# Portugal

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## Legislative framework

**1** What is the relevant legislation and who enforces it?

The most relevant piece of Portuguese legislation in the field of public procurement is the Public Contracts Code (PCC), approved by Decree-Law No. 18/2008, 29 January 2008. The PCC has been subject to seven amendments, the most important of which are: Decree-Law No. 278/2009, 2 October 2009; Law No. 3/2010, 27 April 2010; Decree-Law No. 131/2010, 14 December 2010; and Decree-Law No. 149/2012, 12 July 2012.

Whenever there is litigation over public procurement procedures, administrative courts are the main bodies as regards enforcement. However, the Court of Auditors also plays a fundamental role, as its independent judges are responsible for examining public expenditure. In fact, this court oversees and decides on both the legality (jurisdictional control) and the management (financial control) of contracts concluded by public entities, as well as private bodies in charge of performing public functions (eg, providing public services), as long as public funds and assets are involved. In the same way as administrative courts, the Court of Audits may apply fines, relieve financial accountability and declare contracts to be null or void.

Furthermore, there are two regulatory authorities competent to impose sanctions on bidders who fail to comply with public procurement rules, namely with respect to participatory requirements: InCI (public works) and ASAE (goods and services).

**2** In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The PCC transposes Directive 2004/18/EC, on the coordination of procedures for the award of public works contracts, public supply contracts and public services contracts and Directive 2004/17/EC, on the coordination of procurement procedures of entities operating in the water, energy, transport and postal service sectors. It also partly implements Directive 89/665/EC, on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directives 92/50/EC and 2007/66 (the remaining provisions on public procurement remedies are transposed in the administrative courts procedural regulations).

The scope of the PCC, however, goes far beyond that of the referred directives: it creates a complete set of detailed rules on public procurement procedures including contracts not covered by the EC directives (for example: services concessions, institutionalised public-private partnerships, contracts below the EU directives thresholds, etc), along with a comprehensive regime on the performance of public contracts.

**3** Are there proposals to change the legislation?

A task force has been created to verify how the PCC rules and procedures are applied in practice, complied with by all public procurement bodies, and enforced by the competent authorities. Some changes have already been implemented in order to better adapt the legal framework to practical experience, namely as regards the performance of public works contracts, as well as e-procurement. Additional changes to the PCC have recently been prompted by the need to comply with the specific terms of the 'troika agreement' between Portugal, the European Commission, the European Central Bank and the International Monetary Fund. As a result of the European Green Paper on the Modernisation of Public Procurement and the proposals for new public procurement directives still under discussion, some changes to the PCC may be in the pipeline, but no specific proposals have yet been made public.

**4** Is there any sector-specific procurement legislation supplementing the general regime?

There is a specific piece of legislation devoted to implementing Directive 2009/81/EC, on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security: Decree-Law No. 104/2011, 6 October 2011, which allows more flexibility and less transparency in defence procurement procedures for the purchase of military equipment by contracting authorities in the field of defence (subject to article 346 of the Treaty on the Functioning of the European Union).

In addition, there is a particular legislative framework which regulates the establishment of shared services entities (eg, in the health sector), and the setting up and functioning of central purchasing bodies (eg, at central government level).

Temporary legislative measures are sometimes put in place in order to facilitate public procurement strategies in certain sectors such as health, education or agriculture (eg, public-private partnerships for the building and operation of hospitals; a national programme on refurbishment of schools; works contracts related to investment projects in the rural sector). However, by definition, these initiatives are exceptional and only last for a limited period of time.

## Applicability of procurement law

**5** Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

The Portuguese approach to the personal scope of the public procurement rules has focused on expanding their coverage rather than the opposite.

On the one hand, all entities labelled as contracting authorities by Directives 2004/18/EC and 2004/17/EC are also contracting authorities according to the PCC, which includes central government,

regional and local authorities, 'bodies governed by public law' (regardless of their public or private nature) and utilities (operating in the water, energy, transport and postal service sectors). When in doubt, there is a tendency to apply the contracting authority's 'label' in a broad way.

