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Procurement in Times of Crisis:

The Portuguese Experience

Abstract. Since 2020, Portugal has enacted legislation specific to addressing the SARS-CoV-2 pandemic, with two distinct moments in this process: one dedicated to the pandemic situation in particular and a more recent one, connected with European funding and its implementation, various energy crises, and effects of economic warfare. As regards the complex and intricately entangled COVID-19 legislation, swift public procurement procedures were established to comply with certain requirements to guarantee competition, since the pandemic constituted an abnormal and unforeseeable circumstance that did not fit into the forecast of urgency provided for in the Directives. Legislation was issued on the modification of long-term contracts, yet with presented a highly debatable solution for the changes' implementation and prohibiting the use of pecuniary compensation. While that legislation has since been repealed, transitory rules and exceptions whose scope is still difficult to understand in full took its place – in the main, the current special legislation on public procurement, Law 30/2021, intended for executing the implementation plan for projects financed or co-financed by European funds, which contains several rules that deviate from the regime resulting from the European directives, plus re-establishment of monitoring by the Court of Auditors, creation of an Independent Commission for supervising the implementation of the associated legislation, and the passing of extraordinary price-revision legislation. The paper presents a brief report on this Portuguese legislative context and on the respective monitoring by both jurisdiction-linked and non-jurisdiction-associated bodies. It directs special attention to the difficulties and perplexities raised by the regimes involved.

Keywords: public-procurement rules, crisis legislation, extraordinary price revision

1. Introduction

1.1. The context of public procurement in Portugal

The 2004 Public Procurement Directives were transposed into the Portuguese Public Contract Code (PCC) in 2008. From even before the EU-level work and the associated transposition, the code has undergone revision several times.

As an EU member state, Portugal transposed the 2014 Public Procurement Directives too, yet without much creative effort, even where it was allowed, thus copying European solutions wholesale. Therefore, the country's public-procurement-related legal context reflects said European directives strongly, with one consequence being legislation more or less similar to that of other Member States.

Portugal has established several types of public-procurement procedure, among them direct award. Its rules for direct award are based on criteria of strict necessity and 'reasons of extreme urgency resulting from events unforeseeable by the contracting authority [that] cannot meet the deadlines inherent in the other procedures and provided that the circumstances invoked are in no way directly attributable to the contracting authority'[*1]. Before the pandemic (namely, between 2016 and 2019), urgency was appealed to as a criterion for choosing direct award in the case of 72.8% of all contracts concluded[*2].

1.2. The setting impelling adjustment

On 13 March 2020, the World Health Organization (WHO) declared the disease COVID-19, caused by the worldwide spread of the SARS-CoV-2 virus, to have reached pandemic levels. Faced with this global threat to the health of their citizens, countries took various measures, particularly at the regulatory level. Two public needs were immediately pressing: protecting citizens from the disease and strengthening health systems so as to provide adequate and timely response to the avalanche of patients seeking medical help.

Portugal was no exception in terms of extraordinary legislation to address these two needs, in combination with those arising in the wake of associated administrative measures with their serious impact on the economy. Successive lockdowns/confinements, decreed in the context of the declaration of a state of emergency – a state of constitutional exception – ushered in several norms and instruments for measures restricting rights, freedoms, and guarantees, many of questionable constitutionality.

This social and health context precipitated complex, intricate legislation, often difficult to interpret and apply. In the arena of public procurement, spinning of this web began with Decree-Law 10-A/2020, of 13 March 2020, and Law 1-A/2020, following it on 20 March. Since then, the former has been amended more than 30 times – with its articles 2 to 4 (Chapter II) and its definition of the scope of application (presented in Art. 1) being especially important with regard to public procurement. Legislation subsequent to this addressed the objective amendments of public contracts, prohibiting pecuniary compensation, a solution that raised several persistent doubts as to constitutionality. It was argued that this legislative measure violated the right to property inherent to the practice of pecuniary compensation by way of violation of the contractual equilibrium that evolves with an abnormal and unavoidable change of circumstances. The right to property is a fundamental right, with its nature (similar to that of core rights, freedoms, and guarantees) rendering it subject to special legal and constitutional protection, particularly with regard to special rules on restriction of its content.

In further developments, with justification anchored in the application of European funds for support amid the economic situation emerging from the pandemic, Portugal again enacted specific legislation on the public-procurement mechanisms applicable in that context – namely, Law 30/2021, of 21 May 2021, approving special measures for public procurement, a law very recently amended by Decree-Law 78/2022, of 7 November 2022.

Notwithstanding the many doubts expressed as to their legality, constitutionality, and compliance with EU law, said regimes established supervisory mechanisms that continued to hold sway. In the case of the public-procurement legislation connected with the pandemic, the Court of Auditors (CofA) assumed increased responsibilities; for the special measures' framework and implementation. In addition to supervision by the CofA, the measures included creating an *ad hoc* entity to monitor execution: Independent Commission for the Monitoring and Supervision of Special Public Procurement Measures (ICMSSPPM).

1 Per art 24(1)(c) of the PCC.

2 Institute of Public Markets, Real Estate and Construction, IP (IPMREC, IP), *Annual Report – Public Procurement in Portugal 2019* (November 2020) 42, in its English-language version available via <https://www.impic.pt/impic/pt-pt/relatorios-e-dados-estatisticos/relatorios-de-contratacao-publica> accessed 21 June 2023.

