

NEW AMENDMENTS TO THE ORGANIZATION AND PROCEDURAL LAW OF THE COURT OF AUDITORS

PUBLIC LAW

The Organization and Procedural Law of the Court of Auditors, approved by Law no. 98/97, 26 August and the following amendments (hereinafter, “OPLCA”), was recently altered – twice – by Laws no. 61/2011, 7 December and no. 2/2012, 6 January.

We underline the following changes in this Court’s regime: (i) widening of the scope of its preventive control (“*visto*”), (ii) modification of the rules regarding the effects of the acts and contracts subject to “*visto*”, (iii) reinforcement of the Court of Auditors’ power to impose sanctions.

(i) Widening of the scope for preventive control by the Court of Auditors (“visto”)

In what concerns the *subjective scope* of the preventive control held by the Court of Auditors, **the legislator widened the number of entities whose acts and agreements are subject to preventive control (“visto”).**

Besides maintaining preventive control over the acts and contracts of the State and its services, Autonomous Regions and its services, municipalities, its associations and federations and its services, metropolitan areas, public institutes and social security institutions, the legislator introduced an amendment to the first part of paragraph c) of no. 1 of article 5 of OPLCA, establishing the preventive control of acts and agreements of the entities referred in paragraph a), b) and c) of no. 2. of article 2, that is, of:

- public associations, associations of public entities or associations of public and private entities majorly financed by public entities or subject to its management control,
- public companies, including public entity enterprises and
- municipal, intermunicipal and regional companies.

The final part of article 5, no. 1, paragraph c) of OPLCA was also altered, now determining the submission to preventive control of acts and contracts of entities of any nature, created by the State or by any other public entity to perform administrative functions that were primarily assigned to the Public Administration, with costs supported through direct or indirect financing, including the rendering of guarantees, of the entity that has created them.

*Widening of the number
of entities subject
to the preventive control held
by the Court of Auditors*

The acts and contracts up to € 5.000.000¹ practiced or entered into by the entities referred to in paragraph a), b), c) of no. 2 of article 2 (and that do not fit the final part of article 5, no. 1, paragraph c)) are exempted from preventive control.

The *objective scope* of the preventive control was also widened (article 46 of OPLCA), now being subject to it (i) the acts or contracts that formalize objective modifications to agreements that already have been subjected to the “*visto*” and that imply an increase in the financial burden or liability thereof and (ii) the acts or contracts that formalize objective modifications to agreements that have not been subjected to the “*visto*” and that imply an increase in the financial burden or liability higher² than the value established in article 48 of the OPLCA (for 2012, the value is € 350.000). There is also a clarification about the concept of “*contracts*” for the purposes of article 46 of OPLCA, which shall include “*the agreements, protocols, apostilles or other instruments that cause, or may cause, financial or patrimonial burden*”.

In what concerns the list of exemptions regarding preventive control set forth in article 47 of OPLCA, the reference to “*additional contracts to contracts already subjected to preventive control*” was withdrawn and this article now refers to “*acts and agreements that, within public works contracts already subjected to the “visto”, address the performance of additional works or the repair of errors or omissions*”, which are only subject to concomitant and *ex post* control (all relevant documentation must be sent to the Court of Auditors within 60 days from the beginning of the execution).

Article 48 no. 1 of OPLCA maintains the exemption of previous control regarding the contracts referred in paragraph b) and c) of no. 1 of article 46³, that have a contract value, VAT free, inferior to the one annually defined in the State Budget Law (for the State Budget of 2012, the relevant value is € 350.000). A second number was added to the aforementioned article, determining that, for the effects of exemption regulated in the first number, the global value of the relevant acts and contracts is measured taking into account “*those who are or appear to be related with each other*”.

(ii) Modification of the rules regarding the effects of the acts and contracts subject to “visto”

An important novelty was also introduced regarding the “*visto*” effects. According to article 45, no. 4 of OPLCA, **the acts, contracts and further instruments** subject to previous control of the Court of Auditors, **whose value exceeds € 950.000** (except for direct award contracts due to reasons of extreme urgency), **have no effects whatsoever before the “visto”** or the declaration of compliance.

Regarding the acts, contracts and other instruments, whose value is equal or inferior to € 950.000, and contracts that exceed such value but were granted by direct award due to reasons of extreme urgency, the previous “*visto*” regime remains unaltered (such acts, contracts and instruments may produce all effects before the “*visto*” or compliance declaration, except for the payments they originate).

*Contracts whose value exceeds
€ 950.000 have no effects
before the “visto”
of the Court of Auditors*

¹ Article 47 no. 1, paragraph a) of “OPLCA”, as amended by Law no. 2/2012, 6 January.

² Article 46 no. 3 of “OPLCA” determines that the value that outcomes the one predicted in article 48 must result from the sum of the initial value and of previous objective modifications.

³ Public works contracts, acquisition of goods and services, as well as other asset acquisitions that imply expenditure under article 48, when written by force of law and drafts of contracts of equal or superior value to the one set forth in the State Budget Law as determined in article 48, whose burden, or part of it, has to be satisfied in the act of signature.

*Sanctions for the violation
of legal or regulatory provisions
regarding public procurement*

(iii) Reinforcement of the sanctioning powers of the Court of Auditors

In what concerns the power to impose sanctions regarding financial liability, regulated in article 65, the material scope was also widened, as for the Court of Auditors is now authorized to apply fines (i) for the violation of legal or regulatory provisions regarding public procurement, as well as the admission of staff, (ii) by the lack of trigger of the legal mechanisms regarding the exercise of the right of recourse, the execution of penalties or restitutions due to the public treasury.

The minimum and maximum thresholds of the applicable fines were also raised, varying from 25 to 180 UC (*Unidades de Conta*).

Law no. 61/2011, 7 December – which is responsible for the vast majority of the amendments referred herein – entered into force ten days after its publication and it is applicable to the acts and agreements entered into after that date⁴. The law also contains, in article 2, a transitory ruling determining that the Govern must proceed, in the following 120 days, to the legislative and instrumental changes necessary for the Court of Auditors to exercise, in the specific situations where it is still not verified, the competences regarding previous control on the acts and contracts of the entities that are now, under the new regime, subject to the “*visto*” and that we not under the old version of the law.

⁴ Law no. 2/2012, 6 January – which only altered article 47, no. 1, paragraph a), that had already been amended by Law no. 61/2011, 7 December – entered into force on the day after it was published and is applicable to the acts and contracts entered into after such date.

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