WENEXUS

DELIVERING THE WATER-ENERGY NEXUS FOR ENERGY EFFICIENCY

D3.1 – Administrative and Legal Constraints Report

Final Version (1.0)

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WENEXUS

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ACRONYMS

APA	Portuguese Environment Agency
CCP	Code of Public Contracts
CJEU	Court of Justice of the European Union (CJEU)
ERSAR	Water and Waste Services Regulatory Authority
FRCP	Fundo de Reabilitação e Conservação Patrimonial
GA	Grant Agreement number 101120628 - LIFE22-CET-WENexus - LIFE-2022-CET-PDA - LIFE-PJG CINEA/D/01
GDPR	General Data Protection Regulation - Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of the companies' Data and on the free movement of such Data and repealing Directive 95/46/EC.
TFEU	Treaty on the Functioning of the European Union
Partners	For the purposes defined in this DMP, the following utilities shall be considered as the Consortium Partners: S317 Consulting, Lda. (hereinafter referred to as S317); ENGIDRO Engineering Solutions, Lda. (hereinafter referred to as Engidro); Sérvulo e Associados, Sociedade de Advogados, SP, RL (hereinafter referred to as Sérvulo).
PEAASAR	Plano Estratégico de Abastecimento de Água e de Saneamento de Águas
PRR	Plano de Recuperação e Resiliência
PPEC	Plan to Promote Efficiency in Energy Consumption
PPPI	Institutionalised Public-Private Partnerships

1. Introduction

1.1. WENexus Overview

Under the Grant Agreement[1] (GA), WENexus – *Delivering the Water-Energy nexus for energy efficiency* (hereafter referred to as "WENexus"), is a European project, financed under the LIFE - Clean Energy Transition 2022 Programme, and led by S317 Consulting in a consortium with Engidro Engineering Solutions and Sérvulo e Associados. The project started in September 2023, and it is intended to last 3 years (pilot phase).

The WENexus project aligns seamlessly with the objectives and prerequisites outlined in key documents, including the *Plano Estratégico para o Abastecimento de Água e Gestão de Águas Residuais* (PENSAARP2030), *Plano Nacional de Energía e Clima 2030* (PNEC), the Portuguese Roadmap for Carbon Neutrality 2050, and the United Nations 2030 Agenda for Sustainable Development Goals (SDGs). At its core, the project looks for the adaptation of the water sector by directing the development, implementation, and standardization of innovative tools designed to enhance energy efficiency within the water sector. This endeavor is complemented by the provision of comprehensive technical, financial, and legal support to the organizations responsible for water and wastewater service management and operations, guaranteeing a high degree of replicability and transferability potential within the sector.

WENexus primarily focuses on mobilizing private investment for water infrastructure renovation by creating innovative financial models specifically tailored for energy efficiency investments in water services infrastructures. Additionally, the project aims to contribute to the de-risking of energy efficiency projects in water infrastructures. All things considered, the project's goals are:

1. Contribute to the energy transition and sustainable energy use in the water sector.
2. Leverage investments that promote energy efficiency in water supply and wastewater systems in Portugal.
3. Ensure the replicability and transferability of the projects and good practices identified through the pilots developed.

Hence, WENexus' goals were designed to achieve energy and efficiency improvements specifically through four key vectors:

[1] Grant Agreement number 101120628 - LIFE22-CET-WENexus - LIFE-2022-CET-PDA - LIFE-PJG CINEA/D/01

Vector 1 - acting on the system's electromechanical equipment efficiency, replacing them with more energy-efficient ones, where warranted, or eliminating hydraulic inefficiencies that may exist in the systems; Vector 2 - acting on sustainable energy production capacity by implementing energy production systems generated from photovoltaic panels; Vector 3 - acting on the power storage capacity, foreseeing the installation of storage batteries; Vector 4 - acting on energy production capacity the efficiency of the overall system, introducing systems to produce biomethane.

For the purpose of the present report, the vectors of the project were the baseline for the formulation of the efficiency measures.

1.2. Scope of the document

This Report was developed with the objective of addressing the main legislative and/or administrative legal constraints to private investment with the purpose of raising confidence in the sector, both from private parties and utilities.

In addition to a comprehensive and thorough legal research, which entails a detailed analysis of the water services legal changes in Portugal and current practices, and the results of market contacts to relevant market players. Besides, the institutions in the water utilities market, namely sectoral concerns, will also be examined, since they have a direct perspective of the barriers to entry in the sector and/or opportunities of energy efficiency.

Finally, the report addresses different funding opportunities in the sector and their objectives in driving continuous improvement.

1.3. Document structure

The current document is structured in six Sections: Section 1 (Introduction); Section 2 (Market Perspectives); Section 3 (Overview of the water sector in Portugal); Section 4 (Water utilities potentially interested in adopting energy efficiency measures); Section 5 (The types of contracts that tend to be involved); Section 6 (Available and potentially eligible public funding measures), and Section 7 (Conclusions).

Firstly, Section 1 introduces the document. Section 2 provides reflects the overall observations and conclusions present following formal and informal market contacts. Section 3 contextualizes the report by examining the current legal and historical perspectives that underline the applicable legal framework to the water sector, in particular water management services. Secondly, Section 4 identifies interested parties in adopting energy efficiency measures, namely their categories, nature, applicable legal procedures and types of contracts and their respective regulation. Subsequently, Section 5 presents the specific types of contracts involved. Section 6 addresses the available and potentially eligible public funding measures); and Section 7 (Conclusions) presents the main outcomes of the legal and empirical observations, in the form of conclusions.