2. The special public-procurement regime responding to the pandemic[*3]

Decree-Law 10-A/2020, whose effects were later codified explicitly by Law 1-A/2020, of 20 March[*4], approved exceptional, temporary measures for public procurement and the authorisation of expenses in response to the epidemiological situation caused by the coronavirus and by the disease COVID-19. In consequence, the public-procurement regime underwent several changes[*5].

2.1. The first iteration of the special regime

The first version of the special public-procurement regime posed some interpretation challenges as to its subjective scope. In particular, Article 1(3) referred entities that 'are part of the corporate public sector, the administrative public sector or, with the necessary adaptations, local authorities'. The inclusion of expressions for a contracting entity that are non-conformant with the concepts otherwise used in Portugal led to debate and to the prompt revision of Article 1(3)[*6].

As for its objective scope, the regime was specified as applying to public-works contracts, contracts for the lease or purchase of movable property, and the acquisition of services, irrespective of the nature of the contracting entity. It was also required that the contract's object be related to the prevention, containment, mitigation, and treatment of epidemiological infection by the SARS-CoV-2 virus and, alongside it, the restoration of normality after any such infection. Contracts under the new regime were not subject to prior review by the CofA, but neither was a concomitant regime of subsequent review ruled out[*7]. Contracts covered by this exceptional public-procurement regime took effect as soon as they were awarded, whether or not they were put in writing, and they were to be submitted to the CofA for information purposes within 30 days of the signing of the agreement.

For the special regime to apply, several requirements associated with the object of the contract had to be met; i.e., the parties had to provide a demonstration of the purposes motivating recourse to special rules and of a meaningful link between the measures and those purposes.

Specific procedural rules addressing direct negotiation, referred to in Article 2(1), established two requirements: said negotiation had to be both 'strictly necessary and for reasons of urgency'[*8] – requirements quite similar to those articulated in the then-current version of Article 24(2), paragraph c of the PCC. Said provision excluded the procedure for prior consultation previously provided for in Article 27A, which was explicitly withdrawn in subsequent revisions to the PCC.

Article 2(2), in turn, encapsulated the regime for so-called simplified direct agreement – a highly streamlined procedure carried out by means of an invoice that could be employed for values of up to 20,000 euros (in contrast, the procedure articulated in the PCC had a threshold of 5,000 euros), provided

3 The special regimes were criticised by the European Union: Communication 2020/C 108 1/01 – 'Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis' <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0401(05)&from=EN> accessed 16 March 2023; PF Sanchez, 'Medidas Excepcionais de Contratação Pública para Resposta à Pandemia Causada pela Covid-19' in *Covid-19 e o Direito* (Edições Universitárias Lusófonas 2020) 45, 54ff. Regarding analysis of the pandemic-related legislation through to April 2020, JD Coimbra, M Caldeira, and T Serrão, *Direito Administrativo da Emergência* (Almedina 2020) 83ff; PM Pereira, 'Procedimentos Fechados no Contexto de Emergência e de Estabilização' [2020](24) Revista de Contratos Públicos ('RCP') 195, 201ff.

4 Law 1-A/2020 had an important influence in its own right, in parallel with the introduction of Law 4-A/2020, of 6 April of the same year, in the area of judicial litigation of public procurement. This adjustment in the legislative domain brought in suspension to various time limits established for procedures and processes. Later, on 1 February 2021, Law 4-B/202, by revoking articles 7A and 6A of the latter law and providing alternative terms (in its Article 6B) to address suspending procedural deadlines, ended the suspension to judicial deadlines and maintained the non-suspended state of public-procurement deadlines. Ultimately, all the rules set forth in Law 1-A/2020 that pertained to suspension of procedural deadlines were repealed by Law 13-B/2021, of 5 April.

5 Compare with R Carvalho, 'The Portuguese Covid-19 Public Procurement Rules' (2021) 16(1) European Procurement & Public Private Partnership Law Review 30. – DOI: https://doi.org/10.21552/epppl/2021/1/6.

6 Pereira (n 3) 202.

7 Coimbra, Caldeira, and Serrão (n 3) 114ff.

8 Ibid 102ff; Pereira (n 3) 202.

that the requirements specified via the regime's framework were met (principally dictating application for acquisition/rental of goods or for obtaining services).

Finally, Article 2(3) made the limits described in Article 113 of the PCC applicable in cases of employing the direct-award procedure, for reason of protecting competition.

The parties to contracts were required to submit the details of any award under this regime to the government officials responsible for the relevant sector and for the finance domain, and these had to be published online via the state public-procurement portal. Still, publication pertaining to the conclusion of a contract following a direct-award process, as provided for in Article 127 of the PCC, was not made a condition for that contract's entry into force. Hence, all effects stipulated in the contract could unfold immediately upon awarding.

Article 3 made special provisions related to expenses[*9]. These took the form of an exceptional regime establishing the formation of tacit authorisation 'in the absence of a decision, as soon as 24 hours [have] elapsed since the request was sent electronically to the respective public entity' with the power to authorise it. In addition, acquisitions under this decree-law were considered justified 'for the purposes of the requests for authorisation referred to in the previous sub-paragraph'. These provisions were intended for expediting the process and covering situations that are genuinely exceptional relative to traditional contexts of administrative-law obligations: inter-organic control (with the formation of a tacit act) and the duty to substantiate (which gained *ope legis* effect).

