# XV. Public procurement



# Glossary

### Communication 2020/C 108I/01

Communication from the Commission 2020/C 108 I/01 of 1 April, with Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis

### Decree-Law no. 10-A/2020

Decree-Law 10-A/2020 of 13 March, which establishes exceptional temporary measures related to the new Coronavirus - COVID-19 epidemic, amended by Decree-Law no. 10-E/2020 of 24 March, Decree-Law no. 12-A/2020 of 6 April, Law 4-A/2020 of 6 April, Law no. 5/2020, of 10 April, Decree-Law no. 14-F/2020, of 13 April, Decree-Law no. 18/2020, of 23 April, Decree-Law no. 20/2020, of 1 May and Decree-Law 20-A/2020, of 6 May

### Decree-Law 10-E/2020

Decree-Law 10-E/2020 of 24 March, which creates an exceptional framework for authorising expenditure in response to the COVID-19 pandemic and is the first amendment to Decree-Law 10-A/2020 of 13 March

### Decree-Law no 19-A/2020

Decree-Law no. 19-A/2020, of 30 April, establishing an exceptional and temporary regime applicable to long-term execution contracts to which the State or other public entity is a party and compensation for the sacrifice ("indemnização pelo sacrifício") of acts practiced in the scope of preventing and fighting the COVID-19 pandemic.

### Law 1-A/2020

Law 1-A/2020 of 19 March, which approves exceptional and temporary measures regarding the new coronavirus SARS-CoV-2 and COVID-19 epidemic, amended by Law 4-A/2020 of 6 April

### Law 4-A/2020

Law 4-A/2020 of 6 April, which is the first amendment to Law 1-A/2020 and the second amendment to Decree-Law 10-A/2020

# XV. PUBLIC PROCUREMENT

## XV.A. Procurement procedures

Decree-Law 10-A/2020, amended by Decree-Law 10-E/2020 and Law 4-A/2020, which establishes exceptional temporary measures relating to the COVID-19 epidemic, defines, in this regard, an exceptional public procurement framework. The government decree was ratified by the Portuguese Parliament through Law 1-A/2020.

### PURPOSE OF THE EXCEPTIONAL PUBLIC PROCUREMENT FRAMEWORK

The exceptional public procurement framework approved by Decree-Law 10-A/2020 is intended to "simplify" and "accelerate" public procurement procedures required to respond to the COVID-19 epidemic: within its scope of application, the decree-law generally authorises the use of direct award procedures (instead of procedures that are open to competition), derogates legal limitations on repeated direct awards to the same economic operator and, in certain cases, increases the thresholds for the use of the simplified direct award procedure. Furthermore, and with the same purpose, the exceptional legal framework allows the awarding entity to exempt contractors from submitting qualification documents and providing a bond, and dispenses with publication as a condition for effectiveness of contracts awarded (condition generally applicable to contracts entered into following a restricted call for bids ("*consulta prévia*") or a direct award).

The exceptional nature of the legal framework – which translates into the absolute derogation of the principle of competition, and the rules which implement it, specifically in relation to selecting procurement procedures – requires contracting entities to be particularly careful in the following aspects: (*i*) application of the new exceptional legal framework only to cases in which it is clear that the contract to be signed is covered by this legal framework; (*ii*) consideration of general legal requirements that the new framework does not waive, for example, with regard to the grounds for exclusion of economic operators (Article 55 of the Public Contracts Code (CCP)) and, no less important, impediments for public decision-makers (impediments and suspicions set out in Articles 69 and 73 of the Code of Administrative Procedure, in the Legal Framework for the Exercise of Functions by Political Office Holders and Senior Public Officials and in the Regulations for Local Officials).

### ARTICLE 1(2): OBJECTIVE SCOPE OF THE FRAMEWORK

In as far as concerns the objective scope of the exceptional public procurement framework, the general criterion is the applicability of the decree-law. Accordingly, procurement procedures for public contracts are encompassed when the provisions (delivery services or providing products or works) are intended to satisfy specific needs of the contracting authorities in relation to the "prevention", "containment", "mitigation" and "treatment" of the COVID-19 epidemic, as well as the "return to normal afterwards".

In order to be covered by the exceptional legal framework outlined by the decree-law, the contract to be executed must, firstly, be classified within one of the typical categories of public procurement contracts: service procurement, procurement of movable property (products) or performance of works. Secondly, the provisions under the contract must directly meet a need to be satisfied by the contracting authority in at least one of the areas indicated in the law: prevention, containment, mitigation or treatment of the epidemic. In any of these areas, this is related to purchases required in the context of combating the epidemic. Less

clear are the boundaries for contracts to be executed for the "return to normal" following the epidemic – unfortunately, it is not yet time to reflect on contracts that could be concluded in this context, which is why we will not discuss this on this occasion.

