

ROLE OF THE PORTUGUESE AUDIT COURT IN MONITORING THE RECOVERY AND RESILIENCE PLAN: A PIECE OF A HOPEFUL PUZZLE?

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Abstract

This article deals with the legal regime anticipated for the execution of the Portuguese Recovery and Resilience Plan and, in particular, the role attributed to the Portuguese Court of Auditors in the external control of the European funds involved. In view of the need for timely execution of the plan, legislative measures have been approved to facilitate both organic changes (creation of new entities and delegation of competences relating to European funds by existing entities) and procedural changes (reducing the prior control of procedures for approval of public expenditure and making public procurement procedures more flexible). In this context, the Court of Auditors' powers of control over public procurement were strengthened to ensure good financial management. However, the proper control of European public money requires (much) more from the Court of Auditors, which must actively exercise its general powers of control over European funds and public procurement and, above all, establish a timely, maximised and results-oriented control system as envisaged in the Portuguese Recovery and Resilience Plan.


Keywords: NextGenerationEU Funds; Recovery and Resilience Mechanism; Portuguese Recovery and Resilience Plan; Portuguese Court of Auditors; Portugal.

LA FUNCIÓN DEL TRIBUNAL D'AUDITORIA PORTUGUÉS EN EL CONTROL DEL PLA DE RECUPERACIÓN I RESILIENCIA: ¿LA PEÇA D'UN TRENACLOSQUES PROMETEDOR?

Resum

Aquest article tracta del règim jurídic previst per a l'execució del Pla de recuperació i resiliència de Portugal i, en concret, de la funció assignada al Tribunal d'Auditoria portuguès en el control extern dels fons europeus implicats. Davant la necessitat d'executar aquest Pla en els terminis establerts, s'han aprovat un seguit de mesures legislatives per facilitar tant els canvis orgànics (creació de noves entitats i delegació de competències relacionades amb els fons europeus per part de les entitats existents) com els relatius al procediment (reducció del control previ dels procediments d'aprovació de la despesa pública i més flexibilització dels procediments de contractació pública). En aquest context, s'han reforçat les competències de control del Tribunal d'Auditoria per tal de garantir una bona gestió financera. No obstant això, un control adequat dels fons públics europeus exigeix una implicació (molt) més gran per part del Tribunal d'Auditoria, el qual ha d'exercir activament les seves competències generals de control sobre els fons europeus i la contractació pública i, sobretot, ha d'establir un sistema de control adequat, maximitzat i orientat als resultats, tal com preveu el Pla de recuperació i resiliència de Portugal.

Paraules clau: fons NextGenerationEU; Mecanisme de Recuperació i Resiliència; Pla de recuperació i resiliència de Portugal; Tribunal d'Auditoria portuguès; Portugal.

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1 Introduction

In the context of the COVID-19 pandemic crisis, the robustness of the responses of Member States (MS) and, in particular, stimulation and promotion of transformation of the economic structures of the most affected MS,¹ a package of NextGenerationEU² funds to boost recovery was approved at European level. Of particular significance within this package was the European Recovery and Resilience Mechanism (RRM), which required each MS to present its own National Recovery and Resilience Plan (NRRP) in the form of a detailed description of the reforms and investments it considered most appropriate for that purpose. Once presented by the MS and approved by the European Commission, the next step is the expedited³ implementation of these plans, since the funds awarded are intended to cover the period 2021–2026.

Hence, while swift action is required, effective implementation of the reforms and investments provided for in the Recovery and Resilience Plans will require effective action by the national authorities of the MS in question. In order to achieve this, a number of MS, Portugal included, have introduced organic changes, either by creating new entities dedicated specifically to their NRRP, or by delegating powers to existing entities with experience in the administration of European funds. It should be added that the above-mentioned need for celerity led to certain administrative procedures being altered to make them more flexible and reduce the number of prior control mechanisms, whether at budgetary or public procurement level.

It is in this context of relaxation of administrative procedures that the Portuguese Court of Auditors must focus its attention, in order to control the administrative and financial legality. Moreover, it should be noted that the issue of administrative and financial control of European funds⁴ destined to the implementation of the Portuguese RRP (PRRP) is a much discussed topic (Navarro Molines, 2021, p. 396 ff.), and one of the most relevant aspects for the good application of European budget funds. In other words, in addition to all the types of control needed to maintain legal administrative and financial discipline in the application of European funds by national entities (namely, the internal control carried out by national audit entities, and the external control exercised by the European Commission), it is noteworthy that strict and effective financial monitoring by the Portuguese Court of Auditors is desirable in the context of European funds.

The importance of this external control immediately emerges from the fact that a significant proportion of specially created PRRP implementation measures involve simplifying procedures, making them more flexible, and reducing or excluding prior (common) controls on the part of other public entities. The reduction of such controls first occurred at the level of budget implementation procedures and of public procurement procedures, where normative changes were made to ensure the timely implementation⁵ of the PRRP.

In this scenario, the Portuguese Court of Auditors can play a pivotal role, either through the development of its general functions of financial monitoring in matters of European funds and public procurement, through competences specifically related to special public procurement measures, or by maximising the competences of risk warning and collaboration with the entities responsible for the implementation of the PRRP.

