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DIRECT AWARD AND PRIOR CONSULTATION: EVERYTHING NEEDS TO CHANGE, SO EVERYTHING CAN STAY THE SAME

AJUSTE DIRECTO E CONSULTA PRÉVIA: É PRECISO QUE TUDO MUDE PARA QUE TUDO FIQUE NA MESMA

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Abstract: The Portuguese Revised Public Contracts Code misses an opportunity to change the paradigm of how public contracts valued at below EU thresholds are awarded. This paper argues that the changes for low value contracts, where the direct award was replaced for some contracts by the prior consultation procedure (request for quotes) amount to little more than window dressing. This is problematic since 90.2% of all public contracts in Portugal are awarded via direct award, meaning 47.9% all public procurement expenditure is not subject to transparency. As the lack of transparency in low value public contracts is associated with procurement risks such as corruption, strategic behaviour by contracting authorities and bidders or lack of accountability, it is apparent the recent public procurement reform did not really address the behaviours behind these risks.

Portugal could have instead improved transparency in low value contracts by adapting already existing provisions within its legal framework, or following the footsteps of the Public Contracts Regulations 2015 (England and Wales) and the Draft Public Sector Contracts Law (Spain) which introduced significant transparency reforms for low value contracts. Although, there is room for improvement on these, either solution would have provided a marked improvement in the regulation of low value public contracts in Portugal.

Keywords: public procurement; financial thresholds; EU law; Directive 2014/24/EU; corruption; direct award; prior consultation; Spain; United Kingdom

Resumo: O Código dos Contratos Públicos revisto é uma oportunidade perdida para mudar o paradigma de como adjudicar contratos com valor inferior aos limiares financeiros europeus. Este artigo considera que as mudanças introduzidas para contratos de valor reduzido, com a substituição do ajuste directo pela consulta prévia, são meramente cosméticas. Isto é problemático tendo em conta que a adjudicação de 90.2% de todos os contratos públicos em Portugal é feita através do ajuste directo, de forma que 47.9% de todo o gasto em

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contratos públicos não está sujeito ao princípio da transparência. Tendo em conta que a ausência de transparência em contratos públicos está associada a riscos como corrupção, tacticismo por parte de entidades adjudicantes e/ou operadores económicos e falta de prestação de contas, é evidente que a reforma recente na legislação portuguesa não acautelou tais riscos.

Ao invés, Portugal poderia ter melhorado a transparência em contratos de baixo valor adoptando algumas normas já existentes na legislação nacional, ou se tivesse seguido os exemplos do Regulamento de Contratos Públicos 2015 (Inglaterra e País de Gales) ou do Ante-Projecto de Lei de Contratos do Sector Público (Espanha) que introduziram importantes reformas em termos de transparência para contratos de baixo valor. Sendo certo que ambos exemplos poderiam ser melhorados, qualquer um deles oferece soluções superiores a da legislação nacional.

Palavras-chave: Contratação pública; limiares financeiros; Direito da União Europeia; Directiva 2014/24/EU; corrupção; ajuste direto; consulta prévia; Espanha; Reino Unido

1. Introduction

This paper argues that the Revised Public Contracts Code in Portugal misses an opportunity to change the paradigm of how public contracts valued at below EU thresholds are awarded in the country. It is posited in this article that the lack of transparency in low value public contracts is associated with procurement risks such as corruption, strategic behaviour by contracting authorities and bidders or lack of accountability. The changes for low value contracts, where the direct award was replaced for some contracts by the prior consultation procedure (request for quotes) amount to little more than window dressing.

Instead of introducing transparency for those low value contracts, Portuguese lawmakers decided to re-brand the direct award procedure as a prior consultation, without fundamentally changing its non-transparent nature. This is a significant issue since 90.2% of all public contracts in Portugal are awarded via direct award, meaning 47.9% all public procurement expenditure is not subject to transparency, leading to the question that if transparency is indeed a key legal principle, how is it not applicable to the majority of contract opportunities in the country. Furthermore, it is argued that this change is worse than no change at all, since it alleviates the reputation cost for the contracting authority associated with the use of direct award.

Portugal could have instead improved transparency in low value contracts by adapting already existing provisions within its legal framework, or following the footsteps of the Public Contracts Regulations 2015 (England and Wales) and the Draft Public Sector Contracts Law (Spain) which introduced significant transparency reforms for low value contracts. Although, there is room for improvement on these, either solution would have provided a marked improvement in the regulation of low value public contracts in Portugal.

2. Contracts below-thresholds in the EU

Under Directive 2014/24/EU, only contracts valued above certain financial thresholds are subject to the full application of EU law regulation. These vary according to the type of contract and contracting authority and currently lie² at:

Entity	Goods and Services	Works	Light touch
Central Government	€135,000	€5,225,000	€750,000

² Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts.

Sub-Central	€209,000	€5,225,000	€750,000
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Table 1 – Directive 2014/24/EU financial threshold values for 2016 and 2017

Contracts valued at below those thresholds are subject (mostly) only to national rules. The exception to such rule is contracts with certain cross-border interest, the definition of which has fluctuated in accordance with the case law of the Court of Justice since *Telaustria*.³ Even in recent decisions⁴ it appears the Court is unsure on how to define what constitutes certain cross-border interest.⁵ The whole idea of ‘certain cross-border interest’ is the perfect “Schrodinger’s cat” since a contracting authority is unable to know in advance if the contract will generate or not such interest. Furthermore, in consequence the actual legal regime applicable will vary depending on the nationality of the economic operators presenting themselves to the contract.

Within that legal vacuum it is up to Member States to define their own rules on how contracts below-thresholds are to be awarded. Traditionally, this meant either no rules at all or at least a wide margin of discretion for contracting authorities to choose which economic operators would be offered the opportunity to tender or even awarding the contract directly. That has certainly been the case of countries like Portugal, Spain or the United Kingdom.

