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ENVIRONMENTAL LAW

THE NEW RULES ON ENVIRONMENTAL OFFENCES

Ten years have passed since the Framework Law was introduced, and the Portuguese State has made it clear that it wants to increase environmental protection by "perfecting solutions that allow gains in efficiency for the Administration" and through the consequent "advantages in terms of health, safety of people and property and the environment".

These days, the environment is a genuine concern for all Member States of the European Union, including Portugal[1].

Against this background, Draft Law 332/XII provides for changes to be made to the Framework Law on environmental administrative offences. Ten years have passed since the Framework Law was introduced, and the Portuguese State has made it clear that it wants to increase environmental protection by "*perfecting solutions that allow gains in efficiency for the Administration*" and through the consequent "*advantages in terms of health, safety of people and property and the environment*".

THE MAIN CHANGES IN THE DRAFT LAW

1. Extension of the scope of application of the rules to cover administrative offences for infringement of municipal and inter-municipal plans, and of the special programme management regulations

Under the draft law, land use is now covered not only by the Environmental Base Law, but also by the Framework Law of environmental administrative offences, which means the Framework Law is being extended to cover town and country planning.

In fact, the new wording proposed for article 1(4) states that: "*Any infringement of the municipal and inter-municipal plans and of the preventive measures constitutes a planning administrative offence*". Article 1(5) states that "*any infringement of the special programme management regulations constitutes an environmental administrative offence*".

We also have the proposed wording for the new article 40-A, which classifies as serious administrative offences "*alteration or construction works*" or "*the creation of banks or excavations" in breach of a municipal or inter-municipal land use plan. The same rule also classifies as very serious administrative offences: i) carrying out "construction, extension and demolition works*", ii) "*land division operations*", iii) "*setting up scrapyards and refuse dumps (...)*" and iv) "*the occupation and change of use of land for construction, alteration, extension or use as quarries*". As we will explain in further detail below, very serious administrative offences can attract a fine of up to EUR 5,000,000.

2. Changes to the framework of the applicable fines

The proposed wording for article 22 of the new law on environmental administrative offences provides for significant broadening of the framework of the applicable environmental fines. We will now explain how.

1 On this point, we recall the approval, at the beginning of the year, of the Legal Framework for Single Environmental Licensing (Decree-Law no. 75/2015 of 11 May), which simplified the environmental licensing procedure to achieve greater speed and efficiency in the environmental decision-making process.

Under the draft law, the commission of a serious environmental administrative offence, when committed by an individual, is punishable with a fine of between EUR 2 000 and EUR 40 000. When that offence is committed by a legal entity, it is punishable by a fine of between EUR 12 000 and EUR 216 000. In the case of a commission of a very serious environmental offence, the fines are much higher. When the offence is committed by an individual, it is punishable with a fine of between EUR 10 000 and EUR 200 000, and when it is committed by a legal entity, it is punishable with a fine of between EUR 24 000 and EUR 5 000 000 (these amounts can be doubled in the case of very serious administrative offences).

This proposal to change the framework of applicable fines and their amounts should act as a warning to economic operators of the importance of strict compliance with the applicable environmental legislation.

3. Extension of liability for infringements

The wording proposed for the new article 8 leaves no margin for doubt as to the liability of "*directors, managers and other persons who, even if only on a de facto basis, perform management duties in companies (...)*".

This proposal to change the rules on environmental administrative offences is extremely significant, even if the liability is, in principle, subsidiary to that of the company in question.

It should be noted that the draft law also states that the subsidiary liability will be joint and several liability "*if more than one person engages in the wrongful acts or omissions that result in the company's in question having insufficient assets*" (this insufficiency of assets is presumed in the case of insolvency of the company).

All the proposed changes to the rules that are currently in force are and intended not only to bring greater legal protection for the environment but also to ensure greater "efficiency" and "effectiveness of the procedures to apply penalties".

4. Issuing the debt certificate

When the fine or the costs are not paid by the legal deadline for payment, a debt certificate can be issued which will serve as the basis for enforcement proceedings in the courts.

This debt certificate can be issued against companies and other legal entities or, under the terms of point 3 above, against directors, managers and other persons who perform management duties in companies, even if only on a de facto basis. Naturally, a debt certificate can also be issued against individuals.

5. The possibility of suspending the application of the fine and the simple warning

Another proposed change is the possibility to suspend the application of the fine when an ancillary penalty is applied that imposes measures adequate to prevent environmental damage, to reinstate the situation that existed prior to the infringement, and to minimise its effects and compliance with the ancillary penalty is essential to eliminating risks to health, and the safety of people, property or the environment. In this case, the suspension can be made subject to compliance with certain obligations. The period of the suspension may not exceed three years. This new proposal has many similarities with the criminal law concept of provisional suspension proceedings provided for in article 281 of the Criminal Procedure CodeIn addition to this, provision is also made for the possibility of the offender receiving only a simple warning if all the following conditions are met: i) it is only a minor offence, ii) the offender has not been found guilty of a serious or very serious administrative offence in the last five years, and iii) a period of at least three years has passed since any previous warning for the same environmental administrative offence. The decision to apply warning does not amount to a finding of guilt.

All the proposed changes to the rules that are currently in force are and intended not only to bring greater legal protection for the environment but also to ensure greater "*efficiency*" and "*effectiveness of the procedures to apply penalties*". It remains to be seen whether the increase in the applicable fines to amounts of as much as EUR 5 million (or in certain cases EUR 10 million) will meet this objective and whether this measure will have any effect on economic operators in terms of actual compliance with the environmental obligations to each their subject. The truth is that the courts have, as a rule, reduced the amounts of the fines imposed by the Environmental Administrative Authority, taking into account the financial capacity of the offenders, in particular, companies. However, with the significant increase in the level of fines, it seems inevitable that we will see the imposition of penalties with much higher values than those that have been applied up to now.