### ARTICLE 1(3): SUBJECTIVE SCOPE OF THE LEGAL FRAMEWORK

Under Article 1(3) of Decree-Law 10-A/2020, the exceptional measures set out in Chapters II and III apply, with the necessary adaptations, to the contracting authorities set out in Article 2 of the Public Contracts Code, in its current wording. The phrase "with the necessary adaptations" is understood as meaning "with the necessary adaptations according to the contracting authority".

### GUIDANCE FROM THE EUROPEAN COMMISSION OF 1 APRIL 2020

In interpreting and correctly applying the exceptional legal framework, Communication 2020/C 108I/01 of the European Commission, which adopts a set of guidelines on applying public procurement rules in the emergency situation related to the COVID-19 crisis, cannot be ignored.

By contrast to Portuguese legislator which, in this particular context, generally tend to authorise the use of the direct award procedures in preference to procedures that are open to competition, the European Commission adopts a clearly more restrictive rationale which only applies to cases of proven urgency and favours the use of bidding procedures.

Consequently, these guidelines reflect a rationale of *subsidiarity* and *strict necessity and proportionality* that contracting authorities must ensure: (*i*) firstly, and only if necessary, contracting authorities may shorten the deadlines established in the scope of open and restricted procedures, accelerating the respective process (in the case of open procedures, the deadline for the submission of tenders may be reduced to 15 days; in the case of restricted procedures, the deadline to submit a request for participation may be reduced to 15 days and the deadline to submit a offer to 10 days – *cf.* point 2.2 of Communication 2020/C 108I/01); (*ii*) alternatively, if the reduction of this time limit is not sufficient, in "*cases of extreme urgency*", contracting authorities may use negotiated procedures without publication.

The exceptional nature of the use of non-competitive procedures is, in this context, particularly underlined. Besides the requirement for a case by case assessment that tends to be restrictive, contracting authorities may only use these procedures if the cumulative requirements for that purpose have been fulfilled ("event unforeseeable by the contracting authority" and "extreme urgency making compliance with general deadlines impossible"). The application of this legal framework seems to be limited, in practice, to the specific needs of hospitals and other health institutions.

At heart, and in contrast to the option taken by Portuguese legislator to facilitate the use of direct award procedures, the EU legislator seems to have a clear preference for using "*open*" procedures, only allowing resorting to non-competitive procedures as a last resort.

In this regard, at least relating to contracts whose value exceeds European thresholds, contracting authorities must apply the exceptional legal framework with redoubled caution, for instance with regard to the full clarification of the substantive reasons for using a direct award procedure under the terms defined in Decree-Law 10-A/2020.

**ARTICLE 2(1):**
**DIRECT AWARD PROCEDURE**

Article 2(1)[1] relates to the use of the direct award procedure for entering into contracts defined therein, regardless of their value. This is a specific application of the choice of direct contracting under material criteria, whereby contracting authorities may invite a single economic operator and enter into one of the listed types of contract with them.

With regard to this analysis, Article 2(1), raises two essential questions:

- a first question, of a procedural nature, correlated with the requirements for using direct awards and with the contracts covered (i.e. the scope of objective application of the legal framework);
- and a second question, of a substantive nature, pertaining to the material requirements for recourse to the direct award procedure.

With regard to the first question, and as has already been referred in the notes on Article 1, the objective requirements legitimating the choice of the direct contracting procedures are all – exclusively – those set out in Article 1(2), i.e. those aimed at taking measures to: (*i*) prevent, contain, mitigate and treat the COVID-19 epidemic; and (*ii*) return to normal following the COVID-19 epidemic.

For both cases, the criterion for choosing the direct award procedure requires contracting authorities to demonstrate – an sufficient or plausible demonstration at least – the existence of a substantive causal link: that the use of direct contracting is always caused by the COVID-19 epidemic.

On the other hand, and in relation to the objective scope of application, as already mentioned above, the use of the direct award procedure only allows for the conclusion of the following contracts:

- For public works, as defined by Article 343 of the Public Contracts Code, in conjunction with Annex XI, relating to civil construction;
- For purchase and leasing of movable property, within the meaning of Article 431 and 437 of the Public Contracts Code, respectively;
- For procurement of services, as defined by Article 450 of the Public Contracts Code.

Any other contracts are excluded from the regime, including the other contracts regulated directly by the Public Contracts Code, as is the case of public works concessions and services concessions. It should be noted that there may be contracts which involve multiple aspects (for example, services and works or one of these with the acquisition of movable property). In such situations, with regard to the identification of the specific contract to be executed, contracting authorities must follow the general criteria established in Article 32 of the Public Contracts Code.