2 The ‘big picture’ of the RRM and the PRRP

As indicated above, in the context of the COVID-19 crisis, it became necessary to strengthen the current regime for providing support and providing the MS with direct financial support through an innovative instrument.⁶ As a result, and on the basis of Article 175 TFEU, the European Union deemed it appropriate to create the

1 Drawing attention to the fact of the crisis and in the event of inaction by the Union: “perhaps we have never been so close to disintegration”, see Albertí i Rovira (2021, p. 1).

2 On control at the European level, see Fernández Pasarín (2020, p. 1). On the principle of solidarity, also in this context, see Brauneck (2021, pp. 773–775).

3 In the French context of the “France Relance” plan, see Canivenc (2021, pp. 115–123).

4 On European funds, see Gallizioli (1992); Ordoñez Solís (1997); Evans (1999); Bernard (2002); Cappello (2014); Belicka (2014); Karl and Demir (2015); Pedro (2020); Navarro Molines (2021).

5 With the same concern in the Italian context, see Villani (2021, p. 5).

6 For a notion of the different European instruments created to respond to the COVID-19 health crisis, see Olesti Rayo (2021, p. 6 ff.).

Recovery and Resilience Mechanism (RRM)⁷ for the purpose of providing effective and significant financial support to enhance the implementation of sustainable reforms and related public and private investments in the MS (Olesti Rayo, 2021, p. 6 ff.; Alcidi and Gros, 2020, pp. 202–203).

Thus, an ad hoc mechanism was created to channel most of the funds under the Cohesion Policy. This is based on six key pillars: the ecological transition; digital transformation; smart, sustainable and inclusive growth, including economic cohesion, employment, productivity, competitiveness, research, development and innovation, and a well-functioning internal market with strong small and medium-sized enterprises (SMEs); social and territorial cohesion; health and economic, social and institutional resilience, particularly with a view to increasing preparedness for and response to crisis situations; and policies for the next generation of children and young people, including education and skills. The mechanism stipulates a set of approval criteria, namely, consistency with the macroeconomic priorities for each country within the framework of the European Semester. Non-fulfilment or unsatisfactory fulfilment of the commitments made by the MS may lead to the suspension of payments and, ultimately, the termination of the agreement by the European Commission, if a certain deadline has passed and the MS has failed to present tangible results.

The vehicles to which RRM funds are destined are the NRRP. In the case of Portugal, the plan has already been assessed and approved by the European Commission.⁸ Assessment was carried out on a per-item basis, and the Portuguese RRP received grades of A and B. Annexed to the Commission's approval decision is the Portuguese RRP,⁹ which is structured into reforms and investments, covering specific components (e.g., health, housing, etc.) and providing a description of these reforms and investments as well as indicating milestones, targets, indicators, timetables, etc. "Component" is the magic word here (Navarro Molines, 2021, p. 387), and should be understood as a constituent element or part of the PRRP, with each component reflecting reform priorities and corresponding investments within a policy framework, sectoral activity or related theme designed to address specific purposes, forming a coherent package of mutually reinforcing measures.

A specific governance model was anticipated for implementation of the PRRP.¹⁰ This model is limited to four levels: the political level, the monitoring level, the management level, and the control and audit level.¹¹ This governance model, according to the law that created it,¹² "should ensure a high degree of coordination between the various actors", taking into account "fundamental principles such as simplification, transparency and accountability, participation, centralised management and decentralised implementation, segregation of functions and results orientation".

7 Regulation (EU) 2021/241 of the European Parliament and of the Council, of 12 February 2021, establishing the Recovery and Resilience Facility (OJ L 57, 18/2/2021, pp. 17–75).

8 [Proposal](#) for an EU Council-implemented decision to approve the assessment of the Portuguese Recovery and Resilience Plan (SWD (2021) 146 final), consulted on 17 January 2022.

9 [Annex](#) to the proposal for an EU Council-implemented decision to approve the assessment of the Portuguese Recovery and Resilience Plan (SWD(2021) 146 final), consulted on 17 January 2022.

10 See Decree-Law No. 29-B/2021, of 4 May, which establishes the governance model for European funds allocated to Portugal through the Recovery and Resilience Plan. All national laws referred to can be found at: www.dre.pt

Strictly speaking, in this article we are only addressing the Portuguese RRP governance model at the level of the mainland, since the Autonomous Regions of the Azores and Madeira have their own regime. In other words, (i) for the Autonomous Region of Madeira, Regional Regulatory Decree No. 6/2021/M, of 15 June 2021, establishes the governance model of the regional investments included in the Recovery and Resilience Plan, under the European Union Resilience and Recovery Mechanism for the period 2021–2026, as well as the organic structure related to regional strategic and operational management, follow-up, monitoring and evaluation, taking into account the reality and specificities of the Autonomous Region of Madeira; and (ii) for the Autonomous Region of the Azores, Regional Regulatory Decree No. 23/2021/A, of 3 September, establishes the governance model for the reforms and investments included in the Recovery and Resilience Plan for the Autonomous Region of the Azores (RRP-Açores).

11 On this level of governance of the PRRP, see Rodrigues and Proença (2022, p. 69 ff.). The importance of this level of governance is crucial for the success of the PRRP. However, attention is also paid to the role of the Court of Auditors as the body responsible for the external control of European funds to ensure the congruence of internal and external control system results, because the practical unity of the legal system and the legal certainty that public managers should benefit from requires it. In this way, we must aim to ensure that a situation considered to be good public expenditure by the internal auditing system is not later deemed to be the opposite by the Court of Auditors and involving, in the worst case, penalties or financial liability for the public manager. Moreover, only the Court of Auditors will have an integral vision of European and national investments and is therefore in a position to make an integrated assessment. In this last sense, see Villani (2021, p. 6).

