

PORTUGAL: An Introduction to Public Law

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2018 begins with a general positive feeling, since, in 2017, Portuguese economy grew – for the fourth year running – at a projected rate of approximately 2.5%. This growth follows a deep recession experienced between 2011 and 2013, years that were also marked by a significant decrease of foreign demand and both private and public investment. In 2011, Portugal signed a bailout agreement – worth EUR 78 billion – with the European Union, the European Central Bank and the International Monetary Fund (the “Troika”) to balance the country’s national budget. The Portuguese Government launched a major structural adjustment and reform plan to comply with this agreement, having emerged from this financial aid programme in May 2015. In the same year, an unprecedented political solution – a moderate socialist government with parliamentary support from far-left parties – emerged from the elections held in October.

The Government proved unexpectedly resilient, and has been able to carry out its programme while managing to secure the approval of national budgets, and committing to the long-term stability plan required by the European Union. Significant and reliable growth rates – spurred by structural market adjustments carried out during the crisis, and, particularly, by a boom in Tourism and Real Estate – have yielded cautious economic optimism, and allowed the Government a lifeline to invest and sponsor political reform without forfeiting the chance to enact a range of social policies that are ultimately closer to the priorities of its constituents and the far-left parties that support the Government in Parliament. This growth is the foundation of the balance the Government managed to strike between the demands of European institutions and international competitiveness, on one hand, and the biddings of allied parties and social peace, on the other.

This political shift wrought interesting consequences for the Public Law market, particularly considering that the Government change overlapped with important legal modifications.

What to expect from Public Law sector in 2018

2017 gave way to several trends that impacted regulation, public procurement, Administrative Justice, and, ultimately, the public-sector market, which will set the pace in 2018.

i. Economic regulation

Changes in the political outlook created an environment that welcomes a more dominant economic regulation. Private companies performing in heavily regulated sectors have been confronted with decisions and regulations, either in draft or in effect, that somehow seek to upset the economy of the relationship.

Examples of this trend occurred across the entire public-sector spectrum. In network industries such as electricity, telecommunications, in public service oriented industries, such as healthcare and transportation, and in public service concessions, companies have been dealing with decisions or regulations that create new obligations, aggravate existing conditions, or overturn earlier decisions that were important to the relationship’s *status quo*.

Key examples of this tendency were the decision to partially revert the privatization of TAP-Air Portugal – the public-owned airline that had been privatized by the former Government –, a string of

unilateral decisions that decreased total reimbursement value for several medications, several measures that burdened the execution of Hospital Public-Private Partnerships, and the parliamentary hearing on CTT's (the Portuguese Mail Service Concessionaire) Concession, which was also privatized by the former government pursuant to the Troika bailout agreement.

ii. The Public Contracts Code

Directives 2014/13/EU, 2014/24/EU and 2014/25/EU on Public Procurement were finally transposed to national law in 2017. Effective since 1 January 2018, the revised Public Contracts Code implemented the key features of the Procurement Directives – such as the incorporation of economy-wide strategic policy goals in award criteria and exclusion grounds –, but also enacted changes of domestic creation. One of the Portuguese legislator's priorities was to improve access to SME. The law established that contracts below the value of the European threshold should be awarded through simplified, yet competitive procedures. The Code further requires, as a rule, that public contracts should be divided into lots, with the provision that opting not to divide contracts must be explained in the procurement documents. The mandatory value of collateral for the execution of the contract was also allowed to be significantly reduced.

The revised Code also devoted attention to centralized procedures, and exempts awarding authorities from the obligation to award contracts pursuant to a Framework Agreement if market operators outside of the Framework Agreement undertake to execute the contract for a lower price.

These changes should contribute to open up the market. Competition should increase in contracts of lower value and, if larger contracts are indeed split into lots, SMEs should participate in contracts they would otherwise be excluded from. This, however, comes at the price of increased sophistication and complexity of public procedures, which will necessarily increase costs for both awarding authorities and economic operators.

iii. Administrative Justice

Finally, 2017 saw significant efforts to improve Administrative Justice. The Government approved legislation that requires administrative judicial proceedings to be carried out through an electronic platform, and the platform was upgraded accordingly. 30 new judges were appointed to the chronically overwhelmed Administrative Court of Lisbon, where most of the country's administrative litigation is held.

In addition, pursuant to a change in arbitration laws, a growing number of sophisticated disputes is being entrusted to Arbitration Courts, and the Public Contracts Code now allows awarding authorities to unilaterally subject disputes emerging from tender award procedures to the exclusive jurisdiction of Arbitration Courts.