More recently, there has been a move towards more transparency, equal treatment and non-discrimination for low value contracts. This movement has happened at the policy making,⁶ EU regulation⁷ and national regulation levels with countries

3. Case C-324/98, ECLI:EU:C:2000:669. For a general overview of the difficulties raised by the certain cross-border interest test see, Telles, (2013) *The good, the bad and the ugly: EU’s internal market, public procurement thresholds and cross-border interest*, *Public Contract Law Journal* 43 (1), BOGDANOWICZ, *Cross-border interest and concession contracts: a critical approach in European Procurement and Public Private Partnership Law Review*, 2015, p. 83 and BOGDANOWICZ, *(Still) qualitative approach to a cross-border interest and application of European Union law to concessions? Some remarks on the C-388/12 Comune di Ancona judgment*, (2015) PPLR (1).

4. Cases C-388/12, *Comune di Ancona*, EU:C:2013:734 and Case C-318/15 *Tecnoedi*, EU:C:2016:747 On the latter see, SANCHEZ-GRAELLS, *Tecnoedi: an overlooked distortion of the ECJ’s approach to the assessment of cross-border interest for public contracts (C-318/15)*, available at: <http://www.howtocrackanut.com/blog/2017/3/20/tecnoedi-an-overlooked-distortion-of-the-ecjs-approach-to-the-assessment-of-cross-border-interest-for-public-contracts-c-31815>. On the former see, Sanchez-Graells, *CJEU kicks new concessions Directive in the shins (C-388/12)*, available at: <http://www.howtocrackanut.com/blog/2013/11/cjeu-kicks-new-concessions-directive-in.html?rq=ancona>

5. BROWN, *‘The requirement for “certain cross-border interest” before EU Treaty obligations apply to below-threshold contracts: the EU Court of Justice ruling in case C-318/15 Tecnoedi’*, 2017 (1) PPLR and BROWN, *Seeing through transparency: the requirement to advertise public contracts and concessions under the EC Treaty*, 2007 (1) PPLR

6. *Transparency International*, OECD (2011), *Public Procurement: Below Threshold Contracts*.

7. EU Commission Country Report, Portugal + Spain, EU Commission, (2006) *Interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives*.

such as Czech Republic, Poland, Spain or the United Kingdom (in England and Wales at least) introducing national rules to reduce discretion in awarding low value contracts.⁸ However, that is not the route Portugal decided to follow on its transposition of Directive 2014/24/EU.

3. Contracts below-thresholds under the Public Contracts Code 2008

Under the Public Contracts Code 2008,⁹ contracts with a value below the financial thresholds set by Directive 2014/24/EU can be awarded by means of transparent public procurement procedures such as the open or restricted procedure. However, that does not happen often in practice with most contracting authorities preferring to use what can be described as a negotiated procedure without prior notice, known in Portugal as a direct award.¹⁰ There is nothing new in this practice in Portugal and previous legislative frameworks offered the same flexibility to contracting authorities to award non-EU covered contracts as they saw fit.¹¹

As per Articles 113 and 128 of the Public Contracts Code 2008, direct award can be configured in two different ways.¹² The contract can be awarded simply without competition to a single tenderer¹³ or multiple economic operators may be invited to present bids.¹⁴ Either way, the contracting authority decides which economic operators to invite in both cases, putting it in full control of which economic operators to choose as no advertising is conducted and non-invited operators are barred from taking part.¹⁵

Until the Public Contracts Code 2008 came into force it was impossible to quantify the number of contracts or procurement spend which was filtered through these procedures as they are not advertised and no data on actual contracts was kept. The Public Contracts Code 2008 introduced the concept of ex-post advertising for contracts which were not subject to pre-award publicity, that is, direct award.¹⁶

8 On the other hand, Finland has significantly increased its national thresholds since their introduction in 2007 (€15,000 for goods and services) to the 2016 transposition of Directive 2014/24/EU (€60,000 for goods and services).

9 Approved by Decree-Law 18/2008 and amended by Law 59/2008, Decree-Law 223/2009, Decree-Law 278/2009, Law 3/2010, Decree-Law 131/2010, Law 64-B/2011, Decree-Law 149/2012 and Decree-Law 214-G/2015, hereinafter "Public Contracts Code 2008."

10 Articles 19 and 20 of the Public Contracts Code 2008.

11 On this topic see, DRAGOS & CARANTA (eds), *Outside the EU procurement Directives – inside the Treaty?* European Procurement Law Series 4, 2010.

12 On these articles see P. GONÇALVES, *Direito dos Contratos Públicos*, Coimbra, 2016, p. 202-203.

13 Article 128 of the Public Contracts Code 2008

14 Article 113 of the Public Contracts Code 2008

15 Notwithstanding the consistent jurisprudence from the Audit Court which has considered that contracts awarded directly or by request for quotes without real competition can violate EU general principles, namely transparency, equal treatment and competition. For all see, Ac.32/2011-1.a S/PL, Ac.23/2011-1.a S/PL, Ac.17/2011-1.a S/PL, Ac.16/2011-1.a S/PL.

16 This was later expanded to cover all contracts tendered, even those subject to ex ante transparency.

By doing so it introduced a modicum of transparency in a process which until then was a blackbox. As such, since 2009 reliable data has been collected in the base.gov.pt website and regular yearly reports on Portuguese public procurement produced.