2. Market Perspectives

WENexus' project, as already mentioned, aims to contribute to the energy transition and the sustainable use of energy in the water sector through four different vectors: i) efficiency of the system's electromechanical equipment; ii) sustainable energy production capacity; iii) energy storage capacity; and iv) the overall efficiency of the system.

To accomplish its main objectives, WENexus has maintained a direct contact with the relevant bodies, institutions, and other relevant market participants in the water services sector. Throughout the project, and in the context of the numerous contacts established between WENexus and the market, several contributions have been received, either through formal or informal channels.

Furthermore, it is essential to consider the diversity of companies existing in this sector, as outlined in Section 4. The state utilities typically technologically advanced and with extensive experience, but also, at times, with some constraints in terms of autonomy. Private-held municipal concessionaires, albeit on a smaller scale, actively seek strategic partnerships and demonstrate greater autonomy in implementing projects of energy efficiency measures. Meanwhile, municipal utilities, despite facing technological and management challenges, represent a significant portion of the sector in Portugal. These utilities are, generally, the ones most in need of services such as those offered by WENexus, although they have greater difficulties in implementing efficiency energy projects.

3. Overview of the water sector in Portugal

From the outset, it should be noted that water related services are legally identified as services of general interest[2], in Article 3 of Decree-Law 194/2009 of 20 August, and are therefore linked with a body of associated principles and public service obligations, such as the principles of universality and guaranteeing equal access, guaranteeing the quality of the service, protecting public health and the environment, and guaranteeing efficiency and continuous improvement in the use of resources (see Article 5(1) of Decree-Law 194/2009 of 20 August).

Like other public utilities services, water services are true natural monopolies, in the sense that they involve infrastructure networks (e.g. pipes, collectors, pumping stations, among others) which, for economic and environmental reasons, cannot be multiplied[3]; since competition between different providers, each with its own network, is inconceivable, given that there is no natural incentive for management utilities to be more efficient and effective.

The Water Act (approved by Law 58/2005 of 29 December, which transposed Directive 2000/60/EC of the European Parliament and of the Council of 23 October into national law, establishing the bases and institutional framework for sustainable water management) defines the concept of 'water services' as all *services provided to households', public utilities or any economic activity through: (i) impoundment, abstraction, storage, treatment, elevation, adduction and distribution of surface or groundwater; (ii) collection, treatment and rejection of wastewater*', under the terms set out in Article 4 (zz) of the Water Act.

The legal regime associated with water services is not contained in the Water Act but, essentially, , in the Sector Delimitation Act (approved by Law no. 35/2013, of 11 June) and Decree-Law no. 194/2009, of 20 August. Thus, there are exceptions of some fundamentally important rules, on the economic and financial legal framework of water services, contained in Chapter VII of the Water Act, such as:

- The principle of recovering the costs of water services;
- The scarcity costs (Article 77(1)(c)), which stipulates that users of public water supply and wastewater drainage, and treatment services are subject to the water services tariff provided for

[2] PEDRO COSTA GONÇALVES, 'Os Serviços Públicos Económicos e a Concessão no Estado Regulador', in Estudos de Regulação Pública I, Organ. Vital Moreira, Cedipre, no. 5, Coimbra Editora, p. 198 et seq.
[3] Cfr. PEDRO COSTA GONÇALVES, "Regulação, Eletricidade e Telecomunicações", in Estudos de Regulação Pública I, Organiz. Vital Moreira, Cedipre, n.º7, Coimbra Editora, p. 80.

in Article 82 of the Water Act (Article 77(3)), and Article 82, which establishes the objectives of the tariff regime for water services.

3.1. Evolution of the Legal framework

The sector, traditionally, was characterised as a municipal sector, closed to private initiative and, only from a certain point onwards, it started to be characterised by state intervention in the provision of water services. At present, the applicable framework is set out in Law no. 75/2013, of 12 September, which still recognises that environment and basic sanitation are municipal attributions (Article 23, no. 2, subparagraph k)).

From a constitutional perspective, in particular Article 86 (3) of the Portuguese Constitution, which stated that ´*the law may define basic sectors in which private companies and other utilities of the same nature are prohibited from operating*', successive constitutional revisions and integration into the European Union have significantly strengthened the structuring principles of an open market economy and free competition, and over time the constitutional imposition of prohibited sectors has faded away.

As previously stated, in the beginning, the existence of sectors closed to private initiative was imposed, and today the possibility is provided for the legislator to (only) close certain economic areas to private initiative.

The water sector is, thus, a closed sector, a sector reserved for the public sector. At most, there is competition through the market (in access to concessions), but not competition in the market.

The Sector Delimitation Act - Law 46/77 of 8 July - completely excluded private companies from carrying out water service activities (supply and sanitation). Not only until the entry into force of Decree-Law 372/93 of 29 October, which amended the Sector Delimitation Law, did private capital participation, albeit in the form of a concession, was made possible.

In addition, Decree-Law 372/93 of 29 October also introduced the current segmentation between multi-municipal systems and municipal systems, for the first time, and established that, in multi-municipal systems, concessions must be awarded to companies that are mainly public, with private companies only being able to hold minority stakes.

No less relevant was the enactment of Law no. 35/2013, of 11 June, which allowed the subconcession to private individuals, which was a novelty in the context of multi-municipal systems.

Overall, the legislative changes in 1993 partially opened the access to water service activities to private individuals.

