
New special public procurement measures

Law 43/2024 of December 2 implements special public procurement measures to facilitate the implementation of projects financed by European funds.

Portugal - Legal Update

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Key aspects

- > Law 43/2024 aims to change the regime for projects financed by European funds, in particular the Recovery and Resilience Plan (RRP).
- > The new measures ensure that acts and contracts aimed at implementing these projects will continue to have effect, even while they are being audited by the Portuguese Court of Auditors (PCoA).
- > These measures also include new procedural rules for projects at risk of losing European funding.
- > Special rules have also been established for public procurement and auditing by the PCoA in the context of procedures and contracts concerning the concentration of public services in the Campus XXI buildings.



Context

Three years after the launch of the European Union's RRP, the European Court of Auditors (ECA) issued a report—published in September of this year—highlighting significant delays in the payment of funds and in project implementation. One of the main reasons put forward by the ECA is the lack of administrative capacity and the complexity of the rules at national level.

To respond to the identified problems, the Portuguese Parliament approved **Law 43/2024 of December 2** (Law 43/2024), which originated from Proposed Law 20/XVI/1 presented by the Government. Law 43/2024 amends the regime on special public procurement measures (Law 30/2021), focusing in particular on acts and contracts concerning projects financed by European funds.

Main amendments

Law 43/2024 introduces three major amendments to the special public procurement measures for procedures and contracts that are financed or co-financed by European funds:

➤ **Preventive supervision by the Portuguese Court of Auditors (PCoA)**

The acts and contracts aimed at implementing projects financed or co-financed by European funds, being subject to the **regime on prior inspection by the PCoA**, are effective and bring about effects. They can be performed even before the PCoA's approval or declaration of conformity, and article 45 of Law 98/97 of August 26 (PCoA Organization and Procedure Law") does not apply to them.

In cases where the PCoA concludes that the act or contract complies with the applicable rules, it will issue an approval decision that may come with recommendations, but these will not prevent the performance of the act or contract. If the PCoA identifies any non-compliance of the act or contract in question with the applicable regime, the case is referred for a parallel inspection to determine any financial liability.

➤ **New procedural rules for pre-contractual litigation actions**

Regarding the **new special procedural rules for pre-contractual litigation actions**, Law 43/2024 establishes that **the automatic suspensory effect** (currently established in article 103-A of the Administrative Courts Code of Procedure) can be **provisionally lifted** when awards in procedures aimed at implementing projects financed or co-financed by European funds are challenged.

To order that the suspension be lifted, the court has 48 hours to check, cumulatively and summarily, that:

- (i) 10 business days have elapsed from notification of the award decision to all the bidders; and
- (ii) there is a risk of loss of funding in a contract aimed at implementing a project financed or co-financed by European funds (this risk is presumed by law and, to this end, it is enough to attach a document evidencing the decision to finance the project to which the contract belongs).

> Arbitration

The possibility of **arbitration** is also established in public works contracts or contracts for the supply of public goods or services financed or co-financed by European funds. This applies to disputes arising during the performance of the contracts when their importance may jeopardize compliance with the contractual deadlines or the loss of funds, even if the contracts establish that any disputes arising from the contracts must be settled by the administrative courts.

Finally, the law establishes that the signing of contracts for the leasing or purchase of movable property, the acquisition of services, or the conclusion of public works contracts aimed at organizing, programming, designing, and implementing the concentration of public services in the **Campus XXI buildings** may be preceded, in some cases, by simplified prior consultation procedures (with an invitation to at least five entities), with the waiver of some essential formalities established in the Public Contracts Code. For these contracts, the law also established the waiver of prior review by the PCoA and they must be sent to that court for a review in parallel.

These rules apply to all the acts and contracts aimed at implementing projects financed or co-financed by European funds that are subject to PCoA review and to the urgent administrative actions challenging awards in procedures aimed at implementing projects financed or co-financed by European funds that are pending when the new law comes into force.

For additional information, please contact Cuatrecasas.

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