The most recent annual report is from 2015¹⁷ and it sheds light on the popularity of direct award in Portugal. 90.2% of all public contracts in the country are awarded via direct award, representing 47.9%¹⁸ of the whole procurement spend in the country. There is no significant change from previous years either in its share of the total number of procedures (fluctuating from 95.9% in 2011 to 83.5% in 2013) or the percentage of yearly procurement spend (50.1% in 2013 to 44.4% in 2014).¹⁹ It is safe to assume that the 90% number of contracts and 50% of procurement spend is roughly the current point of equilibrium for the use of direct awards. These figures show a remarking resiliency on the numbers of direct awards in Portugal, indicating contracting authorities are used to the procedure and that it remains the most popular way of awarding contracts in this country. They can, however, be explored further as 97.4% of all direct awards are for goods and services contracts with only 2.6% for public works.²⁰ The data from 2015 hides another important piece of this puzzle - in 2015 the number of direct awards in goods and services jumped from 120,220 in 2013 to 358,175 in 2014 and then back again to 257,159 in 2015.²¹ This can be explained by a number of reasons. First, reporting compliance by contracting authorities may have improved (which would explain also the increase from 95,253 in 2012 to 120,220 in 2013) as public procurers became aware of the obligation and consequences for non-compliance. Second, it may be due to the difficult economic situation of Portugal with contracts now averaging a smaller value than in the past, bringing them below the financial thresholds. If one looks to the progression on total spend via direct award between 2012 and 2015, it grew from €1.184 billion to €1.839 billion, thus leading to a significant decrease in the average value in the same period from €12,430 to €7,150. Finally, as it will be discussed further in the next section, it may be an example of strategic behaviour from contracting authorities to avoid having to follow the more transparent and demanding procedures mandatory for contracts above the EU financial thresholds. If the latter is true, it would be illegal under EU law rules and an area for potential investigation by the European Commission.

The flipside of the numbers presented above is that it is hard to speak of a *real* public procurement market in Portugal when 90% of the contract opportunities are simply awarded without any meaningful competition.

17. IMPIC, Contratação pública em Portugal, 2015. Monthly reports are available as well at www.base.gov.pt. At the date of writing, the most recent one is for September 2017.

18. IMPIC, Contratação pública em Portugal 2015, p. 31

19. IMPIC, Contratação pública em Portugal, 2014 p. 30

20. IMPIC, Contratação pública em Portugal 2015 p. 33

21. IMPIC, Contratação pública em Portugal 2015, p. 36

4. Revised Public Contracts Code

4.1 Analysis of Revised Public Contracts Code

The Revised Public Contracts Code²² appears to change how direct awards will work in the future in Portugal. First, the terminology is changed, limiting the term “direct award” (Article 16(1)(a) of the Revised Public Contracts Code) to those situations where a contract is given out to a single supplier without quotes or proposals from other economic operators.²³ For those contracts where three proposals are required, they are now described in a literal translation “prior consultation”,²⁴ which we could describe in a more liberal translation as “request for quotes.” This change in terminology is understandable as it made no sense to have the same name to describe two different realities and appears to answer some historical calls by the country’s Audit Court to increase transparency.²⁵ Consulting three entities is indeed different from giving the contract to a single entity without any modicum of market consultation. However, apart from the obligation of now consulting at least three economic operators there are no other major differences between them. In the end, both constitute variations of the negotiated procedure and leave in the hands of the contracting authority the power to decide which economic operators will be invited to submit a tender.²⁶ The contracting authority is left with a fair degree of discretion on whom to invite and can do so as it wishes.²⁷

With the division of what was the direct award into direct award and prior consultation, the Draft Public Contracts Code has revised (slightly) the national thresholds for the availability of these procedures. The changes are summarised in the following tables.

Number of economic operators to invite	Threshold in 2008	Threshold in 2017
One	€150,000	€30,000
Three		€150,000

Table 2: Works

22. Approved by Decree-Law 111-B/2017.

23. Article 112(2) of the Revised Public Contracts Code.

24. Article 16(1)(b) and Article 112(1) of the Revised Public Contracts Code. For comments on the draft text of the Revised Public Contracts Code, see L. VERDE SOUSA, *Alterações Procedimentais*, in Relatório de análise e de reflexão crítica sobre o Anteprojecto de Revisão do Código dos Contratos Públicos, 17 de Setembro de 2016, p. 19.

25. On these articles see P. GONÇALVES, *Direito dos Contratos Públicos*, Coimbra, 2016, p. 202.

26. On this issue, see Supreme Administrative Court on case P 416/10, 2.11.2010 stressing that there is no need on the direct award procedure for a model of evaluation the award criteria. On this, C. VIANA, *O ajuste directo concorrencial e a vinculação da entidade adjudicante - Ac. do STA de 2.11.2010, P. 416/10* in CJA n.º 103, 2014.

27. Article 113(1) and (2) of the Revised Public Contracts Code, although the use of the same economic operators in three financial years is correctly capped at the EU financial threshold values for works, goods and services.

Number of economic operators to invite	Threshold in 2008	Threshold in 2017
One	€75,000	€20,000
Three		€75,000

Table 3: Goods and services

In the Public Contracts Code 2008, direct award for public works contracts was available for public works contracts with a value up to €150,000,²⁸ or €75,000 for goods and services.²⁹ Under the Revised Public Contracts Code however, it is possible to see that the “new” direct award is now only available for public works contracts below €30,000³⁰ and the prior consultation for contracts below €150,000.³¹ As for goods and services, the “new” direct award can be used for contracts valued at €20,000 or less and the prior consultation procedure for those contracts valued at up to €75,000. Furthermore, if one of the material grounds for the use of direct award is used³² irrespective of the contract value and more than one economic operator would be available to perform the contract, then the prior consultation is to be used instead of the direct award. In consequence, it is quite possible a significant percentage of the material grounds for use of the direct award procedure will from now on require the prior consultation procedure instead.