Moreover, in the same year, Águas de Portugal Group was established as the state holding company for the water sector, which still controls the majority of the share capital of the concessionaires of the multi-municipal systems.

In the current legislative framework, the state and municipalities can resort to private collaboration through one of the following possibilities:

- Minority participation in the capital of multi-municipal concessionaires;
- Minority participation in the capital of local companies; and
- Concession of the municipality to a private entity.

In the first two cases, a mixed-capital company is created (*i.e.* an institutionalised public-private partnerships (PPPI)).

In the latter case, private participation is contractual without the institutionalisation of a new entity together with a public entity.

The present systems are either a multi-municipal system - ownership rests with the state and it also retains control of management (although, in theory, municipalities may hold a majority shareholding) – or a municipal system, where ownership lies with the municipalities and management can be: direct; delegated; through a public-public partnership; or concessioned.

3.2. Public-Public Partnerships

Decree-Law 90/2009 established the possibility of managing wastewater treatment plants in partnership between the state and municipalities as a possibility.

The legislator' concern was to '*make the current model more flexible, enabling new forms of relationship with municipalities, while respecting their autonomy and own competences*'.

The available types of partnerships (Article 2, no. 2) are the following:

- Entity in the state business sector;
- Local business sector entity; and
- State business sector entity legally authorised to carry out the activities of collection, treatment and distribution of water for public consumption, collection, treatment and rejection of urban wastewater and collection and treatment of urban solid waste.

In general, these models reflect an option to integrate the lower levels (horizontal integration). The third modality, in particular, insofar as it presupposes the attribution of the management of the lower reaches to a multi-municipal concessionaire, is what PEAASAR calls ‘integration of the lower reaches into the existing upper reaches.

Whenever the partnership is realised through an entity in the state business sector, it always presupposes a delegation of the municipalities' competences to the state.

In terms of the management entity regime (Article 6) presupposes:

- Exclusive exercise of the partnership (without prejudice to the exercise of the concession activity if the managing body is a multi-municipal concessionaire);
- The State, the municipalities or both, as established in the partnership contract, to have powers of supervision, direction, authorisation, approval and suspension of the acts of the management entity; and
- Provided it is authorised in the management contract, it may (i) subcontract, through the conclusion of service provision contracts and (ii) subcontract part of the services.

3.3. Public regulation

In terms of public regulation, the options for corporatisation, concessions and partial opening to the private sector were accompanied by a new model for public regulation of the sector.

Initially, the “Comissão de Acompanhamento das Concessões” was created (in 1995) with powers delegated by the grantor and which issued opinions on the investment plans of the multi-municipal concessionaires.

In 1998, IRAR (Instituto Regulador de Águas e Resíduos) was established. Originally, its scope was multi-municipal and municipal concession systems, except for control over the quality of water for human consumption, which it exercised over all management utilities, regardless of the management model.

In 2009, IRAR was transformed into ERSAR and given wider powers.

With Law no. 10/2014 of 6 March, ERSAR's status changed completely, becoming an independent administrative body with regulatory and supervisory functions, such as:

- It covers regulation in all service management models;
- In multi-municipal systems, it sets tariffs, and

- In municipal systems, it regulates, evaluates and audits the application of tariffs and supervises and penalises non-compliance with the recommendations issued.

3.4. Public planning

The central role falls to the state, although it involves utilities from the decentralised direct administration, indirect administration (*e.g.* APA) and municipalities, depending on the planning instrument in question.

Starting in April 2000, the Strategic Plan for Water Supply and Urban Wastewater Sanitation - 2000-2006 (PEAASAR) was developed under the Ministry of the Environment and Spatial Planning. It played an essential role in restructuring the entire sector.

From 2007 to 2013, once the PEAASAR I planning period was over, the strategic objectives for the sector had to be reprogrammed, not least because of the existence of the 2007-2013 NSRF, in order to take advantage of the EU funds for that period.

The Strategic Plan for Water Supply and Wastewater Sanitation (PEAASAR) for the period 2007-2013, approved by Order no. 2339/2007, DR 2nd Series, no. 32, of 14 February, sets out the strategic guidelines and targets for the sector, defining three main strategic objectives:

- Universality, continuity and quality of service;
- The sustainability of the sector, implying improved productivity and efficiency; and
- The protection of public health and environmental values.

Some of the PEAASAR operational objectives were to:

- Serve around 95% of the country's total population with public water supply systems;
- Serve around 90% of the country's population with public urban wastewater sanitation systems;
- Ensure full recovery of the costs incurred for the services;
- Contribute to the dynamization of the national and local private business fabric; and
- Fulfil the objectives arising from national and EU environmental and public health protection regulations.

In July 2013, a committee was set up to monitor work on the PENSAAR 2020 plan. The document was approved by Order No. 4385/2015 of the Secretary of State for the Environment, published in the 2nd

Series of the Official Gazette of 30 April 2015, with the executive summary attached. The full version is available on the APA website (www.apa.pt).

PENSAAR identifies the following as the operational objectives of PEASAAR II, that have fallen short of expectations:

- Improving the private business fabric through concessions in municipal systems and subcontracting in multi-municipal systems;
- Optimising operational management and eliminating efficiency costs;
- Also the promotion of the creation of integrated systems in the ‘low’ level, articulated with existing solutions in the ‘high’ level and the promotion of economies of scale and scope and environmental added value, through greater territorial and functional integration of neighbouring multi-municipal systems;
- Full recovery of service costs; and
- An integrated approach to pollution prevention and control.