With regard to the second question, the regime for choosing the direct award procedure on the basis of these material criteria, under the reference made at the end of Article 2(1) of Decree-Law 10-A/2020 – "the provisions of Article 24(1)(c) of the Public Contracts Code apply [...], to the extent strictly necessary and for reasons of extreme urgency" –, does not exempt contracting authorities, when making the decision to launch said procedure, from mentioning the cumulative substantive and procedural requirements mentioned in that paragraph, under which contracting authorities may use the direct award procedure to enter into contracts of any value "to the extent strictly necessary and regarding which, for reasons of extreme urgency resulting from events

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[1] Article 2(1): "For the purposes of selecting the direct award procedure for entering into public works contracts, contracts for the purchase or lease of movable property and service contracts, regardless of the nature of the contracting authority, the provisions of Article 24(1)(c) of the Public Contracts Code (CCP), approved by Decree-Law 18/2008 of 29 January 2008, in its current wording, applies, to the extent strictly necessary and for reasons of extreme urgency".

unforeseeable by the contracting authority, the deadlines inherent to other procedures cannot be complied with and provided that the circumstances involved are not, in any way, attributable to the contracting authority".

In other words, as well as the requirements already resulting expressly from the rule under discussion "[t]o the extent strictly necessary and for reasons of compelling urgency", it is important that contracting authorities, in making the decision to launch such a procedure, to demonstrate, at least plausibly, that the other requirements, to be "applied cumulatively", for using the direct award procedure for reasons of compelling urgency are met:

- That the reasons of extreme urgency result from events unforeseeable by the contracting authority;
- That are not attributable, under any circumstances, to the contracting authority; and
- That the deadlines set out for bidding procedures cannot be met.

The legislator does not, however, exempt contracting authorities from the requirement to provide reasoning for the decision. Nonetheless, it should be said that the emergency and disaster situation caused by the pandemic is, unquestionably, an unforeseeable event and is also, clearly, an event that is not imputable to the contracting authority. In this regard, we are inclined to believe, in fact, in accordance with the primary meaning of the exceptional legal framework itself, that public contracts awarded to meet the needs of prevention or containment of the epidemic fully meet all the conditions set in Article 24(1)(c) of Public Contracts Code. In this context, the duty to provide reasons prescribed by the provision under discussion should be read more as a formal reasoning requirement, rather than a substantive one.

It should be noted that the exceptional situation experienced could lead to various situations of awarding public contracts "for reasons of extreme urgency", as generally provided in the Public Contracts Code, for cases in which the exceptional legal framework does not apply. The fact that situations of extreme urgency for procurement occur does not imply, for this reason, that the conditions for applicability of the exceptional regime are considered to be met.

#### ARTICLE 2(2): SIMPLIFIED DIRECT AWARD PROCEDURE

This provision[(2)] establishes a special and extended framework for simplified direct award in relation to the framework in Article 128 of the Public Contracts Code. Article 2(1) provides that "[i]n the event of direct award for the formation of an acquisition or lease contract for movable property or for service procurement whose contract price does not exceed EUR 5,000, or in the case of public works, EUR 10,000, the award may be made by the body with the authority to take the decision to contract, directly, upon the presentation of an invoice or equivalent document by the invited entity, without having to use an electronic procedure".

Essentially, Article 2(2) of the exceptional public procurement framework results in the following:

- Contracting authorities can always use the direct award procedure under the material criteria for entering into contracts of any value; it is irrelevant whether the value is high or low. This is what results from the safeguard placed at the start of the provision, which expressly mentions "[n]ot withstanding the provisions in the preceding paragraph";

(2) Article 2(2) provides that "notwithstanding the provisions of the preceding paragraph, if relating to direct contracting for the formation of a contract for acquisition or lease of movable property and for service procurement regarding which the contract price does not exceed EUR 20,000, the provisions of Article 128(1) and (3) of the CCP apply".

- However, for acquisition or lease contracts for movable property or service procurement for which the contract price does not exceed EUR 20,000, contracting authorities can use the simplified direct award procedure (for public works, the general legal framework for simplified direct awards in Article 128(1) of the Public Contracts Code will continue to apply, with a threshold of EUR 10,000);
- By virtue of the referral in the final part of the provision, the simplified direct contracting method is exempted from any other formal requirements under the Public Contracts Code, including those relating to entering into the contract and publication set out in Article 465. In other words, in order to take full legal and financial effect, these contracts are exempted from the requirements of publication and contract effectiveness established in Article 127 of the Public Contracts Code;
- In any case, the Portuguese legislator has not exempted simplified direct awards under the exceptional public procurement framework from the limits set out in Article 129 of the Public Contracts Code. These are substantive limits imposed on the contracts themselves: the duration cannot be longer than one year from the award decision; the duration cannot be extended (notwithstanding the existence of additional obligations established clearly in favour of the contracting authority, such as confidentiality or warranty for goods or serviced procured); and the contract price cannot be revised.