12 Decree-Law No. 29-B/2021, of 4 May.

It is a governance model based on strictly administrative structures, with the prime minister and other high-ranking members of the Portuguese government responsible for the policy coordination level. With the objective of promoting institutional, economic and social partnership, the second level of the governance model is responsible for monitoring implementation and results of the PRRP, and promoting the appropriate dissemination of the plan to citizens, companies and other organisations, as well as analysing any issues affecting its performance and proposing recommendations. In order to ensure compliance with the obligations and requirements set out in Regulation (EU) 2021/241, an entity responsible for the technical and management coordination of the PRRP has been provided as the third level of the governance model, which is completed with the provision of an audit and control level to supervise the management and control system of the third level of governance.

For a more complete understanding of the puzzle, it is important to take into account that, in addition to executive power, judicial and legislative powers were also called upon in the task¹³ of implementing the PRRP. Thus, in addition to the role played by the Public Prosecutor's Office at the Court of Auditors, and at the last level of the governance model – audit and control – in monitoring the activity of the entities responsible for that level of control, the Court of Auditors is generally assigned a role of external control of European funds, and has also assumed specific powers in the field of public procurement.¹⁴ Furthermore, within the context of monitoring and supervising the implementation of special public procurement measures, an independent commission has been set up, in which three of the five members are appointed by the Assembly of the Republic and two others by administrative entities.¹⁵

Finally, it is important to note that implementation of the PRRP is based on strong contractualisation of reforms and investments with the beneficiaries. That is to say, the reforms and investments defined in the PRRP are subject to contractualisation between the mission structure's *direct*¹⁶ or *intermediary*¹⁷ beneficiaries, and between the latter and the respective *final beneficiaries*.¹⁸ In this contractual logic, direct or intermediary beneficiaries are required to provide the information on milestones and targets necessary to monitor compliance with the objectives and financial planning of the reforms and investments and other obligations arising from Regulation (EU) 2021/241. Inherent in this contractual logic is a financial chain and compliance with the respective duties that impact on the overall sound financial management of the PRRP. This requires the different actors involved in the implementation of the PRRP to pay particular attention to the legal framework involved, as the expedited implementation requirements do not support non-compliance.

3 Exceptional budget and administration simplification measures adopted to implement the PRRP

3.1 Budget simplification

For the purpose of expediting implementation of the PRRP, an exceptional framework has been provided to simplify and speed up public expenditure procedures.^{19,20}

13 “The entire institutional system is called to a test of seriousness and efficiency that does not admit of recovery sessions”. In this sense, see Villani and Vasarri (2021, p. 23).

14 See below, section 4.

15 See below, section 5.

16 “Direct beneficiaries” are the entities responsible for the implementation and physical and financial execution of a reform and/or investment included in the PRRP, which enables them to benefit from financing.

17 “Intermediary beneficiaries” are the public entities responsible overall for the physical and financial implementation of a reform and/or investment included in the PRRP, but whose execution is ensured by third parties selected by them.

18 “Final beneficiaries” are the entities responsible for the implementation and physical and financial execution of a reform and/or investment, benefiting from PRRP funding directly as a direct beneficiary or through an intermediary beneficiary.

19 Despite this simplification, the obligations set out in articles 6(2)(3)(4), 7(3), 8(3), 13(2), 14(3), 16(4)(5), 17(1)(2)(3) of Decree-Law No. 53-B/2021, of 23 June, must be taken into account.

20 Measures with these objectives have also been anticipated in other countries, for example, in Spain, in the sense that the relaxation of budgetary control of NextGenerationEU funds is one of the fundamental pillars of the legal framework developed for this purpose, see Escribano and Magaña (2021, p. 344).

Within this framework, the following measures are particularly worthy of note: (i) extension of the limits of powers to authorise expenditure;²¹ (ii) waiver of authorisation for the assumption of multi-annual charges;²² (iii) exemption from captivation;²³ (iv) irrelevance for the purposes of compliance with the budget balance rule;²⁴ (v) waiver of authorisation to enter into service acquisition contracts;²⁵ (vi) waiver of the need to obtain a binding prior opinion for the signing or renewal of service purchase contracts in the form of a task or contract;²⁶ (vii) tacit deferment of prior opinions or consultations regarding electronic certification, administration modernisation and simplification, and electronic administration;²⁷ (viii) simplified and urgent procedures for the temporary hiring of human resources.²⁸

These measures represent a “certain ‘lowering of standards’ in the formation of the public financial decision” (Silva, 2022, p. 63), which may result in greater vulnerability as regards the conformity of the decision with the law. In other words, preventive controls are being stepped back and successive controls are being extended, even though the latter may be performed after a legal irregularity has already occurred.^{29,30}

3.2 Making public procurement rules more flexible

The necessary timely implementation of the PRRP was also based on the provision of *special public procurement measures*.³¹ That is, along with the general public procurement rules provided for under the Portuguese Public Procurement Code (*Código dos Contratos Públicos* or CCP),³² the legislator opted to provide special public procurement rules to ensure swift implementation of the PRRP, since expedited public procurement is needed to ensure the rapid absorption of funds.³³ These measures are optional for the contracting entities, which may choose between the general rules or these special public procurement measures. Although these cover several areas of economic activity and different regimes, revealing variable geometry in terms of procedure and deadlines,³⁴ this article will deal only with special measures that apply to the implementation of projects financed or co-financed by European funds, and the PRRP in particular.