PENSAAR 2020 was a strategy less centred on building infrastructures to increase coverage, and more focused on managing assets, their operation and the quality of services provided with comprehensive sustainability. Within this framework, 5 strategic objectives (or fundamental axes) have been defined:

- Protecting the environment and improving the quality of water bodies;
- Improving the quality of the services provided;
- Optimisation and efficient management of resources;
- Economic, financial and social sustainability; and
- Basic and transversal conditions.

In order to guarantee that the financial instruments supporting EU funds are designed in such a way as to that investments will contribute to the objectives defined in PENSAAR 2020, the need for coordination with POSEUR (Operational Programme for Sustainability and Efficiency in the Use of Resources) was established.

While PEASAAR proposed that eligibility should be related to the merit of the project, the new paradigm and the failure of some objectives and measures means that, within the scope of PENSAAR 2020, greater importance must be given to the sustainability of projects resulting from the performance of the water utilities that propose them.

Recently, the Strategic Water Supply and Wastewater and Stormwater Sanitation Plan 2030 (PENSAARP 2030), was approved in February 2024 (Council of Ministers Resolution 23/2024 of 5 February). The aim of the new strategy is to ensure the sector's long-term sustainability, and it is the guiding instrument for policies on the urban water cycle, particularly in response to the challenges posed by climate change. Precisely, one of PENSAARP's strategic objectives is the efficiency of services, which involves ensuring the governance and structuring of the sector, the organisation of the management utilities, the allocation of financial resources, water efficiency and *energy efficiency and decarbonisation*. In this context, one of the measures proposed by PENSAARP is energy efficiency and decarbonisation through improving the energy efficiency of systems and gradually increasing self-consumption of renewable energy by management utilities and their gradual decarbonisation.

With regard to the flow of energy, PENSARP clearly assumes that it is possible to reduce the pressure on the environment by: increasing water efficiency; increasing energy efficiency; increasing self-consumption of energy from renewable sources (e.g. photovoltaics); and evolving towards decarbonisation with a gradual transition from fossil energy to green energy.

As a conclusion, this shows that the WENexus Project is fully aligned with the Portuguese public strategic vision for the water sector.

3.5. General data in the water sector

Over the last 50 years, as observed, the sector has undergone a major evolution. For decades, the management of the sector in Portugal was traditionally based on municipalism. A 1977 law prevented private capital from entering the sector. The sector was only opened to private initiative in 1993, and in recent years there has been a growing influx of operators and foreign capital.

The physical accessibility of the supply and the quality of the water have improved greatly over the last few years. More than 1,500,000 inhabitants have been served with a water supply since 1993, which means that the PEAASAR target was reached before 2013.

In 2009, for example, the level of water supply service coverage in Portugal reached 97% (the PEAASAR target was 95%).

In respect to sanitation, physical accessibility to sanitation has improved, but is still far from the target.

4. Water utilities potentially interested in adopting energy efficiency measures

4.1. Categorisation

Given the organisation of the sector in Portugal, companies that manage public water systems include:

a) Concessionaires of multi-municipal systems (which are public companies with public capital);

b) EPAL (public company responsible for the activity in the city of Lisbon and in some of the surrounding municipalities);

c)Municipal system management utilities which, under the terms of Decree-Law 194/2009, can be:

(i) Each municipality, through direct management, through municipal or intermunicipalised services;

(ii) More than one municipality, aggregated, through the constitution of an intermunicipal system, owned by an association of municipalities, through intermunicipal or intermunicipalised services;

(iii) A local company, set up under the terms of Law no. 50/2012, in which one or more municipalities hold a total or majority stake;

(iv) A local company or a company in the state business sector, in which the municipality and the state have a stake, for the management of the system in question in partnership; and

(v) A private company to which the management of that municipal system has been concessioned.

In addition to these, for the purposes of this WENexus, private companies should be considered which, although they do not manage public water services, they rather collaborate with these management utilities through contracts for the purchase of services and may be utilities interested in carrying out the investments covered by the WENexus (hereinafter maned as Service Providers).

4.2. The application of public procurement rules

Based on this universe, it is important to assess whether such utilities are subject, or not, to the public procurement legal regime which has been perceived by the utilities consulted as an obstacle to the implementation of energy efficiency measures.

In fact, the identified categories of utilities are potentially exposed to the Public Contracts Code (CCP), which transpose for Portuguese legal systema a public procurement regime established by EU directives.

In this light, it is fundamental to analyse whether they fulfil the status of 'contracting authority' under the CCP:

- Municipalities, in cases where they directly provide this public service (this includes situations where this activity is carried out through 'municipalised services');
- Public companies, whether they are part of the local business sector (municipal or inter-municipal companies, responsible for the delegated management of municipal systems, or multi-municipal concessionaires), or the state business sector (multi-municipal concessionaires or public companies resulting from a partnership between municipalities and the state for the management of municipal systems) whose mission is to provide these services; and
- Municipal concessionaires, within the scope of the concessionary management model for municipal systems.

Besides the managing utilities above describe, one shall also consider as potential interests in the adoption of efficiency measures under WE Nexus, private operators that are mere collaborators to the managing utilities (utilities) and who manage some water infrastructures included in the public systems – as seen, the Service Providers.

According to the CCP and to the definition of "contracting authority" that originates from the EU Directives, one may say that, from the list above, both municipalities and public companies comply with the contracting authority conditions precedent and are, subsequently, subject to public procurement rules.