On the other hand, statutory law has recently clarified that a number of entities should be considered contracting authorities and therefore caught by the public procurement rules, namely higher education institutions established as public foundations, hospitals set up as public enterprises and private associations of a scientific or technological nature that benefit from public funding.

Instead of ruling out certain organisations, the general trend has been to increase the number of entities subject to the PCC.

**6** For which, or what kinds of, entities is the status as a contracting authority in dispute?

The category of 'bodies governed by public law' is the most disputed. In fact, the interpretation of the circumstances (referred to in article 1, paragraph 9 of Directive 2004/18/EC) that determine that a particular entity must be considered a 'body governed by public law' for procurement purposes raises several uncertainties. In practice, this matter has been dealt with on a case-by-case basis. As a result of the European Court of Justice's case law on 'bodies governed by public law', however, the PCC provides an interpretative clue, which has proved to be very useful in practice. The PCC states that a qualifying characteristic of the 'bodies governed by public law' is the fact that they do not act according to the logic of the market and free competition.

**7** Are there specific domestic rules relating to the calculation of the threshold value of contracts?

There are no domestic rules relating to the calculation of the threshold value of contracts as such, because the PCC takes a different approach to this topic. According to the PCC, the choice of a specific public procurement procedure limits the value of the respective contract, instead of the contract's estimated value limiting the choice of procedure which may be adopted in a particular case. Thus, the contract value is not an estimated value but the maximum value the contracting authority is allowed to pay for a particular contract taking into account the chosen procedure.

When choosing the negotiated procedure without prior notice, contracting authorities are allowed to conclude contracts under €75,000 (goods and services) or €150,000 (public works). Contracts concluded by utilities (operating in the water, energy, transport and postal service sectors) are excluded from the scope of the PCC provided their value does not exceed the applicable European thresholds.

The open and the restricted procedures, whose notice is only published in the national official journal (and not in the OJEU), allow contracting authorities to conclude contracts up to the applicable EU thresholds (dependent on the object of the contract).

**8** Does the extension of an existing contract require a new procurement procedure?

Not always. It depends on whether that extension has already been provided for in the existing contract or not. In the first case, there is no need for a new procurement procedure. In the latter case, a new procurement procedure is required as a general rule. However, there may be certain exceptional circumstances that allow for an extension of an existing contract without requiring a new procurement procedure, such as additional works, services or goods (provided that contracting authorities comply with EU directives rules on these matters).

**9** Does the amendment of an existing contract require a new procurement procedure?

It depends on the type of amendment. If the amendment does not affect the competition conditions laid down in the original procurement procedure, which led to the conclusion of the existing contract, it does not require a new procurement procedure. This negative test aims at preventing a fraudulent distortion to competition in the post-award stage. On grounds of public interest, on the other hand, contracting authorities may be able to justify the need to amend an existing contract without undertaking a new procurement procedure.

**10** May an existing contract be transferred to another supplier or provider without a new procurement procedure?

Only when that transfer is provided for in the existing contract or when it is authorised by the contracting authority during the contract's performance. In either case, this transfer is illegal when it aims at distorting the competition conditions laid down in the procurement procedure, which led to the conclusion of the existing contract.

**11** In which circumstances do privatisations require a procurement procedure?

Privatisations are regulated by Law No. 71/88 (24 May 1988) and Decree-Law No. 328/88 (27 September 1988). As regards the privatisation of companies that were previously nationalised in the aftermath of the Portuguese revolution (25 April 1974), a special piece of legislation applies: Law No. 11/90 (5 April 1990), as amended by Law No. 102/2033 (15 November 2003) and by Law No. 50/2011 (13 September 2011). Both these sets of rules require privatisations to be preceded by a procurement procedure: preferably, a tendering procedure (either open or restricted); alternatively, a negotiated procedure or a public offering. Whenever a privatisation takes place, the government passes a tailor-made regulation in order to detail the respective procurement procedure to which the PCC does not apply.

