

THE NEED TO AVOID 'EXCEPTIONS' IN GOVERNMENT POLICY - SERRA LOPES CORTES MARTINS & ASSOCIADOS

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The unfolding global financial crisis is prompting governments to circumvent established competition or procedural rules leaving the potential for continuing administrative confusion, say Miguel Pena Machete and Claudio Monteiro of Serra Lopes Cortes Martins & Associados.

Governments attempts to "shake"

their economies with an injection of capital may not only be contrary to many fundamental competition rules, but evidence also perhaps that many administrative existing policies do not function properly, believe Miguel Pena Machete and Claudio Monteiro, partners at Serra Lopes Cortes Martins & Associados.

"It is curious that while we are now seeing a demand for more regulation of private businesses at the same time administrations are looking to lift the rules that apply to them, in order to achieve a more immediate economic impact," says Pena Machete.

The problem with such an approach, believes Monteiro, is that the line between what is the normal rule and what is the exception may become easily blurred. "Even where an exception is justified, the message that is unfortunately sent out is that the normal rules do not work and that there is validity in being able to circumvent the normal legal system."

"Notable, they suggest, is the recent Portuguese government's intention to create 'exceptions to the new Public Contracts Code, launched in July last year. Despite taking two years to write, ratify and come into effect, the government now believes that the value threshold above which bids for public works must go out to public tender shall be raised from €150,000 to €5 million."

"This infers that the original rules were not sufficiently workable to enable the tax payer to get the best value contracts in the most efficient manner, and that ultimately they restrict the flow of business," says Monteiro. "In the meantime the very issue the new rules were intended to encourage – the transparency of municipalities tendering processes and increased efficiency of decision-making – have been ignored."

The main driver of construction and infrastructure investment in Portugal is the central and regional government, so transparency is hugely important to the competitiveness of the national economy, adds Pena Machete.

"We have seen special rules applied for public works in specific circumstances in the past, such as the development of the Expo 98 site, and more recently in the ability to speed-up planning rules for projects of national interest (PIN) – notably for economically significant tourist developments – but already we have PIN+ procedures. The publication of an exception infers that the old rules will be reapplied, but with the current crisis who knows when that will be and who will decide?"

It is important to realise however that efficiency is not merely a legal issue, and that there is a tremendous gap between the expectations and operational efficiency of private and public enterprise in Portugal, says Monteiro.

"Clearly many of our normal bureaucratic rules and procedures are too onerous and the administrations do not function well. It is ironic that the private markets are deemed too efficient, while if an administrative procedure takes less time than expected the suspicion is that payments have been made."

There is a clear demand to change the rules, to make processes and investment more efficient, but not always to do so only ever on an exceptional basis.

"Portugal's new Contracts Code is arguably now more complicated and more uncertain than its predecessor – more statutory law does not mean more efficiency.

In fact more illegality may result as operators are tempted to avoid the bureaucracy associated with it," says Pena Machete.

Ultimately the question is one of public and private confidence. If investors are willing to invest in Portugal they have to accept that the procedural hurdles that confront them may take years to overcome, concludes Monteiro.

"The bigger the project the more complicated the processes may be. On the other hand, if a project is 'so' big there is always the possibility that an 'exception' may be applied."