Revista catalana de dret públic #56

www.rcdp.cat

PUBLIC PROCUREMENT FROM 2007 TO 2017: TIMES OF CRISIS, TIMES OF CHANGE*

Xavier Padrós**

Abstract

This article offers an analysis of the impacts caused by the economic crisis on different areas of government agency procurement over the ten years in which the 2007 Law on Public Sector Contracts was in force. This crisis, coupled with the growing influence of European contracting law, has contributed to a revision of traditional concepts and standards, a progressive changing of the model and the development of a new agenda of priorities in public procurement. Within this new framework, the need to move toward greater professionalisation of public managers, and the reinforcement of the governance mechanisms that enable guarantees of integrity and transparency in the pertinent organisations and decision-making processes, have been especially noteworthy. On another note, though the article does not aim to study the new 2017 Law on Public Sector Contracts, which actually marks the end of the period analysed, reference is made to it to highlight the key changes it will bring about as concerns the regulation that has been in force over the prior decade.

Key words: public procurement; economic crisis; transparency; integrity; organisation; governance.

LA CONTRACTACIÓ PÚBLICA ENTRE 2007 I 2017: TEMPS DE CRISI, TEMPS DE CANVIS

Resum

Aquest article analitza els efectes de la crisi econòmica en relació amb diferents aspectes de la contractació de les administracions públiques al llarg de la dècada que coincideix amb el període de vigència de la Llei de contractes del sector públic de l'any 2007. Aquesta crisi, unida a la influència cada cop més decisiva del dret europeu de contractes, ha contribuït a la revisió de conceptes i regles tradicionals, a un progressiu canvi de model i a la confecció d'una nova agenda de prioritats en el camp de la contractació pública, dins la qual destaquen de manera principal la necessitat d'avançar cap a una major professionalització dels gestors públics i al reforçament dels mecanismes de governança que permetin garantir la integritat i la transparència en l'organització i en els processos de presa de decisions en la matèria. D'altra banda, tot i que no constitueix l'objecte d'aquest treball l'anàlisi de la nova LCSP del 2017, que, de fet, posa fi a l'etapa estudiada, s'hi efectuen també les referències necessàries per indicar els principals canvis que ha introduït respecte de la regulació que ha estat vigent durant la dècada precedent.

Paraules clau: contractació pública; crisi econòmica; transparència; integritat; organització; governança.

---

* This article is a translation of an original version in Catalan.

** Xavier Padrós, professor of Constitutional Law at the University of Barcelona, Government of Catalonia attorney and head of legal studies at the Government of Catalonia's Legal Office. Department of Political Science, Constitutional Law and Philosophy of Law, UB School of Law, Avinguda Diagonal, 684, 08034 Barcelona. xpadros@ub.edu.

Article received: 28.02.2018. Blind review: 23.03.2018 and 30.03.2018. Final version accepted: 20.04.2018.

Recommended citation: Padrós, Xavier. "Public procurement from 2007 to 2017: times of crisis, times of change". *Revista Catalana de Dret Públic*, Issue 56 (June 2018), p. 78-104. DOI: 10.2436/rcdp.i56.2018.3113.

Summary

1 Introduction: 2007-2017, a decade of regulatory modifications

Law 30/2007, of 30 October, on public sector contracts, and Law 31/2007, also of 30 October, on contracting procedures in the water, energy, transport and postal service sectors, were published in the *Official State Gazette* (hereafter BOE) no. 261 on 31 October 2007. Neither of the two laws so much as mentioned the economic crisis that would begin to permeate the contractual activity of all Spanish government agencies just one year thereafter.

Ten years later, Law 9/2017, of 8 November, on public sector contracts, by which Directive 2014/23/EU and Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 were transposed into the Spanish legal system, was published in BOE no. 272 on 9 November 2017.[1] The new Law does not mention the crisis suffered either. However, this omission is not a phenomenon exclusive to Spanish legislation, as the two Directives mentioned above do not contain any mention of the crisis themselves. And yet, the effects of the financial crisis on the field of public procurement have been and still are evident, and not only in quantitative terms. They have had a marked impact on some of the essential elements of the contracting model, changed numerous rules of this model and even overturned certain points of classic dogma in this subject matter.

As stated previously, a few months after the approval of the 2007 Law on Public Sector Contracts (LCSP), public procurement began to feel the effects of tensions and problems that the just-configured regulatory framework was unable to solve, as it had still been fundamentally conceived from the perspective of normality in the economic cycle, and had just entered an initial warm-up phase.[2]

A look back on the repeated changes and adaptations of this regulatory framework speaks to the significant instability of a decade that can be divided into two stages: the first could be placed between the approval of the LCSP, in October 2007, and Royal Legislative Decree 3/2011, of 14 November, that approved the Recast Text of the aforementioned Law (TRLCSP) one week before the general elections of 20 November, which the Popular Party won with absolute majority. The second period could be counted from November 2011 until to the approval of the new LCSP, in November 2017.

In the initial years, there were not many changes in the specific realm of procurement, beyond approval of Royal Decree 817/2009, of 8 May, which partially implemented the LCSP, especially concerning business classification, the various public registries (i.e. the Registro Oficial de Licitadores y Empresas Clasificadas del Estado, or the Spanish Official Register of Bidders and Classified Companies) and the procurement boards and the intervention of expert committees for the awards, with a predominance of criteria based on value judgments. Notwithstanding this, by the end of 2008, and coinciding with the beginning of the crisis and the first attempts to recover and jump-start the economy while also boosting employment, the Fondo Estatal de Inversión Local (State Fund for Local Investment), through Royal Decree-Law 9/2008, of 28 November, was created, followed almost a year later, through Royal Decree-Law 13/2009, of 26 October, by the Fondo Estatal para el Empleo y la Sostenibilidad Local (State Fund for Local Employment and Sustainability). The former fund was endowed with 8 billion euros, earmarked entirely to finance public works at the local level; the latter, endowed with 5 billion euros, had a broader aim, and included other kinds of contracts (supply, services, etc.). In both regulations, certain specialties are provided for in the procurement that local councils were to engage in. This was done with a view to favouring the hiring and employment of the long-term unemployed when it came to performance of the contract.[3] Between one and the other, a new Decree-Law

1 Citation of the Directives in the title of the Law does not follow the denomination used by European Community institutions, which would be Directives 2014/23/EU and 2014/24/EU of the European Parliament and of the Council of 26 February 2014. In any case, directives cited in this article from now onward will be quoted with abbreviated reference: i.e., Directive 2014/24/EU.

2 Padrós, Xavier. "La contratación pública en tiempos de crisis económica: medidas, proyectos, reformas". In: Font i Llovet, Tomàs; Galán Galán, Alfredo (dir.). *Anuario del Gobierno Local 2009: La Directiva de Servicios. Contratación local y crisis económica. Nuevos desarrollos estatutarios*. Madrid: Fundación Democracia y Gobierno Local; Barcelona: Institut de Dret Públic, 2010, p. 187-209.

3 Regarding the two Decree-Laws (9/2008 and 13/2009), see Gómez-Ferrer Morant, Rafael. "La contratación local en tiempos de crisis económica". In: Font i Llovet, Tomàs; Galán Galán, Alfredo (dir.). *Anuario del Gobierno Local 2009: La Directiva de Servicios. Contratación local y crisis económica. Nuevos desarrollos estatutarios.* Madrid: Fundación Democracia y Gobierno Local; Barcelona: Institut de Dret Públic, 2010, p.163-186, especially p. 180-185. Regarding the same provisions and also later ones related with the payment to suppliers of local organisations, see Moreno Molina, José Antonio. "Crisis y contratación local

(5/2009, of 24 April, on exceptional, urgent measures to facilitate local councils' restructuring of debts payable to companies and self-employed professionals) called attention to the harmful effects on companies' liquidity caused by delayed payments of the obligations contracted by local governments.

In 2010, two new decree-laws brought about the approval of new measures: Decree-Law 6/2010, of 9 April, to facilitate economic recovery and employment, which included certain changes in contract laws to facilitate the continuity of the Government's relationships with contractors even if they were in bankruptcy, and Decree-Law 8/2010, of 20 May, for reduction of the public deficit.

That same year saw ratification of Law 15/2010, of 5 July, amending Law 3/2004, of 29 December, which established measures on combating late payment in commercial transactions. This will be discussed in greater depth further on. Just one month later, although with notable delay, the repeated European Community demands regarding the need to transpose the directives related to appeals were finally met, with approval of Law 34/2010, of 5 August,[4] which provided for creation of the Tribunal Administrativo Central de Recursos Contractuales (Central Administrative Court of Contractual Appeals), and enabled the creation of similar tribunals at autonomous community level. These courts were endowed with the authority to hear and rule on matters of special appeals for contracting affairs. Seven years on, the record of these courts' activities shows that the special appeal for contracting affairs has in fact been consolidated as a useful tool, especially to challenge decisions on awarding, but also for tender specifications or calls and decisions for prior exclusion of bidders.[5]

Even though Law 2/2011, of 4 March, on sustainable economy, was approved early the following fiscal year, before 2011 was over, and facing evidence of the failure of Royal Decree-Law 5/2009, new measures for public spending control and settlement of debts with companies and self-employed professionals contracted by local councils had to be approved. The instrument containing these measures, Royal Decree-Law 8/2011, of 1 July, expressed the Zapatero Administration's new narrative on this subject matter: the Government's non-payment of its obligations was causing a liquidity crisis in companies, and difficulties in their access to credit. This made exceptional measures necessary, essentially local councils' recourse to go into debt.

But that did not improve matters, either. In 2012, the first Rajoy Administration approved Royal Decree-Law 4/2012, of 24 February, which provided for a mechanism to finance payments to local councils' suppliers. A few days later, through a decision of the Consejo de Política Fiscal y Financiera (Fiscal and Finance Policy Council) dated 6 March 2012, it was extended to autonomous communities, and was developed by Royal Decree-Law 7/2012, of 9 March, by which the fund for financing payments to suppliers was created. Shortly thereafter, Organic Law 2/2012, of 27 April, on budgetary stability and financial sustainability, introduced the concept of the average payment period to measure the delay in payment of business debt in economic terms to facilitate control of late payments.[6]

In 2013, a number of laws with significant impacts in different areas of contracting were passed: first, Law 11/2013, of 26 July, on measures of support for entrepreneurs and stimulus for growth and job creation.[7] Later came Law 14/2013, of 27 September, in support of entrepreneurs and their internationalisation, and

desde la perspectiva de la Administración". In: Font i Llovet, Tomàs; Galán Galán, Alfredo (dir.). *Anuario del Gobierno Local 2011. Gobierno local: ¿crisis o renovación?* Madrid: Fundación Democracia y Gobierno Local; Barcelona: Institut de Dret Públic, 2012, p. 117-145, especially p. 118-123.

4 The aforementioned Law modified Law 30/2007, of 30 October, on public sector contracts; Law 31/2007, of October 30, on contracting procedures in the water, energy, transport and postal service sectors; and Law 29/1998, of July 13, regulating the contentious administrative jurisdiction for Community regulatory adaptation of the first two laws.

5 The longest data series is from the Tribunal Administrativo Central de Recursos Contractuales, which since its inception in October 2010 and until November 30 2017 had handed down 5,713 rulings, of which 516 had been challenged (less than 9% of the total) in the chamber for contentious administrative proceedings, showing parties' high degree of acceptance of the Tribunal's rulings. Of the 335 appeals concluded, 146 have confirmed the ruling of the aforementioned Tribunal Administrativo, 128 have expired or been withdrawn. The pretensions of the appellant have been totally or partially allowed in only 61 of the challenges. See: Tribunal Administrativo Central de Recursos Contractuales. *Tribunal Administrativo Central de Recursos Contractuales. Memoria de actividades. Año 2017* [online]. Madrid: Ministerio de Hacienda y Función Pública, 2018. <http://www.minhafp.gob.es/TACRC/Documentos/memoria_tacrc_2017.pdf> [consulted: May 10 2018].

6 A standardised method to calculate the average payment period was developed through Royal Decree 635/2014, of July 25.

7 This Law is the result of the processing of Royal Decree-Law 4/2013, of 22 February, on measures of support for entrepreneurs and stimulus of growth and job creation, as a draft bill after the pertinent validation..

Law 25/2013, of 28 August, for the promotion of electronic invoices and creation of an accounting registry of invoices in the public sector. Both laws brought about relevant changes over the rules of classification and solvency of companies, which will be discussed later in this article.