Regarding private concessionaires and Service Providers, one may consider that they are not subject to public procurement rules, unless a specific contract is mostly financed by funds from public utilities, or such utilities have assumed a contractual obligation to comply with such legal regime.

Summing up, we can consider that, as a rule, private utilities do not have to comply with the public procurement rules set out in the CCP. On the other hand, municipalities and public companies (whether local companies or companies in the state business sector, referring either managing utilities of municipal systems and of multi-municipal systems) are already bound by these rules, both in terms of the content to be entered into and the choice of the entity that will carry out the chosen energy efficiency measures.

The application of public procurement rules to utilities operating in the water sector immediately suggests the application of the so-called 'special sectors' regime. This regime corresponds to a public procurement regime established by EU directives which, because it applies only to utilities and contracts that are relevant to certain sectors of economic activity, previously excluded from the scope of public procurement law, is commonly referred to as the 'special sectors' regime. These sectors currently correspond to the water, energy, transport and postal services sectors.

Of relevance to the water sector, Article 9(1)(a) of the CCP describes the activities covered by the special sectors, namely it states that activities in the water, energy, transport and postal services sectors are considered to be '*the provision, operation and supply of fixed networks for the provision of services to the public in the field of production, transport or distribution of drinking water, electricity, gas or heating*.

From the interpretation of Article 9(1)(a) of the Public Contracts Code rule it is immediately clear, and on a preliminary assessment, that utilities engaged in the activity of supplying and distributing drinking water are likely to be covered by the special sectors regime, and therefore the basic condition for them to be able to benefit from the more beneficial special sectors regime is met: carrying out one of the activities legally defined as activities in these sectors.

The subjective scope of Part II of the CCP is defined primarily by Article 2 (paragraphs 1 and 2), but also by Article 7(1), which applies in a special way to the so-called special sectors. In fact, in addition to the subjective scope of the CCP outlined in Article 2, Article 7 of the CCP establishes that, for the purposes of applying the special sectors regime, utilities that are not included in Article 2 are also contracting utilities.

Although municipalities are included in the list of contracting utilities established in Article 2 of the CCP and although they carry out activities in the water sector, they are expressly excluded from the scope of application of the special sectors regime. Hence, ***the special sectors regime does not apply to municipalities***, but they are rather subject to the general regime established in the CCP (by virtue of the provisions of Article 12 of the CCP).

Consequently, It is with regard to the other management utilities in the water sector (integrated into the categories of public companies) that the application of the special sectors regime may be in question - provided, of course, that these utilities are any of the types of contracting utilities provided for in Article 2 or Article 7 of the CCP and, furthermore, that the contracts to be concluded by these utilities directly and principally concern activities in the water sector. At the risk of simplification, it can be assumed that:

a) Public companies that manage public water supply services are contracting authorities for the purposes of Article 2 and Article 7 of the CCP, and

b) Special sectors regime is applicable to them for the contracts that directly and principally concern water supply.

4.2.1. The more flexible regime for designated 'special sectors'

The regime for special sectors is a different legal regime to the general regime stemming from the CCP (classic sectors) and, above all, is more flexible than the latter.

A complete, rigorous and up-to-date knowledge of the public procurement legal regime applicable to organisations operating in the water sector must go beyond the regime that emerges from the European directives on public procurement and the CCP itself, which transposes them. This body of legislation is known as the 'legal regime' for special sectors, because it derives from rules with legislative value.

But in addition to it, there is a set of general principles of European law, contained in the Treaty on the Functioning of the European Union (TFEU), which the case law of the Court of Justice of the European Union (CJEU) has intensively developed in various judgements, to the point of having built a solid body of parameters for action inferred from those principles, which operate beyond the scope of the aforementioned legal regime, and which cannot fail to be taken into account by contracting authorities, also in the field of special sectors. For the purposes of this report, this regime, "the jurisprudential regime for special sectors", is to be understood as a differentiating name from the regime that derives from Part II of the CCP.

This choice of approach to the public procurement regime applicable to the special sectors leads us to view the framework for the actions of contracting authorities in the special sectors from a binary perspective (two regimes and not one regime), covering the 'legal regime' and a 'jurisprudential regime' for public procurement in the special sectors.

a) The "legal regime"

The greater flexibility is particularly evident in the freedom to choose the negotiated procedure as an alternative to the public tender and the restricted tender with prior qualification, as provided for in Article 33(1) of the CCP[4]. Direct award may also be chosen, but only on the basis of material criteria - not the value of the contract.

Even more relevant to the present report is the significant restriction of the objective scope of application of the public procurement rules established in the special sectors when compared to the general regime provided for in the CCP.

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[4] see R. MEDEIROS, Âmbito do novo regime da contratação pública à luz do princípio da concorrência, pp. 26-28.

In fact, Part II of the CCP only applies to contracts whose subject matter covers services typical of (i) public works contracts, (ii) public works or public service concessions, (iii) the leasing or acquisition of movable property and (iv) the acquisition of services. It should be underlined, that the creation of a special procurement regime applicable to 'special sectors' is aimed at promoting the competitiveness of the internal market in sectors that are vital to the European economy. For this reason, the Community legislator only imposes its application to the formation of contracts that it considers to be particularly relevant to the very structuring of the market.

In addition to this very important restriction, the formation of such contracts is excluded when their values are below the Community thresholds, except in the case of concession contracts. .

