

PUBLIC
LAW

NEW PUBLIC-PRIVATE PARTNERSHIPS' REGIME

On May 23, Decree-Law no. 111/2012 was published, defining new rules applicable to the State's intervention regarding the definition, conception, preparation, launching, awarding, modification, supervision and monitoring of the public-private partnerships (PPP).

The goal of this revised legal regime, which was approved in the context of the Economic and Financial Aid to Portugal Programme, is to **reinforce the prior evaluation, by the Ministry of Finances, of the PPP participation's risks, as well as the monitoring of their execution.**

Among the novelties introduced by the diploma, we point out the following:

a) SCOPE OF APPLICATION OF THE NEW REGIME

This new regime tends to widen the cases in which there is additional control over PPP or projects.

Firstly, **the definition of "public partners" now includes all the public companies and not only the corporate public entities** ("entidades públicas empresariais"). Furthermore, the definition also includes **any other entities incorporated by the State, by public state companies, by funds or autonomous services or by public companies created to satisfy general interest needs** (*cf.* paragraph d) and e) of no. 2 of article 2).

However, we underline that this diploma establishes a special regime, which is less demanding, for those partnerships which are developed and launched by public companies with commercial or industrial character, whenever the terms of article 24 are verified. In essence, this special regime applies whenever the partnership does not need or demands any direct or indirect State financing or State warranties and whenever the costs do not affect the public debt.

*Widening of the scope
of PPP regime*

Secondly, we underline the widening of the PPP regulation instruments to certain types of contracts that previously were not subject to them. As such, the **sub concessions of public works and public services are now subject to this regime of PPP control** (cfr. paragraph a) and b) of number 4 of article 2).

This new legal regime also specifies the new situations to which it is not applicable. Decree-Law no. 111/2012 **excludes** from its scope:

- i)* The concessions of multimunicipal water supply for human consumption systems, as well as sanitation of residual waters and management of urban solid waste;
- ii)* The concessions awarded by the State, by a legal diploma, to public entities or entities with exclusively public capital, despite the fact that the partnerships developed by any of these entities are subject to the regime established by this diploma (cfr. paragraph b) and c) of no. 5 of article 2).

b) CREATION OF THE TECHNICAL UNIT OF PROJECT ACCOMPANIMENT

*Creation of a new entity,
in the dependence of the
Minister of Finances, with vast
powers regarding PPP issues*

A new **Technical Unit of Project Accompaniment** is created, in dependence of the Ministry of Finances, that centralizes a set of powers regarding the definition, conception, preparation, launching, awarding, modification, supervision and monitoring of the PPP (cfr. article 34 and 35).

Thus, there is a decrease of the powers of services and entities of other ministries in favor of this Unit.

The new Unit will ensure: *i)* specialized technical support to the Government, especially to the Ministry of Finances, in what concerns economic and financial issues; *ii)* technical support to public entities regarding the management of contracts, assuming the role of contract's manager; and, furthermore, *iii)* support on the development, procurement and the follow up of large projects of other infrastructures that do not fit in the legal definition of PPP.

Therefore, the entity will exert powers in PPP issues, but also in any other project that may demand its intervention.

These projects are identified by order of the Minister of Finances and the minister responsible for the sector of the project, as long as they involve, during the entire time of the project, a gross charge for the public sector equal or higher than 10M€ or an investment equal or higher than 25M€.

Among the powers of this new Unit, we underline:

- i)* The **designation of the project teams** for the study, preparation and launching of the PPP, as well as the teams to accompany the initial phase of the execution of PPP;

- ii)* The **appointment of jury members and PPP negotiation's committee**;
- iii)* The follow up of the arbitral cases referring to PPP;
- iv)* Gathering, treatment and centralization of economic and financial information and risk and allocation of risk regarding PPP contracts already signed or to be signed;
- v)* Publicity of the PPP's on related subjects (*cf.* paragraph e), f), k), n) and p) of no. 2 of article 35).

In addition to these powers, the new **Unit informs the Minister of Finances of the economic and financial situation of the PPP contracts and its evolution and identifies situations that may contribute for an eventual augmentation of the public sector financial effort** (*cf.* paragraph l) and m) of no. 2 of article 35).

c) GROUNDS FOR LAUNCHING AND AWARDED OF THE PPP

Creation of new grounds to launch and award PPP

Another important point to underline is the creation of new grounds to launch and award PPP. The objective is, once again, to ensure a tighter control of the financial and budget effects arising from the PPP.

This way, besides the grounds that already existed, some additional grounds were established, such as, among others:

- i)* The **study of the predictable budget impacts**, regarding the income and expense and its **affordability**, as well as the sensitivity analysis, regarding the demand and the macro economical evolution;
- ii)* The clear enunciation of the partnership goals to the public sector, specifying the expected results and the advantages arising thereof, in a **cost-benefit analysis**;
- iii)* The clear enunciation of the private partnership expected results;
- iv)* The framing of partnership models and contractual structures that ensure, namely, that the financial effort of the public partner is divided with adequate terms and budget affordability;
- v)* The **detailed identification of the risks to be assumed by each of the partners** (*cf.* paragraph b), f), g), j) and l) of no. 1 of article 6).

d) EXECUTION AND MODIFICATION OF THE PPP

The goal of financial and budgetary control also refers to the execution and modification of the PPP.

On one hand, the public partner that wishes to issue an unilateral determination that may justify a **request for the restitution of the financial balance of the contract** now has to previously estimate the financial effects of that determination and verify its budgetary affordability (*cf.* no. 1 of article 20).

On the other hand, the negotiation committee, created whenever facts occur that may sustain the **distribution of benefits, the restitution of the financial balance or the renegotiation of the agreement**, must demonstrate the budgetary affordability of the chosen solutions and quantify, in a detailed way, the public sector charge. This negotiation committee must also estimate the potential impact of the eventual modification of the risk matrix or the new risks to the public sector (*cf.* paragraph d) no. 3, article 22).

Furthermore, the law foresees new situations in which a previous act of the members of the government responsible for the areas of finances and the projects is required. Such demand now has to be satisfied whenever a decision of a public partner may cause: *i*) an increase of accrued charge of 10M€ gross, in updated values or *ii*) a reduction of charge to the private partner (*cf.* paragraph a) and b) of no. 2 of article 20).

Finally, there is an objective of articulating this regime with the Public Contracts Code (“PCC”), since the new legal regime states, in several provisions, the need to observe the PCC regime. So, among other aspects, the choice of the proceeding for the formation of the partnership contract must observe the PCC regime (*cf.* article 15, no. 1)

This new diploma enters into force in 1 July 2012.

Contact

Fernanda Matoso | fmatoso@mlgts.pt



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ASSOCIADOS
SOCIEDADE DE
ADVOGADOS

LISBON

Rua Castilho, 165
1070-050 Lisbon
Telephone: (+351) 213 817 400
Fax: (+351) 213 817 499
mlgtslisboa@mlgts.pt

OPORTO

Av. da Boavista, 3265 - 5.2
Edifício Oceanvs – 4100-137 Oporto
Telephone: (+351) 226 166 950
Fax: (+351) 226 163 810
mlgtsporto@mlgts.pt

MADEIRA

Avenida Arriaga, Edifício Marina Club, 73, 2º
Sala 212 – 9000-060 Funchal
Telephone: (+351) 291 200 040
Fax: (+351) 291 200 049
mlgtsmadeira@mlgts.pt

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