With Law 13/2014, of 14 July, the transformation of the Fondo para la Financiación de los Pagos a Proveedores (Fund for Financing Payments to Suppliers) was approved, cancelling the Fund created in 2012 and establishing in its place a new fund (Fondo para la Financiación de los Pagos a Proveedores 2). But at the end of the same year, by Royal Decree-Law 17/2014, of 26 December, the Fondo de Financiación de las Comunidades Autónomas (Autonomous Community Financing Fund) and the Fondo de Financiación a Entidades Locales (Local Council Financing Fund) were created, repealing the cited Law.

In 2015, Law 2/2015, of 30 March, for the deindexation of the Spanish economy, was approved. It ended the traditional price review system used for Spanish public procurement. Law 40/2015, of 1 October, on the legal system governing the public sector, was also approved. It established a few specific modifications to the system of prohibitions for contracting, new regulations on the State's in-house technical services, and certain precepts on works concessions, with the creation of the Oficina Nacional de Evaluación (Spanish National Evaluation Office). Two highly relevant regulations were approved that same year: Royal Decree 773/2015, of 28 August, which modified a number of precepts of the General LCAP Regulation, approved by Royal Decree 1098/2001, of 12 October; and Royal Decree 814/2015, of 11 September, which approved the Procedural Regulations for contractual decision review and organisation of the Tribunal Administrativo Central de Recursos Contractuales. Finally, also at the regulatory level and more recently, special mention is deserved by the approval of Royal Decree 55/2017, of 3 February, which implemented Law 2/2015, of 30 March, for the deindexation of the Spanish economy.

Over the following pages these changes, which have triggered so much instability in the regulatory framework, and the legal insecurity that comes with it, will be analysed. Attention will also be devoted to aspects that have to do with the numerous "pathologies" that have engendered the crisis, as well as the responses and solutions that have come forward, in a context of gradual transformation of the public procurement model in Spain. On another note, though the article does not aim to study the new Law on Public Sector Contracts (hereafter LCSP), which actually marks the end of the period analysed, reference is made to it to highlight the key changes it will bring about as concerns the regulation that has been in force over the prior decade.[8]

2 A contractual typology under review

The typology of government agency contracts had not undergone any major changes until the LCSP of 2007. Both the first Law to be passed in this area following Spain's 1978 Constitution – Law 13/1995, of 18 May, on contracts in the public administration (LCAP) – as well as its successive reforms, especially the one enacted through Law 53/1999, of 28 December, had kept among their main characteristics the classical distinction between administrative contracts and private contracts. In the former case, there was a further differentiation between typical or nominate administrative contracts (for works, management of public services, supply and, in a number of formulations, services)[9] and special administrative contracts. So-called "mixed" contracts rounded out the classification. These were defined in the 1995 LCAP as those that contained objects corresponding to administrative contracts of different classes.

This framework was still more or less in place in 2007 (it had undergone few modifications, essentially: elimination of the contract for "specific non-habitual work", in 1999;[10] and incorporation of the public works

8 At the time of the final draft of this article, the first comprehensive studies on the new Law 9/2017, of 8 November, were just being published. See: Gamero Casado, Eduardo; Gallego Córcoles, Isabel (dir.). *Tratado de Contratos del Sector Público*. Valencia: Tirant Lo Blanch, 2018, or Gimeno Feliú, José María (dir.). *Estudio sistemático de la Ley de Contratos del Sector Público*. Cizur Menor: Thomson Reuters Aranzadi, 2018.

9 With regard to the 1965 Law on State Contracts, Law 13/1995, of 18 May, incorporated into the typical or nominate administrative contracts the previous special technical assistance administrative contract, which it broke down in two figures (the consultancy and assistance contract and the services contract) and the "specific non-habitual work contract", also considered a special administrative contract.

10 Through Law 53/1999, of 28 December, cited.

concession contract, in 2003).[11] It would be significantly modified with the LCSP of that year, which included a new configuration of the division between administrative contracts and private contracts, which would no longer be based only on the objects of the contracts in question, but also the contracting authorities that formalise them.

Specifically, in 2007, lawmakers established that the only administrative contracts (whether typical or special) are those signed by a public administration, while private contracts are not only those having to do with the object specifically described by law,[12] but also all of those formalised by public sector bodies, organisations and entities that cannot be qualified as public administration. More changes were in store with the 2007 Law. These included the definitive elimination of the consultancy and assistance contract, incorporation of a new administrative contract called that of "public-private partnerships", a redefinition of mixed contracts (which, from that time, could include features of one or more contracts of different classes) and, lastly, specific inclusion of contracts subject to harmonised regulation (those of public-private partnerships, in any event, and those for works, concession of public works, supply and certain categories of services, of a value equal to or higher than Community thresholds) and those not subject to harmonised regulation.

Some elements of the model did not survive the crisis that would come later. Just three years later, at the behest of the European Commission, Law 2/2011, of 4 March, on sustainable economy, entirely reformed the contract modification system and, in doing so, subjected private contracts to the new, more restrictive discipline of administrative contract modification.

Ten years on, and with the new 2017 LCSP, the contract for public-private partnerships has been done away with, mostly due to its misuse (oftentimes, the only real reason for using this model were the insurmountable difficulties in securing budgetary financing), but also because of its deficient configuration as a contract meant to be typical, but conditioned to the fact that other alternative forms of procurement were not possible, and subordinated to application of the most similar nominated contract legal system.[13] Scrapped along with this was the traditional public service management contract, although a new service concession contract would enter the picture. This contract and the works concession contract will be the two models for concessions from now.[14]

With regard to these most recent changes, it must be borne in mind that a good portion of the outsourcing processes that have come about in recent years, especially in healthcare or water management, have been articulated through the public service management contract in the form of a concession, or, with greater or lesser success, through public-private partnership formulas. Some of these processes are closely linked to the budgetary crisis that the country has been through. This is the case to the degree that, beyond the much-touted virtues that private management can bring to these areas, the key reason behind some of the options chosen is none other than achieving certain budgetary savings goals, especially in expenses for the maintenance of the affected infrastructures and those of the personnel for the provision of the service. They also have to do with obtaining additional revenue, through government fees that contractor companies are obliged to pay.

Obviously, this article has neither the ambition nor the space to analyse these phenomena in detail. However, just as an example, we can refer to the numerous outsourcing formulas that have come about in the healthcare industry, whether outsourcing only healthcare management; outsourcing comprehensive management (healthcare and non-healthcare) and the construction of hospitals and infrastructures; or outsourcing non-healthcare management and the construction of hospitals and infrastructures. The processes have basically been

11 Law 13/2003, of 23 May, regulating the public works concession contract.

12 Those signed by a government agency whose purpose is financial services, artistic and literary creation and performance or spectacles included in the category of recreation, cultural and sport services, subscription to journals, periodical publications and databases, as well as other contracts different from administrative contracts.

13 For more on the problems of practical usage of this contract, see Padrós, Xavier. "Le contrat de partenariat à la lumière de l'expérience espagnole". In: Rapp, Lucien; Regourd, Serge. *Du contrat de partenariat au marché de partenariat*. Brussels: Larcier/ Bruylant, 2016, p. 307-326.

14 On this elimination and advocating the alternative of maintaining the public service management contract in the interested management, agreement and mixed-ownership company formulas, see Martínez-Alonso, José Luis. "Modificación de la Ley de Contratos del Sector Público y gestión de servicios públicos locales: propuestas y alternativas". *Revista General de Derecho Administrativo* [Madrid: Iustel], Issue 40 (October 2015) p. 1-40.

concentrated in a number of autonomous communities (Castile and León, Catalonia, Navarre, La Rioja, and especially the Balearic Islands and Madrid)[15] and it bears mention that they have been formalised, in general, through open procedures and different concession formulas, although, as some authors have stated, as in the majority of cases they are "concessions" in which the "concessionaire" does not receive the fees paid by the users of the works or services, it is likely that they should have been designed as public and private sector collaboration contracts, pursuant to Eurostat regulations.[16]

Of all the experiences launched, the one that resonated with the most impact was probably that of the six university hospitals of Madrid.[17] Based on the authorisation granted by Law 8/2012, of 28 December, on fiscal and administrative measures of the Autonomous Community of Madrid, it was proposed as a concession contract for management of a public specialised healthcare service, with a budget of just under 4.68 billion euros, and a foreseen term of 10 years, during which time the contractor companies had to pay an annual government fee for the lease of the infrastructures made available to them. The tender, conducted as an open procedure, was fraught with controversy due to irregularities in the process. For example, during the bid submission term, there were changes in the criteria for calculation of the bond that bidders were to deposit. Finally, in light of the social and political pressure that arose, and the numerous appeals lodged in the courts, the outsourcing was halted in early 2014 by the Government of the Autonomous Community of Madrid, which had originally enacted it. Obviously, this article will not examine that whole controversy. However, it is worth noting that a year later, the Constitutional Court, through Judgment 84/2015, of 30 April, confirmed the possibility included in the Autonomous Community Law to grant contracts for the management of public specialised healthcare services in the hospitals indicated, as this possible opening to private management models and accountability preserved, in any event, the public ownership of the service and was only a case of service outsourcing.[18]

Another scenario in which the administrative public service management contract has been used, also in a concession mode, was the tender through an open procedure for the construction, improvement, management and operation of the facilities making up the waterworks of the Ter-Llobregat rivers. This included the treatment, storage and transport of the water, with a planned duration of 50 years, and in which the concessionaire was to pay a contractual fee of 995.5 million euros; 298.6 of which upon contract formalisation, which allowed the Government of Catalonia to reduce its deficit for that fiscal year.[19] The judicial controversy basically had to do with the possible violation of the principles of equality and transparency in the awarding process as a consequence of the interpretation problems arising with certain contractual documents and their impact on the preparation of the offers.[20] Beyond the legal dispute, the case has been surrounded by controversy

15 For a good summary of the different processes, see: Comisión Nacional de la Competencia. *Aplicación de la Guía de Contratación y Competencia a los procesos de licitación para la provisión de la sanidad pública en España*. [online]. Madrid: Comisión Nacional de la Competencia, 2013. <https://www.cnmc.es/sites/default/files/1296474.pdf> [consulted: 9 May 2018].

16 Villar Rojas, Francisco José. "La concesión como modalidad de colaboración privada en los servicios sanitarios y sociales". *Revista de Administración Pública* [Madrid: Centro de Estudios Políticos y Constitucionales], Issue 172 (January-April 2007), p. 141-188, especially p. 157 and s., or Araujo, Alejandro. "La colaboración público-privada: entre indeterminación, flexibilidad e incertidumbre". Madrid: Instituto de Estudios Fiscales, 2013. (Documentos de Trabajo; 4-2013), especially p. 48.

17 The centres in question were the Infanta Sofía, Infanta Leonor, Infanta Cristina, Hospital del Henares, Hospital del Sureste and Hospital del Tajo.

18 See LG 7. On the other hand, the Judgement partially upheld the unconstitutionality complaint filed by over 50 senators of the Socialist parliamentary group, regarding the possibility featured in the Law itself for preferentially offering management of primary care centres to professional associations, the entirety or majority of whose membership are healthcare professionals from the Servicio Madrileño de Salud (Madrid Health Service), in the understanding that this preference contravenes basic legislation in contract subject matter (LG 6).

19 Tender announcement published in the *Official Journal of the Government of Catalonia* (DOGC) no. 6185, of 3 August, 2012 (amended, regarding the terms of presentation and opening of bids, pursuant to the announcement published in DOGC no. 6212, of 13 September, 2012).

20 Specifically, the awarding of the contract, dated 6 November 2012, was the object of an appeal filed before the Òrgan Administratiu de Recursos Contractuals of the Government of Catalonia, which ruled on 2 January 2013, and partially admitted the special appeal for contracting affairs, resulting in the exclusion of the theretofore awarded company from the procedure.