On the one hand, special or simplified pre-contractual procedures are provided for: the simplified “public tender”,³⁵ “public tender with prior qualification”,³⁶ “prior consultation”³⁷ and “direct award”.³⁸ These are not really new procedures, but rather procedures which have been simplified to maintain the typification of

21 See Article 5 of Decree-Law No. 53-B/2021, of 23 June, which establishes the exceptional regime of budget execution and simplification of procedures for projects approved under the Recovery and Resilience Plan.

22 See Article 6 of Decree-Law No. 53-B/2021, of 23 June.

23 See Article 7 of Decree-Law No. 53-B/2021, of 23 June.

24 See Article 8(4) of Decree-Law No. 53-B/2021, of 23 June.

25 See Article 9 of Decree-Law No. 53-B/2021, of 23 June.

26 See Article 10 of Decree-Law No. 53-B/2021, of 23 June.

27 See Article 9 of Decree-Law No. 53-B/2021, of 23 June.

28 See Article 15 of Decree-Law No. 53-B/2021, of 23 June. On this regime, see Cavaleiro (2022, p. 83).

29 On simplification in this context of European fund management, see Pretel (2021, p. 250 ff.).

30 On the relationship between administrative simplification and the economic crisis by analysing the experience of several European countries (particularly, France and Spain), see Travi et al. (2018, pp. 241–263).

31 Law No. 30/2021, of 21 May, which approves special measures for public procurement and amends the Public Procurement Code, approved in annex to Decree-Law No. 18/2008, of 29 January, the Code of Procedure in Administrative Courts, approved in annex to Law No. 15/2002, of 22 February, and Decree-Law No. 200/2008, of 9 October.

32 Decree-Law No. 18/2008, of 29 January (with multiple amendments).

33 In the Spanish context, see Pernas García (2021, p. 161).

34 On this regime, see Gonçalves et al. (2021, 47 ff.).

35 *Concurso público* in general, see articles 130 et seq. of the CCP.

36 *Concurso público com prévia qualificação* in general, see articles 162 et seq. of the CCP.

37 *Consulta prévia* in general, see articles 112 et seq. of the CCP.

38 *Ajuste directo* in general, see articles 112 et seq. of the CCP.

public procurement procedures provided for under the CCP.³⁹ The simplified procedures regime refers to: (i) electronic processing (as a rule, the processing is electronic);⁴⁰ (ii) exemption from the obligation to state reasons (waiver of the requirement to state reasons for the decision not to procure in lots, and for the fixing of the base price);⁴¹ (iii) choice of entities invited to the simplified prior consultation (limitation of entities which may be invited);⁴² (iv) impediments (special rules on compliance with tax and social security obligations of competitors);⁴³ (v) prior hearing (reduction of deadlines);⁴⁴ (vi) surety (special rules for the waiver of surety);⁴⁵ (vi) administrative appeals (reduction of deadlines).⁴⁶

On the other hand, in addition to the above, other procedural alterations – amendments applicable to *non-simplified procedures* – are anticipated.⁴⁷ With regard to public tender or limited tender by prior qualification (not simplified), reduction of the deadline for submission of bids and applications is permitted thus: (i) 15 days for submission of bids in public tender with international publicity;⁴⁸ (ii) 15 days for submission of applications in limited tender by prior qualification with international publicity;⁴⁹ (iii) 10 days for submission of bids in limited tender by prior qualification with international publicity.⁵⁰ In addition to these deadline reductions, the stipulated justification in these provisions of the CCP is waived, in other words, substantiation of the urgency is not a requirement. This exemption is based on a fiction of legal urgency.

Lastly, a system of administrative offences was created as a counterbalance to the flexibility of the special public procurement measures.⁵¹ In short, the minimum and maximum amounts of fines laid down for public procurement in general are doubled.⁵²

The special public procurement measures described aim to simplify and expedite pre-contractual procedures in order to boost economic recovery (Raimundo, 2021, p. 58). However, this increased flexibility has a tendency to jeopardise the fundamental values and principles of public procurement. In fact, the Portuguese Court of Auditors has already presented a report on the first five months of application of the special public procurement measures, in which it states that “the main consequence of the application of the special measures for public procurement is the widening of the use of non-competitive procedures of direct award and simplified prior consultation”.⁵³ As a way of counterbalancing this flexibility, the control system of this special public contracting framework was strengthened from the outset by the Court of Auditors.⁵⁴

4 The Portuguese Court of Auditors

The need for economic and financial control of public accounts has led most modern states to create a body that performs this task. This typically constitutional body forms part of the primary structure of the state, although its composition, organisation, functions and operation vary from one country to another. This difference has

39 See Article 16(1) of the CCP.

40 See Article 10 of Law No. 30/2021, of 21 May.

41 See Article 11 of Law No. 30/2021, of 21 May.

42 See Article 12 of Law No. 30/2021, of 21 May.

43 See Article 13 of Law No. 30/2021, of 21 May.

44 See Article 14 of Law No. 30/2021, of 21 May.

45 See Article 15 of Law No. 30/2021, of 21 May.

46 See Article 16 of Law No. 30/2021, of 21 May.

47 See Article 2 of Law No. 30/2021, of 21 May.

48 See Article 136(3) of the CCP.

49 See Article 174(2) of the CCP.

50 See Article 191(5) of the CCP.

51 See Article 20 of Law No. 30/2021, of 21 May.

52 Under the terms of articles 456–458 of the CCP.

53 See [Tribunal de Contas – Relatório N.º 1/2021 – OAC/PG](#), consulted on 2 January 2022.

54 Also in the sense of the need to strengthen control of contracts financed by European funds, see Bernal Blay (2021, p. 237).