In essence, we can sum up the changes introduced by the Revised Public Contracts Code as the obligation to obtain quotes from at least three entities for contracts between €30,000 and €150,000 (works) or €20,000 and €75,000 (goods and services). Previously, the contracting authority was entitled to select a single supplier for all these contracts. It is possible that this will lead to an increase in the average number of tenders submitted, since the current average for direct award procedures is 1.7 tenders,³³ but the fact the number is not 1 indicates contracting authorities were already asking for multiple bids in a significant number of procedures anyway. It is important to note that the 2012-2015 trend on the whole is down for the number of tenderers and that is no different for the direct award procedure. Whereas in 2012 the average was 3 tenders per procedure we now have the aforementioned 1.7.³⁴ It seems unlikely that forcing a higher number of tenders will lead to an increase in real tendering competition. Numbers may edge upwards because of compliance requirements but if there is no desire in the market to compete for such contracts the increase will come from non-realistic bids. Three competitors has been established as the optimum level of competition, but that is only for oligopolic or concentrated

28. Article 19(a) of the Public Contracts Code 2008

29. Article 20(1)(a) of the Public Contracts Code 2008

30. Article 19(d) of the Revised Public Contracts Code

31. Article 19(c) of the Revised Public Contracts Code

32. Article 27-A of the Revised Public Contracts Code

33. IMPIC, Contratacao publica em Portugal, 2015, p.61

34. IMPIC, Contratacao publica em Portugal, 2015, p.62

markets.³⁵ It is farfetched however to establish that all public contracts below thresholds constitute concentrated markets, and outside of those the increase of transparency does contribute to more competition and lower prices.³⁶ As such it would have been preferable to ensure that at least those three participants are chosen transparently in the prior consultation procedure.

As for the contracts above €150,000 (works) and €75,000 (goods and services), they simply follow the rules for contracts above the EU thresholds without any distinction.

4.2 Shortcomings of the Revised Public Contracts Code

The approach taken by the Revised Public Contracts Code can be criticised for whitewashing a procedure with poor reputation, facilitating the strategic behaviour by buyers, making possible the strategic behaviour by buyers and by leaving in place a driver for corruption and rent seeking.

4.2.1 - Whitewashing direct award

The direct award procedure has been associated in Portugal to continued criticism in the media and has become a short hand to imply wrongdoing in public procurement. Ever since the contracts themselves have started being published in the BASE online platform,³⁷ it has become common to see complaints that yet again a given contract was awarded “by direct award” as meaning without competition and probably with foul play involved. It is true, however, that mandating the contract publication has increased the accountability of those involved in public procurement processes. After all, if before they would award the contract and no one would know at least now anyone with the right motivation can check what economic operator was awarded such contract. One example of this “citizenship accountability” is the *Má Despesa Pública* (Poor Public Spending) blog³⁸ which highlighted a significant number of public contracts awarded via direct awards in the last few years.

It can be argued that being involved in a direct award picked up by the Portuguese media leads to reputation damage for the contracting authority, the procurement officer and the economic operator. In a country where (rightly or wrongly) it is

35. BRESNAHAN and REISS, *Entry and competition in concentrated markets* in *Journal of Political Economy*, 1991, Vol 99 (5).

36. COVIELLO and MARINIELLO, *Publicity requirements in public procurement: evidence from a regression discontinuity design* in *Journal of Public Economics*, 2014, 109.

37. Article 465 of the Public Contracts Code 2008 and *Portaria* 701-F/2008, amended by *Portaria* 85/2013. This obligation was extended to all public contracts by the amendment introduced by Decree-Law 149/2012.

38. Available at: www.madespesapublica.blogspot.com.

easy interpret the use of direct award has involving some kind of shady dealing by the parties, one can easily assume what will be the effect of the new prior consultation in public perceptions and mindshare. From now on, for contracts between €20,000 and €75,000 (goods and services) or €30,000 and €150,000 (works) it will be possible to argue that no wrongdoing could have taken place in a contract as it followed the prior consultation procedure and not the direct award. While that may be factually true, in the end there is no real difference between the old direct award practice with the average of 1,7 bidders per procedure and the new obligation of consulting at least three economic operators. As it is still up for the contracting authority to select the participants, it can easily pick two “dead horses” to make up the numbers leading to the same net level of competition as before: none.³⁹ The difference is that from a reputation perspective it is no longer using the direct award but the prior consultation procedure, so that until the general public understands that only the name has changed the cost to reputation of those involved will be lower than until now.

Therefore, it can be argued that from a perspective where external pressure can drive behaviours, changing the name actually reduces the ability for that pressure to occur in the foreseeable future. Even worse, by making it available for all contracts below the mentioned values, someone wanting to game the rules can do that even on very low value contracts without risking the fallout of using a direct award procedure.

In conclusion, from the perspective of reputation impact it would have been preferable to keep the old name with all its baggage and include the new minimum requirement only. However, doing that would not allow lawmakers to claim a reduction in scope of the use of the direct award procedure, which appears to be their primary objective.

4.2.2 - Strategic behaviour from buyers

The reduction in reputation cost argued above may contribute to strategic behaviour at the other end of the scale. In other countries it has been observed that where a financial threshold exists separating contracts that are to be awarded with transparency or publicity from those which are not, it is possible to observe a cluster of contracts right before the threshold.⁴⁰

In Portugal, however, avoiding judicial review of selection and award decisions might be a national justification for said strategic behaviour. By limiting

39. With a similar view about the 2016 Draft Public Contracts Code, S. AUGUSTO DE MATOS, *Novos tipos de procedimentos pre-contratuais*, in ESTORNINHO and MARTINS (eds.) *Atas da Conferencia: A revisão do Código dos Contratos Públicos*, ICJP-CIDP, 2016, p.62.