**12** In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

The setting-up of a PPP, as well as its monitoring, is regulated by Decree-Law No. 111/2012 (23 May 2012). There are a few exceptions (eg, PPPs related to waste management), which are covered by specific regulations. In any case, it always requires a procurement procedure according to the PCC. The applicable rules depend on the type of contract involved (eg, works concession).

**13** What are the rules and requirements for the award of works or services concessions?

The award of both works and services concessions is covered by the same procedural rules and requirements established in the PCC (whose scope and detail are much more comprehensive than that of the EU directives on public procurement, as mentioned in question 2). The award of a concessions contract must follow a procurement procedure with prior notice (open, restricted or negotiated procedure). In exceptional circumstances, contracting authorities may award services concessions through a negotiated procedure without prior notice.

**14** To which forms of cooperation between public bodies and undertakings does public procurement law not apply and what are the respective requirements?

Public procurement law does not apply to in-house relationships between contracting authorities and publicly owned undertakings. The requirements for this exclusion to operate are very strict and

closely follow those laid down by the Court of Justice of the European Union (CJEU) (also known as the *Teckal* exemption conditions):

- the contracting authority (itself or jointly with other contracting authorities) must exercise over the said undertaking a control which is similar to that which is exercised over its own departments; and simultaneously
- the said undertaking must carry out the essential part of its activities with the contracting authority (or authorities).

Although it is not stated explicitly in any rule, it is established that the involvement of any element of private sector equity – even if only a minority shareholder of the undertaking or a minority participant in a joint venture – prevents the fulfilment of the first in-house requirement referred to above. This interpretation derives from the CJEU's case law on the subject.

Public procurement regulations do not apply also when contracting authorities purchase works, supplies or services from an undertaking acting as a 'central purchasing body' or award a public services contract to an undertaking that stands as a contracting authority itself, on the basis of an exclusive right. Both these situations are provided for in the EU directives.

## The procurement procedures

**15** Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency, competition?

Yes, in the light of the EU directives on public procurement.

**16** Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Yes, according to the general principles of good public administration.

**17** How are conflicts of interest dealt with?

As a general rule, should there be a case of a conflict of interest, the contracting authority is prevented from awarding that particular contract to the bidder in question. This rule is not limited to public procurement: it is provided for in the Administrative Procedure Code, and it is applicable to all decision-making processes by public entities, including by contracting authorities in the context of public procurement.

**18** How is the involvement of a bidder in the preparation of a tender procedure dealt with?

Whenever potential bidders participate in the drafting of the tender documents or in the setting-up of the specifications (eg, as advisers to the contracting authority), they are prohibited from submitting bids to that particular procurement procedure, as long as that involvement in the preparation of the said procedure afforded them an advantage over the other potential bidders, which may affect what the PCC refers to as the 'normal competition conditions'.

**19** What is the prevailing type of procurement procedure used by contracting authorities?

The open procedure is the most frequently used procurement procedure, followed by the restricted one when there is the need to select the bidders according to their technical or financial skills. For contracts whose value is under €75,000 (goods and services) or €150,000 (works), the prevailing procurement procedure is the negotiated one without prior notice.

**20** Can related bidders submit separate bids in one procurement procedure? If yes, what requirements must be fulfilled?

On the one hand, according to the PCC, bidders who get together in order to submit a joint bid in one procurement procedure cannot submit another bid in the same procedure (neither individually, nor jointly with another group of bidders). Should this happen, all bids – the joint one, the individual one, or the other joint ones – shall be excluded.

On the other hand, the Portuguese public procurement rules do not forbid bidders who have some sort of previous relationship (eg partnership, collaboration, part of the same national or international group of companies, etc) to submit separate bids in one procurement procedure. However, tenders submitted by these somehow 'related' bidders shall be excluded should there be a suspicion of anti-competitive behaviour on their part, mainly because of their more or less close relationship (which might have led to them agreeing on prices, etc).

