Sérvulo & Associados | Sociedade de Advogados, RL

momentum

Summer 2009

EDITORIAL

Pedro Furtado Martins
pfm@servulo.com

This edition of *Momentum* clearly illustrates the diversity and complexity of the today's system of legal sources. It is clear that the primary means of creating legal rules continues to be by statute, making it essential to keep up with the daily flow of new legislation, such as the recent changes to the rules on penalties in the financial sector, the legal framework for the creation and operation of enterprise location areas and to employment legislation, as referred to in articles prepared by our departments specializing in criminal law and civil offences, urban planning, environmental and property law, and in employment law. Knowledge of the legal texts themselves needs to be complemented by an understanding of how they are seen and applied by the different players in the legal arena. Our public law department has contributed an article on some of the rules governing public procurement, and our fiscal law department has examined how the administrative authorities interpret certain rules on the transfer of property, even if their understanding is open to question. But the system of legal sources is not limited to statute: we also need to consider case law as another means of revealing legal rules. A good example of this is the recent decision of the Court of Justice in the Genetics UK judgement, discussed for us by our European Union and competition law department.
Finally, the system of source also depends on regulatory institutions, exemplified by the creation of the Financial Stability Board in response to the international financial crisis, as examined in one of the articles.

ACTIVITIES COVERED BY THE RULES ON PUBLIC PROCUREMENT IN "SPECIAL SECTORS"

Article 11.1 a) of the Public Contracts Code (PCC) lays down that *"part II of this Code only applies to the formation of contracts to be entered into by the contracting authorities referred to in Article 7.1 when these contracts relate directly and principally to one or more activities they carry on in the water, energy, transport and postal sectors..."* Likewise, whether or not the specific rules for special sectors apply to contracting authorities invested with this status by simultaneous operation of Articles 2.2 and 7.1 of the PCC depends on whether or not the contracts concluded relate directly and principally to the activities regulated.
The error which has slipped into interpretation of the expression *"relate directly and principally"* derives from the fact that it is read as imposing a relationship between the specific nature of the goods, service or works to be acquired and the activities of the special sector in question, and not, as follows from the applicable community rules, as requiring the functional allocation of these goods, services or works to the activity of the contracting authority which is carried on in the special sectors.
Indeed, the problem only arises when an entity operating in a special sector also carries on other activities not related to these sectors (given that if the entity operates exclusively in the special sector, the contracts it concludes, irrespective of their subject matter, relate, by nature, directly and principally to the activity it carries on in such sector). In these cases it is necessary to determine the activity which is principally addressed by the contract. So in the event of the contract addressing, as its principal object, the activity included within the special sector, then the specific procurement rules for the sector in question apply. On the other hand, in the event of the contract addressing, as its principal object, other activities not pertaining to the special sectors, then there are two possibilities: either we are dealing with a contracting authority exclusively under the terms of Article 7 of the PCC, in which case the formation of the contract is not covered by public procurement rules, or else we are dealing with a contracting authority under the terms of Article 2.2, in which case the formation of the contract will be governed by the general rules applicable to this type of entity, in particular to *public law bodies*.
It follows from this, for instance, that when an entity carries on activities in special sectors and also outside them, and this entity wishes to acquire an IT system for document management for all the company's operations, the question we should ask is not whether this system is an asset which, due to its nature or specific intended use, is acquired due to the fact of the entity operating in special sector.

"The interpretation of the expression "relate directly and principally" that delimitates the application of rules of public procurement for the special sectors entities has been subjected to great mistakes."

