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Article

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Direct Award, the New Normal in times of Covid-19

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Abstract

This article outlines the main exceptional and temporary measures adopted in Portugal to address the Covid-19 pandemic crisis.

Keywords

Public procurement, exceptional and temporary measures, Covid-19 pandemic, direct award.

1. Introduction

The Covid-19 pandemic crisis declared by the World Health Organization in January 2020 triggered the adoption of an extensive and distinct range of exceptional regulations and measures.

Public procurement was no exception. The generalized stoppage caused by the pandemic impacted public procurement procedures, which became more drawn out in terms of their procedural paths and the associated decision-making processes. Governments suddenly had to deal with a huge increase in the global demand for goods and services essential to tackle the pandemic – including its prevention, contention, mitigation, diagnosis and treatment – and the simultaneous constraints on the manufacture and distribution of goods. The exceptional public health emergency was not compatible with existing public acquisition rules. It required special measures that would allow the public entities of the Portuguese National Health System to easily and quickly acquire the works, goods and services necessary to deal with the escalating health crisis.

The essential characteristics of the exceptional temporary measures adopted in Portugal include: the exceptional non-suspension of procurement procedure deadlines; the free adoption of direct award, including the increase in situations where simplified direct award is allowed; the elimination of limitations to contracting the same private entity by repeated direct awards; the simplification of the awardee documentary and guarantee requirements; the easing of publicity, approval and other requirements prior to the effectiveness of contracts; and the easing of public expense approval.

In this paper, we will focus our attention on the new exceptional rules facilitating the use of direct award procedures even in high value or repeated contracts, decreasing the level of transparency, equality and open competition in public acquisitions in order to increase their speed and simplification.

2. Direct Award, the new normal

On 13 March 2020, Decree-Law no. 10-A/2020 was enacted[1] to ensure the swift availability of products and services considered essential in the combat against Covid-19, by simplifying and accelerating public procurement procedures in the context of Covid-19 related contracts the purpose of which was the "*prevention, contention, mitigation and treatment*" of Covid-19 and the "*replacement of normality*" (cf. article 1, no. 2).

This piece of legislation aimed at generalizing the direct award procedure for contracts executed for the purposes mentioned above, justified by the public interest of protecting public health. It is in force since 13 March 2020 and, despite being an *exceptional* and *temporary* regime, there is no indication of its term. It will thus remain in force until revoked by a new legislative act or until the conditions for its application are no longer verified[2]. Given that it applies to contracts relating to the replacement of normality, we assume it will be the new normal for quite some time yet.

Article 2, no. 1 of Decree-Law no. 10-A/2020 set forth the possibility of public awarding entities adopting direct award procedures, under article 24, no. 1, c) of the Portuguese Public Contracts Code ("PCC")[3], regardless of the value of the contract, whenever the contract relates to the execution of public works or the lease or purchase of goods and services and is considered strictly necessary and based on grounds of extreme urgency.

The adoption of simplified direct award procedures was also facilitated (article 2, no. 2), with the maximum threshold of the contractual price of goods and services that may be awarded under said procedure having been increased to €20,000[4]. It is worth noting that, as the law orders the application of article 128, nos. 1 and 3 of the PCC, these procedures will be exempted from any formalities concerning the execution or the publication of contracts, of value up to €20,000.

With the enactment of Decree-Law 18/2020, amending Decree Law 10-A/2020, article 2-A was added to extend the possibility of adoption of the simplified direct award procedure, regardless of the contractual price, (i) up to the budgetary ceiling, (ii) to the extent necessary and based on duly grounded reasons of extreme urgency, (iii) for the execution of contracts for the acquisition of necessary equipment, goods and services, and (iv) for the prevention, containment, mitigation and treatment of Covid-19, or related purposes.

One specific situation was expressly set forth in article 2-B of Decree-Law 10-A/2020, as amended by Decree-Law no. 20-A/2020, of 6 May, which established that, to the extent strictly necessary and on duly grounded reasons of extreme urgency, regardless of the contractual price and up to a total amount of €15,000,000.00, contracts may be directly awarded by a group of awarding entities,

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[1] And subsequently amended. The main amendments of relevance to public procurement procedures were approved by Law no. 1-A/2020, of 19 March, Decree-Law no. 10-E/2020, of 23 March, Decree-Law no. 12-A/2020, of 6 April, Law no. 4-A/2020, of 6 April, Decree-Law no. 18/2020, of 23 April, and Decree-Law no. 20-A/2020, of 6 May.