led authors to present various criteria to distinguish these bodies from other entities and highlight the existence of different models from the outset.⁵⁵

In the Portuguese legal system, the competent body for the control of public accounts is the Court of Auditors,⁵⁶ which is constitutionally established in Article 214 of the Constitution of the Portuguese Republic. A sovereign body with the nature of a court (Franco, 2001, p. 458), it is both unique and autonomous⁵⁷ and performs three functions that go far beyond the jurisdictional, namely: (i) a consultative function “of a technical and political nature”, which consists of giving an opinion on the Portuguese State General Account; (ii) a “preventive supervisory function”, which allows it to pronounce on the administrative legality and financial regularity of the intended item of public expenditure; and (iii) a “jurisdictional function”, reflected in the audit of the accounts at the end of each year (Estorninho, 1996, p. 311).

In addition to its judicial activities, the Court of Auditors carries out activities of a materially administrative nature (or powers of financial control). These activities are mainly centred on assessing prior approval⁵⁸ and making decisions on financial liability cases resulting from monitoring actions carried out by the Court of Auditors.⁵⁹

4.1 The role of the Portuguese Court of Auditors in monitoring European funds destined for the PRRP

The control of European funds is an essential material competence of the Court of Auditors (Correia, 1997, pp. 129–159). In this regard, it should be borne in mind that it is within the competence of the Portuguese Court of Auditors to audit, at national level, the collection of own resources and the application of financial resources originating from the European Union, in accordance with the applicable law.⁶⁰ To put it another way, it is responsible for monitoring formal and substantive legality: strict legality, financial regularity and management correctness (Correia, 1997, p. 140). Internally, European funds are public money like any other (Franco, 1995, p. 230).

The Court of Auditors has a special role to play in monitoring financial and administrative legality in the implementation of the PRRP. In addition to the above, the administrative and financial legality of the measures adopted in the implementation of the PRRP (not only in terms of public procurement)⁶¹ may be assessed in the context of this Court’s opinion on the Portuguese State General Account, when verifying accounts provided by managers, and in the context of systems, regularity and performance audits of systems, funds, instruments and commitments. Also worth highlighting are the successive monitoring of public contracts and indebtedness, and the assessment and enforcement of responsibilities for financial violations detected during the implementation of European support programmes such as the PRRP.

Lastly, the Portuguese Court of Auditors may have contact with these issues through the monitoring of actions undertaken by the European Court of Auditors in Portugal. Coordination of national control bodies with European control bodies is also required.

55 The most common models are Anglo-Saxon, Germanic, Scandinavian and Latin. On these models, see Cubillo Rodríguez (1999, p. 61 ff.)

56 On this, among many, see Sampaio (2001, pp. 667–688); Canotilho (2008, pp. 23–39); Tavares (2008, pp. 38–44); Martins (2012, pp. 633–647).

57 See Tavares (1996, p. 462). Considering it “*a fundamental organ of the Public Administration*”, see Amaral (2012, p. 297).

58 The jurisdictional nature of the prior approval (*visto prévio*) or, more specifically, the refusal of prior approval, has been much discussed, with positions varying between considering it to be either jurisdictional or materially administrative in nature. A summary of these positions can be found in Duarte (2008, pp. 31–37).

59 See Chapters IV and V of Law No. 98/97, of 26 August, which approves the Law of Organisation and Procedure of the Court of Auditors (“Law No. 98/97, of 26 August”). Qualifying as jurisdictional the *processes of enforcement of financial liability*, see Raposo (2004, pp. 43–66); Canotilho and Moreira (2010, pp. 577); Cura (2011, p. 76 ff.), among others.

60 See article 5(1)(h) of Law No. 98/97, of 26 August.

61 See below.

4.2 Specific role of the Portuguese Court of Auditors in special public procurement measures

First of all, it must be expressly stated that the control of public procurement expenditure by the Court of Auditors⁶² appears to be a general (*noble and fundamental*) competence (Tavares, 2008, p. 991). This means that, depending on their financial value, certain public contracts will be subject to *prior supervision*⁶³ while others may require *concomitant supervision*;⁶⁴ finally, there will be *successive control* covering the entire contractual activity of the entities subject to the Court's control. In addition, should Court of Auditors or reporting body reports reveal facts entailing *financial liability*, the corresponding legal⁶⁵ proceedings may be instituted.

The special measures under consideration also lay down rules for auditing of the special measures⁶⁶ by the Portuguese Court of Auditors, including contracts financed by the PRRP.⁶⁷

A system of prior supervision is provided for contracts with a value equal to or greater than €750,000 (stand-alone contracts) and €950,000 (interrelated contracts), following the general rule for supervision of public contracts in this respect.⁶⁸

Additionally, a concomitant monitoring regime has been provided for contracts worth less than €750,000 (single contracts) and €950,000 (interrelated contracts). Contracts falling into this category must be sent electronically to the Court of Auditors within 10 days of their conclusion and accompanied by the respective administrative documents.