Finally, Article 4 created an exemption to the usual authorisation requirements in cases of 'decisions to contract for the acquisition of services the object of which is the performance of studies, opinions, projects, and consultancy services, as well as any specialised work'.

2.2. The revised special public-contract regime

On 25 March, Decree-Law 10-E/2020 revised Article 1, on the special regime for public procurement; introduced additional rules regarding the granting of powers to authorise expenses; and made the effects retroactive to the date of issue of the revised Decree-Law instrument.

Thus, the range of subjects to which the regime applied under Decree-Law 10-A/2020, including the special public-procurement system, was amended: the regime was now applicable to those contracting entities and 'bodies governed by public law' listed in Article 2 of the PCC.

Article 2A of Decree-Law 18/2020 of 23 April 2020 established an exceptional regime of simplified direct award, provided for in Article 128 of the PCC, one whose application hinged on the fulfilment of the requirements of strict necessity and reasons of imperative urgency, subject to justification whatever the contract price might be and up to the budgetary limit. Though it was expansive in this regard, the scope of objective application was limited to 'contracts whose purpose [is] the acquisition of equipment, goods, and services necessary for the prevention, containment, mitigation, and treatment of infection by SARS-CoV-2 and the disease COVID-19'.

Shortly after this, Decree-Law 20-A/2020, of 6 May, introduced a new article (Article 6), addressing the requirements applied by contracting authorities in the context of institutional advertising related to COVID-19. The limits were specified as 'to the extent strictly necessary and for reasons of imperative urgency, duly substantiated, regardless of the contractual price, and up to the limit of the budget'.

In the meantime, another piece of legislation had appeared. The Portuguese government issued an exceptional temporary-duration regime for the financial *reequilibrium* of long-term execution contracts, via Decree-Law 19-A/2020 of 30 April[*10].

The regime that it entailed prompted extensive discussion from the start as to its scope of application and the concept of a long-term, or 'lasting', performance contract. Per most doctrine, the regime was deemed intended, in particular, for concession contracts. It imposed suspension of the financial *reequilibrium* mechanisms provided for by law, until the end of the state of emergency. Therefore, in the event of any imbalance caused in the intervening span of time for reasons stemming from the pandemic, room was left only for such 'compensation or replacement [to] be carried out [as was possible] by extending the deadline for performance of the services or the duration of the contract, not giving rise, regardless of legal provision

9 The rules for authorising expenses are, as a norm, those contained in Decree-Law 197/99 of 8 June.

10 ML Brito, 'Impacto da Pandemia Covid-19 na Execução dos Contratos Administrativos' [2020](24) RCP 247, 274ff.

or contractual stipulation, to price revision or assumption, by the contracting party or public partner, of a duty to provide to the counterparty'.

In some scholars' opinion, the law established two regimes, the first of which, applied from 3 April to 20 May 2020, forbade the contracting partners to 'activate the contractual clauses that established the right to restoring the financial balance or compensation'*[11] while the second entailed, past that time window, the possibility of activating compensation or restoration of the financial balance on condition that the events had occurred before 3 April or after 20 May.

In summary, consistently with the understanding of Pedro Fernández Sánchez,

i) Law 1-A/2020 of 19 March dealt with exemptions from the prior requirement for CofA approval and ratified the regime approved via Decree-Law 10-A/2020;
ii) on its heels, Decree-Law 10-E/2020 clarified the subjective scope of application of the exceptional regime (to extend it to all contracting entities encompassed by Article 2 of the CCP);
iii) preceding these pieces of legislation, April's Law 4-A/2020 permitted the exceptions to the terms dictating the presentation of qualification documents and to the requirement of a bond;
iv) Decree-Law 18/2020 of 23 April authorised 'direct' and 'simplified direct' adjustment up to the limit of the budgetary allocation in cases of certain acquisitions of goods and equipment for the health field; and
v) finally, Decree-Law 20-A/2020 of 6 May authorised groups of contracting entities to use direct adjustment procedures, again only to the extent strictly necessary and for reasons of compelling urgency, with due foundations, regardless of the contract price and within the limits of the budget's allocation, in aims of establishing a space where institutional publicity of the State and other public entities actions could diffuse and flourish, through measures implemented a short while later by means of Resolution of the Council of Ministers 38-B/2020 of 19 May*[12].

2.3. The withdrawal of the special regime for public procurement

Decree-Law 66-A/2022 of 30 September extinguished some of the legislation's provisions for pandemic-linked situations. Addressing this purpose, the preamble articulated that 'in this context, through this decree-law, clarification is being made [with regard to] the decree-laws that are still in force, as well as regarding the elimination of measures that are no longer necessary, through the express resolution of termination of the validity of decree-laws that are already obsolete, anachronistic, [or now] outdated by the evolution of the pandemic'; still, the introductory context-setting continues, it is 'important to guarantee that the alterations made to legislation prior to the pandemic by the decree-laws now revoked are not affected' and, therefore, 'is clarified that the revocation promoted by this decree-law has its effects limited to the decree-laws provided for herein, thus not affecting changes to other diplomas [legislative instruments] introduced by these decree-laws that are now revoked'.