[2] See also Miguel Assis Raimundo, "Covid-19 e Contratação Pública, O Regime Excecional do Decreto-Lei n.º 10-A/2020, de 13 de Março", Revista da Ordem dos Advogados, ano 80, (I-II), 2020, pp. 173-174.

[3] Approved by Decree-Law no. 18/2008, of 31 August, as subsequently amended.

[4] Instead of €5,000, as set forth in article 128 of the PCC.

under article 39 of the PCC, for the acquisition of space for institutional advertising related to Covid-19 in national, regional and local media, through television, radio, printed and/or digital means[5].

This very concrete ruling is again based on the public interest of raising awareness and informing the population on the specificities of the pandemic, prevention and treatment measures, individual good practice and recommended social behaviour, among other concerns.

The advertising space acquired is that strictly necessary, for reasons of extreme urgency, for institutional advertising, for a period of 18 months, and is densified or limited by a list of concrete measures such as, *inter alia*: the public health pandemic situation; advertising on preventive and containment measures; good social and hygiene practices; legislative measures adopted to contain the pandemic, to balance the economy, or for the recovery of life and the economy; and public or social means available to rescue, monitor, inform or oversee. The scope of this exceptional group of awarding entities regime is also densified by means of the global prices limitation for certain acquisitions.

3-. The subjective scope

Whilst these rules generally apply to all public awarding entities subject to the PCC, as per article 2 thereof (article 1, no. 3) – i.e., the Portuguese State, the Autonomous Regions of the Azores and of Madeira, municipalities, independent agencies, public institutes, public foundations, public associations and "public law bodies" – regardless of whether they are healthcare or related entities, the simplified direct award procedure rules only apply to the health sector acquiring entities specifically listed in the law (article 2-A, no. 2), including centralised purchasing entities: the Directorate General of Health, the Health System Central Administration Public Institute ("ACSS"), the National Health Institute Dr. Ricardo Jorge and the Ministry of Health, Shared Services ("SPMS") regarding acquisitions for entities under the supervision of the Ministry of Health (such as public hospitals).

On the one hand, we understand that the simplified direct award is an even "more exceptional" procedure than the direct award, thus justifying the restriction of entities that may benefit from this even more flexible regime and the limitation of its use to the minimum number of situations possible, where beneficiaries are health entities directly engaged in the fight against Covid-19.

However, we are of the opinion that the same restriction should have been applied to the list of entities benefiting from the exceptional regime applicable to "normal" direct awards also, at least as regards contracts for the acquisition of goods and services, which is – or should be –, in this specific case, restricted to health care entities of the National Health System.

In fact, exceptional rules impose the need for strict measures and interpretations[6], which should only include the entities considered strictly necessary to achieve the intended goal. This would

[5] Resolution of the Council of Ministers no. 38-B/2020, of 15 May, as amended by Declaration of Rectification no. 22/2020, of 27 May, designated the entities acquiring said services.

[6] Concerning the strict interpretation of exceptional rules regarding direct award, see the European Court of Justice ("ECJ") cases no. C-250/07, *Commission vs. Greece*, 04.06.2009, par. 34, 35; C-157/06, *Commission vs. Italy*, 02.10.2008, par. 23; C-385/02, *Commission vs. Italy*, 14.09.2004, par, 19, 37; C-318/94, *Commission vs. Germany*, 28.03.1996, par. 13; C-57/94, *Commission vs. Italy*, 18.5.1995, par. 23; C-199/85, *Commission vs.*

appear to be the intention of the legislator, who mentions, in the Preamble of Decree-Law 10-A/2020, that, "*in the domain of health, it is a priority to guarantee that health care entities of the National Health System have the possibility of acquiring, with maximum speed, the goods and services necessary to evaluate suspected cases and treat the symptoms and complications associated with Covid-19*". Nevertheless, in its rulings, the legislator preferred to limit the applicability of the exceptional measures by only expressly restricting the type of contracts included thereunder.

4. The objective scope. "Covid-19 related contracts"

On the one hand, the exceptional rules apply only to public works, provision of services and acquisition or lease of goods contracts. The exceptional regime for simplified direct award is stricter, applying only to the acquisition or lease of goods and the acquisition of services (article 2, no. 2, and article 2-A, no. 1[7]). And the exceptional regime for acquisition by groups of awarding entities is even stricter, applying only to acquisitions of space for institutional advertising (article 2-B).