**21** Are there special rules or requirements determining the conduct of a negotiated procedure?

As regards requirements for choosing the negotiated procedure, articles 30 and 31 of Directive 2004/18/EC have been fully implemented in the PCC. Regarding the rules on how to conduct the negotiated procedure, they are roughly the same as the ones applicable to the open procedure (should the negotiated procedure have no prior notice), or to the restricted procedure (should the negotiated procedure be preceded by such a notice). Essentially, the procedural difference between the negotiated procedure and the open or restricted one lies almost solely in the opportunity to negotiate the tenders.

**22** When and how may the competitive dialogue procedure be used? Is it used in practice in your jurisdiction?

The competitive dialogues may only be used in the rather exceptional and strictly interpreted circumstances provided for in article 29 of Directive 2004/18/EC, which has been quite faithfully transposed into the PCC. This new public procurement procedure has proved to be extremely unappealing for both contracting authorities and economic operators in Portugal. In fact, since the PCC entered into force in July 2008, under half a dozen competitive dialogues have been initiated, and none has been successfully concluded.

**23** What are the requirements for the conclusion of a framework agreement?

Following on from Directive 2004/18/EC, the PCC provides that framework agreements may be concluded between contracting authorities or 'central purchasing bodies' and one or several suppliers, providers or contractors.

The conclusion of a framework agreement requires a procurement procedure to be put in place, namely the open or restricted one. It is then up to each framework agreement to regulate its own content and to determine its scope (including whether contracting authorities are bound by it or can still buy similar goods, services or works from suppliers, providers and contractors outside the agreement). The duration of each framework agreement shall not exceed four years.

**24** May a framework agreement with several suppliers be concluded? If yes, does the award of a contract under the framework agreement require an additional competitive procedure?

As mentioned in question 23, a framework agreement may be concluded with several suppliers, providers or contractors at the same time. When this is the case, an additional competitive procedure is required to allow the contracting authority to choose between those

suppliers/providers/contractors every time a contract is awarded under the framework. This additional competitive procedure consists of sending an invitation to tender to the suppliers, providers or contractors and giving them a reasonable time limit to submit their offers regarding that particular contract. The contracting authority shall then select the best tender according to the award criteria derived from those disclosed in the tendering documents of the framework agreement.

**25** Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

As a general rule, consortium members cannot be changed in the course of a procurement procedure. During the contract performance, this change depends on the contracting authority's authorisation.

**26** Are unduly burdensome or risky requirements in tender specifications prohibited?

Although tender specifications should not provide for unduly burdensome or risky requirements, these are not explicitly prohibited by the PCC. However, even though no written rule forbidding contracting authorities from doing so exists, there is a general principle about tendering requirements being proportionate to the subject matter of the contract. This should prevent contracting authorities from coming up with the referred unduly burdensome or risky requirements, as they would be considered to go beyond what is necessary to set the tender specifications in a given situation.

**27** What are the legal limitations on the discretion of contracting authorities in assessing the qualifications of tenderers?

When assessing the qualifications of the bidders, contracting authorities must use adequate and proportionate criteria in the light of the subject matter of the contract, in such a way that does not result in a restriction of competition. Furthermore, the contracting authorities' discretion regarding this matter is partly self-limited as the specific qualifications and respective evidence regarding each contract must be laid down in advance in the tender documents. Finally, as regards financial qualifications (as opposed to technical ones), the PCC sets out a formula whose data must be filled in by the bidders, therefore limiting the margin of discretion of contracting authorities on this particular issue.

**28** Are there specific mechanisms to further the participation of small and medium enterprises in the procurement procedure?

There are no mechanisms specifically created in order to further the participation of small and medium enterprises. There are, however, general mechanisms which, in practice, may be used to achieve that objective, such as the division in lots, the possibility of subcontracting, the ability to rely on third parties as an alternative to meet the technical and financial qualification criteria.

**29** What are the requirements for the admissibility of alternative bids?

Alternative bids are only admissible when the tender documents say so; bidders are not free to decide whether to submit alternative bids. Furthermore, whenever the tender documents provide for alternative bids, their terms and conditions are explicitly laid down. Alternative bids must comply with these terms and conditions, and therefore bidders are not free to offer whichever different solutions they might wish to. An alternative bid shall be excluded if the contracting authority has not explicitly provided for its admissibility or if it does not comply with the terms and conditions the contracting authority decided to impose on potential different solutions.