Article 2.1 (a) withdrew the special public-procurement regime while maintaining the amendments introduced by means of said 'diplomas' (now revoked) within other regimes (per paragraph 2). This provision could have posed many difficulties for efforts to identify said alterations and their respective delimitation; however, it did not affect the public-procurement regime in the dimension we have been grappling with in this paper.

At present, the country has no special rules in force that pertain to public-procurement procedures specific to the context of COVID-19 and the pandemic.

11 Ibid, 277.

12 Sanchez (n 3) 44–45.

3. Special procurement measures linked to post-pandemic economic recovery

In 2021[*13], while the complex regime of the 'COVID-19 Regulations' held sway, the legislature passed into law special measures related to public procurement, with Law 30/2021 of 21 May. Yet the grounds for these were anchored not in the pandemic but in implementation of the Recovery and Resilience Plan[*14]. Its object, as defined in Article 1(1)(a), was the 'approval of special public procurement measures regarding projects financed or co-financed by European funds, housing and decentralisation, information and knowledge technologies, health and social support, implementation of the Economic and Social Stabilisation Programme and the Recovery and Resilience Plan, fuel management under the Integrated Management System for Rural Fires (SGIFR) and also agri-food goods'.

The commensurate measures developed were elaborated upon via Chapter II of that law, and an initial limit to the term of validity, 31 December 2022, was set in certain areas[*15].

In addition to furnishing special measures related to those sectors, Section II established simplified procedures. In tuning implemented since passage of the law's first version, simplification brought electronic procedures, exemptions from the duty to supply reasons for not contracting in lots and for setting a certain base price, special rules for selecting invited entities in accordance with the value of the contract, special terms addressing impediments, shortening of the time before deadlines for completion of hearings and administrative impugnation, and rules on not providing a guarantee.

Also, specific terms were introduced that deal with supervision by the CofA, and an independent commission was set up. Finally, doubling of the fines foreseen enabled the administrative-fine framework to emerge as a protective mechanism accompanying this special-measures regime.

In 2022, Law 30/2021 was amended. The rationale underpinning the special measures, as characterised in the preamble, was to promote the 'deepening and clarification' referred to, where '[a]n example of the first desideratum is the extension of the deadline for application of the special measures to matters related to housing and decentralization, information and knowledge technologies and the health and social support sectors' and '[a]n example of the second is the clarification of the applicable procedures in the case of pre-contractual procedures relating to the implementation of the Recovery and Resilience Plan (RRP)'. The introduction continues thus:

> In relation to these, the law has now firmly clarified what has always been the legislator's option [but that] has left doubts about interpretation in need of intervention. It has now been clarified that the procedures covered by Article 2 of Law 30/2021 of 21 May also relates to contracts for the implementation of projects within the scope of the RRP[*16]. It is therefore clear that, in these cases, it is not necessary to apply the provisions of Article 6 of the above-mentioned law (which, in any case, already exempted the order provided for therein in situations where the interventions in question concern the implementation of projects financed or co-financed by European funds, as is the case for all projects under the RRP)[*17].

The legislative amendment extended to Articles 2–7 and 19. The former pertain to pre-contract procedures related to implementation of projects financed or co-financed by European funds, housing, decentralisation, information and knowledge technologies, programmes for stabilisation of health and economic/social

13 Law 30/2021 of 21 May approved special measures for public procurement and amended the Public Procurement Code.

14 When consulting the explanatory memorandum on Proposed Law 41/XIV/1, presented by the government to Parliament and which served as the basis for Law 30/2021, one can identify 'the purpose of stimulating the relaunch of the economy, intending to modernise, simplify and debureaucratise administrative activity and, in particular[,] render more flexible and simplify the procedures for the formation of public contracts, as well as to promote … more effective, and less prolonged, access to those contracts by economic operators'. See the report titled 'Acompanhamento da Contratação Pública abrangida pelas Medidas Especiais previstas na Lei n.º 30/2021', on monitoring of public procurement covered by the special measures provided for by Law 30/2021 <https://www.tcontas.pt/pt-pt/ProdutosTC/Relatorios/relatorios-oac/Documents/2021/relatorio-oac001-2021-pg.pdf> accessed 22 December 2022 ('2021 Report').

15 Here, cf the original versions of articles 3, 4, and 5 of Law 30/2020. The special-measures regime entailed a time limitation connected with pre-contract procedures in the fields of housing and decentralisation, information and knowledge-related technology, health care, and social support.

16 PC Gonçalves, LL Martins, and PS Azevedo, *As Medidas Especiais de Contratação Pública Anotadas* (Almedina 2023) 33.

17 Decree-Law 78/2022 of 7 November 2022.

conditions, and the Integrated Management System for Rural Fires. All these areas apart from the very final one listed saw the special regime's application extended to December 2026. As jurists in Portugal concluded, it was no longer a special and exceptional regime; it had become a regime existing in parallel to that of the PCC.

3.1. The sectors involved

The provisions made for simplified pre-contract procedures encompassed contracts 'intended for the promotion of public housing or of controlled costs or for intervention in real estate whose ownership and management has been transferred to the municipalities, within the scope of the process of decentralisation' of competencies (per Article 3) where the object is the leasing or purchasing of IT equipment; the purchase, renewal, extension, or maintenance of software licences or services; purchasing of computing or cloud-storage services; purchasing of consulting or advisory services; and the execution of public-works projects associated with digital transformation processes (see Article 4) that are designed for 'the promotion of interventions that, by order of the member of the Government responsible for the respective activity sector, are considered integrated within the scope of the Social and Economic Stabilization Programme' as approved in the annex to Resolution of the Council of Ministers 41/2020, of 6 June (per paragraph 1 of Article 6).