Excluded are other types of public contracts, such as public concessions or public-private partnerships. The latter, being long-lasting and transformative contracts, remain subject to the general rules ensuring transparency and open competition, even if their execution is motivated by pandemic related reasons. This may be the case, for instance, of public-private partnerships for hospital management or for the supply of public health services. Even though these may be of extreme importance in the current situation, where all – public, private and social – efforts should be combined, it would not be justified to open the door to the execution of such important – in terms of value, duration and transformative impact – contracts by means of urgent and closed procedures, such as direct awards.

On the other hand, all contracts benefiting from this regime must be "Covid-19 related contracts".

Pursuant to article 1, no. 2 of Decree-Law 10-A/2020, the regime applies to the "*prevention, contention, mitigation and treatment of infection by Covid-19*" and the "*replacement of normality*". Accordingly, it applies to contracts related to these purposes (i.e., "Covid-19 related contracts"). Article 2-A, on the simplified direct award, is more limited in its scope, applying only to contracts for the "*prevention, contention, mitigation and treatment of infection by SARS-CoV-2 and Covid-19 sickness*", "*or others* [illnesses] *related thereto*". On the one hand, this last provision excludes contracts aimed at the replacement of normality, but on the other hand, it seems to include contracts concerning any illness related to Covid-19 infection. Although these contracts are not expressly set forth in article 1, no. 2, we may assume that the legislator's intention was to include in the scope of this regime any other Covid-19 related illness or condition.

Certain cases are clearly included in the scope of the law. These cases include the examples set forth in the law as eligible for the exceptional simplified direct award, and which are unequivocally directly related to Covid-19 infection – namely, the acquisition of personal protective equipment;

Italy, 10.03.1987, par. 14; among others. The list of awarding entities should also only include those strictly necessary to fulfil the objective of the law.

[7] Article 2-A, no. 1 mentions the "*acquisition of equipment, goods and services*", with equipment being included in the category of goods.

goods necessary for Covid-19 testing; equipment and materials for intensive care units; medicines, including medical gases; other medical devices; and logistics and transport services related thereto, or distribution to entities supervised by the Ministry of Health or to other public entities or entities of public interest (article 2-A, no. 2). Other cases, such as contracts for the construction of new hospitals or for expansion and improvement works, will certainly also be allowed to be executed through direct award procedures under article 2, no. 1.

However, other situations may fall on the border line, such as food supply for those sick with Covid-19, support services to the families of sick people, consultancy services or R&D services related with Covid-19 matters, and cleaning services in public service buildings or public transport. Are these contracts related to the "*prevention, contention, mitigation and treatment*" of Covid-19?

And what is the scope of contracts aimed at the "*replacement of normality*"? This latter concept is very ambiguous and may open the door to a number of distinct purpose contracts, probably a higher number than would be allowed by a more cautious and truly exceptional positioning, including in terms of extension in time. In fact, said concept might theoretically include contracts for the acquisition of any kind of services or works for the reopening of closed activities, or even the acquisition of medicines, medical devices and other goods to treat long-lasting lung disease caused by Covid-19 in recovered patients.

In the above mentioned and most other cases, the contracts at stake may be considered to be *related* to the *replacement of normality.* However, their inclusion will extend the applicability of the regime much further than desired, including in terms of extension in time. The replacement of normality will be a long-lasting effort and should be subject to correct and reflected planning that allows for transparency, equality and open competition to prevail in acquisition procedures.

According to the principle set forth by the ECJ case law for procedures without a notice, such as direct awards, the grounds for using such procedures should be strictly interpreted[8], seeing as they are exceptional procedures that do not promote effective transparency and competition.

In addition, in its Technical Orientation[9], the Instituto dos Mercados Públicos do Imobiliário e da Construção ("IMPIC") states that a strict interpretation is to be adopted, by only including contracts *directly* related to Covid-19. Notwithstanding this, the same doubts arise concerning the scope of contracts "*directly related to Covid-19*".

The concept may be interpreted in line with the criteria applicable to public procurement rules, for instance, when entities and activities of the utilities sectors are at stake. In order to determine the legal regime applicable to contracts to be executed by public entities exercising activities in the utilities sectors (as per article 9 of the PCC, and according to the European Utilities Directive[10]),

[8] See Cases mentioned in point 3., footnote 6, above. The Court mentions that "the provisions (…) which authorise derogations from the rules intended to ensure the effectiveness of the rights conferred by the EC Treaty in relation to public works contracts, must be interpreted strictly".

[9] Technical Orientation no. 06/CCP/2020, of 17 April, on the exceptional regime under analysis.