The question we should ask is whether the system is intended principally for the activity carried on in special sectors, in view of the respective usage rates or proportional allocation of resources to the different activities carried on. To this end, the following criteria should be considered:
a) If the subject matter of the contract has a clear connection (technically, functionally or otherwise) with one of the company's activities, then the formation of the contract is subject to the rules deriving from the PCC for the conclusion of contracts within the scope of these activities. For instance, if a company which is a contracting authority under the terms of Article 2.2 carries on simultaneously the activity of supply of public drinking water networks and also the activity of waste collection and treatment, a works contract for the laying of drinking water mains will be subject to the rules for special sectors. A works contract for construction of a waste treatment plant will be subject to the general rules applicable to contracting authorities under Article 2.2.
b) If the subject matter of the contract does not have a clear connection with one of the company's activities (for instance, a works contract for construction of its head offices), it is up to the contracting authority to determine and prove which is the company's principal business, given that, once this is determined, the principal functional allocation of the contract will in principle be established.
c) An entity may also demonstrate that the utility or most of the value of the contractual goods or services are intended for one or other of the company's activities, but not its principal activity. For example, when a company which operates principally in the waste treatment sector (not subject to specific regulations) and, as a side line, in the public drinking water network supply sector (a special sector), concludes a works contract for the construction of a canteen, it may apply the most permissive rules applicable to special sectors if it is prepared to demonstrate that the canteen is intended, solely or primarily, for company workers engaged in water supply activities.
d) In the event of doubt, the assumptions established in paragraphs 3 and 4 of Article 33 of the PCC shall hold (for all the applicable rules, and not merely for the choice of procedure, in an interpretation compliant with the provisions of Article 9 of Directive 2004/17/EC).

Mark Kirkby
mak@servulo.com

THE NEW LEGAL FRAMEWORK FOR ENTERPRISE LOCATION AREAS

According to the Portuguese Constitution, the State is responsible for *"conducting and promoting town and country planning, pursuing a correct location of activities, balanced social and economic development and the enhancement of the landscape"*. The *Basic Law on Town and Country Planning Policy,* which set out to establish the procedures and the underlying principles and objectives in this field, was drafted in response to this *constitutional requirement.* Whilst it is possible to distinguish between the tasks involved in *land use planning* (country planning) and *urbanism* (town planning), both concepts share a common goal, which is to achieve a *"correct planning of land use"*, to be pursued through the many different planning instruments provided for in law, ranging from the National Programme for Town and Country Planning Policy to municipal plans, such as the municipal master plans.
The business location areas (BLA) are a consequence of the constitutional requirement of town and country planning, and represent a higher level of detail even than the municipal master plans, with which they should be coordinated, while seeking to assure the *"correct location of activities"*. Hence the importance of the newly issued Decree-Law 72/2009 of 31 March, which establishes the legal framework for creating and operating BLAs, together with the general principles for managing them, within the context of sustainable development and social responsibility.
BLAs are areas earmarked for industrial and other business facilities, and were originally regulated by Decree-Law 46/2001 of 10 February, which, when it proved unworkable, was revoked by Decree-Law 70/2003 of 10 April. However, this second attempt also fell short of the desired ends, failing to generate any real enthusiasm for development of these industrial areas, due mainly to the general failure to simplify procedures.
The new legal framework is therefore designed to address the shortcomings of the previous system, and also to coordinate the respective planning procedures with other licensing systems, such as the rules on industrial activities (RIA) and the rules on environmental impact assessments (EIA).
The first aspect worthy of note in the new system is the change in the actual concept of BLAs, which are no longer thought of as primarily *industrial* and instead encompass *"any areas which may serve as the location for business activities, the respective promoter being free to decide whether BLAs are given over to multiple sectors of business or geared only to particular industrial, commercial or service activities"*.

"The new legal framework is therefore designed to address the shortcomings of the previous system, and also to coordinate the respective planning procedures with other licensing systems."

Important changes have also been made to the requirements concerning the *management company*, which no longer needs to be incorporated at the date of the original planning application, and can now be incorporated up to 60 days after the granting of planning permission, so as to avoid investors incurring unnecessary expenses at a stage when the future viability of the project is not yet certain. The financial capacity requirement has also been eliminated for the management company, which now only needs to comply with the requirements currently in force regarding share capital and net assets.
As mentioned, efforts have been made to build bridges between the new legal framework and other planning systems, with a consequent simplification of procedures.
For instance, whenever a BLA is subject to an EIA procedure, this operation is conducted under the specific BLA rules. Also, if the applicant so wishes, the EIA procedure for the project, as the industrial licensing process, *"can be initiated with the Regional Directorate of the Economy and proceed simultaneously with the planning application for setting up the BLA*". The necessity of a request of EIA scope demarcation was also eliminated, which is now an optional stage, as established in the relevant rules. Finally, the applicant can now choose to submit an environmental impact study covering all the establishments to be located in the BLA or for only some of them.
To the same end, the rules on creating and operating BLAs have been brought into line with the Rules on Industrial Activities, concerning class 1 establishments, in order to avoid overloading the system with separate sets of rules on similar issues, leading to an unnecessary level of complexity.
However, although it is possible to point to a number of minor attempts at simplification, the changes introduced by this new law are mostly designed to bring the rules into line with other systems which might result in *procedural overlap.* Thus, even though the new system appears at first sight to be *better adjusted* than its predecessor, it remains to be seen how these alterations work out in practice. All the same, the new rules offer what appears to be a useful instrument for economic and industrial development in Portugal, whilst responding to the significant *environmental and urban development concerns* which have been accorded increasing importance in public policies.

