

**PUBLIC LAW**

Confirmation that the rules on public-private partnerships do not apply to local authorities

Decree-Law no. 170/2019 was published on 4 December and amends the Public Contracts Code and Decree-Law no. 111/2012 of 23 May, usually known as the Legal Framework of Public-private Partnerships (*Regime Jurídico das Parcerias Público-Privadas* or RJPPP). The amendments to the Public Contracts Code may be deemed as minimal. However, sweeping changes have been made to the RJPPP and they reveal a clear intention on the part of the legislator to bring greater flexibility to the introduction of new PPPs. This may herald a new wave of investment.

Decree-Law no. 170/2019 brings several changes. One highlight is the addition to the RJPPP of a new article 2-A, which makes it clear that the RJPPP is only applicable to those entities identified as public partners in article 2(2) of the same law. These are the State, state public entities, funds and autonomous departments, State-owned undertakings and other entities constituted by them to meet the needs of general interest. In particular, article 2-A provides that the RJPPP does not apply “to municipalities and to the autonomous regions, or to the entities created by them”.

It should be noted that municipalities, autonomous regions and the entities created by them have never appeared on the list of public partners provided for in the RJPPP. However, the Court of Auditors has held on various occasions that, although with adaptations, the rules also applied at the local government level. Court of Auditor’s judgments nos. 1/2019 of 16 January and 3/2019 of 1 February, both of the Court’s First Section (sitting as a subsection), are examples of this. It is now clear, by an express legal determination, that this should not be understood to be the case. It is, therefore, important to keep an eye on the way the Court of Auditors approaches this issue in the future. This is particularly so because article 2-A of the RJPPP is qualified as an “interpretative rule”. Accordingly, the determination now expressed applies, as a general rule, to those situations that have arisen in the past.

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Besides the addition of article 2-A, and among other issues, it is also important to underline that article 2(4) of the RJPPP has been amended. This change affects the way the RJPPP is applied as it restricts what can now be regarded as instruments of legal regulation of the relationships of cooperation between public bodies and private bodies. These instruments are (i) concessions and sub-concessions of public works and public services, and (ii) other contracts of a typical or atypical nature that are determined to be subject to the RJPPP by resolution of the Council of Ministers.

There are other significant changes with meaningful practical impact. One is the express exclusion from the RJPPP of partnerships that do not involve payments to the private partner (other than contractual penalties or contingency payments), and this excludes a large number of the traditional concessions. There is also much greater flexibility in preparing and setting up new PPPs as their requirements will be defined on a case-by-case basis by the Council of Ministers. Finally, the Council of Ministers will also be the body responsible for taking unilateral decisions to amend partnership agreements. This change will certainly entail practical difficulties in managing and performing these agreements.

Decree-Law no. 170/2019 of 4 December came into force on 5 December 2019 and contains various provisions on the terms of its application over time.