[10] Directive 2014/25/EU of the European Parliament and of the Council, of 26 February 2014 ("Utilities Directive").

the criteria rests on whether the contracts are or not intended "*for the pursuit*" of those activities[11]. This should be interpreted as including contracts related to the carrying out a particular activity, i.e., if the works, goods or services in question are being acquired for the carrying out of the activity included in the Utilities Directive or not[12].

The same criteria should be applied in this case. If the acquisitions are necessary for the pursuit of the prevention, contention, mitigation and treatment of Covid-19 (or for the replacement of normality), then the exceptional regime shall apply.

Furthermore, according to European Directives and national rules[13], any contract intended to cover several activities "*shall be subject to the rules applicable to the activity to which it is principally intended*"[14]. For contracts where the main intended activity cannot be objectively determined, the applicable rules shall be established in accordance with the rule that the most demanding regime should prevail[15]. As Swe Arrowsmith mentions[16], "*in accordance with the philosophy (…) that exceptions ad limitations should be strictly applied or interpreted, there is a presumption in favour of regulation in accordance with the stricter of the two regimes*".

It is our opinion that contracts benefiting from the more flexible Covid-19 regime – considering that it is an exceptional temporary regime and that the principles of competition and transparency are being compromised in favour of speed – should not pursue several purposes, i.e., they should not cover several (Covid-19 and non-Covid-19 related) activities and simultaneously benefit from the exceptional regime, even if they are principally intended for Covid-19 related activities. Otherwise, the principles of transparency and competition will be threatened, potentially making way for abusive applications of the law. Accordingly, the general rules resulting from the PCC should apply to contracts covering both Covid-19 and non-Covid-19 related activities, where it is assumed that the Covid-19 related acquisitions are not strictly urgent. Public entities would thus have to set up a separate procedure and contract for any urgent Covid-19 related acquisitions.

It is also worth noting that public entities' duty of reasoning in what concerns justification of the inclusion of contracts within the objective scope of the exceptional regime, i.e., demonstration that acquisitions are directly related to Covid-19 and are directly intended to pursue *prevention, contention, mitigation and treatment* of Covid-19 or the *replacement of normality* activities, should gain special prominence here. If the principle that public awarding entities should bear the burden of proof as regards verification of the circumstances justifying the use of the exceptional

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[11] Article 7 of Directive 2014/24/EU of the European Parliament and of the Council, of 26 February 2014 ("Public Sector Directive").

[12] See also Swe Arrowsmith, The Law of Public and Utilities Procurement, Thompson – Sweet & Maxwell, 2005, Vol. I, pp. 478, 479; and Mark Kirkby, *A Contratação Pública nos «sectores especiais»"*, *Estudos de Contratação Pública*, Vol. II, pp. 75-78.

[13] Article 12 of the PCC.

[14] Article 6, no. 2 of the Utilities Directive.

[15] This same solution results from article 6, no. 3, of the Public Sector Directive.

[16] *Ob. Cit.,* pp. 481.

procedures[17] is valid for "normal" direct award procedures under the PCC, it is even more valid (and demanding) for "exceptional" direct award procedures carried out under the exceptional regime.

5. Conditions for the adoption of direct award

As mentioned above, article 2, no. 1 of Decree-Law 10-A/2020 sets forth that, for the purposes of the adoption of the direct award procedure, "*article 24, no. 1, c) of the Public Contracts Code applies* (…) *to the extent strictly necessary and based on grounds of extreme urgency*".

Article 24, no. 1, c) of the Public Contracts Code establishes that direct award should only be used: (i) to the extent strictly necessary, (ii) based on grounds of extreme urgency, (iii) as a result of events unforeseen by the public awarding entity, (iv) when the deadlines inherent to other procedures cannot be complied with, and (v) provided that the circumstances invoked to justify its use are not imputable to the public awarding entity[18].

As per the reference made to article 24, no. 1, c) of the Public Contracts Code, the adoption under the exceptional temporary regime of a direct award procedure for Covid-19 related contracts requires that all five conditions listed above be met. Therefore, the novelty introduced by Decree-Law 10-A/2020 and respective amendments is not to exempt awarding entities from the need to fulfil one or more of these conditions, or to increase the scope of application of said procedures, but rather to simply state that article 24, no. 1, c) of the Public Contracts Code may apply (and will most probably apply) to Covid-19 related contracts.