**30** Must a contracting authority take alternative bids into account?

Alternative bids are allowed only if the tender documents explicitly say so (see answer to the previous question). Furthermore, the contracting authority must clearly identify which contract terms are open for alternative proposals by the bidders, who should limit themselves to those terms (otherwise their bids shall be excluded).

**31** What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

As a general rule, their bids must be excluded.

**32** What are the award criteria provided for in the relevant legislation?

The PCC provides for the two types of criteria stipulated in the EU public procurement directives: the lowest price and the most economically advantageous tender.

Regarding the most economically advantageous tender, non-purely economic sub-criteria may be included (eg, environmental and social criteria) as long as they are linked to the subject matter of the contract. Selection and qualification criteria must not be taken into account when evaluating the tenders (the PCC follows the *Lianakis* case law rather closely on this topic).

When determining the sub-criteria, contracting authorities may not describe them by referring to an attribute of a forthcoming tender (eg, scoring the price sub-criteria by reference to the lowest price that shall be submitted by one of the potential bidders). As regards quantitative sub-criteria, the contracting authorities must evaluate them by using value functions. When the sub-criteria relate to qualitative issues, contracting authorities must produce quality levels against which to measure the bids.

Finally, contracting authorities must disclose in advance not only the sub-criteria and respective weightings, but also the methodology for evaluating the tenders (including the scoring system, in particular the rating scales, and the value function or quality level for each of the sub-criteria).

**33** What constitutes an 'abnormally low' bid?

Whatever the contracting authority considers (and gives reasons as) to be 'abnormally low'. However, if a maximum price is laid down in the tender documents, a bid shall be considered abnormally low when its price is at least 50 per cent (goods and services) or 40 per cent (public works) under that fixed maximum price.

**34** What is the required process for dealing with abnormally low bids?

The bidders are always allowed a chance to justify their abnormally low bids. If they do not provide any justification or a valid one (in the view of the contracting authority), their bids are excluded.

**35** How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

Reliability may be regained after a certain period has passed (the length of time depends on the type of irregularity, ie, the type of criminal conviction or the type of sanctioned misconduct). Self-cleaning is admitted when past irregularities have to do with bankruptcy proceedings and delays in payment of social security contributions or taxes.

## Review proceedings and judicial proceedings

**36** Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

Contracting authorities rule on review applications and it is possible to appeal against review decisions both to the hierarchical entity (should there be one) and to the administrative courts (by bringing judicial proceedings against the review decision). Alternatively to a review application, or at the same time, judicial proceedings may be initiated.

**37** How long does an administrative review proceeding or judicial proceeding for review take?

An administrative review proceeding usually takes about three weeks, whereas a judicial proceeding may take from two to four months (estimate based on special urgent procedures only available in the field of public procurement remedies).

**38** What are the admissibility requirements?

Not only bidders but also all persons 'potentially interested' in the contract award may submit a review application or initiate judicial proceedings. As a general rule, every step of a procurement procedure (including the contract itself) may be subject to review.

**39** What are the deadlines for a review application and an appeal?

The deadlines are five days for a review proceeding, 30 days for a judicial proceeding and 15 days for an appeal (deadlines based on special urgent procedures specifically designed for the field of public procurement remedies).

**40** Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

As a general rule, the suspension is not automatic, but the applicant may ask for it.

**41** Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

Yes, all unsuccessful bidders must be notified of the reasoned award decision and a standstill period of 10 days must be observed before the conclusion of the contract. As regards the notification of the award decision and the standstill period, the PCC anticipated the current remedies directive.

**42** Is access to the procurement file granted to an applicant?

All applicants (ie, all persons 'potentially interested' in the contract award) are granted the right to access the procurement file. This right derives from the constitutional principle of freedom of information.

**43** Is it customary for disadvantaged bidders to file review applications?

Yes, it occurs quite often (as it does in other areas of decision-making within public administration and administrative law).