For the purposes of making these rules operational, the Court of Auditors has approved instructions⁶⁹ requiring that each contract sent to the Court of Auditors be accompanied, where applicable, by the following documents: (i) decision or resolution to contract; (ii) decision or resolution approving the stages of the procedure; (iii) programme of the procedure; (iv) specifications; (v) contractor's proposal; (vi) final report of analysis of proposals; (vii) award decision or resolution; (viii) declaration of the contractor pursuant to Annex II of the CCP; (ix) decision, protocol or contract approving European funding.

Failure to send the contract and respective documents to the Court of Auditors renders the contract ineffective for payment purposes.

In a situation in which the Court of Auditors detects an illegality in the scope of the concomitant control, two hypotheses must be taken into account: (i) if the illegality is detected before execution of the contract commences, the contracting entity must be instructed to submit the contract for prior supervision and not to commence execution until approval is obtained, under penalty of financial liability;⁷⁰ (ii) if execution has already commenced, and even if the contract has already been executed in full, the audit report must be forwarded to the Public Prosecutor's Office⁷¹ for the purposes of determining any financial liabilities.⁷²

62 On the overseeing of public contracts by the Court of Auditors, see Magalhães (2006, pp. 203–217); Tavares (2008, 967–991); Martins (2011, 9–19); Tavares (2018, pp. 197–214); Gonçalves (2020, p. 1003 ff.).

63 See articles 46, 47 and 48 of Law No. 98/97, of 26 August.

64 See Article 49(1) of Law No. 98/97, of 26 August.

65 See articles 57 and 89. On no financial discipline without financial liability, see Correia (1997, p. 157).

66 See Article 17 of Law No. 30/2021, of 21 May.

67 Although difficult to put into practice, “the monitoring of public contracts financed by European funds” is a very popular topic. In the Spanish context, see Bernal Blay (2021, p. 240 ff.).

68 See Article 48 of Law No. 98/97, of 26 August.

69 See Court of Auditors Resolution No. 5/2021-PG, of 28 June, approving the instructions establishing the discipline applicable to electronic submission to the Court of Auditors of the contracts referred to in Article 17(2) of Law No. 30/2021, of 21 May, which approves, among other provisions, special measures for public procurement.

70 Pursuant to the general regime provided for in articles 5(1)(c) and 49(2) of Law No. 98/97, of 26 August.

71 On the Portuguese Public Prosecutor's Office, see Pedro (2016, p. 408 ff.).

72 Under the terms of paragraph 3, Article 49 of Law No. 98/97, of 26 August.

5 Further monitoring of special public procurement measures: the independent commission

In addition to the aforementioned supervision by the Court of Auditors, provision is made for the special measures to be audited by an independent administrative commission with increased powers.^{73,74} In short, dual supervision is permitted.⁷⁵

The mission and general competence of this commission is to monitor and supervise pre-contractual procedures, as well as the conclusion and implementation of the respective contracts, particularly monitoring compliance with the applicable transparency and impartiality requirements, and the implementation of contracts concluded as a result of these procedures.

The commission's specific powers include preparation and submission to the contracting authorities of generic or specific recommendations on the following: (i) carrying out of pre-contractual procedures, beginning with procedures relating to the PRRP; (ii) conclusion and performance of the corresponding contracts; (iii) preparation of half-yearly evaluation reports on the carrying out of the above procedures, and conclusion and performance of the respective contracts, which must be sent to the Portuguese Government and Parliament, the Court of Auditors and the Public Prosecutor's Office.

Lastly, it is the duty of the contracting entities to collaborate with this commission, and any breach of this duty will be disclosed in the commission's reports and the Public Prosecutor's Office will be notified for the purpose of ascertaining criminal liability.

6 Monitoring the PRRP: review of the puzzle and conclusions

6.1 Control of PRRP by the Court of Auditors: balancing items

As already mentioned, implementation of the PRRP required a set of legislative changes in the Portuguese legal system, whether from the organic point of view (creation of new entities or attribution of competences to existing entities) or from the point of view of administrative procedures (as a rule, through the simplification and reduction of previous controls), the underlying idea being that *administrative and procedural simplification can contribute to achieving the objective of agile and efficient management of European funds*.⁷⁶

In the context of implementation of the RRM and the PRRP, *control is a characteristic that presents itself as a basic pillar* (Quirós Castro, 2021, p. 349). Therefore, the control competences carried out by the Portuguese Court of Auditors take on particular relevance (Feio, 2021, p. 6).⁷⁷ In other words, the Portuguese Court of Auditors may play a key role, through the development of its general functions regarding the monitoring of financial legality in matters of European funds and public procurement, through specific competences regarding special public procurement measures, as well as through the maximisation of (pedagogical?) risk-warning competences and collaboration with the entities responsible for implementation of the PRRP^{78,79} and

73 See articles 18 and 19 of Law No. 30/2021, of 21 May.

74 It is debatable whether the potential of this commission should not be harnessed to play a more preventive and proactive role, for example, in the design of standard contractual clauses and standardisation of certain tender specifications in the field of sustainable public procurement.

75 On the risk of overlapping the competencies of this independent commission with those of the Court of Auditors, see Caldeira (2021, p. 102). As the aforementioned doctrine also points out, the practical relevance of this commission is dependent on the human resources it has at its disposal (currently five).

