Corruption in the fields of public procurement contracts: the example of French and Greek public procurement criminal law

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The Problem of Lack of Morality in Public Sector

The economic crisis in Europe after 2008 contributed substantially to rethink the structure of public economy, the resources and the expenses of the member states. Besides, the causes of this crisis are rather institutional than purely economic, mostly relevant to moral problems of each state, such as corruption, lack of transparency and waste of public money. This constant problem in Greece has also been of considerable concern to certain recent publications of Professor Courakis.[1]

Many different forms of anti-competitive practice, such as agreements prohibited by public procurement law, predatory pricing, abuse of dominant position, are closely associated to criminal offences, such as obstructing of public tender procedures, corruption, fraud, even money laundering and misappropriation. The usual practice of illegal bribes received by political authorities in exchange for their tolerance complicates even more the problem and the research of an effective solution seems rather an illusion.

[1] N. Courakis. 'Confronting corruption in Greece', in *The Art of Crime*, English internet edition (www.theartofcrime.gr), issue 3, May 2011. 28; 'Anti-corruption efforts in Greece: between law in books and law in action', in *The Art of Crime*, English internet edition (www.theartofcrime.gr), issue 7, July 2015. 5 31.

The Significance of Public Contracts in the Fields of Corruption in Public Sector

According to European Union's statistics, each year, more than 250,000 public authorities in the EU spend around 14% of GDP on purchasing services.[2] This percentage, according to OECD, corresponds to an amount around US$9.5 trillion of public money spent each year by governments procuring merchandises and services for their citizens.[3] If these numbers are apparently significant for the national budget of each member state as well as for the European policy regarding the public procurement in the European market, the rate of corruption is rather terrifying. The numbers speak for themselves. More precisely, OECD estimates that corruption ranges between 20-25% of national procurement budgets,[4] an extremely high percentage considering that this money coming from unbearable legal taxes are becoming illegal bribes instead of public services.

The Role of European Law

The European Union, visualizing the implementation of a unique European market of merchandises, capitals and services, has already realized that the consolidations of public procurement procedures at the national level are the essential step in order to achieve this. Therefore, the construction of a stable framework of tendering rules, inspired from the principals of transparency and equity between candidates.[5]

[2] Source : http://europa.eu/youreurope/business/public-tenders/rules-procedures/index_en.htm

[3] Source: https://oecdinsights.org/2015/03/27/transparency-in-public-procurement-moving-away-from-the-abstract/

[4] *Ibid*.

[5] Considering the efforts of the European institutions in the fields of public procurement in public contracts, it could be useful to classify them into the following four categories, by chronological order:

i. Directive 77/62/EC amended by the directive 80/767/EC and directive 88/295/EC, considered as the first effort of the European community to construct the framework of public procurement procedures in order to establish the European market;

Nowadays, it is obvious that the vast majority of the public contracts – the most significant for public economy due to their value over the threshold set by the Directives- is now regulated by the European law,[6] providing effective measures such as different procurement procedures depending to each case (open procedure, negotiation etc..), digital publication (e- procurement) and publication in the *Official Journal of the European Union*, as well as objective selection based on objective award criteria, moderating the financial criterion of the lowest price bytaking into account considerations related to public interest (social and environmental considerations, ecolabels etc.). Defining by these means the award of "the most economically advantageous tender",[7] the European secondary law requires the respect from the member states of a transparent and objective procedure *ex ante*, implicating in the meantime a control *ex post* concerning the respect of the anti-trust law of the European Union (state aids etc.). However, the role of the European law includes no criminal sanctions. From the administrative

ii. Directive 2001/78/EC of 13 September 2001 directive 97/52/CE) and 93/38/CE (already amended by the directive 98/4/EC);

iii. Directives 2005/51/EC of 7 September 2005 and 2005/75/EC of 16 November 2005 modifying the directives 2004/18/EC et 2004/17/EC and their annexes, concerning the public procurement process in the fields of the European market;

iv. Directive 2007/24/EC of 23 May 2007 abrogating the directive 71/304/EC removing the existing legal restrictions freedom to provide services, in the fields of public procurement contracts considering public works and on the award of public works contracts to contractors acting through agencies or branches; v. Directive 2014/24/EU of 26 February 2014 considering public procurement contracts providing works, merchandises and services, directive 2014/25/EU considering the ancient "excluded sectors" of energy, telecommunications etc. and directive 2014/23/EU considering the concession contracts.