**44** May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

Yes, concluded contracts may be cancelled or terminated in such a situation. However, it will not occur in certain circumstances, for example, when the contract has already been totally performed (in this case, damages may be awarded to the unsuccessful bidder on a case-by-case basis).

**45** Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Yes, legal protection is available in this situation, similarly to when there is a procurement procedure that breaches any other requirement of the public procurement law.

**46** If a violation of procurement law is established in an administrative or judicial review proceeding, can disadvantaged bidders claim damages? If yes, please specify the requirements for such claims.

Following on from an administrative or judicial decision, should a violation of public procurement law be established and the procurement procedure be invalidated (ie, cancelled), all bidders are entitled to compensation for the expenses incurred in connection with participating in that particular public procurement procedure (ie, payment for the costs of putting together a bid and submitting it). The PCC and the traditional line of Portuguese case law does not generally provide for a more extended right to damages in the context of pre-contractual liability.

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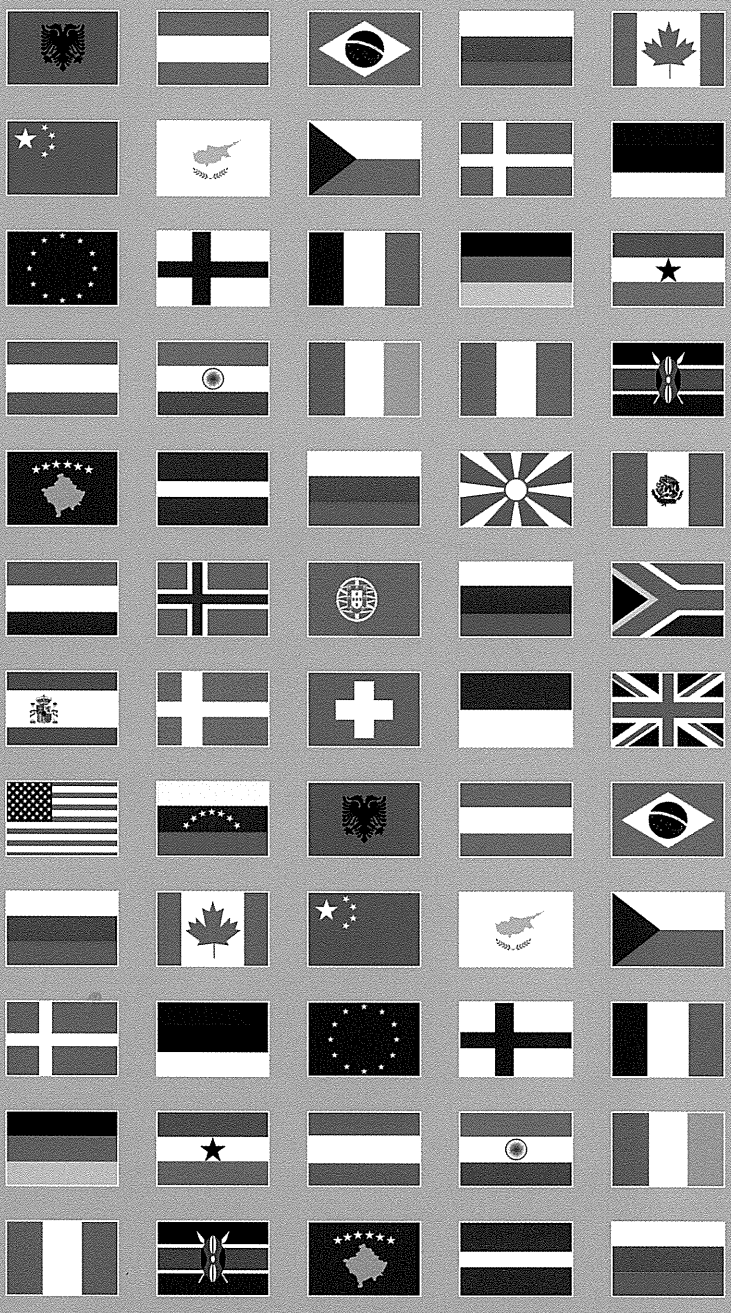


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