The Government of Catalonia appealed by administrative dispute procedure before the High Court of Justice of Catalonia, whose Fifth Chamber for Contentious Administrative Proceedings, with Judgment no. 390/2015 of 22 June, partially admitted the appeal to the degree in which the challenged judgment excluded the offer presented by the awarded company, but confirmed the annulment of the award agreement.

as regards the phenomenon of outsourcing. Even in 2017, there was a legal provision that, in the event that the Supreme Court confirmed (as it finally did) the sentence handed down by the High Court of Justice of Catalonia annulling the award of the water supply service contract in the upper Ter-Llobregat region, the Catalan Government would have to present to Parliament its will to recover direct management of it and a timeline of actions and measures to make it possible.[21]

In any event, the successive adaptations of the contract classification over these years reveal a certain fragility of the model, and also show how difficult it is to reconcile the complexity of certain cases of contracting with excessively rigid contract categories. This explains the increasingly successful use of mixed contracts to handle complex contracting cases, especially when such contracts come with the need to incorporate private financing formulas, as has occurred in an especially relevant way in the years of budgetary crisis. It is likely for this reason that the new 2017 LCSP, following the lead of Community directives, has progressed toward a new and more extensive regulation of the legal system applicable to the awarding of these mixed contracts, leaving behind the traditional criterion of the "most financially significant object of the contract" to determine the legal system to be applied and incorporating that of the "main object of the contract", combined with that of the separability of the objects.[22]

3 In-house technical services: exclusion or escape from contract legislation?

In the 1990s there were several instances of escape from contract legislation application, which took place with the subjective field of application of the law, most especially the 1995 LCAP and its amendments. However, judgments of the Court of Justice of the European Union (CJEU), namely those of 15 May 2003,[23] 16 October 2003[24] and 13 January 2005[25], brought a halt to these approaches.

A second point of escape was found in the objective field of application of contract laws, and most especially in relation with the agreements between public government agencies, which since the 1995 LCAP had been absolutely excluded from application of the Law. The stance of the CJEU, in its aforementioned Judgment of 13 January 2005, proved decisive once again, by reorienting the exclusion of inter-administrative cooperation in terms compatible with European regulations.[26]

The later appeal for annulment 2725/2015 before the Supreme Court recently resolves and confirms the judgment of the High Court of Justice. See Judgment no. 269/2018, of 20 February, of the Fourth Chamber for Contentious Administrative Proceedings of the aforementioned Supreme Court.

21 Sixth additional provision of Law 5/2017, of 28 March, on fiscal, administrative, financial and public sector measures, and creation and regulation of taxes on large commercial establishments, stays in tourist accommodations, radio-toxic elements, canned sugary beverages and carbon dioxide emissions.

22 Following the approach of Article 3 of Directive 2014/24/EU, Article 18 of the new 2017 LCSP establishes that the objects for the contract are those inherent to:

- two or more works, supply or service contracts: the main object of the contract determines the rules that govern the awarding.

- works, supply or service contracts, on the one hand, and works or service concession contracts, on the other: the main object of the contract determines the rules that govern the awarding, if the objects cannot be separated. If they can be, and it is decided to formalise a single contract, the rules for works, supply or service contracts will be applied when the estimated value of the contract of the objects of these contracts is greater than the amounts of the contracts subject to harmonised regulation, and if not, those of works concession and service concession contracts will be applied.

- contracts regulated by the LCSP and objects of contracts other than those regulated in the LCSP, the most significant object of the contract determines the rules that govern the awarding, if the objects are not separable, while if they are, and it is decided to formalise a single contract, the LCSP rules are applied.

23 According to this judgment (Commission/Spain, C-214/00, of 15 May 2003), the LCAP's subjective area of application contravened the functional concept of the body governed by public law found in the directives, by excluding private law organisations (companies, for example) from the Directive's appeal system.

24 This judgment (Commission/Spain, C-283/00, of 16 October 2003), reiterates (and applies to a specific company, SIEPSA) the previously-mentioned doctrine on the qualification of a company as a body governed by public law, as it had been created to meet needs of general interest.

25 Once again, this judgement (Commission/Spain, C-84/03, of 13 January 2005), criticises the definition of the area of subjective application with regard to the Community concept of a "body governed by public law", as it excluded private law organisations that met the requirements to be considered as such bodies.

26 In response to this judgment, in which the absolute exclusion of inter-administrative agreements from the objective application was

Now in the 21st century, the increasing use by contracting authorities of so-called *own or internal means* and *technical services* is triggering a new type of escape, which would include the two previously-mentioned dimensions: objective (insofar as the orders of the contracting authority to the in-house service is one of the legal transactions excluded from application of the Law on Contracts) and subjective (to the extent that this implies the use of instrumental organisations deployed between the contracting authority making the order and the private contractor that often ends up materially fulfilling the order).

It is widely known that Community case law has played a key role in building this figure through the CJEU Judgment of 18 November 1999 (C-107/98), the Teckal case, which established the exclusion of so-called "in-house contracts" from the application of the directives. In these contracts, a contracting authority orders the execution of works, the provision of a service or the supply of a good or service from a body over which it exercises a control similar to that which it has over its own services, and that performs the essential part of its activity for the contracting authority that controls it. Later judgments have completed the case law on this figure.[27] In the same way, and with the addition of Community case law, European directives approved in 2014 on public procurement and contracts in so-called "special sectors" (water, energy, transport, postal service, etc.) have also made a decisive contribution to consolidating the institution.

The management assignment formula was fully incorporated into Spain's contract legislation in 2007. In Article 4.1.n) of the later TRLCSP, management assignments are excluded from the realm of application of the Law, whereas in Article 24.6 of the same provision, the characterisation of these orders and their requirements are outlined. More recently, Article 86 of Law 40/2015, of 1 October, on the legal regime of the public sector, has incorporated the regulation of own means and technical services of Spain's institutional public sector, pursuant to what was already established in the contract regulations, and introducing as new developments the need for a report justifying the creation of an in-house technical service, or the declaration to do so, and a mandatory report from the Intervención General de la Administración del Estado (General State Comptroller).

The latter requirement is consistent with the tenets of Article 22.1 of the TRLCSP, which states that "the entities, bodies and organisations of the public sector cannot formalise contracts other than those necessary for fulfilment and performance of their institutional purposes." This precept brings with it the obligation of assessing the need for the contract. One essential element with which to do so is clearly determining whether or not the organisation has its own services to achieve its institutional purposes. In other words, it is a matter of determining whether it is possible, opportune or advisable for the Government itself to manage the need directly before looking to the market. It goes without saying that this decision becomes especially relevant in times of crisis. Such periods are marked by the scarcity of resources and budgetary restrictions. Therefore, it should come as no surprise that government agencies' use of their own services may have risen in recent years, at least theoretically. What is most striking is the marked proliferation of these resources to the point of reaching true inflation, at the state[28] and autonomous community[29] level, especially because the model of relations that has ultimately been consolidated is beset by more than a few problems.

condemned, within Royal Decree-Law 5/2005, of 14 March, on urgent reforms to spur productivity and improve public procurement, an attempt was made to solve the problem, allowing the Law to be applied to inter-administrative agreements covering administrative contract-related matters, but maintaining the exclusion of those same agreements were for amounts under the Community thresholds for such contracts.

27 Judgment of 11 January 2005 (C-26/03), Stadt Halle case; Judgment of 13 October 2005 (C-458/03), Parking Brixen case; Judgment of 11 May 2006 (C-340/04), Carbotermo case; and, more recently, Judgment of 29 November 2012 (C-182/11 and C-183/11), Econord, SpA case.

28 A report by the Court of Auditors of 28 November, 2013 tallied the amount of contractual management orders over the 2008-2012 period at 1.51 billion euros, corresponding to 1,047 orders by ministries and 443.4 million euros for 1,036 orders by autonomous organisations and state agencies. See *Informe, núm. 1003, de fiscalización de la utilización de la encomienda de gestión regulada en la legislación de contratación pública por los Ministerios, Agencias y Organismos Autónomos del área político-administrativa del Estado, ejercicios 2008-2012.*

29 In its 22 December 2016 report, which was prepared in collaboration with external autonomous control organisations and sought to inform on the public sector organisations of all autonomous communities except Navarre and the Basque Country, the Court of Auditors stated that in the 2013 fiscal year, it had received notice of 2,132 orders for a total amount of a little over 1.66 billion euros. See *Informe núm. 1197, de fiscalización sobre la utilización de la encomienda de gestión, regulada en la legislación de contratación pública aplicable, por las entidades del sector público autonómico español durante el ejercicio 2013.*

The first problem has to do with the instrument most commonly used by the Government or government agency when making the order, which tends to be an agreement with the in-house service. Through this agreement they not only delimit, but also occasionally establish a pact on the terms of the order, which partially distorts the regime sought to be created by Article 24.6 of the TRLCSP, according to which the order must be of mandatory execution, pursuant to instructions unilaterally set by the controlling authority, and with retribution to be established with reference to rates approved by the public organisation making the order.

Furthermore, the material fulfilment of the order, although theoretically it should be performed or be able to be performed with the in-house technical services, is usually *outsourced.* This happens because until the new LCSP there had not been any limitation on the later sub-contracting of orders received, and most in-house services do not have the specific resources to carry out the task. Therefore, they sub-contract the services ordered through the ordinary procedures established in contract legislation.[30] On occasion, and in order to implement the outsourcing, they even establish framework agreements that later derive into the pertinent contracting.

To these general problems we had to add the diversity of material areas of action that some of the in-house technical services can have. These occasionally surpass the specific field of their corporate purpose, and make them susceptible to being used for multiple orders.[31] Another issue is the growing trend by some of these services to diversify their client portfolio, despite their organisational configuration as several contracting authorities' own services.[32] It is a well-known fact that this latter possibility, which allows a number of formulas, was expressly permitted by Community case law in the Empresa de Transformación Agraria, S.A. (TRAGSA) case,[33] and it was fully established in the European directives of 2014.

Additionally, the (sometimes abusive) use of this instrument has led to the emergence of a number of pathologies and has brought to light the existence of false "own or internal means", which should be the target of urgent, sweeping reform, especially considering the regulations of Directive 2014/24/EU and the 2017 LCSP itself, which transposes it and makes for a radical paradigm shift in this area. This is especially true as concerns the objective determination of the minimum activity to be performed for the contracting

In the specific case of Catalonia, the Sindicatura de Comptes de Catalunya (Catalan Public Audit Office), in its *Informe 30/2016, de 13 de desembre, relatiu als encàrrecs de gestió de l'exercici 2013*, offers some surprising figures: according to information provided by the organisations that made the orders that year, there were 564 orders, for a total of 349.3 million euros. On another note, according to the information provided by the in-house technical services, 874 orders were received for a total of 595.7 million euros. These figures differ greatly from the information provided by the contracting authorities, which the Sindicatura de Comptes attributes to a number of reasons (errors in the information provided, differences in the amounts communicated, or in the dates of formalisation and termination). In any event, they are relevant amounts that basically impact orders for services. There are fewer orders for works and supplies.

30 The Junta Consultiva de Contratación Administrativa del Estado (Administrative Contracting Advisory Board of Spain), in Report 65/2007 of 29 January 2009, and the Junta Consultiva de Contratació Administrativa de la Generalitat de Catalunya (Administrative Contracting Advisory Board of the Government of Catalonia), in Report 6/2010 of 28 July, called attention to the need to guarantee the suitability of the in-house service to carry out the task, and their need to have their own staff and material and technical resources.

31 In the case of Empresa de Transformación Agraria, S.A. (TRAGSA), under the generic coverage of related fields referred to in its regulations, there are all kinds of actions that have led to the ordering of services theoretically inconsistent with the realms of rural development, environmental conservation or emergency services, such as projects for the optimisation and renovation of spaces, buildings and communications of ministries; the maintenance, conservation and restoration of artistic and historical heritage elements in 900 municipalities; or the development of IT solutions for government agencies, such as electronic judicial files.

32 Therefore, according to *Informe 31/2016, de 13 de desembre, de la Sindicatura de Comptes de Catalunya*, in 2013, the in-house service under analysis, the Centre for Reinsertion Initiatives (CIRE), only conducted 31% of its activity for the contracting authorities of which it was the in-house service (28% for the Government of Catalonia and 3% for local governments).

33 The CJEU, which had already devoted its attention to this company in relation to one of its subsidiaries (Judgment of 8 May 2003, case C-349/97) allowed autonomous communities to hold a symbolic participation in TRAGSA through its Judgment of April 2007 (Case C-295/05) which made the notion of the "similar control" requirement more flexible. to allow it even in the case of this minimal participation held by the autonomous communities. The later Spanish Supreme Court Judgment 444/2008, of 30 January (appeal for annulment 548/2002) corroborated this approach and in fact, paved the way the proliferation in Spain of in-house services of various contracting authorities, most especially autonomous community and local contracting authorities. On the specific case of TRAGSA and, in general, the problems linked to the administration's own services, see Amoedo Souto, Carlos Alberto. *Tragsa: Medios propios de la Administración y huida del Derecho Administrativo*. Barcelona: Atelier, 2004. For a more general take, see Vilalta Reixach, Marc. *La encomienda de gestión. Entre la eficacia administrativa y la contratación pública*. Pamplona: Thomson Reuters Aranzadi, 2012.

authority making the order (80%) and as regards the sub-contracting limit (50%). That said, regarding this last item, it must be borne in mind that some organisations, such as the aforementioned TRAGSA (now regulated, along with its subsidiary TRAGSATEC, by additional provision 24a of the 2017 LCSP), had already had the 50% limit for sub-contracting established as part of their activity since 2007.