[6] However, typically it is considered as a two-tier law system: the public contracts as a whole are subjected to the principals inspired from the texts of European treaties (transparency, equity, free circulation of merchandises, capitals and services), when the contracts of the most high value and consequently more significant for the national budget, are strictly regulated by the texts of the EU public procurement directives of 26 February 2014.

[7] Art. 67 Directive 2014/24/EU.

law perspective, the pre- and post- contractual remedies provided to any person with legitimate interest to act (unselected candidates as well as users of public services) by the Directive 2007/66/ EC, have to be considered as the most efficient legal instrument aiming to control any lack of transparency and impartiality concerning the award of the contract. However, it is rather regrettable to confirm the limited potentials of sanctioning the public authorities contributing against the fight of corruption in the public sector. Consequently, the qualification of anticompetitive behaviors as criminal offences and the establishment of an association between them, weights upon the member states, which remain competent.

The Examples of French and Greek National Law

If there's an un doubtable interest for the sector of public law, the contribution of criminal law becomes necessary, considering the strong link between protection of public procurement and criminal justice. Anticompetitive behaviors are more likely to be associated to the offence of favoritism and the offence of corruption (active and passive). In order to explain this association, the reference to the examples of the criminal law of two member states (France and Greece), it is considered to be useful as well as representative of the current situation in criminal justice in the fields of public procurement.[8]

[8] In the fields of administrative law, it is noteworthy that the European directives of 26 February 2014 concerning the public procurement, are transposed in French law by order (*ordonnance*) n° 2015-899 of 23 July 2015 (public procurement contracts concerning works, supplies and services) and n° 2016-65 of 29 January 2016 (concession contracts), as well as in Greek law by law n° 4412/2016 (public procurement contracts concerning works, supplies and services) and 4413/2016 (concession contracts) of 10 August 2016. Cf. also the decision of the Assembly of French Council of the State (Conseil d'État) anticipating this directive, of 16 juill. 2007, n° 291545, *Société Tropic travaux signalisation*, *Lebon* p. 360, concl. Casas D.; *AJDA* 2007. 1577, chron. Lenica F. and Boucher J.; *ibid*. 1497, obs. Braconnier S.; *ibid*. 1777, obs Woehrling J.-M.; *D.* 2007. 2500, note Capitant D.; *RDI* 2007. 429, obs. Dreyfus J.-D.; *ibid*. 2008. 42, obs. Noguellou R.; *ibid*. 2009. 246, obs. Noguellou R.; *RFDA* 2007. 696, concl. D. Casas; *ibid*. 917, study Moderne F.; *ibid*. 923, note Pouyaud D. *ibid*. 935, study Canedo-Paris M.; *RJEP* 2007. 327, note Delvolvé P.; *RTD* civ.

1. *The French criminal law of public procurement*

As regards the French criminal law of public procurement existing since 1810, the offence of favoritism, often associated to anticompetitive behaviors, is set down in the article 432-14 of the French Criminal Code.[9] According to the text of the code, the offence considers any granting of unjustified advantages likely to provoke distortions to the competition by favoring certain candidates. The example of illegal state aids prohibited by the article 107 of the Treaty on the Functioning of the European Union seems to be covered by this article.[10]

In addition, it should be mentioned the offence of corruption, characterized as a double- faced offence (*délit à double face*), once it covers the case of passive corruption as well as active corruption. The first type of offence considers the case of public authorities accepting been rewarded in order to confer an advantage or even sign a contract of public procurement as part of accomplishing their mission. On the other side, active corruption is identified as committed by entrepreneurs aspiring to sign a contract. The two types of the offence of corruption are often related to the trading influence, namely to the mediation of people having the authority to interfere and determine the result of the competitive procedure.

In these terms, the recently modified public procurement criminal law provides specific financial penalties as well as imprisonment,[11] without excluding the possibility of complementary penalties – listed restrictively.[12]

2007. 531, obs. Deumier P. ; *RTD eur.* 2008. 835, chron. Ritleng D., Bouveresse A. and Kovar J.-P.

[9] Cabanes Arnaud-Gesta Amaury, 'Corruption in public procurement' ('Corruption dans la commande publique'), *Jurisclasseur Encyclopédies – Protection sociale traité*, section 35 (available at http :www.lexis360.fr- last update: 28 April 2016).

[10] c.f. art. 432-11 of the French Criminal Code As modified by the article 6 of the law n° 2013-1117 of 6 December 2013, concerning the fight against tax fraud and serious economic and financial crime.