40. AURIOL, STRAUB & FLOCHER, *Public Procurement and Rent-Seeking: The Case of Paraguay*, *World Development*, Vol 77, 2016, pp. 395-407 and PALGUTA, *Concealed Ownership of Contractors, Manipulation of Tenders and the Allocation of Public Procurement Contracts*, CERGE-EI Working Paper Series No. 501, 2014; BOBILEV, GUGLIELMO, PALTSEVA and SPAGNOLO, *Public procurement thresholds and data in Sweden*, Uppdragsforskningsrapport 2015, 3.

competition and transparency, a contracting authority is reducing the risk of delays arising from legal challenges. All economic operators have standing to bring up an action for annulment and the costs of doing so are relatively low in comparison with other jurisdictions such as England and Wales. However, there is a wider discussion to be had around remedies in public procurement, one that is well beyond the scope of this paper.⁴¹

4.2.3 - Corruption and rent seeking

It has been argued that possible reasons for the strategic behaviour of clustering contracts right below financial thresholds and in procedures with limited competition or transparency include corruption⁴² and protectionism.⁴³ Therefore, any claim that transforming the direct award into the prior market consultation would improve competition is effectively proved wrong. Similarly, it has also been argued that these financial thresholds indicate the presence of rent-seeking by economic operators which take benefit from the reduced competition allowed for by the non-transparent procedures.⁴⁴ It should be noted, however, that the alternative (making those contracts transparent) is not without costs, particularly transaction costs for both the contracting authority and the economic operators. But those can be minimised either in legislation or by each contracting authority at the design or tender preparation stage, as it will be argued in more detail in section 5.

41. Arguing the need for a more pro-active system of oversight bodies for direct awards and infringements of transparency, CERQUEIRA GOMES, *A Lost Proposal in the 2014 Public Procurement Package: Is there any Life for the Proposed Public Procurement Oversight Bodies?* in SKOVGAARD ØLYKKE and SANchez-GRAELLS (eds) *Reformation or Deformation of the EU Public Procurement Rules*, Edward Elgar, 2016, pp. 170-190.

42. FAZEKAS, CINGOLANI & TOTH, *A comprehensive review of objective corruption proxies in public procurement: risky actors, transactions and vehicles of rent extraction*, GTI Working Paper series: GTI-WP/2016.03, 2016; PALGUTA & PERTOLD, *Corruption and Manipulation of Public Procurement: Evidence from the Introduction of Discretionary Thresholds*, 2015; PALGUTA, 2014, *Concealed Ownership of Contractors, Manipulation of Tenders and the Allocation of Public Procurement Contracts*, CERGE-EI Working Paper Series No. 501.

43. FAZEKAS & SKUHROVEC, *Universalistic Rules-Particularistic Implementation: The EU's Single Market for Government Purchases*, Proceedings fighting the Hidden Tariff: Global Trade Without Corruption, 2016, OECD Integrity Forum.

44. AURIOL, STRAUB & FLOCHÉL, *Public Procurement and Rent-Seeking: The Case of Paraguay*, *World Development*, Vol 77, 2016, p. 395-407. With an opposing view, arguing a significant reduction on transaction costs, CHEVER, SAUSSIER & YVRANDE-BILLON, *The law of small numbers: investigating the benefits of restricted auctions for public procurement*, Applied Economics, 2017.

4.2.4 Lack of appropriate defense against strategic behaviour or corruption

While it is possible to make good use of the limited competition afforded by the prior consultation procedure to drive good results⁴⁵ the opposite is true as well, or else transparency would not be the gold standard for “good enough” procurement practice for slightly more expensive contracts. More so, when the research is clear on the benefits for limiting competition in very expensive or complex contracts, *ie* the exact polar opposite of the contracts usually covered by the prior consultation procedure.⁴⁶ This state of affairs would not be problematic if not for the fact that there are no real safeguards against strategic behaviour or even corruption arising from those contracts.⁴⁷ It can be argued that Art.113(2) of the Revised Public Contracts Code, establishing the need to keep track of all awards made to any given economic operator during three years to avoid going over the EU financial thresholds is able to provide some defense.⁴⁸ This defense of Article 113(2) of the Revised Public Contracts Code is broader than the equivalent provision in the outgoing Public Contracts Code 2008 since all contracts need to be tallied and not only those with the same object. Such defense is nonetheless, limited. First, it does not follow the rules against disaggregation imposed by the Directives since it does not use the same definition of “contracting authority” as that of Directive 2014/24/EU (Article 2(1) and (2) and 5(2)). Whereas the EU definition is broader, the Portuguese one (Article 113(3) and (4)) is narrower and as such, an economic operator could easily accumulate direct awards from different departments of the same contracting authority. By itself, the Portuguese approach is not a breach of EU law since it only applies to contracts below thresholds, but it is possible to accumulate enough contracts from a single contracting authority as defined by EU law valued above the EU thresholds but that technically would still comply with the requirements of Article 113(3) and (4) of the Revised Public Contracts Code.

Second, this line of defense relies in contracting authorities keeping track of this information and acting upon it where there is no incentive to do so. The likelihood of any wrongdoing being found is limited even with the obligation

45. CHEVER, SAUSSIER & YVRANDE-BILLON, *The law of small numbers: investigating the benefits of restricted auctions for public procurement*, Applied Economics, 2017.

46. BROWN, POTOSKI & VAN SLYKE, 2010, *Contracting for Complex Products* in Journal of Public Administration Research and Theory, 20(s1): 41-58; BAJARI, McMILLAN & TADELIS, 2009, *Auctions versus Negotiations in Procurement: An Empirical Analysis* in *J Law Econ Organ* 25(2); HEIJBOER & TELGEN, *Choosing the Open or Restricted Procurement: A Bif Deal or A Big Deal* in Journal of Public Procurement 2 (2), 2002; BAJARI & TADELIS, *Incentives versus Transaction costs: A theory of procurement contracts* in *RAND Journal of Economics* 32 (3), 2001.