The impact of this statement is that the burden of proof as regards verification of the applicable conditions is lightened. The awarding entities are not exempted from invoking the abovementioned conditions in their decision to contract, but the duty of reasoning has become less demanding.

In any case, the five conditions must be met and should be interpreted in line with article 24, no. 1, c) of the PCC general regime. The jurisprudence of the ECJ and of the Portuguese administrative courts has interpreted these conditions very restrictively. The examples are several:

(i) The contract's scope (e.g., quantities required) and duration should not be broader and longer than that strictly necessary to meet the public entity's immediate needs – i.e., needs that the public entity must unfailingly supply[19] – during the period necessary to pursue a competitive procedure and only to the extent necessary during that specific period, according to the proportionality principle.

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[17] Cases mentioned in footnote 6 above C-385/02, par. 19; C-318/94, par. 13; C-57/94, par. 23; and C-199/85, par. 14. The Court stated that "*the burden of proving the existence of exceptional circumstances justifying a derogation lies with the person seeking to rely on those circumstances".*

[18] Regarding direct award based on extreme urgency, see Mário Esteves de Oliveira and Rodrigo Esteves de Oliveira, "*Concursos e Outros Procedimentos de Contratação Pública*", Almedina, 2011, pp. 755-757, and Pedro Costa Gonçalves, "*Direito dos Contratos Públicos",* Almedina, 2020, pp. 527-532.

[19] Court of Auditors, cases no. 08/2015, proc. 459/2015, 30.06.2015, par. 17; and no. 40/2014, proc. 1323/2014, 10.11.2014, par. 27.

(ii) The level of urgency is deemed extreme only in cases where the non-acquisition of the relevant goods or services within a short period of time will significantly harm public interest – a "superior interest" that must be defended even at the cost of compromising transparency and competition, such as community, public security or public health interests. Extreme urgency is not a normal level of urgency. It indicates something that must be done immediately or within a very short period of time, at the risk of causing non-repairable damages[20].

(iii) If the public awarding entity, deemed as a normal awarding entity, acting as a real decision maker[21], could not have foreseen the inherent circumstances. If the entity is aware it will need a certain quantity of products or works completed within a short period of time, but delays the launch of a tender for the purpose, or launches a tender that fails to comply with the applicable rules and has thus no success[22], the urgent need cannot be considered unforeseen[23]. Similarly, if the public awarding entity knows that an approval will be needed, and the entity responsible for approval raises legitimate objections which end up delaying the approval process, this is "*something which is foreseeable on plan approval procedure*"[24] and thus the urgency of an acquisition to overcome the effects of delayed or non-approval will not be considered unforeseeable.

Additionally, it is clearly accepted that a causal link must exist between the unforeseeable event and the extreme urgency resulting therefrom[25].

(iv) The urgency justifying a direct award, given the impossibility of complying with the deadlines inherent to other competitive procedures, must be justified taking into account the consequences of adopting the latter option, including accelerated procedures such as urgent public tenders. The EUCJ has rejected the adoption of direct award when the public awarding entity fails to demonstrate its inability, during the period it has available, to adopt an accelerated procedure, such as an urgent public tender[26].

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[20] Court of Auditors, case no. 17/2014, proc. 1829/2013, 11.06.2014, par. II.2, on the need for the non-interruption of health care services.

[21] Court of Auditors, cases no. 17/2014, mentioned in footnote 20 above, par. II.2.(ii); and no. 13/2014, proc. 268/2014, 08.07.2014, par. III.1.1.

[22] Court of Auditors, case no. 08/2015, mentioned in footnote 19 above.

[23] ECJ, case no.194/88R, *Commission vs. Italy*, 27.09.1988, par. 14.

[24] Case C-318/94, mentioned in footnote 6 above, par. 18.

[25] Cases C-318/94, mentioned in footnote 6 above, par. 14; and C-107/92, *Commission vs. Italy,* 02.08.1993, par. 12.

[26] Case C-107/92, mentioned in footnote 25 above, par. 9. The court stated that "*more than three months elapsed between the presentation to the competent national authorities, on 10 June 1988, of the report from the Geological Department of the Ministry of the Environment recommending urgent action and the commencement of the works on 21 September 1988 and that, during that period, the Italian Government could have set in motion the 22-day accelerated procedure provided for by the directive*". See also Case C-24/91, *Commission vs. Spain*, 18.03.1992.

(v) If a public awarding entity has a shortage of a certain product due to lack of correct planning, the urgency will be deemed imputable to it. The urgency may not be caused by a fact imputable to the awarding entity[27].