With the entry into force of Decree-Law no. 18/2020, of 23 April 23, Article 2-A was added to Decree-Law no. 10-A/2020, which also regulates an exceptional simplified direct award for the conclusion of contracts which consists in the acquisition of equipment, goods and services necessary for the prevention, containment, mitigation and treatment of the infection caused by SARS-CoV-2 and the COVID-19 disease, or related to, namely, the acquisition of personal protective equipment, goods that are necessary to carry out tests on COVID-19, equipment and material for intensive care units, etc.

Contrary to the rule of Article 2(2), the exceptional simplified direct award governed by the Article 2-A allows the Contracting authorities, to the extent strictly necessary and for reasons of overriding urgency, contracts regardless of value and up to the limit of the budgetary allocation.

However, such exceptional simplified direct award must be promoted by «*Direção-Geral da Saúde*», «*Administração Central do Sistema de Saúde, I.P.*», «*Instituto Nacional de Saúde Dr. Ricardo Jorge, I.P.*,» or «*Serviços Partilhados do Ministério da Saúde, E.P.E. (SPMS, E.P.E.)*», in respect of goods intended for entities under the tutelage of the Minister of Health Article (of the 2-A(2)).

The Contracting Authorities shall be obliged to communicate the adoption of these procedures, and their award decision, to the members of the Government responsible for finance and health (including the reasons for the adoption of this exceptional regime), advertising them on the public contracts portal.

### ARTICLE 2(3): PRIOR CONTRACTS WITH THE ECONOMIC OPERATOR

By virtue of Article 2(3)[3], for any and all procurement procedure for public works, acquisition or lease of movable property and service procurement, the Portuguese legislator has – quite rightly – exempted contracting authorities from checking for prior contracts with the economic operator. In other words, it fully neutralises the general legal framework of the Public Contracts Code, as set out in the

[3] Article 2(3) provides that "[t]he limitations in Article 113(2) to (5) of the CCP do not apply to the procedures encompassed by this decree-law, which are also exempt from Article 27-A of the CCP".

aforementioned Article 113(2) to (5). This means that:

- Contracts already awarded and those that may be awarded to the same economic operator are not relevant for the "three-year limit";
- Contracting authorities do not need to confirm whether potential economic operators have already (or will) provide free supplies (donations).

In addition, they are also exempted from complying with Article 27-A of the Public Contracts Code, according to which a restricted call for bids procedure ("*consulta prévia*") must be adopted whenever the use of more than one entity is possible and compatible with the grounds invoked to adopt this procedure. Namely, the exceptional public procurement framework – and again rightly – derogates the general rule of preferring restricted calls for bids as opposed to direct awards.

#### ARTICLE 2(4): PRINCIPLES OF PUBLICITY AND TRANSPARENCY

This rule[4] establishes a specific duty to report to the Government, imposed on each and every contracting authority. In general terms, one can understand that this duty should be enshrined. However, this does not extend to local authorities and equivalent entities, without prejudice, naturally, to the observance of the principles of publicity and transparency in procurement by these entities.

#### ARTICLE 2(5): EFFECTIVENESS OF CONTRACT FOLLOWING DIRECT AWARD PROCEDURE

In practical terms, Article 2(5)[5], derogates Article 127(3) of the Public Contracts Code, which requires the prior publication of the conclusion of contracts following direct award as a condition for the contract to take effect. Publication continues to be required, but the contract may – by direct effect of the law, which need not to be set out in the procedural documents – take full effect (legally and financially) before publication and, furthermore, according to the law, immediately after the award is made. This means that, in this case, the legislator considers that the contract should be considered legally existent from the moment it is awarded, even when it has to be reduced to writing; therefore, it can take effect from this moment on. The solution in law leads to considering the award, including in contracts that must be made in writing, as a "statement with a double significance", on one hand, as an administrative decision completing the award procedure and, on the other, as a negotiation statement of completion of a contract.

#### ARTICLE 2(7): WAIVER OF PRIOR CONSENT

Under Article 2(7)[6], entities encompassed by the National Public Procurement System are required to make purchases covered by framework agreements concluded by central

[4] Article 2(4) provides that "awards made under this exceptional legal framework are reported by the contracting authorities to the members of the Government responsible for finance and the relevant sector and publicised on the public contracts portal, ensuring compliance with the principles of publicity and transparency in procurement".

[5] Article 2(5): "[c]ontracts executed under this exceptional legal framework following direct award, regardless of whether or not they are made in writing, can take full effect after the award, notwithstanding the respective publication, in accordance with Article 127(1) of the CCP".