The new regulations also feature a provision found lacking until now: that the non-compliance of any of the requirements to be an in-house service will lead to their loss of this status, with the affected legal entity being disqualified from carrying out orders. On another note, Article 44.2.e) of the new 2017 LCSP also establishes that the formalisation of orders to the in-house technical services can also be the subject of special appeal for contracting affairs in the event they do not meet the legal requirements.

All of this notwithstanding, other matters go unresolved. Among the list of problems, one of the most relevant is this: if the contracting authority can freely decide whether to use its own service or go to the market, on what criteria should they base this decision? How neutral can they be, considering the control they have over the service? It seems that a preliminary efficiency study should be the rule, because, among other reasons, a public tender could be more competitive than the order made with unilaterally established conditions.

For the sake of consistency with everything stated up to now, later results assessment studies should also be required to determine whether government in-house technical services comply with their institutional objectives. There should also be demands for greater transparency in the actions of in-house technical services, to know what portion of the work they actually perform with their own resources and what portion they outsource, or, in the case of services belonging to any contracting authority, what it is that they do for each of them.

Furthermore, the creation of specialised subsidiaries (as occurred with TRAGSA, for example) or the expansion of activities should be subjected to supervision. In any event, the corporate purpose of all of these companies must be specified.

In conclusion, it must be noted that the new legal regulations do not satisfactorily resolve the possible confusion of roles or eventual incompatibilities between the governing bodies of in-house technical services and the administrators of the contracting authorities making the orders, often made up by the same individuals. In short, it is not only a matter of delimiting the activities of in-house technical services as contracting authorities before third parties, but also assessing this in terms of competition and transparency, avoiding any possible circumvention of the law.[34]

4 Solvency requirements in times of insolvency

The Spanish system of economic/financial and technical/professional solvency accreditation, which had for many years been underpinned by the demands of the so-called *business classification* for works and services contracts of significant economic volume, entered a crisis from the very outset of Spain's adhesion to the European Economic Community in 1986. The community requirement to prevent discrimination in access to markets based on the nationality of companies came into direct conflict with the business classification institution as it had been conceived in Spain's system, among other reasons because the vast majority of Community countries do not have equivalent or similar classification systems. Soon, alternative mechanisms were arbitrated to determine the solvency of foreign Community companies wishing to participate in Spanish tenders, with the unique characteristic that, with the passage of time, this mechanism has ended up becoming the rule, while the old system of business classification has progressively been relegated. Today, it is only mandatory for a single type of contract (works) of an estimated value of 500,000 euros or more.

Accreditation of solvency is a key factor in selecting contractors and allowing access to tenders. Based on the accreditation of one or more resources, both regarding economic and financial solvency as well as technical or professional solvency, the system designed in the 2007 LCSP underwent a number of changes in

34 Comisión Nacional de la Competencia. *Los medios propios y las encomiendas de gestión: implicaciones de su uso desde la óptica de la promoción de la competencia* [online]. Madrid: Comisión Nacional de la Competencia, 2013. <https://www.cnmc.es/sites/default/files/1186066_1.pdf> [consulted: 9 May 2018].

the following decade, caused to a large degree by the need to adjust it to the evolution of the financial crisis, which clearly had a severe impact on companies' levels of solvency. Lower levels of investment and the financial crisis had direct repercussions on the solvency of companies: less work, less experience and lower turnover, which translates into the lessening or even loss of economic and technical solvency.

There are figures that back up this claim: as of 2008, the number of insolvent debtors increased significantly, and reached a record level in 2013 with 9,704 bankruptcies, the year in which the number began to decline (to 5,131 in 2017). Catalonia, the Community of Madrid and Valencia (with 22%, 16.5% and 14.5%, respectively, in 2017) led the insolvency ranking of autonomous communities, and the construction industry and real estate activities were the areas most affected by insolvencies from 2008 to 2014. By type of company, insolvencies were concentrated in the lowest turnover segment (under 2 million euros) and, in general, corresponded to the oldest companies (established for over 20 years). Aside from that, by type, the majority were voluntary bankruptcies (around 90%), processed by shortened procedures (in over 85% of cases). It is interesting to note that, although certain improvement was observed as of 2013, the majority of companies that begin bankruptcy procedures end up in dissolution.[35]

Even though the effects of the crisis on companies' solvency were readily apparent from the early stages, the public response was long in arriving. Significant changes, such as the simplification of solvency requirements, did not come about until 2013: first, with the approval of Law 14/2013, of 27 September, on support for entrepreneurs and their internationalisation, which raised the mandatory thresholds of classification in contracts for works (from 350,000 to 500,000 euros) and services (from 120,000 to 200,000 euros), and, later, with the approval of Law 25/2013, of 28 August, promoting electronic invoices and creating the accounting registry of invoices in the public sector, which preserved the mandatory classification system for works contracts of estimated value of 500,000 euros or more. However, it also established, predicated on its regulatory implementation, the optional classification of all service contracts, regardless of their estimated value, and a new regulation of economic and financial solvency accreditation resources, as well as the establishment of new time frames for technical solvency accreditation in works, supplies and services. Nevertheless, this regulatory implementation would have to wait until Royal Decree 773/2015, of 28 August, amending certain precepts of the General LCAP Regulations, approved by Royal Decree 1098/2001, of 12 October, which definitively eliminated the mandatory requirement of the classification for service contracts. This classification was left as a sufficient condition, and alternative means of solvency accreditation, which could be determined in each contract. It also brought about the extension of the period in which the works, supplies or services would be taken into account as evidence of the company ownership's 10 years of experience for works and 5 years of experience for supplies and services.

One of the basic elements of solvency definitely has to do with the size of the contracts and their division into lots, as a means of facilitating access to tenders by SMEs or specialised companies from various sectors. That is why it is so surprising to find that peculiar practices have been followed in certain contracts. These consist of defining "macro-lots" only accessible by certain companies or dominant companies from the relevant industry, alongside others of little economic significance, which ends up configuring contracts with very unequal successful tenderers. A problem associated with this is the added difficulty brought by the configuration of the lots in mixed contracts, more and more widespread in contractual practice, as previously mentioned.

The bodies specialised in the defence of competition have likewise called attention to the effects that could come from the requirement for certain solvency levels in terms of limitation or restriction of competition between companies and in relation with markets in general. Therefore, the possibility for integration of solvency with external resources, or the formation of temporary associations of undertakings (*uniones*

35 These data are from the Instituto Nacional de Estadística (National Statistics Institute). *Estadísticas del procedimiento concursal (EPC). Cuarto trimestre de 2017 y año 2017. Datos provisionales* [online]. Madrid: Instituto Nacional de Estadística, 2018. <http://www.ine.es/daco/daco42/epc/epc0417.pdf> [consulted:10 May 2018], and from González Pascual, Julián; Gimeno Losilla, Ruth. "Evolución de los concursos de acreedores en España: 2004-2015". *Boletín Económico de Información Comercial Española* [Madrid: Ministerio de Economía, Industria y Competitividad], Issue 3083, January 2017. p. 77-95.

temporales de empresas, UTE), with the legal requirements that go with this, have been, especially in times of crisis, instruments that have contributed to facilitating SMEs' access to the markets.[36]

A singular case that helps illustrate the adaptation of contract law to the effects of the financial crisis has to do with one of the resources most used to accredit economic and financial solvency. Since 2013, this has been defined as a company's statement of its yearly business turnover, or the yearly business turnover in the area covered by the contract, for an amount equal to or greater than that required by the call for tenders or the invitation to participate in the procedure, and in the specifications of the contract. Alternatively, if this does not exist, it must meet whatever is established by regulations.[37] According to the terms of aforementioned Royal Decree 773/2015, of 28 August, and when the specifications do not specify the criteria and minimum requirements, the criterion for accreditation will be the yearly business turnover of the tenderer, or the candidate, which, in reference to the year of greatest business volume of the past three complete business years, will have to be at least one and a half times the average annual value of the contract if its duration is greater than one year.[38] The new 2017 LCSP corroborates this line in its Article 87.1.a), when it refers to the yearly business turnover, or the yearly business turnover in the area covered by the contract, referring to the best of the past three available business years, and specifying that the minimum required yearly business turnover shall not, except in duly justified cases, surpass one and a half times the estimated contract value. Here, it must not be overlooked that Article 58.3 of Directive 2014/24/EU, which is being transposed, establishes that the minimum required yearly business turnover shall not surpass two times the estimated contract value, except in duly justified cases.

This evolution shows how it has been necessary to adapt the rules to keep from excluding tenders on the grounds of the general reduction in solvency triggered by the crisis of recent years. This notwithstanding, it is not only necessary for the rules to evolve. This evolution must be accompanied by an adaptation in management models. It should be remembered that in the specific case analysed, the specifications can modulate the requirements based on the economic situation and/or the business sector or industry (the rules establish the alternative of overall annual business turnover or turnover just in the area of the contract). This explains the frequent appeals in administrative courts in recent years, on the need for solvency requirements to be linked with the purpose of the contract, proportionate, and non-discriminatory.[39]

5 Bidders in search of a contract. Public responses

The investment in construction in Spain, taken as a percentage of its GDP, went from 17.9% in 2006, its historical high, to 12.7% in 2010, a figure similar to that registered in the early 1970s.[40] In the years immediately thereafter (2011 and 2012) there was a generalised reduction of official tenders for construction among all government agencies (in 2011, 46% less than 2010; in 2012, 49% less than 2011). To the contrary, the years 2013 and 2014 saw increases: in 2013 there was an increase of 17.3% over 2012, while in 2014 there was a 32.8% increase over 2013. But the years 2015 and 2016 were again marked by downturns, mainly due to the situation of political deadlock and budgetary cutbacks, which would be corrected in 2017, when public works tendering rose by 38%, above all thanks to the efforts of local councils and autonomous

36 Comisión Nacional de los Mercados y la Competencia. *PRO/CNMC/001/15. Análisis de la contratación pública en España: oportunidades de mejora desde el punto de vista de la competencia.* [online]. Madrid: Comisión Nacional de los Mercados y la Competencia, 2015. <https://www.cnmc.es/file/123729/download> [consulted: 9 May 2018].

37 Article 75.1.a) of the TRLCSP, according to draft approved by the aforementioned Law 25/2013, of 27 December. In the draft of the 2011 TRLCSP, the demand had to do with the statement of the overall business turnover and, eventually, the turnover in the area of activity covered by the contract, taking at the most the past three available business years depending on the date of establishment or initiation of the business owner's activities.

38 Paragraph One of the only Article of the previously mentioned Royal Decree, ammending Article 11 of the General LCAP Regulations.

39 For example, the Tribunal Administrativo Central de Recursos Contractuales (Decisions 548/2014, of 18 July, and 820/2015, of 11 September), and the Tribunal Administrativo de Contractación Pública de la Comunitat de Madrid (Administrative Court of Public Procurement of the Community of Madrid) (Decisions 22/2012, of 29 February, and 103/2013, of 10 July).

40 Construmat Barcelona. *Manifiesto CONSTRUMAT: En defensa del sector de la edificación y la obra civil en España* [online]. Barcelona: Construmat, 2011. <http://contentp.firabcn.es/contenidos/S025011/docs/Manifiesto%20Construmat.pdf> [consulted: 10 May 2018].

communities.[41] Nonetheless, investment by the entirety of government agencies has fallen by almost 68% since the beginning of the crisis, from 40.35 billion euros to 12.85 billion euros in 2017.

These figures reflect the severe crisis suffered in public budgets over all these years, and are at the root of some of the anomalies detected, as well as several of the solutions proposed. Obviously, one of the immediate effects derived from the drop in investments is the lesser public offering of contracts, which has caused an increase of participation in tenders. According to figures from a recent report, the average concurrence in awards from the Government of Catalonia and its public sector in 2016 was 6.24 offers per award. The open procedures are those that have recorded the greatest participation (7.45 offers, a figure that ascends to 15.01 offers when it comes to open procedures for the awarding of works contracts).[42] Successive reports on indicators of percentage reduction in Government of Catalonia tender awards in the 2011-2016 period show a trend oscillating between 8.7% per year in 2013 (that of the lowest percentage) and 11% in 2016 (that of the highest percentage of percentage reduction).[43]

What has been government agencies' response to this situation? More than any one response, several could be mentioned. They have evolved over the years and have been fundamentally focused on two areas.

