4 See Article. 7, b) and c) of Annex I and paragraph 10, point e) of Annex II, both of Decree-Law No. 69/2000 of 3 May.

5 In this vein, cf. the position of Financial Controller of the Ministry of Public Works Transport and Communications (in Tribunal de Contas, Auditoria à Gestão das Parcerias Público-Privadas, Relatório n.º 10/2008, 2.ª secção, Volume I, 2008, p. 27).

6 The very preamble of the Decree-Law No. 141/2006, warning specifically to the concern arising from situations of increased burden for the state.

7 On this issue, cf. Tribunal de Contas, Auditoria à Gestão das Parcerias Público-Privadas, Relatório n.º 10/2008, 2.ª secção, Volume I, 2008, p. 54.

8 Practice shows that the DIA are usually issued with many conditions, including measures of mitigation and compensation.

implemented by the private partners in the post-evaluation stage of the procedure for environmental impact assessment. In specific terms, such measures must be in place in the final design of the construction, and they further must be accompanied by a report in which compliance in the referred conditions set forth in the environmental impact statement is duly showed and grounded ("RECAPE")[9].

Thus, under the legal amendment set forth in 2006, a substantial part of the "environmental risk" is now already considered at the time a PPP is launched, with significant benefits for both partners.

In any case, it is noted that this healthy "little big" revolution in the methodology of the launch of the PPP, as one might sense, does not resolve definitively all the complex problems associated with environmental risk. Besides all the problems that still may arise in the procedure of environmental impact assessment related to the approval of the "RECAPE", it shall be highlighted that contrarily to the understanding of the European Union Court of Justice[10], the Portuguese legal framework allows the tacit acceptance of an environmental impact statement[11] and, worse, the tacit acceptance of the approval of the RECAPE[12].

However, this certainly reopens the spectrum of environmental risk. Indeed, the tacit approval of an environmental impact statement doesn't specify the conditions to minimize the environmental effects / damages of a PPP project. On the other hand, the tacit approval of RECAPE prevents the verification of compliance of a project with all environmental requirements.

As a conclusion, one may say that an importance step has been given so as to mitigate environmental risk in PPP, but environment risk still exists and continues to be a matter of extreme relevance.

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Revisions to the Refinancing Arrangements for PFI

On 16 October 2008 HM Treasury issued an Addendum to the Standardisation of PFI Contracts version 4 (SOPC4). This amended the existing SoPC4 provisions on refinancing by creating a sliding scale of gainshare between the public and private sectors and giving the Authority a right to request a refinancing.

I. The background

Under the original SoPC4 drafting, any gains made through the refinancing of a project were required to be shared 50/50 between the public and private sectors. This was seen by HM Treasury as an equitable position given the factors that would give rise to a gain. In particular, their view was that any improvement in financing terms would not be due mainly to efficiency improvements by the private sector and therefore any benefits should be shared.

The current amendment, introducing a sliding scale of gainshare, has been explained by the Treasury as a response to the challenges in the current funding market. The idea is that the credit crunch has increased margins on financing and therefore the gain to be made on a refinancing if margins move back to pre-credit crunch levels is greater than it would have been previously. It was noted in the covering letter to the Addendum that HM Treasury would review the position in the markets in 18 months time and consider whether to continue the use of the Addendum at that stage. They did not, however, give any indication of the matters that would be taken into consideration at that stage.

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9 The necessary compliance with the RECAPE and environmental impact assessment is a natural consequence of the legally binding nature of the environmental impact assessment. Therefore, if measures to minimize under environmental impact assessment are not implemented in the implementation draft- which is found in the adoption of RECAPE - this will entail the invalidity of the act of final authorization of the construction of public work, for breach with, environmental impact assessment cf. Article 20. paragraph 2 and 3 of Decree-Law No. 69/2000 of 3 May, as result of Decree-Law No. 197/2005 of 8 November.

10 See the judgments of the ECJ, Commission v. Italy, 28 February (Case C-360/87) and Commission v. Kingdom of Belgium, 14 June 2001 (Case C-230/00).

11 For a critical appraisal of tacit deferrals in the environmental impact assessment, cf. Maria Alexandra Aragão, José Eduardo Figueiredo Dias, Ana Maria Barradas, "O Novo Regime da AIA: avaliação de previsíveis impactos legislativos" in CEDOUA, 1 / 3, 2000, p. 95-97.

12 See Article 28.º, Paragraph 7 of Decree Law 69/2000 of 3 May. It was also the procedure of environmental impact assessment legislation, under Article 11., Paragraph 8, the possibility of obtaining the tacit approval of the Environmental Impact Assessment (EIA), which aims to set the scope of the specific action.

Editorial Board

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