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Working Party No. 3 on Co-operation and Enforcement

**PUBLIC PROCUREMENT – THE ROLE OF COMPETITION AUTHORITIES IN PROMOTING
COMPETITION**

-- Portugal --

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The attached document is submitted by Portugal to Working party No. 3 of the Competition Committee FOR DISCUSSION under item VI of the agenda at its forthcoming meeting on 5 June 2007.

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1. The Portuguese Competition Authority (PCA) hereby presents its contribution to the discussion on public procurement, describing its own experience on the role of an antitrust agency in promoting competition in this particular field.

2. In its report, PCA chose to follow the list of topics suggested by the chairman of the working party for an easier comparison of its experience with the results presented by other delegations.

1. Design and operation of public procurement systems to generate optimal competition and minimize risk of collusive tendering

3. The Portuguese legal regime on public procurement has for some years been characterized by an evident dispersion of its relevant rules in multiple diplomas, which has turned its interpretation and application considerably difficult.

4. The Decree-Law No. 197/99, of 8 of June gathers the essential core of rules on the award of public contracts to the rental and acquisition of goods and services. However, there is a remarkable number of other pieces of legislation which have to be taken into consideration when tracing the panorama of the laws applicable to public procurement within the Portuguese legal order.

5. That is the case of the diplomas regulating the administrative contractor agreements, also applicable to concessions (Decree-Law No. 59/99, of 2 March, altered in 2000), the celebration of public contracts for the acquisition of goods and services in certain specific sectors, such as water, energy, transportation and telecommunications (Decree-Law No. 223/2001, of 9 August), informatics (Decree-Law No. 196/99, of 8 June) or the lease and acquisition of goods, services and networks of electronic communications and connected equipments and services (Decree-Law No. 1/2005, of 4 January).

6. Since the beginning of the current year, it is also possible to add to the legal framework in this domain the definition of the **national public procurement system** and designation of its fundamental principles (Decree-Law No 37/2007, of 19 February): adoption of centralized procedures for the realization of framework agreements in view of the celebration of contracts for public purchases and the subsequent payments of the goods and services acquired; gradual and phased celebration of public contracts, separated by certain categories of works, goods and services; adoption of technological tools and specialized practices in the field of e-purchasing; preference for the acquisition of the goods and services that best protect the environment; and, finally, the promotion of competition and of the diversity of suppliers.

7. In light of the close relationship between the design of the national public procurement system and the safeguard of competition in the market, PCA has closely examined the legal framework described above and in several occasions issued recommendation to Government regarding the present legal regime with suggestions for its improvement¹.

8. From the point of view of the applicable law, the multiplication of pieces of legislation was considered harmful in view of the interpretation of its norms and clearness of its legal solutions, which has lead to the launch of a Governmental **project for the creation of a code concentrating all the relevant rules on public procurement**, which at this moment is at the stage of public debate.

9. PCA has closely analyzed this project, which is considered a solid effort of systematic coherence of the legal solution in the area of public procurement, and presented a number of observations to the Government towards the enhancing optimal competition and minimizing the risk of collusive tendering. These can be summarized as follows:

¹ Cfr. Recommendation No. 1/2004, described *infra*.

- The need for strengthening the importance of prices in the context of public procurement, avoiding, through a transparent and non-discriminatory process of assessment of the tenders, prices above the competition level with the consequent increase of public expenditure;
- PCA recognizes the relevance attributed to the element price as an exclusionary criterion of tenders in the context of a public procurement procedure. However, specifically for procedures with high level of specialization it the convenience of attentively considerate, it deems necessary to consider other criteria, such as competency and good reputation of the proponents as well as the quality of the service required, as determinant for the selection of the tenders.
- In this regard, PCA is mainly concerned with the importance of ensuring that the awarding process is transparent and non-discriminatory and that the decisions of the contracting authority are justifiable in view of the technical specifications established in tendering documents. This clearness is all the more important if the obligations deriving from the intended contract are particularly complex, namely in procedures relating to complex public works contracts or specialized consultancy assignments.
- Furthermore, if those criteria are met, PCA sees no reason to exclude from the procedure tenders which present an extraordinarily low price. It has therefore rejected the Governmental legislative proposal presented in this field. PCA considers that the purpose pursued by the rule which establishes the rejection of tenders with an extraordinarily low price could be better achieved by requiring to the bidders warranties that could safeguard the legitimate interest of public contracting authorities.
- Taking into consideration that cartels are serious restrictions to competition and the particularly damaging effects produced by collusive tendering in the award of public works contracts, public supply contracts and public service contracts, PCA has advised the Government to the need that the new Public Procurement Code contributes to minimize the risk of collusive tendering. This could be achieved through the establishment of impediments to the eligibility for public procurement procedures of undertakings that have been previously condemned for the infringement of competition rules.
- With the same objective, PCA has also recommended the adoption of a provision instituting a mandatory notification by the contracting authority to PCA in all cases where the contracting authority detects a circumstantial evidence of an anticompetitive conduct even if this factor isn't sufficient to determine the rejection of proposals. The same is true for circumstantial evidences of anticompetitive conducts that are only detected by the contracting authority after the award of the contract, which shouldn't prevent the pursue of an investigation of the conduct from the Competition Law point of view.
- The applicable legislation establishes legal thresholds to the possibility of priority adoption of the procedure of direct award as well as exceptional circumstances in which this procedure may be adopted above those thresholds. PCA acknowledges the need for the admission of circumstances which justify I view of legitimate interests of public contracting authority the adoption of direct award but recommended an unambiguous delimitation of those circumstances which turn evident the reasons validating the selection of this modus operandi.