As already mentioned, as regards the application of the exceptional Covid-19 regime, the scope (e.g., quantities required) and duration of contracts should not be broader and longer than that strictly necessary to meet the public entity's immediate needs to address the illness, namely during the period necessary to adopt a competitive procedure; urgency is deemed to exist only insofar as the short timing is not imputable to the awarding entity, for instance, due to lack of correct planning of the measures to address the Covid-19 crisis; the urgency must result from an unforeseen event related to the pandemic and only while said event or its effects remain unforeseeable; and the adoption of longer procedures (even procedures such as urgent public tenders) must have become impossible, putting at stake the fulfilment of public health needs.

However, the burden of proof has become less demanding. Covid-19 related contracts are generally assumed to be extremely urgent, resulting from pandemic-related unforeseen events, and the circumstances justifying their execution cannot be imputable to the awarding entity at stake.

This was certainly the undoubted reality at the start of the pandemic. However, as time goes by, these conditions will not be as easily demonstrated as before. One may question to what extent public entities were able to foresee the second or third waves of Covid-19 infection, or to plan public acquisitions to respond to the needs resulting therefrom; or to what extent those entities are responsible for the failure to launch timely public tenders ensuring the acquisition of all (or at least some) goods and services required for the prevention, contention, mitigation and treatment of Covid-19 during second, third or subsequent waves or for the replacement of normality. The burden of proof and the duty of reasoning should thus be as demanding as necessary to ensure that abusive applications of the exceptional regime are avoided, even in the current emergency situation, that, despite being globally exceptional and emergencial, may not, and will increasingly not, justify derogations from the general regime.

6. The repeated direct award procedures and the derogation to the preference of prior consultation

Exceptional derogations to the prohibition of adopting direct award procedures in circumstances where impartiality might be put at stake – as set forth in article 113 of the PCC – were approved, in two specific circumstances: (i) repeated direct awards to the same entity, with an aggregate contract price higher than the direct award legal threshold (article 113, no. 2 to 4); and (ii) direct award to a private contractor that has previously offered works, goods or services to the same awarding entity (article 113, no. 5).

At the same time, a derogation to article 27-A of the PCC was also introduced, thus allowing the adoption of direct award regardless of the preference that should be given to prior consultation procedure to at least three entities.

The limitations set forth in article 113 no. 2 to 5 of the PCC were introduced by Portuguese law in order to assure compliance with fundamental principles of the public procurement rules, of

[27] Court of Auditors, cases no. 3/11, proc. 1554/10, 21.01.2011, par. 3.2., 3.5.; and no. 4/2008, proc. 1019/07, 12.02.2008, par. III.2.3.

transparency and impartiality[28], on the choice of the co-contactors in direct awards[29]. These limitations, even though may be, sometimes, too burdensome – limiting repeated direct awards to the same entity regarding contracts with absolutely distinct scopes, or direct awards to entities that have offered any type of goods, services or works to the same awarding entity – the fact is that they apply generally to all awarding entities and aim at assuring impartiality.

We understand that the derogation to these limitations, not only facilitate fast awards to already known and "at hand" co-contractors, but also avoid administrative workload resulting from the monitoring and accounting of aggregate thresholds and of entities that have supplied to public entities by direct awards or at no cost.

Notwithstanding, considering the proportionality principle and the flexibility introduced by articles 2, n.o. 1 and 2, 2-A and 2-B of Decree-Law 10-A/2020, these derogations would probably be unnecessary. It must not be forgotten that the risk of corruption and abusive use of direct award procedure is a reality that gains a more significant impact when subsequent direct awards to the same entity is a free option for awarding entities.

Moreover, article 113 of the PCC applies to direct award procedures that are adopted on the basis of the contract value criteria, as per the applicable thresholds set forth in the law. Accordingly, extreme urgency may not be at stake on said acquisitions.

More incomprehensible is to, cumulatively with the above derogations, establish a further derogation to the provision of article 27-A of the PCC. In its Technical Orientation, IMPIC mentions that, despite this derogation, awarding entities should always choose, whenever possible, to adopt a prior consultation procedure. This is a valid indication, but it is not what is provided for in Decree-Law 10-A/2020, which sets forth a true derogation.

The truth is that the criteria set forth in article 27-A itself would be sufficient to allow awarding entities to make a reasonable choice of the prior consultation procedure, even in the context of the pandemic, "*whenever the resource to more than one entity is possible and it is compatible with the grounds for adoption of said procedure*".