47. Highlighting the risks of unethical and corrupt behaviour enabled by the use of direct award procedures in Portugal, VALADARES TAVARES, (2016) *Breve ensaio sobre a teoria dos sistemas e o Código dos Contratos Públicos*, in ESTORNINHO, *A transposição das Directivas Europeias de 2014 e o Código dos Contratos Públicos*.

48. On this issue under the outgoing text see, J. AMARAL DE ALMEIDA and P. FERNÁNDEZ SÁNCHEZ, *O limite à contratação reiterada da mesma entidade no âmbito do procedimento e ajuste directo (n.º 2 do art. 133.º do CCP)* in *Temas de Contratação Pública I*, Coimbra, 2011, p. 291.

of ex-post transparency for these contracts, particularly while the BASE transparency portal does not adopt more modern machine readable formats that would simplify access to the data. And even if one argues that the requirements of Article 113 would be fully complied with, then motivated agents would simply bypass the cap by using shell economic operators. As far as limitations go, this is really easy to sidestep without a viable way to make it work as intended.

4.2.5 - U.N. Convention Against Corruption compliance challenge

Portugal is a party to the U.N. Convention Against Corruption adopted by the U.N. General Assembly on October 31, 2003.⁴⁹ This Convention constitutes the first global attempt at tackling corruption,⁵⁰ as well as the broadest international law based anti-corruption legal framework.⁵¹ As of October 2017, the Convention Against Corruption has 140 signatories and a further 43 parties.⁵² While the Convention aims to tackle corruption in multiple areas, its effectiveness has been questioned⁵³ and it remains subject to the traditional limitations of international law mechanisms, namely enforceability and particularly individual enforceability.⁵⁴ Nonetheless, it is a binding international legal instrument for the signatory parties and public procurement is one of the areas covered by it.⁵⁵

Article 9(1) of the Convention establishes clear obligations for the signatory parties in what concerns their public procurement regime: “[e]ach State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption.” Article 9 allows State Parties to have “appropriate threshold values” within their procurement system. It is unquestionable that Portugal does have threshold values for the application of rules which promote transparency, competition and objective criteria in decision-making in public procurement. What is questionable, however, is the *value* of said thresholds since they exclude 90% of all contracts in the country and almost

49. Portugal became a signatory party in 2003 and ratified it in 2007.

50. ARGANDONA, *The United Nations Convention Against Corruption and its Impact on International Companies* in *Journal of Business Ethics*, 2007 74;

51. SPAHN, *Implementing Global Anti-Bribery Norms from the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption* in [Indiana International & Comparative Law Review, Vol. 23, 2013](#).

52. As per the information available on the Convention’s website at the date of writing, available at <https://www.unodc.org/unodc/en/corruption/ratification-status.html>.

53. WEBB, *The United Nations Convention Against Corruption: global achievement or missed opportunity?* in *J Int’l Econ L*, 8, p. 191.

54. On enforceability of international law, see for all HIGGINS, (1995) *Problems and Process: International Law and How We Use It*, p. 53 and SIMMONS, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs* in *American Political Science Review*, 94, 2000.

55. YUKINS, *Integrating integrity and procurement: The United Nations Convention Against Corruption and the UNCITRAL Model Procurement Law* in *Pub. Cont. L. J.*, 36, 307, 2007.

half of the expenditure in public procurement.

Assuming the purpose of the Convention is to ensure that overall a procurement system pursues anti-corruption objectives and is based on transparency, competition and objective criteria in decision-making, how can it be argued that a system whereby 90% of contract opportunities does not meet any of these requirements is compliant with the Convention? It is possible to consider the Convention compliance bar is low and that having transparency, competition and objective criteria in decision-making rules for 10% of contract opportunities would be enough to clear it, since it appears to never have been tested in court. If that is the case, then legal regime in Portugal would be perfectly compatible with the Convention. However, if one understands the Convention otherwise – that a significant proportion of contract opportunities should be subject to transparency, competition and objective criteria in decision-making – then Portugal is in breach of its obligations and the thresholds from which those objectives are made into law need to be lower than their current values.

5. Alternatives within the Portuguese legal framework

Having established that the Revised Public Contracts Code does not change the current status quo of limited competition for most public contracts awarded in Portugal and that increasing transparency and competition would be beneficial, it is possible to conceive alternative models which would fit within the legal framework. These have to match two (theoretically opposite) criteria: enabling free competition while keeping the transaction costs low for both the contracting authority and economic operators so that any change can be net positive in either lower cost/higher quality in the short run or by bringing more suppliers to broaden the base of competition for the long run. To this end, we will be looking at national and international solutions for the problem. For the former we will consider the open procedure as it stands currently in Portuguese legislation and analyse Article 6 of the Draft Revised Public Contracts Code. For the latter we will look at the UK (England and Wales) and Spain.

5.1 - Simplified open procedure

Under the Public Contracts Code 2008, the open procedure⁵⁶ is already much simpler and lighter in transaction costs than the original blueprint from Directive 2004/18/EC. Its design is much closer to what can be found on Directive 2014/24/EU. In fact, it can be argued that most changes such as the single stage nature or checking information only from the winner anticipated the simplification attempted by Directive 2014/24/EU.

⁵⁶ M. OLAZABAL CABRAL, *O concurso público no Código dos Contratos Públicos*, in *Estudos em Contratação Pública – I* (CEDIPRE), p. 181.