[6] Article 2(7): "the need for prior consent regarding the exception from centralised procurement of goods or services covered by a framework agreement for entities encompassed by the National Public Procurement System is also waived".

purchasing bodies (e.g., the central purchasing body of the Ministry of Health, managed by the Ministry of Health Shared Services, Public Enterprise) under such framework agreements (public supply contracts). Under general law, they may be exempted from this obligation by prior express authorisation from the member of the Government responsible for finance (Article 5(4) of Decree-Law 37/2007 of 19 February 2007). The provision in question waives the requirement of prior consent and thereby allows the contacting authorities in question to untie themselves from the framework agreement. This is what in our view can be deduced from this principle, while recognising that the provision would have been clearer if it had established that, under the exceptional framework, centralised procurement is no longer mandatory.

**ARTICLE 2(8):**
**APPROVAL OR DECLARATION OF COMPLIANCE FROM THE COURT OF AUDITORS**

This provision establishes[7] a framework authorising contracts to take effect before approval or declaration of compliance by the Court of Auditors. Article 6 of Law 1-A/2020 exempts the contracts covered by Decree-Law 10-A/2020 from prior control by the Court of Auditors, which is why the article under examination, that presupposes the submission of these contracts to the Court of Auditors, has become meaningless. Accordingly, contracts covered by the decree-law of 13-03-2020 take full effect from the moment they are awarded, as provided by Article 2(5).

However, it should be noted that, under Article 6(2) of Law 1-A/2020, contracts encompassed by Decree-Law 10-A/2020 "[s]hall be sent to the Court of Auditors, for information, within 30 days from their conclusion".

**ARTICLE 2(9):**
**QUALIFICATION DOCUMENTS**

This provision[8], introduced by Law 4-A/2020, allows the contracting authority to waive submission, by the contractor, of the qualification documents set out in Article 81(1) of the Public Contracts Code, i.e. the statement in accordance with Annex II of the Public Contracts Code and documents demonstrating that the contractor does not fall under the grounds of exclusion set forth in Article 55(1)(b), (d), (e) and (h) (related to the existence of certain criminal convictions and non-compliance with tax and social security contributions).

It should be noted that the rule in Article 2(9) of Decree-Law 10-A/2020 does not waive the actual grounds for exclusion; it simply allows the contracting authority to dispense the contractor from providing documents demonstrating that (certain) exclusion grounds do not apply, nevertheless keeping the general participation requirements set out in Article 55(1) of the Public Contracts Code intact. This is confirmed by the express reference to the contracting authority's right to request the qualification documents at any time.

**ARTICLE 2(10):**
**PROVISION OF BOND**

This new rule[9], also added by Law 4-A/2020, allows the contracting authority to release the contractor from providing a bond in all contracts falling under this exceptional legal framework. The exemption from providing a bond is therefore no longer limited to the cases in which the Public Contracts Code allows the contracting authority to waive this requirement (among which, cases where the contract price is less than EUR 200,000).

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(7) Article 2(8): "the provisions of Article 45(5) of Law 98/97 of 26 August, in its current wording, apply to contracts concluded under this decree-law and the contract may take full effect before its approval or declaration of compliance, for instance with regard to the payments arising therefrom".

(8) Article 2(9): "[t]he qualification documents set out in Article 81(1)(a) and (b) of the CCP, can be waived, including for the purposes of making payments, without prejudice to the contracting authority being entitled to request them at any time".

(9) Article 2(10): "[r]egardless of the contract price, the provision of bond need not be required".

It appears that, in the case of ongoing procedures on the date that Law 4-A/2020 entered into force (which added the provision in question to Law 1-A/2020), the contracting authority will enjoy this possibility regardless of that established on this matter in the procedural documents.

In any case, we interpret this provision as establishing a discretionary power of the contracting authority, which means that waiving the bond under this rule must be appropriately reasoned.

#### ARTICLE 2-B: EXCEPTIONAL REGIME FOR GROUPING OF CONTRACTING AUTHORITIES

With the entry into force of Decree-Law no. 20-A/2020, of 6 May, Article 2-B was added to Decree-Law no. 10-A/2020, which expressly admits the possibility of applying, to the extent strictly necessary and for reasons of overriding urgency, irrespective of the contractual price and up to the limit of the budgetary allocation, the regime for grouping of contracting authorities provided for in Article 39 of the Public Contracts Code, for the conclusion of contracts for the acquisition of space for the dissemination of institutional advertising actions under or inherent to the COVID-19 pandemic, with national, regional and local media, by television, radio, print and/or digital, pursuant to Articles 8 and 9 of Law no. 95/2015, of 17 August, in its current wording (see Article 2-B(1)).

It should be noted, however, that the apparent "amplitude" of paragraph 1 of this article is densified throughout the following paragraphs, thus establishing limits on the overall price of acquisition of space for the dissemination of institutional advertising actions (see paragraph 2), the rules for the inclusion of that same global price in the budget of the group representative (see paragraphs 3 and 4), and the types of institutional advertising actions allowed and the applicable time period (see paragraph 5).