Jorge Silva Sampaio
jss@servulo.com

REVIEW OF PENALTIES IN THE FINANCIAL SECTOR – IN PARTICULAR THE DUTY OF ABSTENTION AND REGISTRATION OF OPERATIONS

The international crisis has obliged states to take measures to combat the situation and to avoid it repeating itself.
Portugal is no exception and, amongst recent measures, we may point to the newly enacted Law 28/2009, of 19 June, "laying down the rules on the approval and disclosure of the remuneration policy for members of the management and supervisory boards of public interest bodies and reviewing the penalties applicable in the financial sector for criminal and administrative offences" (cfr. Article 1 of Law 28/2009).
This review of the penalties relating to the financial sector consists of a number of amendments to the General Regulations on Credit Institutions and Financial Companies (GRCIFC), to the Securities Code (SC) and to the Insurance and Reinsurance Regulations (IRR). The changes include increasing the maximum prison term from three years to five years for the crimes of unlawful taking of deposits or other repayable funds from the public (in the event of the lack of a permit), insider dealing, market manipulation, unlawful (unauthorized) carrying on of insurance, reinsurance or pension fund management business. The upper limit for fines, in especially serious cases, has also been raised to € 5,000,000.00 (five million euros). The GRCIFC and the IRR have also been amended to provide for summary proceedings (processo sumaríssimo) for offences, as already contemplated in the SC.
One change stands out from all the others. We refer to the new Article 118-A, added to the GRCIFC, on the duty of abstention from

"The new regime of rules on the approval and disclosure of the remuneration policy for members of the management and supervisory boards helps to prevent the host of solutions which human ingenuity will always devise for fiscal fraud and money laundering."

and registration of operations. This new clause lays down that "credit institutions shall not grant credit to entities based in an offshore jurisdiction considered as non-cooperative or where the final beneficiary is unknown", offshore jurisdictions being considered non-cooperative as defined by Notice of the Bank of Portugal. It is also established that all transfer operations with a value in excess of €15,000.00 "irrespective of whether the transfer is made in a single operation or several interrelated operations", shall be registered by the credit institution, "which shall notify the Bank of Portugal".
The new Article 118-A of the GRCIFC makes it more difficult to break the law in certain areas, and specifically hinders the following:
a) Operations designed to conceal noncompliance with the limits on the purchase of treasury stock established in Article 316 et seq. of the Companies Code;
b) Concealment of impairment by structuring a system of guarantees which in the last analysis encumbers the credit institution;
c) Concealment of lending to the elected officers of credit institutions (prohibited under the terms of Article 85 of the GRCIFC).
This, of course, in addition to preventing the host of solutions which human ingenuity will always devise for fiscal fraud and money laundering.
This is an important new rule, in the new atmosphere of hostility to offshore jurisdictions legitimately generated by the current economic crisis.
All the more pity, therefore, that there should be a flaw in the drafting of Article 118-A of the GRCIFC. Whilst breach of the rules on lending and the recording of operations constitutes an especially serious offence (punishable by a fine of up to € 5,000,000.00), breach of the rules on the registration of operations constitutes an offence punishable by a fine of up to one and a €1,500,000.00 (cfr. Articles 210 l) and 211 t) of the GRCIFC). In other words, the question of the registration of operations is provided for in two distinct precepts, which establish different penalties. Unless the wording is amended or a rectification published, this defect in the drafting is sure to cause problems when the law is applied in practice.