Two further spheres were provided for, without explicit reference to Article 2: (1) elements intended for the promotion of the interventions referenced in the extract quoted above from Article 6 (specifically, paragraph 1) that, as described in the same legislation's Article 474(4), fall below the (case-dependent) threshold of 750,000 euros (see Article 7(1)) and (2) the sphere of 'contracts whose object is the acquisition of agri-food goods, [in which] the contracting entities may initiate simplified direct adjustment procedures under the terms of Article 128 of the PCC' when the value of the contract is at least 10,000 euros, provided that the goods (a) are products of organic production; (b) are supplied by entities identified in the Family Farming Statute, approved by Decree-Law 64/2018, of 7 August; or (c) are supplied by holders of the status Young Rural Entrepreneur, approved by virtue of Decree-Law 9/2019 of 18 January.

The reasons for this choice of sectors are laid out in the preamble to the revision instrument: the establishment of policy priority areas and the promotion of greater, more appropriate incorporation of social, environmental, and sustainability-related considerations into public-procurement procedures.

3.2. The special regime for design-and-build contracts[*18]

The 2022 revision introduced Article 2A, on design–build contracts, and established a bespoke 'design–bid–build' regime[*19]. The concept is still conceived of as public work; however, contracting entities may follow simplified procedures. The so-called special and temporary regime[*20] relaxes procedure at various levels, starting with the content of the specifications and encompassing exemptions to requirements related to grounds for non-division into lots and fixing of a base price. Yet the criterion of the proposal being the most economically advantageous one remained mandatory in the multi-factor method[*21] and applicable to the contracting entities in the special sectors mentioned.

While this new regime is available as an option[*22], any contracting authority that chooses the PCC regime must demonstrate strong grounds for the public work with regard to the design stage[*23], as Article 43's item 3 clearly articulates:

18 Gonçalves, Martins, and Azevedo (n 16) 51–55.

19 MA Raimundo, 'Empreitada de Concepção-Construção no Direito dos Contratos Públicos: Função e Pressupostos da Definição Colaborativa de Obras Públicas' (2021) 153(2) O Direito 327, 332.

20 Extended to December 2026 and, therefore, not as temporary as one might think.

21 Referring to the award criterion and its relation to the two stages in design-and-build, P Linhares, 'O Novo Regime Especial da Empreitada de Conceção-Construção' [2023](31) RCP 75.

22 R Ribeiro, 'Algumas Reflexões em Torno do Regime Aplicável às Empreitadas de Conceção-Construção no Código dos Contratos Públicos' [2021](25) RCP 95, 101; ibid.

23 L Torgal, 'A Empreitada de Obras Públicas no Código dos Contratos Públicos – Breve Nota sobre Algumas das Principais Novidades' [2007](64) Cadernos de Justiça Administrativa 62, 64; ibid, 101.

> In duly substantiated exceptional cases, in which the contractor must assume, under the terms of the specifications, obligations of result related to the use of the work to be done, or in which the technical complexity of the building process of the work to be done requires, [for reason of] the specific technicality of the competitors, the special connection of the competitors to the conception of the work, the adjudicating entity can foresee, as an aspect of the execution of the contract to be concluded, [elaboration on] the execution project, in which case the specifications must be integrated only by a preliminary programme.

Therefore, the burden of motivation imposed is much more demanding: the contracting authority must document facts and reasons sufficing to substantiate 'the exceptional nature of the situation', that the work is technically complex, and that there is a connection between that complexity and the contractor-to-be. Corresponding demands do not exist in the special-measures regime.

The substantive regime of the PCC is to be applied with regard to errors and omissions. This feature is worth mentioning because of the accountability of the public-work project's 'designer'. In the PCC-based regime, if design duties are assigned to a contractor and ensuing omissions and errors go undetected notwithstanding diligence, the accountability resides, in general, with the contracting authority, whereas under the exceptional regime, since the design is the contractor's responsibility, the accountability for omissions and errors rests with the contractor alone[*24].

3.3. The features of the regulation

In brief, the characteristics of the pre-contractual regimes currently encapsulated in Law 30/2021 are the following, in their relevant specifics:

(a) subsidiary application of the CCP to the simplified procedures established (per terms of Article 9)[*25]
(b) mandatory electronic processing of the procedures provided for by Article 9 (Article 10);
(c) elimination of the obligation to provide a statement of reasons with regard to decisions on 1) non-division into lots[*26] and 2) setting of the base price (Article 11);
(d) special rules regulating the invitation of entities to submit proposals in the context of the rule on limits to prior consultation (Article 12);
(e) a special norm (with some interpretive dimension) addressing impediments related to social security contribution or tax situation, requiring the admission of candidates or competitors in two particular sets of circumstances associated with those impediments (articles 13 and 16);
(f) reduction of the period before hearing- and administrative-impugnation-linked deadlines (Article 14);
(g) the possibility of not requiring a guarantee, subject to verification of the impossibility of providing one in light of lack of liquidity/insurance;
(h) raising of the thresholds for the use of simplified direct agreement, direct agreement, or prior consultation as regulated via the CCP, applicable only in the context of Article 7;
(i) doubling of the minimum and maximum limits to the fines for administrative infractions falling within the scope of these special measures.