76 In the Spanish context, see Pernas García (2021, p. 164).

77 The importance of control by an entity such as the Court of Auditors is also noted in the Spanish context, see Quirós Castro (2021, p. 349) and Navarro Molines (2021, p. 396), and much defended in the Italian context, see Bonura and Mattarella (2021, p. 16), Villani (2021, p. 5) and Quaglini (2021, p. 38).

78 In the sense of maximising the informative collaboration competences of the Court of Auditors with the audited entities, see Silva (2021, p. 72 ff.). This collaboration, if intensified, could prove highly relevant for understanding of the Court of Auditors' legal interpretation of the most diverse subjects, such as public procurement.

79 In the sense that there should be "an adequate articulation of the internal control bodies at the various levels of action, and an articulation of the internal control system globally considered with the external control body", see Correia (1997, p. 155).

with the European Court of Auditors.⁸⁰ Moreover, in the context of implementation of the PRRP, these tasks are no more than a concretisation [of the control of] the balance of the financial life of the plan (Tavares, 2021, p. 12).

The relevance of the Court of Auditors is even greater insofar as the management of European funds destined for implementation of the PRRP is entrusted to a diverse set of public entities (and is not centralised with the management authorities, as is the case with European structural and investment funds), i.e., entities with less experience in the management of these funds.

Lastly, while control activities are fundamentally important in normal times and at any time during the implementation of normal investments, they are even more essential *in extraordinary times* with investments that are challenging in terms of new dimensions – both in terms of implementation times and the amount of overall resources – such as those currently envisaged in the Union Recovery and NextGenerationEU package (Villani, 2021, p. 5).

6.2 Control of the PRRP by the Court of Auditors: scope and capacity

Without prejudice to the powers of the Court of Auditors in the area of *prior control*,⁸¹ a large part of its monitoring of the PRRP is based on *successive control*, and even the *concomitant control* (exercised during the pendency of the procedure or execution of the contract⁸²) performed in relation to special public procurement measures (contracts under €750,000) may already reveal financial illegalities with a negative impact on the implementation of the PRRP.⁸³ To put it another way, by the time the Court of Auditors acts, it may already be *too late*, in the sense that some illegalities will have already taken place, which may lead to losses of European funding.⁸⁴

Furthermore, *effective control* by the Court of Auditors is dependent on compliance with the rules on the part of the public entities involved. For example, if the entities obliged to submit public contracts to the Court fail to do so, and even execute the contracts before they are submitted, the Court may not be aware of them in due time, only becoming aware of them a posteriori in the wake of a successive audit.

On the other hand, the public procurement regime mobilised for the implementation of European funds may not take place through recourse to special public procurement measures, but rather through the general rules of public procurement, in which case it is within the Court's discretion whether or not to conduct a concomitant control.

Beyond the rules on public procurement, it should also be noted that the special measures for implementation of the PRRP *are not dedicated to providing a solid legal regime on the allocation of subsidies by public entities*; such regulation tends to occur through either technical guidance or its provision in the contract to be signed with the beneficiary of the subsidy. We clearly find ourselves in a context of public promotion of investments, in which the importance of the role of subsidies will be highlighted (Navarro Molines, 2021, p. 471). It should be added that neither does the national legal system benefit from a duly developed legal regime in relation to the attribution of public subsidies in general,⁸⁵ which will be of little help in satisfying administrative legality

80 See Feio (2021, p. 35). On the relevance assumed by the Italian Court of Auditors in its relationship with the Union (financial relations between Italy and the European Union), see Villani (2021, p. 5). I refer to a “renewed mission” on the part of the Court of Auditors (p. 7).

81 See Article 17(1) of Law No. 30/2021, of 21 May, and Article 48 of Law No. 98/97, of 26 August.

82 See Article 49 of Law No. 98/97, of 26 August and Almeida (2008, pp. 79–204).

83 And revealing financial liability, as would be the case of violation of the duty of communication and remittance accompanied by concomitant execution of the contract (see Article 17(4) of Law No. 30/2021, of 21 May). This would constitute, not only a procedural irregularity, but a true financial infraction, punishable under the terms of Article 65(1), paragraph (b), of Law No. 98/97, of 26 August.

84 This indicates that the moment of control should be brought closer to the moment of administrative management, to the benefit of the latter, making it possible to intervene quickly, avoiding delays and irregularities in implementation in crucial sectors for crisis recovery and economic development. See Quaglino (2021, p. 38).

85 See Decree-Law No. 167/2008, of 26 August, which establishes the legal regime applicable to the award of public subsidies and Law No. 64/2013, of 27 August, which regulates the obligation to publicise the benefits granted by the Public Administration

and legal certainty. In such a sensitive and relevant matter, therefore, we cannot fail to recognise that the value of legal security and transparency would require detailed legislative treatment in compliance with the principle of administrative legality, with respect to administrative procedures for granting subsidies and recovery of unwarranted payments.⁸⁶ Moreover, the element of urgency in implementing procedures relating to subsidies is also relevant here, hence the provision of simplified procedures capable of ensuring the aforementioned concern would also be justified in this area.⁸⁷ If this does not take place – if there is a lack of a clear, precise and adequate legal framework – the proper implementation and control of the funds received for the PRRP may be jeopardised, since one of the essential tools of the external control carried out by the Court of Auditors is the legal framework in force.

