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# Update

## Energy



## The New application Regime for European Funds

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On March 23, the new regime for the implementation of Portugal 2030 came into force. Among other matters, Decree-Law No. 20-A/2023 establishes the obligations of beneficiaries of this package of European funds.

The new regime applies between 2021 and 2026. It encompasses actions financed by the European Regional Development Fund (ERDF), the European Social Fund Plus (ESF+), the Cohesion Fund (CF), the European Maritime, Fisheries and Aquaculture Fund (EMFAF) and the Just Transition Fund (JTF), as well as the Asylum, Migration and Integration Fund (AMIF).

In comparison with the ESIF application regime (Decree-Law No. 159/2014), the new regulatory framework brings about several innovations.

While the previous decree-law adopted the tender procedure as the standard for the submission of applications, **the new regime establishes a procedure of prequalification**, which can also be followed as a rule. The invitation procedure continues to be admissible only in duly substantiated cases, namely whenever the actions can only be carried out by the invited entities.

As in the previous regime, applications can be submitted in partnership and in co-promotion. However, the new regulatory framework also allows the submission of joint applications by public or private non-profit associations, aiming at the implementation of a structured intervention program for a group of entities from the same territory, sector of activity, sector or economic or social aggregate.

In addition to the beneficiaries' own duties, the new regime creates obligations that apply to all entities involved in the implementation of European funds. These entities must comply with social and

environmental criteria, namely considering the polluter pays principle and the do no significant harm principle.

In practice, the application of these principles can be complex. On the one hand, the do no significant harm principle still lacks densification. On the other hand, a rigorous application of the polluter pays principle can make it difficult to allocate funds to projects that, in theory, would justify European financing. For example, the JTF aims to stop polluting activities by funding entities that develop such activities. But the polluter pays principle determines that the reduction of emissions should be pursued by penalizing these entities. Hence, these normative vectors demand conciliation.

One of the innovations of Decree-Law No. 20-A/2023 is the provision of several rules to avoid double financing.

The decree foresees that the total eligible cost of an action cannot be co-financed by the same European fund, another European fund, or another instrument of the European Union. Moreover, the decree establishes that the assessment of double financing is carried out, namely, through the demonstration, by the beneficiaries, that the action and the respective expenses were not object of double financing. In this sense, beneficiaries cannot submit a new application, except in situations where a withdrawal of the previous application has been submitted.

However, the extent to which the prohibition of double funding is enshrined in the new regime must be interpreted in accordance with EU Law. The EU Financial Regulation provides that *i)* in no circumstances shall the same costs be financed twice by the budget, and that *ii)* each action may give rise to the award of only one grant from the budget to any one beneficiary, except where otherwise authorised in the relevant basic acts. Furthermore, the Common Provisions Regulation clarifies that, “in order to optimize the added value from investments funded wholly or in part through the budget of the Union, synergies should be sought (...) and the possibility of combining funding from different Union instruments in the same operation as long as double financing is avoided”.

Thus, EU Law seems to allow the same action to be financed by different European funds, as long as there is no double financing of the same costs.

In the event of non-compliance with the beneficiaries' obligations, the new regime provides that these entities' managers to the accountability of these entities' managers, including for the purposes of refund of amounts unduly received or unjustified. Said accountability also justifies a case-by-case approach and a careful consideration of the legal order in force.

The new regime is based on a dialectical tension between “simplification as a primordial principle” and the need for “the correct use of funds”. The articulation of these vectors will be decisive for the good administration of Portugal 2030.