The foregoing language expresses the original regime, based in its essence on the celerity of procedures.

In this regard, it should be emphasised that the reduction of time spans before deadlines is of little significance for the procuring entity but may constitute an obstacle to the exercise of relevant procedural rights by the other participants. On the other hand, celerity is afforded to the detriment of transparency of administrative decisions, in that the procedure dispenses with the obligation – mandatory under the regime of the PCC – to provide a statement of reasons. Finally, it is important to reiterate that these procedures are not mandatory but, rather, offered as a possibility.

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24 Linhares (n 21).

25 Gonçalves, Martins, and Azevedo maintain that the substantive regime of administrative contracts is also directly applicable to those contracts signed under the special-measures regime (see n 16) 78.

26 For Gonçalves, Martins, and Azevedo, this provision would be expected to have the effect of reducing the number of contracts that are divided into lots, subject to the instrument designed to help small and medium-sized enterprises enter the public-procurement market (see n 16) 85.

3.4. Supervision of the regime

3.4.1. The Court of Account (CofA)

With its Article 17(1), the legislator 'reinstated' the CofA's full supervisory powers: 'Contracts entered into [where the processes follows] simplified public tender or restricted tender procedures by prior qualification adopted under the provisions of section i of this chapter with a value equal to or greater than the value laid down in Article 48 of Law 98/97 of 26 August shall be subject to prior supervision by the Court of Auditors.' In December 2021, the CofA issued a report titled 'Monitoring Public Procurement Covered by the Special Measures Provided For in Law 30/2021 – No 1/2021 – OAC/PG'[*27]. This strengthening of oversight translated into (1) the submission of contracts concluded under the special rules to preventive control by the CofA (per Article 17(1)); (2) submission of contracts entered into on the basis of any procedures adopted under the special procurement measures provided for in said law with a value less than 750,000 euros to concomitant supervision (see Article 17(2)); (3) submission to concurrent oversight under the provisions of Article 17(2), regulated by Resolution 5/2021-PG of 28 June 2021 and establishment of a digital platform, known as eContas-MECP; and (4) submission/documentation of those contracts provided for in Article 17(2) as a condition for their entry into legal effect.

Considering the context of the monitoring that the CofA had been performing, a second Report document was released in October 2022. This offered a set of recommendations to the government in power, Parliament, contracting authorities, the Institute of Public Markets, Real Estate and Construction, IP (IPMREC, IP), and the independent commission.[*28]

Among the many recommendations, the following stand out: (1) that the government and Latvia's parliament '[r]ethink the justification and usefulness of the special public procurement measures regime, given its negligible expression and the prejudice to the use of open competitive procedures'; (2) that they '[c]onsider eliminating the exemptions from justification inherent to the discipline of special public procurement measures, since they are contrary to the public interest, [to] transparency and scrutiny of public procurement and, in the case of paragraph d) of art 2 of Law 30/2021, to applicable European legislation'; (3) to '[p]roceed with the application of art 2 and 6 of Law 30/2021 for the execution of projects or interventions with European funding only in situations where such funding is confirmed', a suggestion aimed at contracting authorities; (4) that entities involved in contracts '[j]ustify all decisions taken in the public procurement procedures, explaining the respective reasons for decision, namely those that decide to contract, that identify the needs to be met, that determine the training procedure to be used, that proceed to the choice of entities to be invited in non-competitive procedures, that reduce [the time before] deadlines for the submission of applications or proposals, that justify the price and that proceed to the award'; (5) for contracting authorities to '[i]ntroduce guarantees of integrity and impartiality in public procurement procedures and adopt internal control practices that reduce opportunities for fraud, corruption or favouritism'; (6) that they also '[r]efrain from giving any effectiveness to MECP contracts [i.e., contracts concluded within special measures regime] before they are communicated to the CofA, in particular for the purpose of payments'; and (7) for the independent commission to '[c]onsider carrying out concrete actions to audit the MECP procedures adopted, as well as the conclusion and implementation of the respective contracts'.

3.4.2. Independent Commission

It was Law 30/2021 that created the Independent Commission as a further supervisory entity. Its composition is set out in Article 18, requiring respect for independence and impartiality, and its mission and powers are rooted in the provisions of Article 19. They encompass (1) monitoring; (2) drawing up recommendations to the contracting parties; and (3) preparing six-monthly evaluation reports on the procedures, which shall be made public.

27 '2021 Report' (n 14).

28 See <https://www.tcontas.pt/pt-pt/ProdutosTC/Relatorios/relatorios-oac/Documents/2022/rel-oac004-2022-2s.pdf> accessed 22 December 2022. https://www.tcontas.pt/pt-pt/MenuSecundario/Pesquisa/Pages/resultadospesquisa.aspx?k=medidas%20especiais.

The Independent Commission issued a Recommendation document on the mandatory submission of all contracts concluded under the special measures to the CofA, Recommendation 1/2022/CIMEC*[29]. It produced two more sets of recommendations too. One dealt with the 'requirement that pre-contractual procedures adopted under the special public procurement measures, as provided for in Article 2 of Law No 30/2021, may only be initiated after the respective financing or the respective financing or co-financing has been ensured beforehand' relative to European funding*[30]. The Commission concluded that 'intention to submit or the presentation of an application for Community funds' is insufficient for application of the special-measures procedures. The most recent Recommendation document is related to the scope and legal regime of the processes conducted and contracts concluded: the latter extends only to contracts addressed in Articles 2 to 8, and following the procedures detailed in those articles is not mandatory*[31].