6.3 Control of the PRRP by the Court of Auditors: type of control required

First of all, it should be made clear that the very *nature of the activity of the Court of Auditors* is not without controversy.⁸⁸ Although it is a Court, not all of its functions are jurisdictional; many of these functions are related to inspection of financial legality (and other purposes).⁸⁹

It is also not unknown for the execution of its competences to vary between a *minimalist* and a *maximalist*⁹⁰ approach, resulting from the Court of Auditors' strategic options in the external control of public finances and, presumably, the means available for these. The application of European Union funds and public procurement are among the aforementioned strategic options open to the Court of Auditors (Tavares, 2021, p. 20).

In this scenario, and although the Court's activity in the *monitoring/control*⁹¹ of European funds should be directed towards the monitoring of deficiencies in internal control or management systems with a view to their correction, it should be stressed that, in addition to compliance with legal rules (with financial impact) on the management of European funds, the PRRP is based on compliance with *targets* (quantitative achievements) and *milestones* (qualitative achievements)⁹² according to the *principle of result orientation*,⁹³ and payments are based on results achieved according to the recovery and resilience plans⁹⁴ and, of course, in compliance with the six pillars of the RRM.

to private individuals. Although these frameworks also apply to grants financed by European funds, the truth is that they are rather sparse in that, as far as these grants are concerned, they merely provide that the granting of public grants is subject to the general principles of administrative activity and to the duty of communication and publicity.

86 It should be noted that this is no innovation, since the allocation of European funds in Portugal as a rule benefits from an administrative procedure set out in a legal framework. With reference to the legal framework provided for the implementation of the 2014–2020 Multiannual Financing Framework, see Pedro (2020, p. 32 ff.).

87 For an overview of the Spanish legal system, among many others, see Navarro Molines (2021, p. 379 ff.).

88 Moreover, this is somewhat aggravated by the fact that the Court of Justice of the European Union (CJEU) does not consider the Portuguese Court of Auditors to be a “national court or tribunal” for the purposes of a preliminary reference, in the context of “prior approval” (Order of the CJEU of 25.04.2018, Case C-102/04). On the notion of “national court or tribunal” for the purposes of preliminary reference, see Pedro (2016, p. 171 ff.). A more demanding and rigorous discussion indicates that the nature of a court may be questioned in relation to the main functions attributed to it, first, because the data of comparative law allows that such functions may be exercised by entities other than courts. Furthermore, even accepting the constitutional option of being before a true court, doubts do not cease to arise with respect to the nature of its main activities, its possible relationship with other jurisdictional bodies and, within the Court of Auditors itself, the segregation of certain functions (non-jurisdictional and jurisdictional).

89 For a systematisation of the acts of the Court of Auditors, see Rocha (2021, p. 101 ff.).

90 Sometimes over areas of administrative discretion. See Gonçalves (2020, p. 1005).

91 On the basic notion of the “monitoring/control” in question: “the set of actions aimed at confronting a main action (controlled) with its objectives or goals and with the principles and rules it must obey” and for further developments. See Franco (1993, p. 127 ff.).

92 See Article 2(4) of the RRM.

93 See Article 2(a) and (b) of Decree-Law No. 29-B/2021, of 4 May. In this context, the doctrine insists on the need for a *performance audit*. See Quirós Castro (2021, p. 352 ff.); Villani and Vasarri (2021, p. 24).

94 In the context of European funds in general, the control objectives are: (i) assess the suitability of the management structures and the security of the internal control systems at the various levels; (ii) verify the degree of use of the European financial resources made available under the European Support Framework; (iii) verify whether they were applied for the purposes for which they were allocated; (iv) verify whether the results achieved correspond to the objectives defined by the political will. See Correia (1997, p. 157). In the context of the PRRP, the final reimbursement will be made based on evidence that the anticipated actions have been implemented and have produced the expected results in terms of economic and social well-being.

In addition to these results, we conclude by stressing that the PRRP implementation regimes imply *compliance with a wide range of values relevant to national and European legality*.⁹⁵ That is to say, control ultimately gains a dimension that may extend to verifying compliance with rules aimed at safeguarding fundamental values of the democratic rule of law, such as impartiality, transparency and equality; fundamental values of the internal market, such as the principles of competition,⁹⁶ non-discrimination and financial sustainability; as well as certain public policies (economic, environmental and social cohesion,⁹⁷ etc.). Closer to the language of the RRM, monitoring of the PRRP by the Court of Auditors should not fall short of compliance with the rules of European Union and national law, particularly the principles of sound financial management, prevention and effective repression of fraud, tax evasion, corruption and conflicts of interest, with respect to the agreed expected results.

6.4 The Court of Auditors' monitoring of the PRRP: conclusion

Implementation of the PRRP, which must be performed in addition to ordinary tasks, requires a huge effort from the various public entities involved and, in matters of external control, poses a particular challenge for the Court of Auditors.

Given the role it has been assigned in the context of the PRRP, the Court of Auditors is the great custodian of the hope that European public money will be well spent (and of inherent economic recovery and “investment in the future”⁹⁸ of the MS and the Union), and the conviction that much needs to be done: *alea jacta est!*

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⁹⁵ As, moreover, is already evident in [Tribunal de Contas - Relatório N.º 1/2021 – OAC/PG](#), consulted on 2 January 2022.

⁹⁶ On the control of this principle in the context of public procurement, see Tavares (2021, p. 21).

⁹⁷ Moreover, the public procurement rules themselves must comply with the sustainability purposes foreseen in the MRR and that the national Recovery and Resilience Plans must materialise through their results. See Gimeno Feliú (2021, p. 27 ff.).

⁹⁸ In the Italian context, see Villani (2021, p. 7).

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