Pedro Duro
pd@servulo.com

WHAT'S (NOT) CHANGED IN HOLIDAY ENTITLEMENT

At a time of year when holidays are uppermost in our minds, it is only appropriate to pause and reflect on some of the tricky issues raised by holiday entitlements in Portuguese law.
These are many such issues, some of them of long standing, and others raised by the Employment Code of 2003. The new Employment Code, approved by Law 7/20090, of 12/02, resolved some of these questions but failed to tackle others, whilst actually exacerbating another group.
Of the most serious issues raised, two in particular deserve our attention: the effects of termination of the employment contract on holiday entitlement and additional holiday entitlement earned through regular attendance.
In respect of the first of these issues, the 2009 Code represents a change for the better, laying down the rule that holidays will be calculated *pro rata* to time worked if the contract is terminated during the first year of employment. This does away with the absurd solution which allowed the accrual of holiday entitlement in the year in which the contract commenced with the entitlement maturing on 1 January of the following year, and also with that proportional to the year of termination of the contract, leading to completely unacceptable outcomes (holiday entitlement of more than 40 days, on contracts which lasted a year or only slightly longer).
However, the controversial question of extra holiday entitlement earned through regular attendance at work continues to cause a degree of perplexity and to give rise to countless questions of interpretation.

"The controversial question of extra holiday entitlement earned through regular attendance at work continues to cause a degree of perplexity and to give rise to countless questions of interpretation."

We may note, for instance, that absence from work, on the justified grounds of the death of a child, for the five days permitted by law, automatically causes the employee to forfeit three days' holiday entitlement. But no entitlement is forfeited in the event of parental leave being taken exclusively by the father. It is hard to see why the authors of the legislation decided to accord different treatment to childbirth and bereavement, especially when there are more objective reasons (specifically, mental incapacity for performance of professional duties) for dealing more favourably with cases of bereavement.

In addition to this, one of the problems which already existed under the previous Employment Code and was not resolved in the latest review is that of how the rules on additional holiday entitlement should be reconciled with the provisions of collective employment agreements which establish minimum holiday entitlement greater than the 22 days laid down in the Employment Code (for instance in the insurance and banking sectors). It is unclear whether employees who already enjoy an annual leave of 25 days can earn additional entitlement or whether this additional entitlement is only applicable to employees with 22 days' basic leave. Legal scholars have tended to subscribe to the latter view, which has just been borne out by the Supreme Court of Justice, in its decision of 20 May 2009. This ruling has clarified that "... the increase in the holiday entitlement is not independent of the general rules on holiday leave, namely on the duration of leave, and is instead an inseparable part of the relevant normative complex." This means that the (contractual) option for an increased minimum holiday entitlement of 25 days must be interpreted as excluding the possibility of this period being extended to 28 days, as a reward for regular attendance. In essence, what these collective employment agreements seek to do is to apply the 15-day entitlement across the board, irrespective of employees' attendance records, disregarding the specific goal of reducing absenteeism which appears to underlie the provision included in the 2003 Employment Code.

We should note that, although it incorporates some of the features of the holiday entitlement rules in the Employment Code, the rules governing employment in the civil service, approved by Law 59/2008, of 11/09, enshrine a more generous holiday entitlement than the Employment Code (maintaining, in essence, a civil service tradition). In the first place, all these public employees have a minimum 25-day entitlement (irrespective of attendance). This minimum entitlement is then extended (automatically) in line with age and length of effective service. On top of this, civil service employees may also enjoy an additional holiday entitlement by way of a performance bonus.

Nuno Pais Gomes
npg@servulo.com

HARMONIZATION OF MEDICINAL PRODUCTS AND MEDICINAL PRODUCTS FROM THE PAST: A PROPOS OF THE GENERICS UK JUDGEMENT, OF 18 JUNE

In the late seventies, the Court of Justice gave a great boost to the common market when it asserted the principle of mutual recognition of legislations, in the judgement known as the *Cassis de Dijon*. Both before and after, community legislation has made a significant effort, in the most diverse fields, and even in those most sensitive or difficult, to promote mutual recognition and to facilitate cross-border operations by companies, making common cause also with the modern concern for *better regulation.*

In the field of medicinal products, in a process dating back to the sixties but which really took off a decade later, the Community gradually adopted harmonized procedures for recognition of marketing authorizations which involved intervention by all the member States involved, in order to assure public health, but also reflecting the concern with facilitating the free movement of medicinal products and simplification of administrative and technical procedures.