2. Education of and cooperation with procurement officials

10. In the course of the work developed in the prevention and detection of cartels, PCA has promoted in 2005 the creation of a “**Anticartel Unit**” integrating members from several public authorities with competences in areas considered relevant for the control of competition within the procedures for the award of contracts concluded on behalf of the State, regional or local authorities or other bodies governed by public law entities.

11. The Unit associates PCA, the Court of Auditors, the Office of the Attorney General, and two departments of the Ministry for Environment, Spatial Planning and Regional Development, with responsibilities in the field of the planning and follow-up of public policies related to public works in general as well as supervision and regulation of constructions and real estate.

12. Taking advantage of the contacts previously established within this unit, PCA has organized and hosted a **workshop for the promotion of competition in the public works market**, during which the following themes were discussed:

- the early detection of cartels and the instruments and techniques for the identification of anticompetitive conducts by procurement officials prior to the award of public contracts;
- the possible consequences from the transposition of Directives 2004/18/EC, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, and 2004/17/EC, coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors;
- and the expected impact of the adoption of legislation on leniency.

13. Considering the negative effects originated by collusive tendering in the public works market, PCA has launched a campaign for raising awareness of procurement officials to the risks of damages to the interests of contracting authorities and competitors, as well as the Treasury and to consumers in the cases where the public procurement systems are used to distort competition.

14. The education of procurement officials in the area of competition regulation plays a fundamental role in the opening-up of public procurement to competition. Bearing this factor in mind, PCA has approved and publicized a document containing what it considers to be the **best practices** adopted by procurement officials for the promotion of competition in the public works market.

15. This document enumerates and describes the most common forms of collusive practices adopted by private parties in the context of a public procurement, such as the suppression of a proposal for the benefit of another candidate or the existence of an agreement between competitors for the presentation of coordinated proposals when bids in a certain domain follow a well-known and cyclic calendar that allows candidates to distribute among them the procurement procedures and equally benefit from the award of public contracts.

16. Moreover, the *Best Practices* document, inspired both by the OECD and several EU countries experiences and by available economic theory, has identified a group of circumstances which could indicate the adoption of an anticompetitive behavior in a public procurement procedure and constructed an open check-list that can be used by procurement officials as means to assess the situation with which they are confronted.

3. Techniques for detecting possibly collusive bidding behavior

17. One of the main contributes of the *Best Practices* document elaborated by PCA rests with the identification of a group of 20 situations that can point towards the existence of a collusive conduct by tenderers.

18. The **check-list** presented is supposed to be non-exclusionary as to other situations that can be deemed to be anticompetitive and even though it was constructed as a set of guidelines in procurement related to public works contracts, it can be also used in other kind of contests.

19. For a clearer interpretation of its guiding principles, the list has been divided into four parts which associate the aspects related to:

- the candidates' proposals (for instance, the abnormally reduced number of proposals presented; the contrast between the number of entities which asked for the tendering documents and the number of tenderers which presented proposals; the presentation of a certain proposal by a tenderer in representation of another tenderer; the fact that an entity which didn't ask for the specifications presented a proposal; or the similarity between two or more proposals as far as their graphic aspect, contents or even spelling mistakes are concerned);
- the commercial terms of the proposals presented (for example, the existence of an inexplicable difference between the proposal with the lowest price and the rest of the proposals; the contrast between the high price presented by a certain tenderer in a given contest and the considerably lower prices presented in previous bids; the fact that the prices presented by the winning proposals to procurement for similar works or services remain stable for a long period of time; the presentation of inadmissible commercial demands or term of execution by some of the competitors; or the difference in price for equivalent works or services submitted by the same entities in contests promoted by different local authorities)
- the estimation of costs (that is the case when the prices of the different tenders are considerably higher than the estimated costs considered by the contracting authority; when several tenderers subcontract the same consultants for their assistance in the elaboration of tenders in public procurement; when, upon the analysis of the tenders, the contracting authority reaches the conclusion that several tenderers didn't produce a careful assessment of the costs; or when in the course of the procedure becomes clear that a certain tenderer is aware of the costs or other specific elements submitted by other competitors and not divulgated by the contracting authority) ;
- and, finally, aspects related to the relationships established between the bidders (namely in cases where there is sufficient evidence that the tenderers met for several times before the term of the period for the presentation of tenders, or the winning tenderer comes to subcontract other competitors which presented higher prices for the works in question in the same contest, or even where there is evidence supporting the conclusion that there is a rotation in the winning entities of public contest which can't be consubstantiated by economic or technical reasons).