First, one could point out an initial restrictive, almost defensive response, expressed in refusals to formalise contracts, often for budgetary reasons. Article 155 of the TRLCSP established this instrument as a possibility in the hands of the contracting body to be exercised prior to the award, and as long as there concurred duly justified reasons of public interest in the case file. This involves the obligation to compensate the candidates or tenderers for the expenses incurred. Over this period, it has become evident that *budget cuts* can be a source of public interest. The Judgment of the Audiencia Nacional of 13 June 2011 (on the refusal to formalise a contract for the creativity, design, production, selection, reservation and media placement of an institutional advertising campaign for the Government of Spain on the electronic national ID card, the DNI) illustrated a few of these aspects when it stated that, although the preparatory tasks to participate in a public tender whose purpose was to carry out a certain advertising campaign have a unique quality that impedes them from being used in other campaigns, this does not mean that the expenses for this work have to be compensated when the Government, for justified reasons (in this case, budgetary cutbacks of 13.6% of the initial credit agreed by the Council of Ministers in the expenses budgeted for the Secretary of State for the Information Society) abandons the public tender. The reasoning is that this case is comparable to cases in which a company is unsuccessful with its bid, or a tender is declared null, in which a company will have performed tasks and incurred expenses to come up with the best offer with which to win the tender.[44]

Along with cases of refusal there have also been cases of withdrawal. Article 155 of the TRLCSP also establishes them as prior to the award, and they must be justified by a non-amendable violation of the rules of preparation of the contract or those regulating the award procedure. The cause must be justified within the tender proceedings. The case of the tender for respiratory therapy in Catalonia is certainly one of those that has had the greatest repercussion over this time, as it was a contract with an estimated value of 449.3 million euros, not including VAT, called in November 2015, from which the Government withdrew in February 2017. [45]

In this same list of responses, the phenomenon of applying contract modifications in order to reduce contract conditions that has appeared in recent years must be included. They are also allowed in Community case

41 Source: Ministry of Transport and Public Works.

42 Direcció General de Contractació Pública. *Informe de la concurrència en la contractació pública de la Generalitat de Catalunya* [online]. Barcelona: Government of Catalonia, 2017. <http://exteriors.gencat.cat/web/ca/_ambits-dactuacio/contractacio-publica/direccio-general-de-contractacio-publica-/.content/osacp/seguiment_i_avaluacio/informes-tematics-adjucacions-anuals/informe_concurrencia/2016/Informe-de-la-concurrencia-en-la-contractacio-publica-2016.pdf> [consulted: 10 May 2018].

43 Direcció General de Contractació Pública. Reports on public procurement awards of the Government of Catalonia and the entities of its public sector for the years 2011, 2012, 2013, 2014, 2015 and 2016.

44 Judgment of 13 June 2011, Chamber for Contentious Administrative Proceedings (Appeal 381/2010), LG 3.

45 Tender announcement published in the *Official Journal of the Government of Catalonia* (DOGC) no. 6992, of 6 November 2015, and Withdrawal Decision of 3 February 2017, published in the public procurement service platform of the Government of Catalonia. The subsequent special contracting appeal lodged by one of the companies against the decision for withdrawal from the contracting procedure was rejected by the Tribunal Català de Contractes del Sector Públic (Catalan Public Sector Contract Court) by Decision 112/2017, of 20 July.

law,[46] both in the reduction of services as well as prices, justified in needs of public interest and as a direct consequence of the application of expense and public deficit control policies. In this context, a number of general preventive formulas have appeared in autonomous community laws (for example in Navarre or Catalonia)[47] to allow contract modifications that enable the reduction of services or the extension of the term of execution. The initiatives for modification carried out for these purposes are qualified as public interest, as they ensure fulfilment of the objective or are enacted in application of budgetary stability measures.

Secondly, another type of public response can be identified. It tends to facilitate bidders' access to the markets through different formulas that, nevertheless, did not come into being until 2013. For example, in Law 14/2013, of 27 September, on support for entrepreneurs and their internationalisation, a number of measures were established: to promote the creation of temporary associations of undertakings through the Registro Oficial de Licitadores y Empresas Clasificadas del Estado; raise, as has been observed, the thresholds of business classification requirements; shorten the bond return terms; introduce the Statement of Responsibility to comply with the contracting conditions of the Government; reduce the delay period from 8 to 6 months to request a break in contract, etc. With the subsequent Law 25/2013, of 27 December, which aimed to promote electronic invoices and create the accounting registry of public sector invoices, the intention was to streamline supplier payment procedures.

Notwithstanding the positive nature of these measures, it must be remembered that, as already said, the virtual nature of some of them (such as those of the definitive elimination of mandatory classification in service contracts) was delayed until the approval in 2015 of Royal Decree 773/2015, of 28 August.

6 Awarding of contracts: a crisis in traditional procedures, old and new awarding criteria

The crisis has clearly affected the way contracts are awarded. It has also cleared a path for the use of novel awarding procedures, and the introduction of new awarding criteria. This has engendered a questioning of traditional awarding procedures and criteria.

It is a relevant matter to the extent that one of the premises of European contract law has always been the importance of the tender and awarding of contracts, which is the source of the transcendence granted to awarding procedures as guarantees of free concurrence and competition in markets. It must be remembered that, traditionally, open procedures had been identified with a greater degree of neutrality and transparency in tenders, in the face of the justified reservations caused by the misuse over these years of the negotiated procedures, especially those without publication, and very especially, the negotiated procedures based on the amount, in the end eliminated in the new LCSP (although some autonomous communities had already done this).[48] Nevertheless, the influence of European law has led to a progressive incorporation, over successive waves of directive transposition and contracts, of procedures into our legal system that are more sophisticated and complex, such as the case of the restricted procedure. This influence has also led to the part of negotiation between public powers and tenderers being incorporated as a significant element of the process, as has occurred with competitive dialogue and, more recently, with innovation partnerships.[49]

Nonetheless, figures on the use of different procedures reflect a predominance of the open procedure. This occurred in 2016, when the open procedure was used in 40% of the total of contracts formalised with the State (58.7%, by monetary amount), as compared to the 22.4% of the contracts with autonomous communities

46 CJEU Judgment of 19 June 2008 (C-454/06), *Pressetext nachrichtenagentur GMBH/Republic of Austria* et al.

47 Article 2 of *Ley Foral* (Regional Law) of Navarre 14/2011, of 27 September, amending *Ley Foral* 22/2010 of 28 December, on the general budget of Navarre for 2011, and *Ley Foral* 24/1996, of 30 December, on corporate tax, or the eleventh additional provision of Catalan Law 5/2012, of 20 March, on fiscal, financial and administrative measures and creation of the tax on accommodation in tourism establishments.

48 Catalonia did so with Decree-Law 3/2016, of 31 May, on urgent public procurement measures (Article 7).

49 For a thorough discussion of procedures and awarding criteria in the new LCSP, see: Razquin Lizarraga, Martín María; Vázquez Matilla, Francisco Javier. *La adjudicación de contratos públicos en la nueva Ley de Contratos del Sector Público*. Cizur Menor: Thomson Reuters Aranzadi, 2017.

(65.7% of the total monetary amount) and 20.2% of the contracts of local councils (85.2% of the monetary amount).[50]

Beyond the figures, often the choice of one or another procedure brings contract organisation problems to light in public entities. Debate should focus on this area. Awarding a contract must be the result of a complex process that, as already stated, must begin with a proper definition of the needs to cover. Within this process, the choice of awarding procedure is definitely relevant, but so is choosing the criteria by which the contract will be awarded.

Therefore, the alternative between objective and subjective criteria in the awarding of contracts has always been present, though it has likely been accentuated since the 2007 LCSP, and even more so because of the crisis, which has tipped the preference of contracting bodies toward objective criteria, especially the price criterion, and not only for economic reasons. The predominance of objective criteria that can be automatically assessed reveals a will to forgo the necessary assembly of external expert committees, as the Law requires, and sometimes also the will to avoid or diminish the risk of appeal-related problems, even though this may at times undermine the quality of the offers. Still and all, over these years the reservation of some discretionary margins by contracting bodies through the use of the controversial "improvements" criteria has been frequent. In most of these instances, they have been used in an absolutely anomalous way, without the types of allowable and assessable improvements being defined in the specifications. On other occasions, they have been openly contrary to the logic of the contracts themselves, as occurs with the provision, or the direct invitation, to offer additional pools of man-hours, which should be stipulated in the requirements of the contract itself and which often end up impinging on the salary rights of the workforce that companies devote to the contract.

Nonetheless, the fundamental innovation over these years has been the spread of environmental and social awarding criteria, beyond the timid initial provision of Article 134.1 of the 2007 LCSP (later Article 150.1 of the TRLCSP), namely the possibility of including environmental characteristics or those linked with the satisfaction of social demands as contract awarding criteria. It must be noted in this regard that, just one year after the LCSP was approved, a legally binding rule (the aforementioned Royal Decree-Law 9/2008, of 28 November) established in Article 9.3 that, to award contracts financed by the Fondo Estatal de Inversión Local that was to be created, local councils would take into account relevant indicators of the extent to which the works contract would contribute to job creation as *awarding criteria* for the assessment of offers. It was a significant provision, given that the regulation of the fund was mandatory. This meant that in the specifications there had to be express mention of these circumstances, and it was consequently necessary to have mechanisms that would make it possible to guarantee this requirement. The later development of social and environmental clauses within government agencies has contributed to expanding and consolidating the use of this type of criteria.

Finally, brief mention must be made of the occasional and irrational use of some framework agreements, which should serve as rationalisation systems of technical contracting: there are examples such as framework agreements without any later derivative contracts, framework agreements promoted by in-house services of the contracting authorities to carry out the orders later through derivative contracts, etc. This is why a positive view must be taken of the fact that with the new 2017 LCSP (Article 44.1.b), framework agreements can be appealed in administrative contract courts.

7 Contract performance: breaches, continuity, breaks

If, as has been shown, the effects of the crisis loom over and come forth in the contract preparation and awarding stages, in performance they are all the more visible. Carrying out the contracted object in the planned conditions and timeframes and compensating it in the legal terms are indubitably the most basic pillars of the contractual relationship model. But the decade of 2007-2017 was marked by breaches of contract and late payment. Therefore, neither the successive reforms of the regulatory framework determining the contract

50 The majority of those remaining are negotiated procedures, and to a lesser degree, competitive dialogues, while the use of the restricted procedure is practically insignificant. See Registro de Contratos del Sector Público. Junta Consultiva de Contratación Administrativa del Estado, 2016.

payment system nor the articulation of specific supplier payment mechanisms to face the extremely serious situation generated by the late payments of government agencies should come as a surprise.

Law 15/2010, of 5 July, amending Law 3/2004, of 29 December, establishing measures to fight late payments in commercial transactions, imposed an express procedure to make debts effective and, furthermore, a system of control over local invoices. But it also established, with a more debatable sense of reality considering the economic context of the time, the payment of contracts at 30 days for 2013 (with interests for late payment and compensation for recovery costs if this did not occur) and a transition period (for payments at 55, 50 and 40 days) that was no less optimistic for the years 2010, 2011 and 2012.[51]

Obviously, none of these terms were fulfilled. That's why, at the beginning of 2012, amidst a scenario defined by the drop in public revenue and the impossibility to go further into debt, as well as rampant late payments. Royal Decree-Law 4/2012, of 24 February, which defined a financing mechanism for the payment of local council suppliers, had to be approved. Suppliers that had accounts receivable from local councils, or any of their bodies, could join the scheme, as long as the pending obligations had expired, were liquid and chargeable, and dated prior to 1 January 2012 (with taxes, but without interest, judicial or similar costs) and corresponded to works, supply or service contracts included within the area of application of the TRLCSP. The rule called for a rationalisation plan as a condition for debt operations authorised to finance the payments, and even allowed for possible debt reductions as a criterion of prioritisation for payment, along with those of judicial chargeability of the debt and its seniority. However, in a later decision of the Comisión Delegada de Asuntos Económicos (Delegate Committee for Economic Affairs) of 1 March 2012, there was a reorganisation of criteria for payment prioritisation (seniority, SME, judicial chargeability), and suppliers' willingness to offer discounts was underscored. As stated previously, this mechanism was immediately extended to autonomous communities and developed by Royal Decree-Law 7/2012 of 9 March, which created the fund for financing supplier payments.