[11] Same penalties as the ancient criminal code: 10 years of imprisonment and a penalty of one million euros.

[12] Cass. Crim., 19 September 2007, n° 2007-041-204. c.f. complementary penal-

2. *The Greek criminal law of public procurement*

The case of Greek criminal law of public procurement seems to be very similar to the French system, providing also the offence of passive and active corruption and influence trade.[13] However, the case of Greek public procurement incorporates the "black hole" of the national budget, considering that corruption is firmly rooted to Greek practice of public procurement if not quasi- institutional. It is rather disappointing the fact that the recent Greek history of public procurement is rich of examples of corruption: if the tolerance of the competent authorities as well as the use of a mathematical formula calculating the award in the early eighties seems to be the most common practice of cartels, the lack of institutional morality became more than obvious the latest years, from the public works related to the hosting of Olympic Games of 2004, to the most recently revealed such as the cases of deficient submariners, Siemens, Man or those concerning medicines and medical supplies, not to mention the pending decision of the Greek Commission of Fair Trade concerning the horizontal cartels on the fields of public works. The last years of recession and despite the national efforts aiming the transparency and the decrease of squandering of public money, contributed to bring into light the lack of institutions, impartiality and neutrality. However, we have to mention the undeniable contribution of two cases concerned as laying the foundations towards transparency: the case of "Major shareholder" concerning the incompatibility between the capacity of the shareholder of medias and the contract holder of a public contract.[14]

ties provided by the art. L-242-6 of the French Commercial Code.

[13] Art. 159, 235 § 1 and 237 §1 of the Greek Criminal Code.For further analysis cf. Androulakis I. "The criminal treatment of cartels in public tenders", *Poinika Chronika*- Studies n° 11, Sakkoulas, 2008

[14] Cf. the decision of the CJEC, 16 December 2008, aff. C-213/07, *Michaniki AE v; Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias.* For further analysis cf. Gerontas Ap., "The judicial adventure of the major shareholder", («Η νομολογιακή περιπέτεια του βασικού μετόχου»), *To Syntagma,* 2008, p. 942; See also Degleris P., *Corruption and public contracts- The legislative and judicial adventure of the "Major Shareholder" and the "Certificate of Transparency" (Διαφθορά και δημόσιες συμβά-*

The Complexity of the Suppressive Sanctions

First of all, it has to be confirmed that the issue of penalties and sanctions considering anticompetitive behaviors identified as criminal offences, seems to be a matter of a high complexity, mostly due to its double nature, on the frontiers between public and criminal law. The accumulation of administrative fines and financial penalties provided by the criminal code often raises problems, related to the calculation of the final amount.

However, an emphasis should be placed on the effectiveness and the efficiency of theses penalties. Considering in the first place their purpose, the fight against corruption in the public sector and the protection of the result of the competitive procedure as well as the protection of interests of candidates aspiring to achieve contracting with public administration, the current system raises doubts. The accumulation of competences of independent administrative authorities and criminal jurisdictions seem to complicate and postpone the procedure of identification of the anticompetitive behavior.[15] Furthermore, the detailed technicality of administrative procedures and competences concerning public contracts complicates even more the identification of anticompetitive matters and, consequently, their association with criminal offences. Even in the case of French public procurement criminal law, which appears to be more mature than others due to the long tradition of France in contractual activity of the public authorities, the effective appliance of the legal provisions related to the offence of favoritism and corruption seem to be rather seldom applied in practice.[16]

σεις- Η νομοθετική και δικαστική περιπέτεια του «Βασικού Μετόχου» και του «Πιστοποιητικού Διαφάνειας»), Nomiki Vivliothiki, Athens, 2012.

[15] See also *Report of Evaluation of Penalties in the Fields of Anticompetitive Practices (Rapport sur l'appréciation de la sanction en matière de pratiques anticoncurrentielles)* available at: http://www.economie.gouv.fr/files/finances/services/rap10/100920rapconcurrence.pdf

[16] Cabanes Arnaud-Gesta Amaury, 'Corruption in public procurement' ('Corruption dans la commande publique'), *op.cit.*

The Essential Preventive Measure of Institutional Enforcement

These issues demand subsequently a concerted effort in order not to legitimate the obvious problems, but to resolve them efficiently. According to statistics, 75% of European parliaments have poorly enforced or insufficient mechanisms of integrity, as confirmed by the perception of the 74% of Europeans who consider that corruption is a growing problem in their country.[17]

However, according to an excellent proverb, prevention is better than cure. Considering that the implication of public authorities leads inevitably to supplementary difficulties in revealing the anticompetitive and criminal matters, an effective solution should be sought in an institutional enforcement of transparency and protection of free and fair competition, including rational legislative solutions, as well as effective institutions, functioning unaffected by changes of political authorities. In other words, the solutions to be found implicate a number of structural changes and a consolidation of the transparency and the legitimacy of each state's function.