By means of its first biannual report, produced in May 2022*[32] after a lengthy process of compiling and aggregating data, the Independent Commission identified both good practices and warning signs. It found that the following best practice, among other elements, should be incorporated into proceedings: to (1) evaluate the risks and benefits of choosing simplified procedures, prior to the start of the procedure; (2) identify the public interest as the primary criterion for choices of necessary and indispensable special measures, with referring to it accordingly; (3) make prudent use of simplification measures such as deviating from the established rationale; (4) implement measures that mitigate the risks associated with less expression of competition; (5) and ensure strengthening of publicity measures. Regarding the warning signs, the Commission pinpointed (1) prior consultation with companies that do not respond to invitations, (2) invitations to newly created companies, (3) signs of fragmentation, and (4) reliance on multiple companies with the same beneficial owner.

By 26 December, the Independent Commission had prepared its second report, which stated that 'a clear increase in the use of the Special Measures for Public Procurement' relative to the figures for the previous six-month term was evident, coming to approximately 78.7% in the number of contracts signed*[33].

4. Exceptional temporary revision to public-procurement prices

In its response to the energy crisis associated with the armed conflict in Ukraine that, alongside pandemic-linked developments, had led to economic instability and rising inflation, the Portuguese government issued Decree-Law 36/2022 in May 2022. This articulated an exceptional temporary regime of price revision for some public contracts – namely, public-works contracts*[34]. The substantive regime foresaw mandatory price revision to accommodate the cost increases that are a matter of course in the context of a contract of some length*[35]. 'The scope of application is quite broad, since it covers contracts that were already in their execution stage as of 21 May 2022 and extends to contracts that were yet to be concluded but for which the

29 CIMEC, 'Envio obrigatório de todos os contratos celebrados ao abrigo das medidas especiais de contratação pública para o Tribunal de Contas' <https://www.base.gov.pt/Base4/media/rmweo1ty/recomenda%C3%A7%C3%A3o-n-%C2%BA1-cimec.pdf> accessed 22 December 2022.

30 CIMEC, 'Exigência de os procedimentos pré-contratuais adotados ao abrigo das medidas especiais de contratação pública, nostermos previstos no artigo 2º da Lei n.º 30/2021, só poderem ser iniciados após ter sido, previamente, assegurado o respetivo financiamentoou cofinanciamento europeu' <https://www.parlamento.pt/Parlamento/Documents/cimec/Recomendacao2-CIMEC.pdf> accessed 22 December 2022.

31 That is, 'Recomendação N.º 3/2022/CIMEC', titled 'Âmbito e regime jurídico dos procedimentostramitados e contratos celebrados ao abrigo das Medidas Especiais de Contratação Pública, nostermos previstos no CapítuloI da Lei n.º 30/2021' <https://www.parlamento.pt/Parlamento/Documents/cimec/Recomendacao3-CIMEC.pdf> accessed 22 December 2022.

32 CIMEC, 'Relatório Semestral' (May 2022) <https://www.base.gov.pt/Base4/media/mw2fnbjp/relat%C3%B3rio-semestral-cimec-maio-2022.pdf> accessed 22 December 2022.

33 CIMEC, '2.º Relatório Semestral Medidas Especiais de Contratação Pública' (2022) <https://www.base.gov.pt/Base4/media/fnpb01wj/segundo-relat%C3%B3rio-semestral-dezembro-2022.pdf> accessed 22 December 2022.

34 Even though the PCC has other instruments to address 'a brisk rise in prices'. See LV Sousa, 'A Revisão Extraordinária de Preços e Outras Medidas Constantes do Decreto-Lei n.º 36/2022, de 20 de Maio – A Sua Aplicação à Empreitada de Obras Públicas' [2022] (3, special issue) Revista de Direito Administrativo 109.

35 In this regard, cf art 382, item 1 of the PCC and art 1, item 2 of Law 6/2004, of 6 June 2004.

procedure was under way before that date, along with even contracts still to be concluded whose procedures were to be initiated after that date[*36].

The intention was to establish a temporary regime – initially running until 31 December 2022 but later extended by six months[*37]. Thereby, the contractor was permitted to submit a request for extraordinary price revisions during the term of a public contract, provided that the increase in costs reflects that for a product representing at least 3% of the contract price[*38] and where the annual cost variation rate is equal to or greater than 20%. Also, an opportunity was offered for extending contract-performance periods without any penalty for the contractor ensuing if the need for extension was not attributable to failure by the contractor to obtain materials for the timely completion of the contract. Provision was made in addition for the possibility of an exceptional award over and above the base price even though a possibility of this nature was not provided for in the procedure programme.