Finally, this exceptional contract also contains the following specificities (see points (a) to (f) of Article 2-B(1):

- The designation of the representative of the group for the purposes of conducting the procedure for the formation of the contract to be concluded shall be defined by resolution of the Council of Ministers;
- The responsibilities of each of the contracting entities which are members of the group, including financial and expenditure are defined by resolution of the Council of Ministers;
- Procedures for the acquisition of diffusion space may be adopted through direct award, applying, with appropriate adaptations, the provisions of Articles 2, 3 and 4, as well as the provisions of Article 6(1) and (2) of Law no. 1/2020, of 19 March, in its current wording;
- All acts whose competence is conferred by resolution of the Council of Ministers to the body with the authority to take the decision to contract shall be carried out individually by the representative of the group;
- Regardless of the contractual price, all powers may be delegated and sub-delegated to the representative of the grouping either for the formation of the procedure or for the performance of the contract.

#### DEADLINES IN PUBLIC PROCUREMENT PROCEDURES

Under Article 7-A(2) of Law 1-A/2020 (article added by Law 4-A/2020, "the suspension of the administrative deadlines set out in (9)(c) of the previous article [which covers "administrative procedures (...) in as far as they relate to acts performed by private entities"] does not apply to deadlines relating to public procurement procedures, particularly those within the Public Contracts Code, approved in the annex to Decree-Law 18/2008 of 29 January 2008". In other words, the deadlines regarding public procurement procedures are not suspended.

Less clear, however, is the scope of Article 7-A(3), according to which "procedural deadlines under the Public Contracts Code which were suspended under Articles 7 and 10 of this law, in its initial wording, resume from the date when Law 4-A/2020 of 6 April 2020 comes into force". More specifically, questions could appear as to the identification of deadlines which "were suspended under Articles 7 and 10 of this law" and which, with the entry into force of Law 4-A/2020, resume their course. Remember that, in the wording prior to Law 4-A/2020, Article 7(1) of Law 1-A/2020 determined the application of the regime of judicial holidays to certain "procedural acts", which did not encompass "acts" performed in public procurement procedures. However, Article 7(6)(c) established that the "framework set out in this article" (and, therefore, also in (1) on *judicial holidays*) "also applies, with the necessary adjustments, to *administrative and tax deadlines in favour of individuals*". In the absence of clarification by the legislator as to which *administrative* deadlines this refers to, questions arose as to whether this rule applied to public procurement procedures and, if so, which deadlines would be affected.

So, with the legislative intervention introduced by Law 4-A/2020, the Portuguese legislator clarified that the rule in Article 7(1), with its initial wording, was applicable to public procurement procedures [by way of the extension set out in (6)(c)]. However, it was not clarified which deadlines had been suspended. Given this framework, it appears that the suspensions were applicable, at least, to deadlines for the performance of acts by the parties interested in the procedure, candidates or bidders (namely, deadlines for requesting clarifications, for submitting lists of errors and omissions, for submitting requests to participate or offers, for submitting opinions in prior hearings, or to comply with post-award duties).

Taking into account the interpretative rule in Article 10 of Law 4-A/2020, these deadlines were suspended on 09-03-2020 and resumed on 07-04-2020.

#### DEADLINES FOR PRE-CONTRACT LITIGATION

According to Article 7-A(1) of Law 1-A/2020, added by Law 4-A/2020, the suspension of deadlines set out in Article 7(1), "does not apply to the pre-contract litigation set out in the Code of Administrative Court Procedure". On this topic, see Chapter XIV of this Guide, *Administrative procedure and litigation – deadlines and hearings*.

## XV.B. Contract performance

In general terms, the exceptional legislation approved does not address matters related to the performance of public contracts. It should be noted, however, that the exception is provided in Article 2(6) of Decree-Law 10-A/2020, which states that "whenever a guarantee of availability of the goods and services referred to in this article, by the economic operator, is concerned, the contracting authority may make advance payments waiving the prerequisites set out in Article 292 of the CCP, and the resulting acts and contracts may take full effect immediately". Essentially, this provision also exempts contracting authorities from the general legal framework of the Public Contracts Code, in relation to advance payments, established in Article 292 of the Public Contracts Code. This general legal framework, as results immediately from the body text in (1) – in the "[c]ase of contracts involving the public entity paying a price, this entity can make advance payments on account of provisions to be made or for preparatory or additional acts regarding these provisions when [...]" – due to the assumptions made about the possibility of making advance payments, ends up converting the advance payment into an exceptional faculty for contracting authorities, but it should be noted that this relates only to the performance of contracts encompassed by the scope of application of that legislation.