To cut a long story short, the European Community has, since 2005, four main procedures for marketing authorizations for medicinal products for human use: centralized procedures (where the authorization is issued by the Commission itself), mutual

"The Court of Justice as taken the side of the concerns expressed by various member States, to the effect of limiting the mandatory nature of mutual recognition of authorizations to the introduction of medicinal products in national markets of other member States."

recognition, decentralized and national procedures (where the marketing authorization is always granted by the national authorities, in the case of Portugal, by INFARMED, I.P.).
With the essential legislative framework in place, the Court of Justice has busied itself with guaranteeing the enforcement of the legislation approved at the same time as setting the boundaries for harmonization.

This then was the background for the important Generics UK ruling rendered on 18 June 2009, in which the Court of Justice set a new threshold, taking the side of the concerns expressed by various member States in the course of the recent legislative process (the so called Review 2001), to the effect of limiting the mandatory nature of mutual recognition of authorizations issued by any of the other 26 member States to cases where these authorizations were granted in accordance with the applicable community law.

The implication of this new case law is obvious. Whilst the Court of Justice recently pointed out (in the Synthon judgement, of 16 October 2008) that a member State may only prevent the recognition of the decision of another member State on the basis of reasons provided for in the Directive (and that failure to comply with the rule contained in Article 28 of Directive 2001/83, in its current wording, would render the State civilly liable), it has now proclaimed, in what only looks like a retreat, that a member State is only required to consider as a reference medicinal product a medicinal product which has been authorized in another member State under community law and in accordance with the requirements laid down by the community law in force at that time. So in the case of Portugal, a decision of this type could affect the medicinal products which have marketing authorizations dating from before 1986 and for which renewal has not been obtained from INFARMED. I.P. under the harmonized provisions of community law.

Miguel Gorjão Henriques
mgh@servulo.com

INSTITUTIONAL REBRANDING AND THE FINANCIAL STABILITY BOARD

A warm welcome is clearly in order for the decision adopted at the G-20 summit to establish the Financial Stability Board, with a mission to coordinate, advise and liaise with financial authorities on issues relating to economic and financial risks with an international impact. However, it is as well to be circumspect in assessing what real effect this political decision will have.
In reality, the agreement on principles reached on 2 April 2009 may fall short of tackling the underlying shortcomings in the international financial architecture: the lack of international decision making powers and a fragmented institutional structure. The financial markets are now global, but supervisory authorities exist only at the national level. The G-20 failed to address this discrepancy, choosing instead to assign a mere coordinating role to the Board chaired by Mario Draghi. In other words, the Financial Stability Board was not granted formal

"The creation of the FEC should have been carried along with streamlined international decision-making structures, so as to be quicker off the mark in emergency situations."

powers of regulation or oversight. In the measured language of the G-20's final document, the Board will only "address vulnerabilities", "promote coordination", "manage contingency planning", "advise", "review" and "collaborate". At the very most, the Board is called on to "set guidelines", but only for the supervisory colleges.

As for the design of the international financial architecture, there are clearly too many international organizations and standard setters in this area. Will this revamped body have the clout to help shape the workings and guidelines of the Basel Committee, the Bank of International Settlements, the FATF, the European Commission, the Committee of European Banking Supervisors, the European Banking Committee, IOSCO, the CESR, the Committee of Payment and Settlement Systems and the European Securities Committee? The new Board could only hope to do so if the international decision-making structures were streamlined, so as to be quicker off the mark in emergency situations. But this has not been done. All the same, we should not be too hasty to dismiss the merits of the initiative, as a step fundamentally in the right direction. It remains to be seen how effective the Financial Stability Board can be in its coordinating role, especially on transversal issues affecting more than one financial sub-sector, and whether it might prove to be the embryo for a body with broader powers, to be created in future.

Implementing the decisions adopted by the G-20, we will now see a process led by finance ministers, and involving the international financial industry and respective bodies. It is impossible to estimate, at this time, how long this will take, what resistance will be encountered and what concrete results will be achieved during this next stage. The guidelines emerging from the London meeting are not therefore the end of a regulatory process designed to rehabilitate the world financial system, and not even the beginning of the end. But, in view of the positive aspects they entail, they are at least the end of the beginning.