These conclusions seem rather too general and cliché than practical solutions. The truth hiding behind them is the fact that no legal system can conserve a wasteful state which cannot provide to its people the services and the merchandises it is supposed to. To this purpose contribute not only the modernization of public structures and the opening of procedures to public procurement by consolidating the system and prevent the money drain of the public sector. The example of Greece may be the starting point.

[17]Rouhette Thomas-Coslin Christelle , 'Money, authority and politics: the risks of corruption in Europe' ('Argent, pouvoir et politique: les risques de corruption en Europe') report published by Transparency International on 6 une 2012, *A. J. Pénal*, 2/2013, p. 83.

Indicative Bibliography

Androulakis I. "The criminal treatment of cartels in public tenders", *Poinika Chronika*- Studies n° 11, Sakkoulas, 2008.

Arrowsmith, Sue, *The Law of Public and Utilities Procurement*, Sweet & Maxwell, London, 2010 (pp. cxxxviii-1547).

Cabanes, Arnaud-Gesta Amaury, 'Corruption in public procurement' ('Corruption dans la commande publique'), *Jurisclasseur Encyclopédies – Protection sociale traité*, section 35 (available at http :http://www.lexis360.fr-/ (last update: 28 April 2016).

Courakis, Nestor. 'Anti-corruption efforts in Greece: between law in books and law in action', in *The Art of Crime*, English internet edition (www.theartofcrime.gr), issue 7, July 2015. 5 31.

Courakis, Nestor. 'Confronting corruption in Greece', in *The Art of Crime*, English internet edition (www.theartofcrime.gr), issue 3, May 2011. 28.

Degleris P., *Corruption and public contracts- The legislative and judicial adventure of the "Major Shareholder" and the "Certificate of Transparency"* (Διαφθορά και δημόσιες συμβάσεις- Η νομοθετική και δικαστική περιπέτεια του «Βασικού Μετόχου» και του «Πιστοποιητικού Διαφάνειας»), Nomiki Vivliothiki, Athens, 2012.

Dossier 'The fight against corruption' ('La lutte contre la corruption'), *A. J. penal* n° 2/2013

Gerontas Ap., *"The judicial adventure of the major shareholder"*, («Η νομολογιακή περιπέτεια του βασικού μετόχου»), To Syntagma, 2008, p. 942

OECD, *Implementing the OECD Principles for Integrity in Public Procurement: Progress since 2008*, OECD Publishing, 2013, Paris (p. 136).

Proceedings of the 6th Conference of the Association of Greek Penologists, 'The criminal management of corruption, possibilities and limits' (Πρακτικά 6ου Συνεδρίου Ένωσης Ελλήνων Ποινικολόγων, 'Η ποινική διαχείριση της δωροδοκίας, δυνατότητες και όρια'), Nomiki Vivliothiki, 2013.

Richer, Laurent, *L'Europe des Marchés Publics: marchés publics et conces-*

sions en droit communautaire, Collection Droit des affaires, LGDJ, Paris, 2009 (393 p.).

Rouhette, Thomas-Coslin Christelle, 'Money, authority and politics: the risks of corruption in Europe' ('Argent, pouvoir et politique: les risques de corruption en Europe') report published by Transparency International on 6 juin 2012, AJ Pénal, 2/2013, p. 83.

Williams-Elegbe, Sope, 'Fighting corruption in public procurement: a comparative analysis of disqualification or debarment measures', coll. *Studies in International Law* vol. 42, (Oxford/Portland, OR: Hart Publishing, 2012), (pp. xlix-306).

Yannakopoulos, C., 'The protection of public procurement when executing administrative contracts' (Η προστασία του ελεύθερου ανταγωνισμού κατά την εκτέλεσης των διοικητικών συμβάσεων), coll. *Library of Public Law* vol. n° 19, Sakkoulas Publishing, Athens-Komotini, 2006 (XXIII + 845 p.).