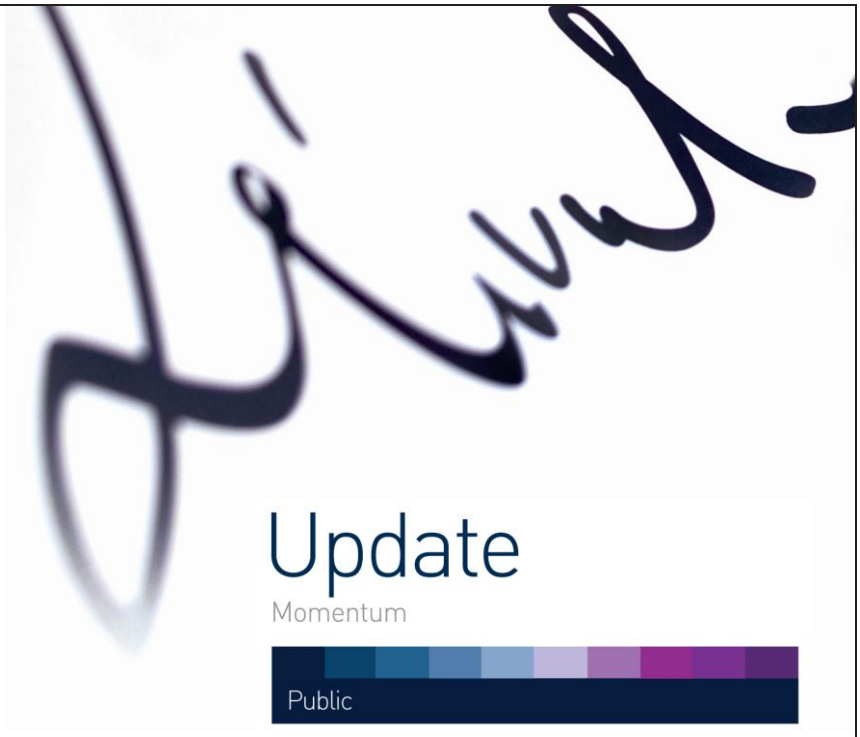


May 23, 2012

THE NEW PORTUGUESE PUBLIC-PRIVATE PARTNERSHIPS REGIME

On May 23rd 2012 Decree-Law no. 111/2012 was published in the Official Gazette of the Portuguese Republic , which, fulfilling commitments set out in the Memorandum of Understanding ("MoU") entered into between Portugal and the "Troika" (EC, IMF, ECB), introduced important amendments to the legal framework applicable to the preparation, launch, execution and negotiation of public-private partnerships (PPPs) in Portugal, hitherto regulated by Decree-Law no. 86/2003, of April 26, amended by Decree-Law no. 141/2006, of July 27. One should point out the following key-changes introduced by the new legal framework.

Broadening the scope

A first note should be made about the broadening of the regime's scope, as all public undertakings [Article 2, Paragraph 2, Point d)] are now "public partners" subject to the law whereas before only those corporate managed public enterprises were. The scope has further been broadened to entities formed by the State, State public entities, autonomous funds and services, or public entities dedicated to fulfilling general public interests [Article 2, Paragraph 2, Point e)]. It is clear that the goal of the legislature in defining the entities covered in this manner is to draw a parallel with the EU's concept of the "body governed by public law", as per Article 2, Paragraph 2, of the Public Contracts Code. In accordance with the jurisprudence of the Court of Justice of the European Union, activities of "general economic interest" are those that directly benefit the community, rather than those that benefit individual or group interests.

However, Article 24 foresees a special regime for public enterprises of a commercial or industrial nature and which launch PPPs without direct or indirect support/financing or guarantees from the State and whose associated costs are not likely to directly or indirectly affect public debt and whose accounting is not consolidated with that of the public administration sector. For this purpose, Paragraph 4 of the referred statute clarifies that a public enterprise is considered to be of a commercial or industrial nature when its economic activity is subject to free market standards and to competition, in line with the definition given by Article 2, Paragraph 3 of the Public Contracts Code to the term "public bodies".

In addition to this, the scope of the statute that identifies the tools by which PPPs can be implemented is widened in order to include sub-concessions for public works and services [Article 2, Paragraph 4, points a) and b)].

On the other hand, the following are now specifically excluded from the regime's scope: (i) concessions of multi-municipal systems of supply of water for human consumption, of wastewater sanitation and of management of urban solid waste; (ii) concessions granted by the State, by statute, to entities of a public nature or wholly publicly owned ones [Article 2, Paragraph 5, Points b) and c)].

Lastly, it should be noted that, in spite of the thresholds of "gross cost for the public sector" and of "amount of investment involved" having been maintained and above which partnerships are subject to the approved legal regime, for the purposes of evaluation of the "investment amounts", costs of maintenance, servicing, repair and substitution of assets pertaining to the partnership are now also considered (Article 2, Paragraph 6), given the fact that these elements were previously not accounted, which led to certain PPPs being excluded from the scope of the legal regime previously in force.

Closer monitoring of the decisions of the public partner, both in the launch phase and in the execution phase, with regards to budgetary affordability and cost-benefit relation

Another important innovation of the new regime relates to the additional requirements imposed on the launching and amendment of PPP contracts, with the aim of exercising closer supervision of the financial and fiscal effects arising from this type of contract, in line with the guidelines set out in the MoU.