Even if the legislator's intention was to assure that a deeper flexibility was to be given to the awarding entities, the exceptional regime could have expressly established that, whenever possible, considering the constraints of the extreme urgency at hand, awarding entities should prefer the prior consultation procedure. This solution is quite different from a simple derogation.

Additionally, considering the legitimate expectations of the economic operators, it will be crucial to assure that the supplies by direct awards based on the criteria of the contract value and the offers made during the period of validity of this exceptional regime are not accounted, under article 113, for purposes of future direct award or prior consultation procedures to be launched after expiry of this regime.

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[28] Article 18 of the Public Sector Directive, article 1-A, no. 1, of the PCC.

[29] Catarina Pinto Correia, "*As Ofertas no Código dos Contratos Públicos*", *Estudos em Homenagem a Mario Esteves de Oliveira*, Almedina, 2017, pp. 321-342.

7. Other exceptional measures adopted

Other rules were adopted to accelerate and facilitate the entry into force of contracts executed by direct award under the exceptional regime. This is the case of measures that establish an anticipated effectiveness of contracts.

Although awarding entities are not exempted from the obligation of publication, or from executing the contracts in writing, there is now a derogation to the rule that conditions a contract's effects to its publication[30], to the awardee qualification phase or to written execution (article 2, no. 5). The production of all contractual effects, including financial effects – such as contractual payments of any nature – is allowed immediately after award.

According to Law no. 1-A/2020, of 19 March, contracts are exempted from prior approval of the Court of Auditors[31] (article 6, no. 1). However, they should still be sent to the Court of Auditors, for information purposes, within thirty days of their execution (art. 6, no. 2).

When the availability of goods and services is at stake, awarding entities may make advance payments regardless of the conditions foreseen in the PCC[32] for that purpose (article 2, no. 6), i.e., regardless (i) of the respective value exceeding 30% of the contract price, (ii) of a bond being provided in an amount equal to or exceeding that of the advance payment, and (iii) of the provision of goods or services corresponding to the amount of the advance payment being performed in the same economic year as the respective payment.

Furthermore, private contracted entities may be exempted from (i) providing the performance bond, regardless of the price of the contract, and (ii) providing the qualification documents[33] that prove the non-existence of any impediment to contract (article 2, no. 9 and 10). Private entities remain prohibited from contracting if an impediment occurs (e.g., debts to the tax or social security authorities, or conviction for certain crimes), but the burden of proof may be greatly eased if the awarding entity grants the exemption. In any case, with the submission of their proposals, co-contractors deliver to the awarding entity the declaration set forth in article 57, no.1 a), and Annex I of the PCC, declaring that they are not under any situation of impediment. Accordingly, the exemption concern, in substance, to the proving documents set forth in article 81, no. 1 b).

Rules were also approved regarding the exemption and simplification of administrative authorisations.

Most public acquisitions in the health sector are subject to framework agreements and public entities of the National Health System are bound to acquire under, and subject to, the centralized procedure of the framework agreement[34]. Whenever a framework agreement is in force, public

[30] As set forth in article 127, no. 1, of the PCC.

[31] As required under the Court of Auditors' Organisation and Procedure Law, approved by Law no. 98/97, of 26 August, as amended.

[32] Article 292.

[33] Set forth in article 81, no. 1, a) and b), and Annex II of the PCC.

[34] Dispatch of the Minister of Health no. 1571-B/2016, of 1.2.2016, that differs from the solution of article 255, no. 2, of the PCC.

awarding entities covered by the National Public Acquisitions System are now exceptionally exempted from obtaining prior authorisation for acquisitions made outside the centralised acquisition mechanism. This means that public entities are now allowed to directly acquire, individually and autonomously, outside the scope of the centralized framework agreements that have been subject to competition, by direct award (article 2, no. 7).

Regarding authorisation of expenditure, exceptional measures set forth the tacit approval of requests for authorisation, of multiannual expenses or of release of funds to meet the objectives related to the fight against the pandemic, as well as simplified authorisation competences regarding budgetary changes involving reinforcement (article 3).

The exemption from administrative authorisations provided for by law and competence rules were also set forth regarding the decision to contract services for studies, opinions, projects, consulting services, and any specialised work, and the decision to contract services by specified bodies, agencies, services and other public entities (article 4).

These rules intend to achieve, not only the simplification of procedures prior to the entry in force of contracts, increasing speed and effectiveness of extremely urgent contracts, but also the elimination of conditions normally required to co-contractors that would assure security of public expenditure and of contractual compliance.