The lawmaker for the Public Contracts Code 2008 made the decision of mandating the use of transparent procedures such as that “simplified” open procedure for contracts above €75,000 (goods and services) and €150,000 (works). There is no reason why it cannot be adapted for contracts of a lower value, by further reducing transaction costs involved. For example, further simplification could be achieved by: (i) reducing minimum submission deadlines, (ii) including a one page summary with key information to help economic operators make the go/no go decision before incurring into any transaction costs with bid preparation, (iii) by only asking for the information effectively necessary to identify the best bid; (iv) making do with the standstill period. These premises were successfully tested in the UK in local councils with limited access to external expertise or especially qualified staff, where it was proved feasible to award contracts routinely between 37-39 calendar days.⁵⁷

5.2 - Article 6(2) of the Draft Revised Public Contracts Code

If using the open procedure as an alternative to the prior consultation is not feasible, then Article 6 of the Draft Revised Public Contracts Code⁵⁸ offered another possibility. This article was, sadly, deleted from the final version of the Revised Public Contracts Code. According to Article 6(1) of the Draft Revised Public Contracts Code, contracts covered by Articles 5 and 5-A were subject to general principles of administrative law, but that is a given since any award decision would always trigger the application of said principles.

Paragraph 2 offered a more compelling solution. It provided a very basic award framework for the contracts covered by Article 5(4)(c)(g) and (j) including all contracts in some sector areas if they have a value below the financial thresholds. However, this solution was puzzling as one of the areas covered by the paragraph is that of social, healthcare and education contracts, *ie* those included in Article 74 of Directive 2014/24/EU. Although the Directive tried to restrict their regulation by only covering contracts above €750,000, in Portugal low value contracts in these sectors⁵⁹ would have been subject to a more stringent regulation than the general ones. Whereas all other contracts can rely on the direct award or prior consultation provisions mentioned in the previous section, social and similar contracts would *have* to be advertised under Article 6(2) of the Draft Revised Public Contracts Code.

This framework of Article 6(2) of the Draft Revised Public Contracts Code included the obligation to advertise the contract, equal treatment for participants, provide grounds of award decision and advertising of award decision. In effect it could have integrated quite well the proposed simplified open procedure from

57. See TELLES et AL., *Simplified Open Procedure Guidance*, ICPS, 2014; TELLES et AL., *Simplified Open Procedure Carmarthenshire Case Study*, 2014; TELLES et AL., *Simplified Open Procedure Gwynedd Case Study*, 2014 and TELLES, *Simplifying procurement for low value contracts*, FSB Seminar Series No. 4., 2014.

58. Version published in September 2016.

59. As per the list included in Annex IX to the Draft Revised Public Contracts Code

above but even on its own it is enough to achieve most of the same outcomes. The improved flexibility of Article 6(2) came with some strings attached though. For example, a contracting authority interested in awarding a contract directly to an economic operator could simply set an unrealistically short deadline for economic operators to register their interest or submit tenders, or request high performance bonds or bank guarantees. It could have also lead to a splintering of practices with contracting authorities awarding similar contracts very differently and forcing economic operators to develop multiple tendering practices or approaches. If that were to happen, it would increase opportunity costs for economic operators.

Article 6(2) of the Draft Revised Public Contracts Code also raised another potential pitfall that can affect the participation by economic operators. Since there is no ban on making the process as complex as possible to deter the participation of economic operators, it is conceivable contracting authorities would adopt the “old” restricted procedure with selection and award stage and that appears allowed under the framework of Article 6(2). It may seem counterintuitive but it is what happened in the UK, where for many years the restricted procedure was more popular than the open, both in numbers of procedures and expenditure.

6. Alternatives based on other Member States’ approaches

In addition to the changes proposed above, it is possible to look into what other Member States are doing regarding contracts below thresholds. There is no evidence of a reduction of transparency in other Member States and the regulatory tide appears to have changed in favour of more transparency instead. In this section we will analyse the approaches taken by the UK (Central Government) and Spain’s draft transposition of Directive 2014/24/EU.

6.1 - UK Central Government

The Public Contracts Regulation 2015 transposed Directive 2014/24/EU into England and Wales⁶⁰ and, for the first time, included a section on regulating contracts below-thresholds. This development should not be understated since it goes against the legal traditions of the country of simply “copying out” EU Directives⁶¹ and avoid introducing any further regulation not strictly necessary.

Chapter 8 (Regulations 109-112) provides for a “light touch” regime mandating

60. SANCHEZ-GRAELLS and TELLES, *Commentary to the Public Contracts Regulations 2015*, 2016, available at: www.pcr2015.uk.

61. HM Government, (2013) *Transposition Guidance: How to implement European Directives effectively*

contracts valued at €11,500⁶² or €28,000⁶³ to be advertised on ContractsFinder,⁶⁴ the “national” portal for England. These provisions include instructions on how to do the advertising, content of the notice or the timescales involved.⁶⁵ These are more prescriptive than Article 6 of the Draft Revised Public Contracts Code and take into consideration issues that are a problem in the United Kingdom, such as the tradition to use restricted procedures often.⁶⁶

Chapter 8 of the Public Contracts Regulations 2015 covers a subset of contracting authorities in the UK, namely Central Government, agencies, non-departmental public bodies, local authorities (in England only) and National Health Service bodies (in England only). It does not cover contracting authorities based in Scotland, Wales or Northern Ireland exercising devolved functions, the procurement of health care services covered by the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 or maintained schools or academies.

The purpose of these legislative alterations is to increase competition and transparency in a part of the market that is usually not subject to these pressures. Although this legal regime has been in force for two years, its impact is unknown for the time being. Currently, there is no consequence for non-compliance other than the risk of judicial review, which is a low risk bearing in mind the low numbers of cases in the country, or some reputation damage by aggrieved economic operators complaining to the Crown Commercial Service’s own Mystery Shopper Service.⁶⁷

6.2 - Spain draft transposition

Spain is yet to transpose Directive 2014/24/EU at the time of writing (October 2017), but there is a publicly available Draft Public Sector Contracts Law from December 2016.

The Draft Public Sector Contracts Law regulates contracts below-thresholds, but does so in a very different way from the Portuguese or English and Welsh laws. According to its Article 118, contracts with a value under €50,000 (works) or €18,000 (goods and services) are considered to be “minor contracts” and by the most part not subject to public procurement regulation. In fact, it is accepted

62. Central contracting authorities, Public Contracts Regulations 2015, Regulation 109(1)(b). Value in pounds is £10,000. Conversion done by the author on March 15th, 2017.