In the absence of special legislation on the performance of public contracts encompassed by the exceptional legal framework, the general rules in the Public Contracts Code are applicable, as are the general legal principles on administrative contracts, in order to address the multiple vicissitudes that may be caused by the current exceptional circumstances in affecting or preventing the normal process of contract performance. In general, everything points to the most frequent issues being related, more or less directly, to the topics regarding the "termination" and "modification" of contracts; to this could be added, as a major topic, that of "suspension of performance" of contractual obligations. Foreseeably, the following most frequent scenarios can be considered:

- **Public entity's loss of interest in the performance of the contract** – questions can be raised as to whether this would be a case of contract termination for reasons of public interest (Article 334 of the Public Contracts Code) or of termination due to an abnormal and unforeseeable change in circumstances (Article 335(1) of the Public Contracts Code); depending on the case, the latter could be considered to apply, provided that the loss of interest arises exclusively by virtue of a situation caused by the pandemic or by the measures taken as a result. But we cannot rule out that a specific public interest to terminate other contracts might also result from this situation (e.g. due to deviation in the allocation of financial resources, it may be necessary to terminate contracts whose performance has become less compelling and can be delayed);
- **Breach of contract by private contractor due to "impossibility of contract performance"** – the characteristic features of force majeure ("unforeseen", "irresistible" and "external" event) will certainly appear as reasons to justify multiple breaches of public contracts entered into before the adoption of public measures to deal with the epidemic. Invoking force majeure exonerates anyone that does not perform an obligation from the liability resulting from that non-performance breach and may also lead to compensation of the private contractor. It may be used in situations of full or partial non-performance. As a general rule, the need to demonstrate a causal link between the specific circumstances of failure to perform the contract and the general measures taken in reaction to the epidemic which render performance impossible should not be neglected. The topic of contract non-performance will arise particularly in relation to collaborative public contracts (public procurement), but also make a significant impact on financing contracts; in this case, force majeure will also serve as justification for non-performance and cause for exemption from liability, as well as potentially leading to the adoption of extraordinary measures to extend deadlines for compliance with the obligations undertaken;
- **Increased burden of contract performance** – the exceptional situation may cause an unexpected and significant increase in costs that the contractor is required to bear in order to perform the contract. This is a scenario which involves applying the so-called "theory of unforeseeability" and, accordingly, the contractor's recognition of the right to the indicated compensation due to lack of foreseeability. This scenario comprises various difficulties arising from the serious shortcomings of the Public Contracts Code on this matter, which establishes several limits on modification (Article 313), without distinguishing contractual changes (increasing the volume and, therefore, the price of provisions) from amendments made to ensure "balanced provisions"; in addition, the compensation due to lack of foreseeability cannot be limited by maximum amounts (e.g. 25% of the initial contract price), for, due to its very nature, it can

involve compensation whose value is defined on a case by case basis;

- **Contract modification** – even outside the scope of unforeseen events, it is possible for exceptional circumstances to require contractual modifications, for example, in order to increase what is provided under the contract; insofar as these amendments can be covered by the exceptional public procurement framework, no difficulties arise; outside this context, as a rule, the strict legal framework which applies to imposed amendments and those promoted by agreement between the parties must be observed;
- **Suspension of contract performance** – the suspension of performance of contractual provisions (Article 297 of the Public Contracts Code, in general, and Articles 365 and 369 in relation to public works) may be determined (by the public entity) or requested (by the contracting partner) or agreed in the event of temporary impossibility to perform the contract.

### EXCEPTIONAL REGIME FOR THE RESTORATION OF FINANCIAL BALANCE OF CONTRACTS

On April 30, 2020, Decree-Law no. 19-A/2020 was published, establishing an exceptional and temporary regime applicable to long-term execution contracts to which the State or other public entity is a party and compensation for the sacrifice ("*indemnização pelo sacrifício*") of acts practiced in the scope of preventing and fighting the COVID-19 pandemic.

Although, in general, doubts may arise as to the exact scope of the long-term execution contracts' concept, there are reasons to consider that any contracts containing clauses to restore financial balance or for which the law foresees a possibility to restore financial balance are covered by such concept.

This regime is partly based on the provision of the Presidential Decree no. 17-A/2020, of 2 April, (also contained in the Presidential Decree no. 20-A/2020, of 17 April), which renewed the state of emergency and allowed the possibility of "temporarily modifying the terms and conditions of long-term execution contracts or waiving the demand for certain services, as well as limiting the right to restore financial balance of concessions as result of a decrease in their use resulting from measures adopted under the state of emergency".