However, once again, the scope of these exceptional measures is too broad and unlimited in their application. In fact, the rationality of public spending – which, more than ever, should now, in times of economic contraction, be protected – may become affected[35].

For instance, the requirements for advance payments to co-contractors might have been lightened or reduced, but not eliminated, namely in what concerns those that contribute to a rational and sane budget execution and control, such as requiring that the provision of goods or services corresponding to the amount of the advance payment should be performed in the same economic year as the respective payment.

Also, in what regards centralized acquisitions under framework agreements, it would be important to include that acquisitions outside the scope of the latter should be limited to the price set forth therein.

8. European rules and the crucial principles of competition, equality, transparency and impartiality

If it is true that all these measures help increase the speed of urgent acquisitions and ensure the immediate availability of "Covid-19 related" works, goods or services, it is also true that these same measures may seriously undermine not only competition and equality, but also transparency and impartiality in public acquisitions. It would appear that the legislator's intention was to accelerate and facilitate public acquisitions at any cost, even if by jeopardising its crucial value of responsibility. Perhaps the legislator has gone too far in said measures, by allowing, for instance, acquisitions from suppliers that would normally be prevented from supplying due to serious

[35] See also Maria João Estorninho, "Covid-19: (novos) desafios e (velhos) riscos na contratação pública", Revista da Faculdade de Direito da Universidade de Lisboa, Ano LXI, 2020, 1, pp. 509-520.

impediments, or acquisitions made under illegal contracts that will not be subject to prior approval, or non-impartial acquisitions.

Some provisions were adopted with the intention of mitigating said pernicious effects, such as: the obligation to notify awards to the Ministry of Finance and the Ministry of Health and to have them published in the public contracts portal, including a statement of the reasons for the adoption of simplified direct award, when applicable (articles 2, no. 4, and 2-A, no. 5, of Decree-Law no. 10-A/2020); the obligation to notify all contracts to the Court of Auditors (article 6, no. 2, of Law 1-A/2020); or the publication of a joint report on simplified direct awards, their respective grounds and circumstances (article 2-A, no. 6, of Decree-Law no. 10-A/2020). These mitigation measures do not allow for control over irresponsible and non-impartial acquisitions, which, if occurring, will not be corrected. However, in the extreme situation currently faced, the defence of public health was deemed a higher value.

On the other hand, Portuguese law is far more flexible than the European Commission guidance on using the public procurement framework in the emergency situation related to Covid-19 crisis[36], which pointed out the options that public buyers can consider. In cases of urgency that render the applicable general time limits impracticable, awarding entities may shorten deadlines under open or restricted procedures.

Only subsidiary and in exceptional situations, awarding entities may adopt a negotiated procedure without publication (i) in unforeseeable events, (ii) as strictly necessary and under extreme urgency, making compliance with the general deadlines or reduced deadlines of competitive procedures impossible, (iii) in cases of undoubted causal link with the Covid-19 pandemic, and (iv) only in order to cover the gap until more stable solutions can be found – conditions which are to be interpreted restrictively. These rules are not only subsidiary and even more exceptional even vis-à-vis the exceptionality of the pandemic that we are living, but also do maintain the duty of reasoning as serious and demanding as in normal circumstances.

Accordingly, the significantly more flexible and general exceptional Portuguese measures must find their limits in European guidance, which shall apply, in any case, at least whenever the contract price exceeds European thresholds.

References

- Law no. 1-A/2020, of 19 March, amended by Law no. 4-A/2020, of 6 April.
- Decree-Law no. 10-A/2020, of 13 March, amended by Law no. 1-A/2020, of 19 March, Decree-Law no. 10-E/2020, of 23 March, Decree-Law no. 12-A/2020, of 6 April, Law no. 4-A/2020, of 6 April, Decree-Law no. 18/2020, of 23 April, and Decree-Law no. 20-A/2020, of 6 May.
- Resolution of the Council of Ministers no. 38-B/2020, of 15 May, as amended by Declaration of Rectification no. 22/2020, of 27 May.
- Public Contracts Code, approved by Decree-Law no. 18/2008, of 29 January, as amended.

[36] Communication from the Commission 2020/C 108 I/01, of 1 April.

- Communication from the Commission 2020/C 108 I/01, of 1 April, approving guidance on the use of the public procurement framework in the emergency situation related to the COVID-19 pandemic crisis.
- Technical Orientation of IMPIC, no. 06/CCP/2020, of 17 April.