Two years later, this fund, which over three successive phases had mobilised as much as 41.8 billion euros (of which over 30.2 were earmarked for autonomous communities and nearly 11.66 for local councils),[52] was repealed by Law 13/2014, of 14 July, approving in its place the Fondo para la Financiación de los Pagos a Proveedores 2. But at the end of the same year, by Royal Decree-Law 17/2014, of 26 December, the Fondo de Financiación de las Comunidades Autónomas and the Fondo de Financiación a Entidades Locales were created, repealing the cited Law.[53]

This notwithstanding, the issue is still open. In February 2017, the European Commission formally requested that a number of Member States, Spain among them, take action to guarantee effective application of Directive 2011/7/EU on late payments. In the specific case of Spain, and through a letter of formal notice, the Commission urged lawmakers to cease from upholding legislation that allowed the systematic prolongation of legal payment terms in 30 days. A few months afterward, the Congreso de los Diputados (a house of Spanish Parliament) registered a draft bill proposal from the Ciudadanos parliamentary group to strengthen the fight against late payments in commercial transactions, now being processed.[54]

51 On the regulations of this Law, see Tornos, Joaquín. "Contratación administrativa en época de crisis. La visión del contratista". In: Font i Llovet, Tomàs; Galán Galán, Alfredo (dir.). *Anuario del Gobierno Local 2011. Gobierno local: ¿crisis o renovación?* Madrid: Fundación Democracia y Gobierno Local; Barcelona: Institut de Dret Públic, 2012, p. 99-115, especially, p. 105-109.

52 Source: former Ministerio de Hacienda y Administraciones Públicas.

53 The first is structured in four compartments: Financing Facility (for communities that meet the goals of budgetary stability, public deficit, and average business debt payment period), Autonomous Liquidity Fund (to which the communities that were parties to the homonymous fund existing at that time adhere automatically, and those that do not meet the average supplier payment period), Social Fund (as a mechanism of support for liquidity of the communities, with obligations pending payment to local councils, at 31 December 2014, derived from agreements in social expenditure and other transfers in social spending) and Fund in Liquidation for Financing Payments to Suppliers of Autonomous Communities (to which valid credit operations formalised with autonomous communities, charged to the Fund for Financing Payments to Suppliers 2). The second is structured in three compartments: Economic Promotion Fund (for organisations with stable financial positions and that comply with the average payment period), Ordering Fund (for local councils at financial risk, or that persistently breach the maximum payment term pursuant to late payment legislation) and Fund in Liquidation for Financing Payments to Suppliers of Local Councils.

54 The text of the draft bill: *Boletín Oficial de las Cortes Generales,* 19 May 2017, No. 124-1.

Regardless of the solution arrived at for this situation of non-compliance, it must be noted that the new LCSP finally addresses an old issue, overlooked in the successive payment system reforms of recent years, and which, if satisfactorily resolved, may contribute to easing more than a few tensions. It is the possibility that the Government make direct payments to sub-contractors. It is true that Article 215.8 of the new legal text maintains the general principle of no direct action by sub-contractors before the contracting Government in regard to obligations that the main contractor has contracted with them and arising from the performance of the main contract and sub-contracts. However, the 51st additional provision establishes that the contracting authority may state in the administrative specifications that direct payments be made to sub-contractors, who may assign their collection rights. Without prejudice to the development of these provisions by the Ministry of Finance and Civil Service, as set forth in the additional provision itself, the possibility opened by the LCSP should be viewed favourably, taking into account the importance and characteristics of sub-contracting in the Spanish contractual system.

Aside from that, crisis-related incidents in contract performance are numerous and vary widely. They include, for example, cases of contract suspension by the Government, which can come about both with relation to the initiation of the contract as well as later on, with the withdrawal from or suspension of the works, supply or service initiated. Incidents arising from delays in payment or cases of suspension with contract rescission must also be borne in mind. Special mention is also deserved by Article 223.g) of the TRLCSP, brought about by Law 2/2011, of 4 March, on sustainable economy. It established as new grounds for contract rescission the impossibility to perform the object in the terms initially agreed on, or the certainty of severe damage to public interest if the good or service were to continue to be performed in that way when it is not possible to modify the contract. This would imply the contractor's right to an indemnity of 3% of the amount of the service that has not been performed, unless the cause is attributable to the contractor. Obviously, although the drafting of the precept, especially as concerns the second circumstance (the possible severe damage to public interest) was quite open to interpretation,[55] the application of this scenario calls for an analysis of each case, its unforeseeable nature, the absence of blame on the Government's part and the impossibility of resolving the problem by modifying the contract. Here there is also consideration of whether the supervening lack of credit as a consequence of the different types of budget cuts can be invoked by the Government as a sufficient and justified cause that impedes the continuity of the contract, taking in account that some of these cutbacks are generic, not assigned to a given budget item.

From a contractor's standpoint, the close relationship between crisis, breaches and contract rescission in a prolonged crisis period begot a number of incidents. First of all, there was withdrawal in the form of bidders revoking their proposals, with the loss of the bond, or failure to formalise the contract due to causes attributable to the awarded company, also resulting in the loss of the deposit. In addition, the proliferation of companies going into bankruptcy also led to numerous contract rescissions. In all of these cases, although the economic crisis situation cannot be an excuse for any possible breaches, it can be considered a parameter to determine whether the party is at fault for breach of contract, and even indicate criteria for the a government agency to follow when deciding whether to rescind or continue with the contract. Some examples of these criteria are the proportionality and assessment of the impact on the main service, the assessment of the contractor's behaviour and whether they are at fault, whether the breach is essential and the accurate assessment of the damages, including those derived from having to reopen the bidding with new updated prices.[56]

Another phenomenon linked to the crisis was also the extension of the concession terms due to disruption of the economic equilibrium in public service management contracts. There have been many statements by advisory bodies reiterating the idea that the restoration of financial equilibrium must not be a means of ensuring the awarded company's profits, but rather the continuity of the service, guaranteeing the principle of free concurrence and also in the sense in which the extension is defined in the specifications. Finally, as a

55 Article 211.1.g) of the new LCSP has done away with this alternative and provided a new version of the grounds for rescission in which its connection with the impossibility of modification is more clearly defined.

56 Supreme Court Judgments of 9840/2001, of 14 December (appeal for annulment 9017/1997), 4277/2004, of 21 June (appeal for annulment 4589/1999), and 530/2008, of 12 March (appeal for annulment 2290/2005).

formula to compensate and re-establish the economic equilibrium of the contract, it is exceptional and can only operate when the applicable regulations allow.[57]

Furthermore, reference has been made elsewhere in this article to the new modification of contracts regime brought into the picture by Law 2/2011, of 4 March, on sustainable economy. It is surely the most relevant reform of the 2007 LCSP, due to the need to adapt its approach to Community prescriptions, and forced to a large degree, as recognised by the Spanish Government in its day, by the fact that the discrepancy was affecting and interfering with the availability of Community structural funds, which made it advisable to finally solve the conflict identified by the Commission's services. It must not be overlooked at this point that, for lawmakers in 2007, "once the contract is formalised, the contracting body may only introduce modifications on the grounds of public interest and to attend to unforeseen causes, duly justifying the need for them in the case file."[58] Although this text significantly restricted the previous LCAP regulations, by blocking the possibility for modifications justified by new needs, the European Commission upheld the divergence based on the case law, which can be summed up in the true leading case on the matter, namely the CJEU Judgment of 29 April 2004 (manifested in case C-496/99 P, Commission/CAS Succhi di Frutta SpA). According to this case, if contracting authorities want to attempt to change some aspect of the contract, for specific reasons and after having signed it, they must have allowed for this possibility in the tender specifications and must have also established the procedures for implementing any such changes. Additionally, no such modifications can alter the essential structure of the contract.[59]

Law 2/2011, of 4 March, included a new title and the partial modification of several LCSP articles. In short, the reform meant the application of new prescriptions in all public sector contracts, and not just the administrative contracts of public administration. It also ordered the elimination of the scenario of contract modification for unforeseen causes and, lastly, the provision that the admission of modifications would only be adopted under certain conditions: if there is express mention of this possibility, and the scope and limits have been clearly, precisely and unequivocally outlined in the specifications or tender announcement and are therefore of common knowledge among bidders. If they were not common knowledge, modifications are only allowed when there is duly justified concurrence of any of the circumstances categorically established as causes justifying said modification, as long as the modification does not alter the essential conditions of the tender and award.[60] This very limiting approach is what has been in place until the new 2017 LCSP came into force. In matters such as these, it transposed the regulation featured in Article 72 of Directive 2014/24/EU, although with more restrictions, both in terms of the percentage thresholds up to which modifications are allowed and in relation with their modes.[61]

In an undeniable connection with the tougher restriction imposed on contractual modifications, but also within the general context of budgetary restrictions, a phenomenon has surfaced in recent years: the so-called *irregular contracting*. Irregularities can be due to the absence of a contract (oral contracting), the lack of legal formalisation documents to validate essential procedures (extensions, modifications), the absence

57 Reports from the Junta Consultiva de Contratación Administrativa del Estado (Report 7/2006, of 24 March) or the Junta Consultiva de Contratació Administrativa de la Generalitat de Catalunya (Report 15/2009, of 5 November). Along similar lines, the reports of the Comissió Jurídica Assessora (Legal Advisory Committee) (292/2009, of 17 September, and 397/2010, of 9 December), on modifications of concessions, that double the duration of the contract or extend it beyond double the term.

58 Article 202.1 of the 2007 LCSP.

59 For a thorough discussion of European case law on this subject matter and its reception in Community and internal law see: Vázquez Matilla. Francisco Javier. *La modificación de los contratos públicos.* Cizur Menor: Thomson Reuters Aranzadi, 2015. Also noteworthy are the contributions of Gallego Córcoles, Isabel. "La modificación de los contratos en la cuarta generación de Directivas sobre contratación pública". In: Observatorio de Los Contratos Públicos; Gimeno Feliú, José María (dir.). *Las nuevas directivas de contratación pública*. Cizur Menor: Thomson Reuters Aranzadi, 2015, p. 107-167, and Hernández González, Francisco L. "La modificación de los contratos públicos en la encrucijada: la crisis como causa de reequilibrio económico". In: Hernández González, Francisco L. (dir.). *El impacto de la crisis en la contratación pública. España, Italia y Francia*. Cizur Menor: Thomson Reuters Aranzadi, 2016, p. 191-261.

60 Baño León, José María. "Del *ius variandi* a la libre concurrencia: la prohibición de modificación como regla general en los contratos públicos". In: Font i Llovet, Tomàs; Galán Galán, Alfredo (dir.). *Anuario del Gobierno Local 2012: Racionalización y sostenibilidad de la Administración local: ¿es esta la reforma?* Madrid: Fundación Democracia y Gobierno Local; Barcelona: Institut de Dret Públic, 2013, p. 141-151.

61 Articles 204 and 205 of the new 2017 LCSP.

of formalities in the procedure, and even the existence of void measures. A diverse array of solutions has been proposed for all of these situations. Some autonomous communities have redirected them to ex-officio reviews of void acts. This is the approach followed in the Balearic Islands, where repeated cases made it necessary to approve in 2012 a joint general instruction from the Intervenció General (General Comptroller) and the Direcció de l'Advocacia del Govern de les Illes Balears (Government of the Balearic Islands Legal Office) on the matter.[62] Something similar occurred in Extremadura, which expressly regulated the recognition of obligations in Article 18 of Law 8/2016, of 12 December, on fiscal, equity, financial and administrative measures of the autonomous community.

In light of this situation, other alternative pathways have been proposed to find solutions to these cases, such as the Government's financial liability, especially when there is no other possible alternative, and, above all, the "acknowledgment of debt" procedure, based on the application of the unjust enrichment doctrine, which prevents the Government from attaining profits from its own breach of contract legislation.[63] This prevents the generalisation of an exceptional, restrictive procedure like the ex-officio reassessment.[64]

It does not appear that a single solution can be advocated for these situations. Surely, the acknowledgment of debt in scenarios in which a possible ground for invalidity has been observed (as may have been the case during the budgetary crisis, such as the lack or insufficiency of credit described in Article 32.c of the TRLCSP) should not operate as an autonomous procedure prior to the eventual declaration of invalidity. In such cases, it should be within the ex-officio procedure, and more specifically at the end of this procedure (when the competent contracting authority declares the contract null and void, proceeding to its consequent liquidation), when there should be a setting of the amount of debt to be paid to the contractor, if appropriate. In all other cases, when there is no legal act that can be the object of an ex-officio review (as occurs with oral contracting, tacit extensions or non-formalised changes) the "acknowledgment of debt" pathway seems to be the most advisable. This is also the opinion of most advisory bodies.[65]

The list of incidents and problems in contract performance that could be linked to the crisis situation of this decade is obviously more extensive than has been described in the preceding pages.[66] An exhaustive analysis would require more figures than those available at present. It is sufficiently well know that contracting by government agencies in Spain suffers from an endemic deficit: the follow-up and monitoring of contract performance. Nonetheless, there is a surprising lack of studies even on the existing data (for example, those of public registries) and a surprisingly low level of attention aroused in economic spheres by a sector as economically relevant as that of procurement. In recent years, government agencies have improved their information, basically to comply with requirements of transparency legislation (reports by advisory boards, administrative contract courts, or other active bodies with areas of authority). However, these agencies only look after their own figures, and except for a few cases (for example, some valuable studies of the National Commission on Markets and Competition) there is a marked shortcoming of comprehensive or sector-based comparative studies on public procurement, and especially on the results obtained with contracting for the purposes of evaluation.