The law established the procedure for extraordinary price revision thus: 'If the public contractor says nothing about the proposal submitted by the contractor, it is tacitly accepted, provided that it complies with the eligibility criteria.' If the proposal presented by the contractor does not, however, mesh with the cost structure of the work, 'the public contracting party must, within 20 days from the date of receipt of the request, present a counterproposal, which will become the price revision of [i.e., constitute the new price structure for] the contract'[*39]. Should the contracting authority dispute the proposal and consider the provisions of Article 4(3)(b) of Decree-Law 36/2022 – related to revision in line with a formula established in the contract, with the Ct coefficients multiplied by the compensation factor 1.1 – to apply or disagree with the proposal and conclude that 'the provisions of paragraph c) of No 3 of Article 4 of Decree-Law 36/2022 should be applied, i.e., identifying the materials or labour that are revised by the cost guarantee method, with the formula established in the contract being applied to the rest without any increase', it may act accordingly. The new legislation stated: 'The extraordinary price revision applies to the whole period of execution of the contract and does not hinder the possibility of financial rebalancing, since the causes of the request are different from the legal point of view.'[*40]

This extraordinary regime also addressed the possibility of extension of the contract term during its term of execution 'when the co-contractor demonstrates' that, for reason of conditions for which said co-contractor is not at fault, 'he cannot obtain the materials necessary for the execution of the contract, as per Article 4(1)'. For example, the proof may be demonstrated with a declaration by a distributor of a certain material (one not subject to substitution under the contract) indicating that there is disruption to supply. That said, the contracting authority is not required to accept the request for an extension.

This exceptional regime is extended to the acquisition of services under 'the categories of contracts determined by administrative ruling of the Government members responsible for the area of finance and for the sector of activity' (per item 2 in Article 2). The corresponding administrative ruling (with Portaria ID 74-A/2023 and issued on 7 March[*41]) lists the categories in question thus: '(a) Health and safety coordination in the scope of works contracts; (b) Canteen operation[s]; (c) Supervision of building works; (d) Energy supply; (e) Food supply; (f) Management of waste, mud and other by-products; (g) Collection of waste water; (h) Collection and treatment of urban waste and hazardous waste; (i) Waste water, waste, cleaning and environmental services; (j) Transport of water by tanker; (k) Transport of persons and goods.'[*42]

36 See the item on the exceptional, temporary-duration revision of public-procurement prices found in the IPMREC, IP frequently asked questions (FAQ) document at <https://www.impic.pt/impic/pt-pt/perguntas-frequentes/revisao-extraordinaria-de-precos> accessed 17 March 2023.

37 Recently extended to run until the end of December 2023.

38 There is some uncertainty with regard to the scope of the concept of price: whether the initial price set *versus* the 'corrected contract price, minus the value of any work suppressed and the sum of any additional work' is the relevant notion; see Sousa (n 34) 114.

39 Per the IPMREC, IP frequently asked questions the exceptional temporary revision to public-procurement prices (n 36).

40 The request for financial rebalance may exist against the backdrop foreseen in art 282 of the PCC and may be issued especially in those cases foreseen by the law or, exceptionally, in the contract itself, with the caveat that the repositioning of the financial balance shall never be based on variations in the costs of materials, equipment, or labour, however, since these are already encompassed by the price revision; ibid.

41 Available at <https://dre.pt/dre/detalhe/portaria/74-a-2023-208269534> (JavaScript required) accessed on 28 July 2023.

42 Afterward, more regulations were issued to assist contractors in the fundamentals of exercising the opportunity for revised prices in works and services contracts.

5. Conclusions

The conjunction between the two nexuses of Portugal's crisis legislation entailed complex negotiation of factors related to, firstly, the pandemic and, secondly, the financial crisis that followed, stemming partly from the war and driven onward by high inflation rates. While legislation arising from the first of these, with its highly complicated and intricate structures (justified in terms of figures attesting to abnormal and unpredictable changes of circumstances), has been repealed in the years since, except for a few changes introduced in particular specifically regulated regimes, organs of the European Union have criticised the establishment of several of the solutions nonetheless. The second set of instruments, perhaps not so transitory, was intended to deal with the application of European Funds for economic recovery. Its effects are no less troubling.

Even though the Commission regarded the relevant Directive instruments as already furnishing adequate procedure-acceleration mechanisms to expedite procurement processes at the time of onset of the pandemic, the legislation that unfolded in Portugal amid these conditions was convoluted, manifested great complexity, and raised many questions of interpretation and application. This state of affairs might have resulted from the hastiness of the legislator, coupled with poor preparation: Faced with a highly demanding public-health situation, administrative entities did not have ready means for a timely response, given their lack of planning for emergency situations. In this troubling environment, the legislator rushed in its passing of legislation, inserting poorly drafted rules into the legal system that were out of step with the usual concepts of legal institutions. These only contributed to the bewilderment.

In my view, any need for legislation specific to emergency situations is directly associated with a lack of strategic planning for facing emergency situations and abnormal circumstances that may influence the public-procurement landscape. In Portugal's case, the absence of a contingency plan and asset stockpiles equipping the country to face the pandemic lie at the root of the complex Portuguese solutions witnessed*[43].

With its legislation connected with the RRP to deal with inflation and associated economic upheaval, the legislation seems to have again become distracted from the bigger picture of the world political and economic situation. When recognising the problematic situation, the legislature once more passed legislation without engaging in much coherent planning. Thereby, essential aspects of the legislation remain to be tuned in the future, through further regulation.

[43] On 4 July, Law 31/2023 terminated the validity of the laws issued in connection with the pandemic; see <https://diariodarepublica.pt/dr/detalhe/lei/31-2023-215097639> (JavaScript required) accessed 4 July 2023.