By establishing this quantitative condition for the application of the 'special sectors' contracting regime, the legislator also introduces another instrument for making pre-contractual procedures more flexible.

The fact is that, in most cases - at least this is the case in the general public procurement regime - when the value of a public works contract, purchase or lease of movable property or purchase of services does not reach the thresholds set out in the EU Directives, the solution offered by the national legislator is to provide for other, less open procedures for these contracts, such as pre-contractual procedures without international advertising, or even, depending on the value involved, to allow a direct award procedure to be adopted

Nonetheless, the adoption of a direct award procedure is still tantamount to applying the public procurement regime laid down in the CCP, even if through the simplest or most flexible of all the procedures provided for in the Code. In other words, the contracting authority continues to adopt an administrative procedure that follows, with the necessary adaptations, the common rules for pre-contractual processing set out in articles 36 to 111 of the Code, as well as the specific rules for the direct award procedure set out in articles 112 to 127 of the Code.

However, this is not what is provided for in Article 11(1)(b): when the contract to be concluded within the scope of the 'special sectors' is not one of the types provided for in its subparagraphs or does not reach the relevant threshold set out in Directive 2004/17/EC, the public procurement regime is not applicable at all. In other words, the contracting authority can initiate an ad hoc procedure, not subject to the rules laid down in Part II of the Public Contracts Code.

b) The jurisprudential regime

Having pointed out some aspects of the so-called 'legal regime' relating to special sectors, we must finally pay some attention to what, at the very beginning of this work, we referred to as the jurisprudential regime for special sectors.

At stake, as we already know, is the regime - if any - to which contracts not covered by the scope of Article 11(1) of the CCP are subject to. It should not be forgotten that contracts (in whole or in part) excluded from the directives are not synonymous with contracts excluded from the scope of European Union law.

Focusing on the CCP, it can be seen that, with regard to special sectors, this jurisprudential regime is particularly relevant (i) with regard to the types of contract not listed in Article 11(1) of the CCP and, (ii) already in the field of contracts included in Article 11(1) of the CCP, also for contracts included in Article 11(1) of the CCP. (ii) in the area of contracts included in Article 11(1) of the CCP, also for public works contracts, the purchase of services and goods (since, with regard to public works and services concessions, the national legislator, by mentioning them in the list of contracts in Article 11(1), did not make their subjection to the regime of Part II of the CCP conditional on any minimum value).The origin of this jurisprudential regime is therefore centred on a set of general principles of European law, contained in the Treaty on the Functioning of the European Union (TFEU), which the case law of the CJEU and the European Commission itself, through interpretative communications that form a true European soft law, have developed intensively, to the point of having built a solid body of parameters for action inferred from those principles, which operate beyond the scope of the aforementioned legal regime, and which cannot fail to be taken into account by contracting authorities, also in the field of special sectors. These are principles such as the free movement of goods, the freedom to provide services, the principle of non-discrimination and the right of establishment, from which the CJEU has inferred other principles such as the principles of transparency, proportionality and mutual recognition. Moreover, it should be noted that it is the European legislator himself who recognises the relevance of these principles beyond the scope of the directives.

In the light of this jurisprudential regime, the conclusion of the contract is not free, and compliance with the fundamental principles of European law in general and the principle of non-discrimination on grounds of nationality in particular must be ensured, which requires ensuring 'in favour of all potential bidders, an adequate degree of publicity to guarantee the openness to competition of service contracts, as well as the control of the impartiality of the award procedures' .

In practical terms, and regardless of the extent of the requirements imposed in this regard, the conclusion that fulfilment of the duty to publicise may result in the submission of tenders from utilities that the contracting authority has not chosen (and indeed would not choose), which must be assessed in non-discriminatory terms, is decisive from the outset.

4.2.2. Special pre-contractual regime provided to regulate energy efficiency management contracts

Decree-Law no. 50/2021, of 15 June, establishes the legal framework applicable to the formation and implementation of energy efficiency management contracts to be signed between direct, indirect and autonomous public administration services and organisations and energy services companies.

The State and other public utilities must, as per Decree-Law no. 50/2021, in the buildings they own and, in the equipment, used to provide public services, implement measures to improve energy efficiency and install self-consumption production units.

With the above-mentioned objectives, the State and other public utilities may entrust energy service companies by concluding energy efficiency management contracts, under the terms of this Decree-Law.

It follows from the provisions of this decree-law that when (and if) the state decides to enter into an energy efficiency management contract as per such decree-law, these provisions must comply with the provisions of Decree-Law 50/2021, without prejudice to the subsidiary application of the Public Contracts Code.

It should be noted that, according to Decree-Law no. 68-A/2015, Article 2, subparagraph h) energy efficiency management contract is "*a contractual agreement between the beneficiary and the party implementing an energy efficiency improvement measure, verified and monitored throughout the contract period, under which investments in that measure are paid in return for a contractually defined level of energy efficiency improvement or other agreed energy performance criteria, including financial savings".*

To conclude contracts for energy efficiency management, contracting authorities must adopt restricted tendering procedures by prior qualification or negotiation, under the terms of Article 245(1) of the CCP.

The award criterion shall be the most economically advantageous tender, pursuant to Article 8 of Decree-Law no. 50/2021 of 15 June; and participation in the procedures is limited to utilities qualified as Energy Services Companies (ESE) under the Regulation of the Energy Services Companies Qualification System (SQESE), approved by Order no. 6227/2022, published in Diário da República, 2nd series, no. 96, of 18 May 2022, depending on the needs and objectives underlying the Contracts to be concluded.