20. When it comes to techniques for detecting possibly collusive behavior in the context of public procurement, it is also important to take notice of a **cooperation protocol** entered into in 5 June 2006

between PCA and the Court of Auditors for the promotion of competition and the principles applicable to public contracts in their respective areas of action.

21. This protocol has an undeniable importance for PCA due to the powers of the Court of Auditors to conduct *a priori* and concomitant audit, besides its powers to perform *a posteriori* audit. Its *a priori* verification of the legality and the budgetary allocation for acts, contracts or other instruments that generate expenditure or represent direct or indirect financial liabilities of the Central, Regional and Local Public Administration, may act as a relevant means for detection anticompetitive conducts in a earlier stage of their course of action.

22. Under this protocol, apart from the exchange of experiences and knowledge with relevance for both PCA and the Court of Auditors, the parties agreed to collaborate for the mutual sharing of non-confidential information related to state aids, public contracts and their respective procedures and markets, particularly supplying to the other party all the relevant data about evidence of anticompetitive conduct or other behavior which is deemed significant for their respective supervision activities. It is still too early in time to assess the success of the established understanding, but it is nonetheless expected to become a fruitful initiative.

4. Advocacy efforts related to public procurement

23. As far as this topic is concerned, it is worth highlighting one of the recommendations made by PCA to the Government following the investigation and analyses of the market of communication services².

24. At the level of the applicable legislation, PCA recommended to the Government an update of the regulation concerning certain specific sectors, such as communication services in which the State is a major buyer.

25. As for the actual proceedings adopted in public procurement, PCA has alerted the Government to the need to promote compulsory periodic public contests and to regularly renegotiate contracts particularly within the field most subjected to the evolution of technology. In addition, PCA made recommendations concerning the adequate and clear organization of the invitations to tender and a transparent and efficient evaluation of the tenderer's proposals, as well as regarding the disclosure through electronic and centralized means of all the relevant information on public contests.

26. This set of recommendations made to the Government has lead to the approval of a group of norms specific to this sector³.

5. Use of enforcement actions to deter malfeasance by procurement officials

27. In the field of the enforcement of competition rules related to public procurement, it is worth referring two important decisions of PCA both involving cartels in the health sector.

28. The first decision, issued in 2004, involved the undertakings that operate in the blood glucose reagent market in Portugal. Having concluded that an anti-competitive practice existed, the Authority

² Recommendation No. 1/2004 (Acquisition of communications services by the State central administration).

³ That is Decree-Law No. 1/2005, of 4 January, referred above.

decided to impose a fine on the five defendant undertakings – Abbott Laboratórios, Bayer Diagnostics Europe, Johnson & Johnson, Menarini Diagnósticos and Roche Farmacêutica Química.

29. The case originated with a complaint by the CHC (*Centro Hospitalar de Coimbra*) following a public call for tenders for the purchase of reagent strips, a product used to diagnose and control diabetes. At the beginning of 2003, the CHC organized a restricted call for tenders for the purchase, among other things, of four thousand blood sugar reagent packs, marketed in the form of five-strip packs. Bids were submitted by five undertakings, the defendants in this case.

30. The CHC decided not to award the contract. It considered that the uniformity of prices and the steep price rise in relation to those charged for the same product the year before formed “a strong presumption of collusion” that could constitute an anti-competitive practice. In fact, in the previous call for tenders for the same product, in 2002, the bid prices varied among themselves and were at considerably lower levels. PCA considered that, as there was no possibility of the prices being divulged in the bid presentation phase, the alignment of prices could not have occurred in the case in question without previous collusion. This also explains the fact that the defendants settled on a different increase in percentage terms in relation to the bid prices for the previous call for tenders.

31. PCA concluded that, in being involved in a concerted practice whose object was to fix uniform prices for a public call for tenders in which they were all bidders, the undertakings breached Article 4 (1) of Law No. 18/2003 of 11 June. Accordingly, taking account of the grounds of this decision, the Authority decided to fine each of the defendants the sum of € 0,7 million, thus imposing a total fine of some € 3,3 million.

32. Following the above case, PCA was made aware by Johnson and Johnson, freely and spontaneously, that the concerted pricing in that open call for tender had not been an isolated case. As there was strong evidence that, between 2001 and 2004, the same undertakings had committed numerous breaches of the law in connection with other open calls for tender, PCA carried out preliminary investigations that culminated in the opening of a new inquiry.

33. The case involves concerted practices between undertakings, of which the object or effect was to appreciably prevent, restrict or distort competition by fixing prices in open procurement procedures for goods in the hospital segment, that is, procedures instigated for the purchase of blood glucose monitoring reagents (test strips). The Authority’s investigations further revealed that the aim of these price rises in the hospital segment was also to influence the negotiating basis for the price agreed between the state and pharmaceutical companies for the sale of this product to the public.

34. The Competition Authority has decided to impose a fine totalling approximately 16 million euros on the five defendant companies in the case, which involved 36 open calls for tender to supply 22 hospitals throughout the country with test strips.

35. Both these decisions were appealed to the court of first instance and are still pending a final decision.