

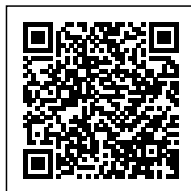
CLARIFYING PORTUGAL'S PPP LEGISLATION - ESQUÍVEL ABOGADOS

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Jose Luis Esquivel

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In addition to the uncertainty surrounding the viability of certain publicly-funded projects, there is also concern around the ability of Portugal's existing project finance regulation to cope with many of the issues now being raised as a result of the financial crisis, says Jose Luis Esquivel of Lisbon public law specialists Esquivel Abogados.

"Portugal's Public Contracts Code (PCC) and public-private partnership (PPP) legislation whilst carefully drafted simply did not foresee some of the problems now arising. Fundamental questions around the financial viability of projects are being raised, and the remedies available in the event of

the cancellation of a project after the awarding decision or its modification after the agreement was entered into."

The Portuguese Government is currently analysing the revision and the effectiveness of the PCC, which regulates all public procurement and project tender processes, he explains.

"The PCC is a very broad but also quite a 'closed' code, in the sense that certain aspects have in practice proved relatively inflexible, particularly in regard to certain stresses that have arisen during projects' tender phase."

Another regulation that is being indicated for revision by the Government is the existing regulation dedicated to PPPs entered into by the State; the primary legislation having come into force in 2003, but partially amended in 2006 and after by the PCC.

"The PCC does not contain an adequate regime of PPPs and has brought confusion in this regard, given that it contains a provision stating the revocation of all legal frameworks that are not in accordance with the matters ruled by the PCC, which gives place to doubts about the current legal regime of PPPs in force in Portugal"

Likewise clarification is also now expected regarding the ability of concessionaires to re-negotiate contract terms after the initial negotiation phase. The Portuguese Audit Court, in November 2009, held that signed concession contracts with the State cannot be renegotiated regardless of their subsequent negative impact.

"The Court ruled that if amendments are to be made after the initial negotiation phase they can only be for the benefit of the State – a decision that fails to take into account the financial reality of the situation that many concessionaires now find themselves in," says Esquivel.