63. Sub-central contracting authorities, Public Contracts Regulations 2015, Regulation 109(1)(c). Value in pounds is £10,000. Conversion done by the author on March 15th, 2017.

64. Public Contracts Regulations 2015, Regulation 110. Clarified by Crown Commercial Service Procurement Policy Note - Legal requirement to publish on Contracts Finder (Action Note 07/16)

65. Public Contracts Regulations 2015, Regulation 110(2), (8), (9) and (16)

66. Expressly prohibited by Regulation 111. On the challenges raised by this Regulation see SANCHEZ-GRAELLS and TELLES, *Commentary to the Public Contracts Regulations 2015*, 2016, available at: www.pcr2015.uk.

67. Crown Commercial Services, (2012) Mystery Shopper: scope and Remit

that those contracts may be awarded directly just as in Portugal.⁶⁸ But the maximum size of the contracts to be tendered via direct award is much smaller than Portugal's, which as we have seen are €150,000 for works and €75,000 for services, since in our opinion the prior market consultation is simply a re-brand of what are currently direct award procedures.

The Spanish Draft Public Sector Contracts Law is a good source of inspiration for another reason. The Spanish lawmaker correctly concluded that simply mandating the use of procedures designed for contracts above-thresholds would not constitute a good solution. As such, Article 157 establishes a simplified open procedure for works valued at below €2M and goods and services below the EU thresholds.⁶⁹ Reading Articles 157 and 131(3) together, the conclusion must be that apart from minor contracts, all other contracts are subject to advertising, transparency and equal treatment and to at least a simplified open procedure. This appears to be a better solution than the Portuguese, even though there have been complaints that it is not as ambitious as it should.⁷⁰ Furthermore, some of its choices should be criticised. For example, advertising is only required on the contracting authority's website and not a national or regional procurement portal like ContractsFinder in the UK,⁷¹ thus pushing into the economic operators the cost of registering and being up to date with all the contracting authorities they might be interested. In a similar note, only economic operators registered on a national or regional registry of contractors will be authorised to tender, something that may end up being considered as discriminatory for contracts with certain cross-border interest⁷² since economic operators based in EU Member States will have to submit qualifying information and as such treated differently.⁷³ Additionally, no tendering bonds or guarantees may be required for participation but performance bonds and guarantees are still mandatory. This option can be understood, but the Spanish Draft Public Sector Contracts Law falls into the trap of mandating the contract to be awarded to the next best bid in case of non-submission of guarantees.⁷⁴ This is a mistake as it facilitates collusion by economic operators if not linked to consequences such as debarring for future contracts.⁷⁵

In addition to the Spanish Draft Public Sector Contracts Law, local authorities have also by themselves introduced more transparency in low value contracts to increase transparency and competition. The Gijon city council in 2016 opened

68. Article 131(3) of the Draft Public Sector Contracts Law.

69. Article 157(1) of the Draft Public Sector Contracts Law

70. *Transparency International Espana, (2016) Enmiendas al proyecto de ley de contratos del sector publico*, p. 4 and GIMENO FELIU, *Hacia una nueva Ley de Contratos del Sector Publico. Una nueva oportunidad perdida?* in *Revista Espanola de Derecho Administrativo*, n.º 182, 2017, p. 181-221.

71. Article 157(2) of the Draft Public Sector Contracts Law

72. TELLES, *The good, the bad and the ugly: EU's internal market, public procurement thresholds and cross-border interest* in *Public Contract Law Journal* 43 (1), 2013 and CARINA RISVIG HAMER, *Contracts not covered, or not fully covered, by the Public Sector Directive*, 2012.

73. Article 157(4)(c) and(g) of the Draft Public Sector Contracts Law

74. Article 157(4)(f) of the Draft Public Sector Contracts Law

75. TELLES, *The European Single Procurement Document*, URT.cc, (1), 2017.

up its small contracts market to economic operators registered in its online platform with good results such as higher number of bids (3,23/procedure) and cost savings (7,32%) calculated against the medium market price and not the original budget.⁷⁶

7. Conclusion

This paper has shown that the proposed revision of the Public Contracts Code in Portugal missed the opportunity to change the paradigm of how low value public contracts are tendered. As such, procurement risks such as corruption, strategic behaviour by contracting authorities and bidders or lack of accountability will remain prevalent for the majority of public contracts made available in the country.

Instead of change, the lawmakers decided for re-branding the direct award procedure as a prior market consultation, both similar to what is known elsewhere as a “request for quotes.” Both procedures leave in the hands of the contracting authority which economic operators will be invited to bid and do not ensure transparency, equal treatment or competition. They can easily be manipulated to ensure the “right” operator wins, and that is a particular problem in a country whereby 90.2% of all public contracts are awarded on the basis of direct award. In consequence, 47.9% all public procurement expenditure is not subject to transparency, leading to the question that if transparency is a legal principle how is it relevant for only a small subset of contracts and the potential lack of compliance with the UN’s Convention on Corruption.

It was argued Portugal could have improved transparency by adapting existing provisions within its legal framework, or following the footsteps of the Public Contracts Regulations 2015 (England and Wales) and the Draft Public Sector Contracts Law (Spain) which introduced significant transparency reforms for low value contracts.

In conclusion, using Giuseppe Tomasi di Lampedusa’s paradox from *The Leopard* it appears “everything needs to change, so everything can stay the same” when it comes down to direct award of public contracts in Portugal.

76. Ayuntamiento de Gijón, Informe Anual 2016 - Implantación de la Plataforma de Licitación Electrónica de VORTAL Connecting Business, S.A. En el Ayuntamiento de Gijón, Empresas Municipales y Organismos Autónomos.