

CORONAVIRUS AND PUBLIC LAW: ADMINISTRATIVE INSTRUMENTS TO TACKLE THE PANDEMIC

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Series
COVID-19

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"We have before us an ordeal of the most grievous kind.
We have before us many, many long months of struggle and of suffering."
Winston Churchill

A comparative analysis of the curves of the number of infected and the mortality of the new coronavirus (causing covid-19) allows for no other conclusion than that Brazil will be one of the countries most seriously impacted by the pandemic. The effects will be potentially devastating for the affected populations, for the Brazilian economy and, above all, for the Unified Health System (SUS) and its capacity to absorb new patients, which, judging by the official authorities' statements, may collapse within the next few weeks.

In the face of such exceptional circumstances, public law will play a central role, on the one hand, in the treatment of the public health crisis and, on the other, in tackling the economic crisis.

As for the fight against the virus, the main legal document conceived thus far is Law No. 13,979, of February 6, 2020 (the Coronavirus Law). With the escalation of the outbreak, however, the instruments provided for in it had to be revised, standardizing guidelines for application throughout Brazil and expanding its scope.

The amendment to the Coronavirus Law came through Executive Order No. 926, of March 20, 2020 (MP 926), and its constitutionality has even been recently confirmed *in limine*, under ADIn 6.341/DF. Among other provisions, MP 926 introduced paragraph 8 to article 3 of the law, ensuring that any measures adopted within the scope of combating and tackling covid-19 should safeguard the exercise and functioning of public services and essential activities.

The provision was simultaneously regulated by Decree No. 10,282, also of March 20, 2020 (the Coronavirus Decree). The regulation determines that the containment actions established in the Coronavirus Law may not impact on essential public services, activities that are essential and indispensable to meet the unavoidable needs of the community, that is, without which the survival, health, and safety of the population are in danger, including the respective chains of related, supporting, and ancillary activities.

The list of activities qualified under the decree involves, among others: (i) health assistance; (ii) social assistance; (iii) public and private security; (iv) national and civil defense; (v) passenger transport, including apps; (vi) telecommunications and internet; (vii) sanitation; (viii) energy generation, transmission, and distribution; (ix) public lighting; (x) cargo transport, including delivery services through electronic commerce; (xi) air, water, and land traffic control; and (xii) capital and insurance markets; without prejudice to other activities that the Crisis Committee for Supervision and Monitoring of Covid-19's Impacts may define as essential.

The decree comes at a good time, inasmuch as the profusion of normative acts promulgated at the three levels of the Federation, aimed at declaring public health emergencies, encouraging social isolation, restricting public activities, and services, threatened to stifle private providers of essential activities with regulatory uncertainties that, at the limit, threatened to paralyze providers mesmerized by such regulatory hypertrophy.

As a general rule, the Coronavirus Law now provides that "limitations on public services and essential activities, including those regulated, granted, or authorized may only be adopted via a specific act and provided that it is in prior coordination with the regulatory agency or the Granting or Authorizing Power" (article 3, paragraph 6).

MP 926 also qualified the bidding waiver arrangement provided for in the law for purchases related to the pandemic, (i) clarifying that the goods acquired need not be new, provided that their conditions of use are guaranteed by the supplier; (ii) dispensing with the preparation of preliminary studies, in the case of common goods and services, and allowing the submission of a simplified reference term sheet or basic plan, in the case of more complex goods and services; (iii) reducing by half the terms for the acquisition of goods and services by electronic or in-person auction; and (iv) increasing the margin for the Government to provide for additions or deletions to the subject matter contractually agreed upon up to 50% of the initial value.

In addition, the scope of the exemption from bidding provided for in the law was extended to include engineering services, including suppliers who are declared to be unfit to contract with the Government (provided that they are, demonstrably, the only possible suppliers for the goods or services to be acquired), or even those that cannot prove good tax or labor standing or other requirements to qualify for the public bidding process, in the event that there is restriction on possible suppliers.

The measure opens the path for contract engagements with contractors for the construction, renovation, and expansion of hospitals, adaptation of other public equipment for the creation of new beds, and other measures to remedy or mitigate the imminent collapse of the SUS. Waiver will also be essential for the purchase of ventilators (even if used), reagents for testing, personal protective equipment, drugs, R&D inputs for vaccines, new drugs, or even for the secondary use of existing drugs.

Another important, albeit delicate, instrument provided for in the Coronavirus Law is administrative requests, which may support, as long as the crisis continues, the use by the Government of private initiative resources, such as hospitals, beds, hotels, cruise ships, stadiums, clubs, and sports venues, in addition to surgical masks, hospital aprons, or antiseptics for hygiene. Services such as technical training for the use of new equipment and medical/hospital services in general may also be subject to administrative request. It is essential to emphasize that the measure must be justified, strictly linked to the fight against the pandemic, and must guarantee subsequent compensation to those from whom the goods or services were requested, even if the valuation of this compensation is a potential source of future conflicts.

Other instruments are gradually being designed against the economic aspects of the crisis. The first sector to receive emergency treatment was civil aviation, for which Executive Order No. 925 (MP 925), of March 18, 2020, was promulgated. The measure sought, on the one hand, to guarantee some financial relief to airports subject to concession by the federal government, allowing any fixed and variable contributions (particularly the amounts due by way of a concession), due throughout 2020, to be paid by the end of the year. On the other hand, MP 925 guaranteed airlines the possibility of reimbursement within 12 months for tickets impacted by the pandemic.

Other measures have already taken shape, such as deferment of payment of federal taxes (especially under the *Simples* tax arrangement, under the terms of Resolution 152 of the *Simples Nacional* Management Committee) or the plan to combat the crisis conducted by BNDES, involving the full suspension, for six months, of payment of interest and principal on direct and indirect transactions with the bank or expansion of credit for working capital for micro, small, and medium-sized enterprises.

Another relevant measure was the publication of Legislative Decree No. 6/20, which, according to article 65 of the Tax Responsibility Law, recognizes the state of national public emergency, with the objective of relaxing budgetary rules and attaining tax results in order to boost the strategic allocation of public resources against the crisis.

It is clear that the government's medicine toolbox is gaining strength to combat covid-19 in all its respects. It is imperative, however, that the remedies be managed well, effectively, vigorously, and wisely. The undersizing of the dosage, as much as the abuse thereof, will have disastrous consequences. Beating the virus is now a national priority, however long and arduous the path to victory may be. As Winston Churchill recalled in his first speech as Prime Minister, having been appointed precisely to combat a colossal threat to world civilization, "without victory, there is no survival."