Paulo Câmara
pc@servulo.com

THE PROCEDURE ESTABLISHED IN ARTICLE 129 OF THE PERSONAL INCOME TAX CODE AND ACCESS TO LAW

Official Circular no. 20126, of 11 March 2009, of the Directorate of Personal Income Tax (IRC) Services, has clarified the understanding of the tax authorities in relation to the procedure for proof of the price effectively paid for the transfer of property, regulated in Article 129 of the Personal Income Tax Code (CIRC).
This procedure has to be used in order to avoid the correction provided for in Article 58-A.2 of the CIRC, which states that the amount to be considered (by both vendor and purchaser) in determining taxable profit for income tax purposes should be the fiscal asset value, whenever the price stated in the contract is lower than the definitive fiscal asset value of the property as fixed under the terms of the Municipal Property Tax Code.
Judicial contestation of the tax assessment resulting from corrections made through application of Article 58-A.2 of the CIRC also requires the tax payer to apply first to initiate this procedure, without the possibility of a non-judicial request for reconsideration.
Interpreting Article 129.6 of the CIRC, the tax authorities have now stated, in this Official Circular, that their powers of access to the banking information of the applicant and of his administrators or managers, in relation to the period when the transfer took place, are a precondition for the procedure and that "with a view to initiating the procedure, the parties concerned should attach to the application the documents authorizing the tax authorities to access not only their own bank accounts, but also those of their administrators and managers", adding that "express waiver of banking secrecy is not therefore a faculty to be exercised by the tax authorities at their discretion only when doubts are raised as to the existence of abnormal market conditions which led to the setting of a price for the property transferred lower than the fiscal asset value".

This requirement that authorization from administrators and managers, for access to personal banking information, be attached to the application for initiating a procedure raises serious doubts as to its proportionality and also as to whether it is consistent with the constitutional principle of access to law and effective jurisdictional protection. In effect, notwithstanding that we could also question whether this access to banking information is compatible with the right of privacy, particularly as concerns the personal information of administrators and managers, there is no doubt that the fact that the opening of this procedure is conditional on the tax payer obtaining authorization from third parties for access to their personal banking information appears to constitute a disproportionate imposition on the exercise of his rights in the light of the interests to be safeguarded. Even if such third party had a special relationship with the tax payer, the provision of such authorization is not something at the disposal of the latter, and could also act as a deterrent to the use of this procedure.

We should recall that restrictions on rights, freedoms and guarantee should "be limited to what is necessary to safeguard other constitutionally protected rights or interests" (cfr. Article 18.2 of the Constitution of the Portuguese Republic). As Vieira de Andrade has written, "a restriction on a fundamental right [is only deemed legitimate] when imposed to the extent necessary, adequate and proportional in order to realize/protect the conflicting good" (cf. *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, 3rd ed., Almedina, 2004, pp. 299 et seq.). It is therefore difficult to consider as reasonable or proportional this requirement in the procedure for proving the price paid in the transfer of property, when, even in cases where there are signs that a fiscal crime has been committed, the rule is that access by the tax authorities to the banking information of family members or third parties in a special relationship with the tax payer requires express judicial authorization, after a hearing of the party in question (cf. Article 63-B.8 of the General Taxation Law).

"In the procedure for proving the price paid in the transfer of property, the requirement that authorization for access to personal banking information raises serious doubts as to its proportionality and also as to whether it is consistent with the constitutional principle."

In addition, as the right to judicial review of the assessment resulting from the corrections resulting from application of Article 58-A.2 of the CIRC is dependent on the prior use of the procedure provided for in Article 129 of the CIRC, the setting of access by the tax authorities to banking information as an essential condition for initiating the procedure and the corresponding requirement that the tax payer obtain authorization from third parties for this purpose amounts to an inadmissible limitation of the constitutional principle of access to law and to effective jurisdictional protection.

It may therefore follow that the acts of assessment resulting from the corrections made by the tax authorities under Article 58-A.2 of the CIRC are unlawful, when these acts result from decisions of rejection rendered in the procedure provided for in Article 129 of the CIRC on the grounds of failure by the tax payer to attach authorization from administrators or managers for access to their personal banking information.

Ana Afonso de Almeida
aaa@servulo.com