5. Typical Contracts Involved

The contractual types involved in energy efficiency projects in the water sector are presented below.

a) The breadth of the category of energy performance contracts

In the field of energy efficiency, as in others, the parties enjoy extensive contractual autonomy and can shape the contracts in the way that they see fit, even considering that management utilities such as municipalities and public companies are subject to certain legal constraints.

In general, it can be said that contracts for the adoption of energy efficiency measures fall into the contractual category of ‘energy performance contract’, the purpose of which is the implementation of a measure to improve energy efficiency and requires the beneficiary to make an investment. Various types of contract can be categorized within this category, with very diverse content and objects in the light of the aforementioned contractual autonomy of the parties. Energy performance contracts can materialize as contracts for the purchase of services or even as works contracts or contracts for the purchase of goods.

b) In particular, energy efficiency management contracts under Decree-Law no. 50/2021, of 15 June

Energy efficiency management contracts, legally established in the mentioned Decree-Law no. 50/2021, can also be categorised within the category of ‘energy performance contract’., Energy efficiency management contracts imply, as a rule, the realisation of more than one energy efficiency measure (see subparagraph i) of paragraph d) of no. 1 of Article 10 of Decree-Law no. 50/2021, and paragraph 2 of Clause 19 of Annex II to Decree-Law no. 50/2021). Article 10(1)(d)(i) of Decree-Law no. 50/2021, and Clause 19(2) of Annex II to Decree-Law no. 50/2021) and that presuppose that it is the co-contractor who bears the costs (both from a technical and financial point of view) of the investments to be made, which will be amortised and remunerated according to the energy savings provided to the beneficiary (see Clause 6 of Annex II to Decree-Law no. 50/2021).

National doctrine has also ruled that the ‘energy efficiency management contract’ is a sub-type of the ‘energy performance contract’, not to be confused with it, and that both the revoked Decree-Law no. 29/2011 and Decree-Law no. 50/2021 are only concerned with the legal framework for ‘energy efficiency management contracts’, which does not extend to ‘energy performance contracts’. Thus, the energy performance contract resembles a contract for the supply of movable goods, while the energy efficiency management contract takes on a more concessional and management aspect.

Therefore, in the conclusion and execution of the contract to be concluded, the management utilities and Service Providers are not subject to the regime provided for in Decree-Law no. 50/2021, which is only imperative 'if and when the State (or another public entity) decides to implement measures to improve energy efficiency in its buildings or equipment for the provision of public services, through a public-private collaboration model, via an energy efficiency contract. This means that the freedom to opt for another type of energy performance contract is always preserved.

The key features that underline the 'energy efficiency management contract' are, from the point of view of its immediate object, the fact that it is 'always and under any circumstances the implementation of energy efficiency measures in public buildings and equipment used to provide public services', and from the point of view of its intermediate object, the fact that 'its distinctive feature is the individualisation, design and implementation of a level of energy efficiency capable of providing savings on the client's energy bill.

Furthermore, it can also be mentioned that it 'presupposes a significant allocation (transfer) of the technical and financial risk underlying its execution to the energy services company and incorporates an obligation of result exclusively borne by the latter, consisting of the achievement of the level of energy savings contractually defined for the system, which makes it a contract especially centred on the energy performance of the facilities or buildings subject to the application of measures to requalify and improve their energy efficiency.

Qualified interested parties who have been selected to participate in the pre-contractual procedure shall, at their own expense, carry out an energy audit of the buildings or equipment involved in the provision of public services, for the purpose of obtaining adequate knowledge of the current energy consumption profile of the buildings or equipment involved in the provision of public services and to identify and quantify opportunities for cost-effective energy savings, with a view to drawing up the final tender.

The term of the contract shall be fixed according to the period necessary for the amortisation and return, under normal conditions of operating profitability, of the capital invested by the energy services company, and may not be less than 15 years.

The contract typically involves a significant and effective transfer of risk between the public contractor to the energy service company, which must be clearly identified in the contract and comply with the principles set out in the Decree-law.

In addition to others provided for by law or in the contract, the energy services company has the right to:

- To exploit energy efficiency on an exclusive basis within the scope of the contract signed and under the terms set out therein;

- To receive the contract price;
- To use, under the terms of the law and the contract, the assets of the public domain necessary for the performance of the contract;

If there are surpluses in electricity production, store them or sell them to third parties, sharing the benefits under the terms agreed in the contract.

In the performance of the contract, the energy services company shall be subject to the power of management and supervision of the public contracting party and may not adopt any measures that may affect the autonomy of the public contracting party in the exercise of its activity and in the pursuit of its duties and competences.

Ordinance no. 671/2022, of 9 September, regulates the standard documents for the procedures for the formation of energy efficiency management contracts, to be concluded under Decree-Law no. 50/2021, of 15 June.

6. Available and Potentially Applicable Funding Measures

This section aims to provide an overview of the different types of financing mechanisms currently or possibly available to utilities in the water sector. There are several public funding initiatives in Portugal aimed at implementing energy efficiency measures, the scope of which may, in certain cases, include projects developed by utilities in the water sector.

6.1 Recovery and Resilience Plan and PT 2030 Financial Incentives

Under the financial incentives system of the Recovery and Resilience Program (in Portuguese, "Plano de Recuperação e Resiliência", or "PRR")[5] and Portugal 2030[6], financial support is being made available for a wide variety of public sector projects, applicable to different types of beneficiaries. In the context of energy efficiency, the PRR covers measures and incentives aimed at promoting renewable energies and renovating efficient infrastructure. Both at a regional and a sectoral level, there may be financing lines which can potentially be mobilized by utilities in the water sector.