62 Instruction 2/2012 of 12 March of the Intervenció General and the Direcció de l'Advocacia del Govern de les Illes Balears, on the procedure to follow in the cases of extrajudicial recognition of credits derived from irregular contracting (*Butlletí Oficial de les Illes Balears*, no. 53, of 14-4-2012).

63 Supreme Court Judgments 1660/2008, of 28 April (appeal for annulment for case-law unification 299/2005), 8916/2012, of 23 November (appeal for annulment 4143/2009), and 1348/2015, of 23 March (appeal for annulment 993/2014).

Advisory bodies have also expressed themselves in similar terms, for example, in Consejo de Estado Reports 88/2004, of 4 March, 1204/2006, of 7 September, and 1008/2008, of 11 September, or in Comissió Jurídica Assessora Reports 235/2012, of 12 July, 394/2012, of 4 December, or 269/2013, of 30 July.

64 In Reports 93/2012, of 3 October, and 57/2014, of 21 May, of the Consell Consultiu de les Illes Balears, there is open criticism of the solution adopted by the aforementioned instruction of the Intervenció General and Direcció de la Advocacia.

65 In Catalonia: Reports 235/2012, of 12 July, 269/2013, of 30 July, or 191/2015, of 18 June, of the Comissió Jurídica Assessora.

66 For a thorough summary of the main areas in which the crisis has been manifested, see: Hernández González, Francisco L. "La modificación de los contratos públicos en la encrucijada: la crisis como causa de reequilibrio económico". In: Hernández González, Francisco L. (dir.). *El impacto de la crisis en la contratación pública. España, Italia y Francia*. Cizur Menor: Thomson Reuters Aranzadi, 2016, p. 191-261.

8 Toward a new public procurement agenda

Over the past decade, new focal points of interest have emerged in the area of public procurement. Some have a direct relationship with the effects of the financial crisis, while others have to do with changes in the contracting model. An exhaustive list of the new public procurement agenda would surpass the aims and limits of this article, but mention can be made of three.

a) Organisation and governance of contracting

Aspects that have to do with how contracting is organised have traditionally been underestimated in Spain, yet they are a fundamental element with which to configure a more effective model. First, it must be remembered that contracting authorities, which represent the executive decision level at which the main areas of authority over the various phases of contract performance are concentrated, have been progressively configured, and continue to be configured, as single-member bodies (ministers or secretaries of state, at State level; autonomous ministers or secretaries general, in Catalonia) to the detriment of collegiate bodies that, with only a few exceptions (central supply and/or service committees, purchasing boards, contracting boards, etc.) have been reserved for only certain kinds of contracts or for contracts of lesser monetary amounts. Of course, the authorisations that are granted, essentially by the Council of Ministers, to formalise certain kinds of contracts do not distort the predominance of this organisational option in favour of single-member bodies.

Collegiality, on the other hand, is the general rule in contracting assistance bodies, especially on procurement boards, whether they are the general or specialised versions established for certain awarding procedures (competitive dialogue board, or the future boards for innovation partnership procedures). In fact, one issue made apparent in recent years is the need to reassess their current composition, which is not always professional enough. Along these lines, the new 2017 LCSP includes certain changes in the regulation governing the composition of boards, which clearly indicate a greater professionalisation of these bodies by expressly forbidding membership or the issuing of assessment reports on offers by representative holders of public office or by temporary staff members,[67] although at the local level, where temporary staff are also barred from this duty, the terms of the legislation do state that the board shall be chaired by a member of the local government or a civil servant, and that elected officials can form part of them as long as they do not make up more than a third of the total.[68] Furthermore, the new regulation also includes stipulations on the roles of the boards, and establishes the possibility for autonomous community laws and implementing rules to be able to attribute to the boards authority to award contracts.

As for specialised advisory bodies, the Junta Consultiva de Contratación Pública del Estado (Public Procurement Advisory Board of Spain), which already held executive powers before (in business classification, admission to registries, etc.), has been clearly strengthened, as it also assumes a regulatory function and becomes the point of reference for cooperation with the European Commission regarding the application of public procurement legislation. Additionally, within the Board, the Comité de Cooperación (Cooperation Committee) for public procurement has also been created, with state, autonomous community and local representation.

In any event, the realm of organizing procurement continues to offer broad margins for action to the autonomous communities which have not made the most of their areas of authority and what they could entail until now, mostly following a policy of duplicating the Spanish State model.[69]

The new 2017 LCSP has brought changes into this model, but the key reform has consisted of incorporating a governance model that aims to respond to the requirements of the European directives of 2014. They impose the need to have one or several authorities, bodies or structures responsible for correct, effective application

67 Articles 326 and 327. *Cf.* with the current regulation in Articles 21 and 22 of Royal Decree 817/2009, of 8 May, which partially implements the 2007 LCSP.

68 Second additional provision, paragraph 7.

69 For more on the possibilities for action in this field by autonomous communities, especially Catalonia, see Padrós, Xavier. "La Llei de contractes del sector públic i les competències de la Generalitat de Catalunya sobre contractació: possibilitats de desenvolupament". *Revista d'Estudis Autonòmics i Federals* [Barcelona: Institut d'Estudis de l'Autogovern], Issue 6 (April 2008), p. 233-271, especially p. 256-258.

of the public procurement rules.[70] Nonetheless, the LCSP model is characterised by a certain inflation of bodies, as well as some degree of confusion in regard to duties and areas. Clearly, the main development is the creation of the Oficina Independiente de Regulación y Supervisión de la Contratación (Independent Office for Procurement Regulation and Surveillance) to ensure proper application of the legislation, promote concurrence, fight illegalities related with public procurement and approve the National Public Procurement Strategy, with a time horizon of four years. Within this Office, there is the Oficina Nacional de Evaluación, to analyse the financial sustainability of works concession and service concession contracts.

b) Professionalisation of procurement

Another reality that the financial crisis has also made apparent is the need to have an administration that is specialised in procurement. Professionalisation in this field is also linked to the growing complexity of public procurement, and will be essential in ensuring a model of higher quality and that is more competitive and transparent. Therefore, the subject has received attention from organisations such as the OECD which, among other recommendations to improve public procurement, has highlighted the need to have a workforce devoted to the topic that is able to provide – at any time, and in an effective, efficient manner – a suitable level of performance in this realm.[71]

More recently, the European Commission presented a Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on 3 October 2017, entitled, "Making Public Procurement work in and for Europe", accompanied by the Recommendation of 3 October 2017, which outlines the strategies to follow alongside three "concrete initiatives": the definition of a policy to professionalise public procurement; in human resources, the improvement of training and professional management; and in systems, the supply of tools and methodology.[72]

Among the areas in which the need for a professional workforce specialised in procurement most clearly appears are the preparation of the contract and especially the creation of special administrative clauses and technical specifications, in which it is necessary to overcome repetitive inertia and practices based on the use of models not always adapted to the numerous and frequent regulatory changes. It is necessary, in this regard, to rethink the development of the specifications, giving them the importance they actually have in the preparation of the contract. The duplication model, as well as the frequent contradictions and obscure clauses, must be done away with to guarantee the quality of the specifications, which must ease the tension inherent to any intelligent public procurement process: the size of the contract (with special attention being paid to the configuration of the lots); the economic and financial and technical or professional solvency required (taking into account the economic circumstances of the time, the evolution of the markets and special traits of the affected sector as concerns competition); the selection of the contractor and awarding of the contract (properly assessing the procedure to follow, guaranteeing competent heads or negotiating teams if the procedure includes a negotiation phase, accurately determining the objective and/or subjective criteria and sub-criteria to apply); and the performance (foreseeing, if necessary, any eventual modifications and properly profiling relations with the main contractor and sub-contractors). Furthermore, as underscored in the doctrine, it is also necessary to insist on the need to professionalise decision-making processes among the various bodies that intervene in the contractor selection phase as much as possible, to guarantee integrity in awarding procedures.[73]

The other area in which it is essential to guarantee professionalised management is contract performance. The operational balance of the natural or legal person as "responsible for the contract" as defined by the 2007 LCSP is less than satisfactory. Progress must be made toward the training of comprehensive contract managers (managers, supervisors and controllers), overcoming the excessive compartmentalisation often observed with the profusion of single-area managers (administrative, technical and economic). However, the new LCSP

70 Article 83 of Directive 2014/24/EU.

71 Recommendation of the OECD Council on public procurement (2015).

72 Commission Recommendation (EU) 2017/1805 of 3 October 2017 on the professionalisation of public procurement. OJ L 259/26, of 7.10.2017.

73 Malaret, Elisenda. "El nuevo reto de la contratación pública para afianzar la integridad y el control: reforzar el profesionalismo y la transparencia". *Revista Digital de Derecho Administrativo* [Bogotá: Universidad Externado de Colombia], Issue 15 (first semester 2016), p. 21-60.

offers few new developments on this point: it reiterates in Article 62 that the unit in charge of the follow-up for and ordinary performance of the contract will be that indicated in the specifications, and establishes that the person responsible for the contract can be a natural or legal person, either affiliated with or external to the contracting authority, whose duties are to supervise the production and make the necessary decisions and hand down proper instructions. It also establishes as special cases those of works contracts (with the figure of functional manager) and those of the works concession contracts and service concession contracts, with the provision to designate a person who must act to defend the general interest and verify compliance with the concessionaire's obligations.

c) Transparency and integrity

The OJEU recently published a Decision of the European Parliament on the Commission's report entitled "Report from the Commission to the European Parliament and the Council: Protection of the EU's financial interests - Fight against fraud. 2014 Annual Report"[74]. In its section devoted to public procurement, it discusses the level of irregularities derived from the breach of rules on public procurement and makes the case for the creation of a database on irregularities in the European realm and within each Member State.

Along with professionalisation, it is clear that one of the key elements in the fight against corruption is the transparency of management.[75] At this point, the approval of Spanish Law 19/2013, of 9 December, on transparency, access to public information and good governance and the approval of the relevant autonomous community laws have indubitably contributed to a major improvement of the available information, which will enable the articulation of more effective control, and accountability.[76]

The new LCSP is also meant to play a role in the fight against fraud and corruption. Article 1 incorporates the principle of integrity into the catalogue of guiding principles of public procurement, although the consequences are not laid out later, at least not systematically.[77] Article 64, devoted to the "Fight against corruption and prevention of conflicts of interest", establishes that procurement bodies must take measures to prevent, detect and solve conflicts of interest that may arise in tender procedures. Conflicts of interest are explicitly defined, based on the concepts featured in Article 24 of Directive 2014/24/EU. Furthermore, the creation of the previously referenced Oficina Independiente de Regulación y Supervisión de la Contratación plays a pivotal role in the fight against corruption, as it must work to ensure the proper application of legislation in public procurement, and fight against any illegality. Nonetheless, it is necessary to implement control activities in each phase of the contractual cycle. In this regard, the definitive generalisation of comprehensive electronic public procurement models is an indispensable tool, not just for transparency, but also integrity.

Therefore, it is welcome news that the new contract legislation has introduced these elements, so vital to the fight against corruption, for the first time. As Claudio Magris has said, "the legislator who punishes the corruption that occurs in public tenders is an artist capable of imagining reality, because in that corruption he not only sees the abstract violation of a rule but also, for example, the poor quality of the equipment that, because of that corruption, a hospital has been outfitted with, instead of the top-quality instruments that it should and would have had if there had been a transparent and legal public tender. Therefore, behind that crime there are improperly treated patients, specific individuals who suffer."[78] From this point on, it must be ensured that legal provisions are fulfilled and developed and that progress is made in the effective prosecution and punishment of corruption and reparation of its consequences.