The following measures are therefore adopted:

#### 1. Restoration of financial rebalance

The legislator establishes an exceptional regime to restore financial balance of long-term execution contracts where the State or other public entity is a party, due to facts arising from the COVID-19 pandemic, distinguishing two periods of time:

a) For the period from April 3rd to May 2nd, 2020, in accordance with the provisions of Article 3, paragraph 1, the clauses for restoring financial balance and the legal provisions providing for such restoration or for the right of compensation following a decrease in their use, are suspended. This means that counterparties may not claim the right to restore financial balance due to a decrease in use in that period as a result of measures adopted in the state of emergency. The law only refers the suspension of compensation or restoration due to a decrease in use (which causes loss of revenue), so, Article 3, paragraph 1, will not apply to the right to compensation or restoration for increased costs caused by the COVID-19 pandemic (as set forth in Presidential Decree no. 17-A/2020).
b) For events occurring before April 3rd or after May 2nd 2020, in accordance with Article 3, paragraph 2, the right to compensation or to restore financial balance is maintained in contracts where compensation is

provided for a decrease in use or in which the pandemic constitutes a ground likely to generate, under the contract, a right to restore financial balance (whether or not it is expressly mentioned in the contract), but this can only take place through an extension of the performance period of the services or of the duration of the contract (even if other forms of restoration are permitted by the contract or under the law). Unlike the provision of paragraph 1, the limitation to compensation or restoration by extension of the period established in paragraph 2, of Article 3, appears to be intended to apply to any right to compensation or restoration following the pandemic (whether it is a loss of revenue or an increase in costs). In any case, the damage or imbalance resulting from the COVID-19 pandemic will always be at stake, and not any other event giving rise to a right to compensation or restoration.

### 2. Concession and sub-concession contracts in the road sector

According to Article 4, in concession or sub-concession contracts in the road sector, the grantor or sub-grantor shall determine, as a matter of urgency, which obligations of the concessionaire or sub-concessionaire are reduced or temporarily suspended, taking into account, in particular, updated traffic levels consistent with reality and the minimum services to be guaranteed in order to safeguard road safety. This will involve, among other things, reducing the obligations laid down in operation and maintenance manuals, major repairs, roadside assistance, etc.

As a result, and in all cases where the concessionaire's or sub-concessionaire's payments are made by the public partner (and not by the users) – whether by availability or by service –, the grantor or sub-grantor should also unilaterally determine the reduction of the payments in proportion to the cost reduction achieved by reducing or suspending the obligations of the concessionaire or sub-concessionaire.

It should be noted that, with the law providing for a unilateral definition, it will be up to the concessionaires or sub-concessionaires to react by appropriate means when they render the decision in question as illegal.

In any event, the right to restore financial balance in accordance with Article 3, paragraph 2, is not hindered in these contracts.

### 3. Compensation for sacrifice

The legislator, without any basis in the presidential decrees that declared the state of emergency, determines in Article 8 that there is no right to compensation for sacrifice for the damage suffered by individuals as a result of lawful measures taken by the State or other public bodies under the powers conferred by public health and civil protection legislation or in the context of the state of emergency, for the purpose of preventing and combating the COVID-19 pandemic. This provision is therefore not limited to the state of emergency.

In the preamble of the Decree-Law no. 19-A/2020, the legislator justifies this provision by considering that the damages in question do not fulfil the requirement of speciality. However, considering that this conclusion depends on the analysis of the specific case, doubts may arise as to its constitutionality.

### 4. Appeals against arbitral decisions on matters regulated in this diploma

It is established that of the disputes related to the regime established in this law and settled by arbitration, there may be a review appeal and uniformization of jurisprudence appeal to the www.mlgts.pt Supreme Administrative Court (under the terms currently established,

for arbitration, in the Code of Procedure in Administrative Courts).

This provision seems to be intended to apply even in the context of contracts which grant to the arbitration court the power to issue a final and unappealable decision, which, if confirmed, also raises questions of constitutionality.

### 5. Articulation with the Public-Private Partnership regime

The legislator rejects the application of requirements for the public partner foreseen in Article 20 of the public-private partnership regime, approved by Decree-Law no. 111/2012, of 23 May, regarding the decisions adopted in the context of the COVID-19 pandemic since March 14th , regardless of their form or nature.

In addition, it is clarified that the regime established in the Decree-Law no. 19-A/2020 is exceptional in relation to the public-private partnership regime, which continues to apply on a subsidiary basis to anything that is not contradicted by this regime.

### 6. Period of validity

The law applies to facts that occur until the World Health Organization determines that the epidemiological situation of the SARS-CoV-2 virus and the COVID-19 disease do not constitute a pandemic, without prejudice to the effects foreseen therein that by their nature will only occur afterwards or will only be effective thereafter.

#### ELECTRONIC BILLING

Also with regard to the performance of public contracts, Decree-Law 14-A/2020 of 7 April 2020 changed the deadline for implementing electronic billing for public procurement: until 31 December 2020, private contractors may use non-electronic billing; this deadline is extended to 30 June 2021 for small and medium-sized enterprises (SME) and to 31 December 2021 for microenterprises and public bodies as contracting partners.

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