By way of example, among the dozens of notices currently open, there is one entitled "Energy Efficiency for Local Administration Buildings", supported by the Lisboa 2030 Program, aimed at promoting energy efficiency in local administration public infrastructures, with an available fund of €3,500,000.00. This notice is regulated by Decree-Law no. 20-A/2023, of March 22, which defines the general regime for the application of Portugal 2030 European funds. The list of utilities that can apply for this funding includes municipalities and their associations, as well as utilities in the local business sector, meaning that this is a line of funding which is available to specific utilities in the water sector.

Also within the scope of the PRR, the Environmental Fund[7] is planning to launch a 100 million euro tender for subsidies towards energy storage projects, namely through investment in batteries. Although it is not

5 The Recovery and Resilience Plan is a national program, in its execution period until 2026, which aims to implement a set of reforms and investments aimed at restoring sustained economic growth after the pandemic, reinforcing the goal of convergence with Europe over the next decade. It is the national instrument of the Recovery and Resilience Facility, approved by the European Commission.

6 The Portugal 2030 Program materializes the Partnership Agreement established between Portugal and the European Commission, which sets out the main strategic objectives for the implementation, between 2021 and 2027, of the global amount of 23 billion euros. It is implemented through 12 programs, some with a thematic scope, such as the Sustainable 2030 Program, dedicated to climate action and sustainability, and others with a territorial scope, such as the Lisbon 2030 Program.

7 The Environmental Fund, created by Decree-Law no. 42-A/2016, of August 12, aims to support environmental and climate action policies in pursuit of sustainable development goals, contributing to the fulfillment of national and international objectives and commitments, namely those relating to climate change, renewable energy sources and energy efficiency, water resources, residues, nature conservation and biodiversity, the welfare of pets, forestry and forest management, landscape planning and management. To this end, it finances entities, activities or projects that fall within the areas of action set out in Article 3(1) of the same law.

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yet possible to determine the sectoral scope and conditions applicable to the planned tender, it is conceivable that certain utilities in the water sector will be eligible to apply for these subsidies.

6.2 PPEC funding

As part of the most recent edition of the PPEC ("Plan to Promote Efficiency in Energy Consumption")[8], the Energy Services Regulatory Authority has been financially supporting initiatives that promote energy efficiency and reduce energy consumption, applicable to various types of beneficiaries. Among the utilities entitled to submit applications for PPEC measures and responsible for implementing those that are approved are municipal associations, so certain utilities in the water sector may seek to use this line of funding to invest in their energy efficiency.

6.3 Heritage Rehabilitation and Conservation Fund

The main purpose of the Heritage Rehabilitation and Conservation Fund (in Portuguese, "Fundo de Reabilitação e Conservação Patrimonial", or "FRCP"), created by Decree-Law no. 24/2009, of January 21, as amended by Law no. 66-B/2013, of December 31, is to finance the rehabilitation, reconstruction, extension, adaptation, rehabilitation, and conservation of state-owned properties used by public services.

The scope of rehabilitation and conservation operations on state-owned buildings will eventually include interventions to promote the electrical efficiency of public infrastructure. The potential beneficiaries of this Fund are the services and bodies of the State's direct or indirect administration, users of State property, including certain utilities in the water sector. The FRCP will therefore be another line of funding that can potentially be mobilized within the scope of this report.

6.4 Financing from the banking sector

Finally, there are also financing solutions potentially available to utilities in the water sector in the commercial banking sector, specifically aimed at promoting energy efficiency.

The legal framework, scope of financing and beneficiary utilities vary between the solutions available on the market. However, by way of example, Caixa Geral de Depósitos' Solução Solar Caixa finances the purchase of a solar panel installation and operation service, in partnership with EDP Comercial. This

8 The Energy Consumption Efficiency Promotion Plan (PPEC) is an instrument for supporting and developing energy efficiency projects, conceived within the scope of economic regulation and which the law has accepted and enshrined as a public policy measure, with the aim of promoting efficiency in the consumption of electricity and natural gas. The rules applicable to the PPEC are set out in Regulation 343/2021, of April 15, 2021.

specific line of financing is aimed at SMEs and large companies from all sectors, provided they have access to a roof, so certain utilities in the water sector would certainly be covered by this solution.

7. Conclusions

Efficient resource management in the water and sanitation sector is critical for public health, economic activities, and sustainable development. Given the pressing challenges of resource scarcity, climate change, and increased demand, it is essential to adopt practices that minimize energy consumption and environmental impact.

The WENexus project offers a comprehensive approach to enhancing energy efficiency in water and sanitation systems through its four key vectors.

The Portuguese legal framework, in the provision and management of water services, has been increasing more open to private investment, be it in the form of minority participation in the capital of multi-municipal concessionaires; minority participation in the capital of local companies; and/or concession of the municipality to a private entity, which is made evident by the growing influx of operators and foreign capital in recent years.

Furthermore, current legislation also reveals an increasing concern in the objectives ensued by WENexus project, through the establishment of more flexible regimes.

Funding opportunities or direct mechanisms, often, do not specifically address the water sector. This lack of targeted funding, as noted by various market players and relevant institutions, makes it more challenging to secure financing for energy efficiency initiatives within the water sector.

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