In this context, pursuant Article 6, Paragraph 1, in addition to the rules already set out for the launch of a PPP, it is now necessary to follow another set of requirements, amongst which the following seem to stand out: studies of foreseen fiscal/budgetary impacts (Point b)); sensitivity

analyses in terms of demand and macroeconomic development [Point b)]; cost-benefit analyses [Point f)]; and the creation of a risk distribution matrix [Point n)].

It should be noted that the financial and fiscal monitoring is not limited to the launch of a PPP, but also extends to the execution and amendment of the contracts. Therefore, pursuant Article 20, Paragraph 1, there is an obligation to estimate - prior to any unilateral decision on the part of the public partner that is likely to give rise to a claim for the reinstatement of the contract's financial balance - the financial effects resulting from this determination and to verify the corresponding fiscal affordability.

On the other hand, it remains mandatory for the minister of finance and for the project's line minister to give a positive verdict regarding public decisions that imply an increase in charges for the public sector that surpass the annual amount of € 1,000,000.00, or in accumulated terms of €10,000,000 (updated amounts), being this positive verdict also required in case of a public decision which determines a reduction of charges for the private partner (Article 20, Paragraph 2).

Establishment of Technical Unit for Project Monitoring

With the aim of strengthening the mechanisms of financial and fiscal control, a new Technical Unit for Project Monitoring has been established, which answers directly to the Ministry of Finance (Article 34). This Unit holds administrative although not financial autonomy, and it has taken on, in whole, tasks that were formerly assigned to a number of other public entities for monitoring the preparation, development and execution of partnership processes and contracts (Article 35).

As it emerges from the preamble to the referred Decree-Law, the creation of this entity has as its aim to endow the State with a professional technical unit specialized in financial and legal matters, and whose main mission is to participate in the preparation, development, execution, negotiation and overall monitoring of PPP processes, giving the necessary specialized technical support to the Government and to other public entities.

At the same time that the unit ensures a coordinated and centralized public management of partnership processes, its function is also to reduce fiscal costs borne by the public sector with external consultants, with the public sector also being able to rely on its technical expertise for large projects that do not necessarily fall into the PPP framework (Article 36).

The importance of the Technical Unit, and, indirectly, of the Ministry of Finance, in this new legal framework is still evident in the fact that it is responsible for nominating the president and the

majority of the members that make up the "project team" charged with preparing the launch of each PPP (Articles 9 and 10), whereas in the previous regime, the Minister of Finance and the project's line Minister each appointed half of the members which would compose the team, jointly nominating the coordinator. The same happens with nominating the members of the juries for the procedures of forming the contracts that make up the partnerships (Article 17) and with the negotiation committees that may be established for negotiating the terms of the contracts or the reinstatement of the contract's financial balance (Articles 21 and 22).

Moreover, the Technical Unit takes over a central role as far as monitoring of the execution of PPP contracts goes, since it is charged with notifying the member of Government responsible for the area of finance about the financial and economic situation of the partnerships contracts and of its development, as well as with identifying situations that are likely to contribute to the possible worsening of the financial burden on the public sector [Article 35, Paragraph 2, Points l) and m)].

Other amendments

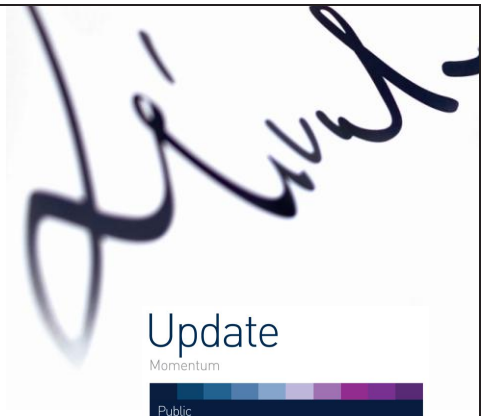
In addition to the main amendments mentioned above that have been introduced into the PPP regime, the following should also be highlighted:

- Adaption of the PPP regime to the Public Contracts Code, thereby settling (at least apparently) the articulation between the two regimes, which had raised some controversy when Public Contracts Code came into force (Articles 2, Paragraph 7, 15, Paragraph 7 and 45);

- It is now possible for tenderers to compete without their proposals being accompanied by a financial package, as was hitherto the case, by presenting engagement letters (Article 15, Paragraph 2). This appears to be a completely innovative amendment, which allows public entities to launch a competitive procedure for the financial component after the proposal has been awarded. However, how this can happen still needs to be provided;

- It is now mandatory to publish the various documents relating to the PPP on an electronic platform (managed by the Technical Unit), as a way to ensure more transparency in the awarding and negotiation of such contracts (Article 33);

- The entities that provide services to the Technical Unit or to the public partner are forbidden from, in the context of the same project, providing services to the private partner or to the entities that come forward as bidders, otherwise this may be grounds for disqualification of the bidder or the proposal submitted to the process for granting the



partnership (Article 43).

Mark Kirkby | Gisela Andrade

mak@servulo.com | ga@servulo.com

Rua Garrett, n.º 64 1200-204 Lisboa - Portugal Tel: (+351) 21 093 30 00 Fax: (+351) 21 093 30 01/02
geral@servulo.com www.servulo.com

Sérvulo & Associados | Sociedade de Advogados, RL