74 OJEU C 50/2, of 9.2.2018.

75 Gimeno Feliú, José María. "La reforma comunitaria en materia de contratos públicos y su incidencia en la legislación española. Una visión desde la perspectiva de la integridad". In: Observatorio de Los Contratos Públicos; Gimeno Feliú, José María (dir.). *Las nuevas directivas de contratación pública*. Cizur Menor: Thomson Reuters Aranzadi, 2015, p. 37-105.

76 Malaret, Elisenda. "Bon govern, transparència i rendició de comptes. Reforçant i completant la legitimitat democràtica dels poders públics". *Revista Catalana de Dret Públic* [Barcelona: Escola d'Administració Pública de Catalunya], Issue 55 (December 2017), p. 23-47. DOI: 10.2436/rcdp.i55.2017.3062.

77 For a thorough discussion of the possibilities to articulate this principle, see: Cerrillo, Agustí. *El principio de integridad en la contratación pública. Mecanismos para la prevención de los conflictos de intereses y la lucha contra la corrupción*. Cizur Menor: Thomson Reuters Aranzadi, 2014.

78 Magris, Claudio. *Literatura y derecho. Ante la ley.* Madrid: Sexto Piso, 2008, p. 83-84. Author's note: author's own translation.

9 Brief conclusion

Before the crisis, we already knew that public administration was an actor with enough power to influence market conditions, especially in certain sectors. In fact it can streamline the productive economy while also acting as a driver for change and innovation.

Today we know that the economic and budgetary crisis has had a direct impact on the capacity for public purchasing, with drastic spending cutbacks and a significant drop in procurement volumes. For years, the scenario has been one of a reduction in the number and monetary worth of contracts, of steeper competition, higher numbers of tenderers, more litigation and conflict, later payments, etc. Yet despite all of this, not only is public procurement still a powerful tool for economic reactivation, but the crisis has ended up contributing to and even obliging us to think about "how to procure better". In other words, the economic crisis and budgetary restrictions that have marked the 2007-2017 decade can be an opportunity to rethink, reconsider and reorient public procurement policies in general, and to introduce new criteria in the organisation and management of procurement that make it more efficient.

Bibliography and references

Amoedo Souto, Carlos Alberto. *Tragsa: Medios propios de la Administración y huida del Derecho Administrativo*. Barcelona: Atelier, 2004.

Araujo, Alejandro. *La colaboración público-privada: entre indeterminación, flexibilidad e incertidumbre*. Madrid: Instituto de Estudios Fiscales, 2013. (Documentos de Trabajo; 4/2013)

Baño León, José María. "Del *ius variandi* a la libre concurrencia: la prohibición de modificación como regla general en los contratos públicos". In: Font i Llovet, Tomàs; Galán Galán, Alfredo (dir.). *Anuario del Gobierno Local 2012: Racionalización y sostenibilidad de la Administración local: ¿es esta la reforma?* Madrid: Fundación Democracia y Gobierno Local; Barcelona: Institut de Dret Públic, 2013, p. 141-151.

Cerrillo, Agustí. *El principio de integridad en la contratación pública: Mecanismos para la prevención de los conflictos de intereses y la lucha contra la corrupción*. Cizur Menor: Thomson Reuters Aranzadi, 2014.

Comisión Nacional de la Competencia. *Aplicación de la Guía de Contratación y Competencia a los procesos de licitación para la provisión de la sanidad pública en España* [online]. Madrid: Comisión Nacional de la Competencia, 2013. <https://www.cnmc.es/sites/default/files/1296474.pdf> [consulted: May 9 2018].

Comisión Nacional de la Competencia. *Los medios propios y las encomiendas de gestión: implicaciones de su uso desde la óptica de la promoción de la competencia* [online]. Madrid: Comisión Nacional de la Competencia, 2013. <https://www.cnmc.es/sites/default/files/1186066.pdf> [consulted: May 1 2018].

Comisión Nacional de los Mercados y la Competencia. *PRO/CNMC/001/15. Análisis de la contratación pública en España: oportunidades de mejora desde el punto de vista de la competencia* [on-line]. Madrid: Comisión Nacional de los Mercados y la Competencia, 2015. <https://www.cnmc.es/file/123729/download> [consulted: May 9 2018].

Construmat Barcelona. *Manifiesto CONSTRUMAT: En defensa del sector de la edificación y la obra civil en España* [on-line]. Barcelona: Construmat, 2011. <http://contentp.firabcn.es/contenidos/S025011/docs/Manifiesto%20Construmat.pdf> [consulted: May 10 2018].

Direcció General de Contractació Pública. *Informe de la concurrència en la contractació pública de la Generalitat de Catalunya [online]. Barcelona: Generalitat de Catalunya.* <http://exteriors.gencat.cat/web/ca/ambits-dactuacio/contractacio-publica/direccio-general-de-contractacio-publica-/.content/osacp/seguiment_i_avaluacio/informes-tematics-adjucacions-anuals/informe_concurrencia/2016/Informe-de-la-concurrencia-en-la-contractacio-publica-2016.pdf> [consulted: May 10 2018].

Gallego Córcoles, Isabel. "La modificación de los contratos en la cuarta generación de Directivas sobre contratación pública". In: Observatorio de los Contratos Públicos; Gimeno Feliú, José María (dir.). *Las nuevas directivas de contratación pública.* Cizur Menor: Thomson Reuters Aranzadi, 2015, p. 107-167.

Gamero Casado, Eduardo; Gallego Córcoles, Isabel (dir.). *Tratado de Contratos del Sector Público*. València: Tirant Lo Blanch, 2018.

Gimeno Feliú, José María (dir.). *Estudio sistemático de la Ley de Contratos del Sector Público*. Cizur Menor: Thomson Reuters Aranzadi, 2018.

Gimeno Feliú, José María. "La reforma comunitaria en materia de contratos públicos y su incidencia en la legislación española. Una visión desde la perspectiva de la integridad". In: Observatorio de los Contratos Públicos; Gimeno Feliú, José María (dir.). *Las nuevas directivas de contratación pública*. Cizur Menor: Thomson Reuters Aranzadi, 2015, p. 37-105.

Gómez-Ferrer Morant, Rafael. "La contratación local en tiempos de crisis económica". In: Font i Llovet, Tomàs; Galán Galán, Alfredo (dir.). *Anuario del Gobierno Local 2009: La Directiva de Servicios. Contratación local y crisis económica. Nuevos desarrollos estatutarios.* Madrid: Fundación Democracia y Gobierno Local; Barcelona: Institut de Dret Públic, 2010, p. 163-186.

González Pascual, Julián; Gimeno Losilla, Ruth. "Evolución de los concursos de acreedores en España: 2004-2015". *Boletín Económico de Información Comercial Española* [Madrid: Ministerio de Economía, Industria y Competitividad], Issue 3083 (January 2017), p. 77-95.

Hernández González, Francisco L. (dir.). *El impacto de la crisis en la contratación pública. España, Italia y Francia*. Cizur Menor: Thomson Reuters Aranzadi, 2016.

Hernández González, Francisco L. "La modificación de los contratos públicos en la encrucijada: la crisis como causa de reequilibrio económico". In: Hernández González, Francisco L. (dir.). *El impacto de la crisis en la contratación pública. España, Italia y Francia*. Cizur Menor: Thomson Reuters Aranzadi, 2016, p. 191-261.

Instituto Nacional de Estadística. *Estadísticas del procedimiento concursal (EPC). Cuarto trimestre de 2017 y año 2017. Datos provisionales* [online]. Madrid: Instituto Nacional de Estadística, 2018. <http://www.ine.es/daco/daco42/epc/epc0417.pdf> [consulted: May 10 2018].

Magris, Claudio. *Literatura y derecho. Ante la ley.* Madrid: Sexto Piso, 2008.

Malaret, Elisenda. "El nuevo reto de la contratación pública para afianzar la integridad y el control: reforzar el profesionalismo y la transparencia". *Revista Digital de Derecho Administrativo* [Bogotá: Universidad Externado de Colombia], Issue 15 (first semester 2016), p. 21-60.

Malaret, Elisenda. "Bon govern, transparència i rendició de comptes. Reforçant i completant la legitimitat democràtica dels poders públics". *Revista Catalana de Dret Públic* [Barcelona: Escola d'Administració Pública de Catalunya], Issue 55 (December 2017), p. 23-47. DOI: 10.2436/rcdp.i55.2017.3062.

Martínez-Alonso, José Luis. "Modificación de la Ley de Contratos del Sector Público y gestión de servicios públicos locales: propuestas y alternativas". *Revista General de Derecho Administrativo* [Madrid: Iustel], Issue 40 (October 2015), p. 1-40.

Moreno Molina, José Antonio. "Crisis y contratación local desde la perspectiva de la Administración". In: Font i Llovet, Tomàs; Galán Galán, Alfredo (dir.). *Anuario del Gobierno Local 2011: Gobierno local: ¿crisis o renovación?* Madrid: Fundación Democracia y Gobierno Local; Barcelona: Institut de Dret Públic, 2012, p.117-145.

Padrós, Xavier. "La Llei de contractes del sector públic i les competències de la Generalitat de Catalunya sobre contractació: possibilitats de desenvolupament". *Revista d'Estudis Autonòmics i Federals* [Barcelona: Institut d'Estudis de l'Autogovern], Issue 6 (April 2008), p. 233-271.

Padrós, Xavier. "La contratación pública en tiempos de crisis económica: medidas, proyectos, reformas". In: Font i Llovet, Tomàs; Galán Galán, Alfredo (dir.). *Anuario del Gobierno Local 2009: La Directiva de Servicios. Contratación local y crisis económica. Nuevos desarrollos estatutarios.* Madrid: Fundación Democracia y Gobierno Local; Barcelona: Institut de Dret Públic, 2010, p. 187-209.

Padrós, Xavier. "Le contrat de partenariat à la lumière de l'expérience espagnole". In: Rapp, Lucien; Regourd, Serge. *Du contrat de partenariat au marché de partenariat*. Brussel·les: Larcier/Bruylant, 2016, p. 307-326.

Razquin Lizarraga, Martín María; Vázquez Matilla, Francisco Javier. *La adjudicación de contratos públicos en la nueva Ley de Contratos del Sector Público.* Cizur Menor: Thomson Reuters Aranzadi, 2017.

Sindicatura de Comptes. *Informe 30/2016, de 13 de desembre. Encàrrecs de gestió. Exercici 2013*.

Sindicatura de Comptes. *Informe 31/2016, de 13 de desembre. Centre d'Iniciatives per a la Reinserció (CIRE). Exercici 2013*.

Tornos, Joaquín. "Contratación administrativa en época de crisis. La visión del contratista". In: Font i Llovet, Tomàs; Galán Galán, Alfredo (dir.). *Anuario del Gobierno Local 2011. Gobierno local: ¿crisis o renovación?* Madrid: Fundación Democracia y Gobierno Local; Barcelona: Institut de Dret Públic, 2012, p. 99-115.

Tribunal Administrativo Central de Recursos Contractuales. *Tribunal Administrativo Central de Recursos Contractuales. Memoria de actividades. Año 2017* [online]. Madrid: Ministerio de Hacienda y Función Pública, 2018. <http://www.minhafp.gob.es/TACRC/Documentos/memoria_tacrc_2017.pdf> [consulted: May 10 2018].

Tribunal de Cuentas. *Informe núm. 1003, de 28 de novembre del 2013, de fiscalización de la utilización de la encomienda de gestión regulada en la legislación de contratación pública por los Ministerios, Agencias y Organismos Autónomos del área político-administrativa del Estado, ejercicios 2008-2012*.

Tribunal de Cuentas. *Informe núm. 1197, de 22 de desembre 2016, de fiscalización sobre la utilización de la encomienda de gestión, regulada en la legislación de contratación pública aplicable, por las entidades del sector público autonómico español durante el ejercicio 2013*.

Vázquez Matilla, Francisco Javier. *La modificación de los contratos públicos.* Cizur Menor: Thomson Reuters Aranzadi, 2015.

Vilalta Reixach, Marc. *La encomienda de gestión. Entre la eficacia administrativa y la contratación pública*. Pamplona: Thomson Reuters Aranzadi, 2012.

Villar Rojas, Francisco José. "La concesión como modalidad de colaboración privada en los servicios sanitarios y sociales". *Revista de Administración Pública* [Madrid: Centro de Estudios Políticos y Constitucionales], Issue 172 (January-April 2007), p. 141-188.