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INFORMATIVE NOTE

PUBLIC LAW | ENERGY AND NATURAL RESOURCES

Simplification of licenses and procedures for companies in the environmental area

Public consultation

The draft diploma on the simplification of licenses and procedures for companies in the environmental area was submitted to public consultation on the 3rd of August (the "Proposal").

The Proposal contains measures mainly in the environmental area, but also measures with a transversal impact, applicable to the administrative activity and public authorities (e.g., the certification mechanism for tacit approvals).

The document will be under public consultation until 16 September 2022, and comments must be submitted in digital format on the website ConsultaLex.

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Reduction of deadlines and certification of tacit approvals

The proposed Decree-Law introduces significant changes in the general scope of the administrative procedure, in particular:

- The mandatory obtaining of opinions in a single procedural moment (simultaneously), the reduction of the deadline for issuing administrative acts from 20 to 10 days and the determination of nullity for opinions that are issued after the period of 10 days, in order to ensure that the procedure effectively proceeds in the absence of opinions;

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- Regarding the counting of the deadline for decision, it is clarified that the relevant moment for determining the beginning of the counting must be the moment in which the competent authority receives the request. In this way, and if such change is approved, there will be a special onus of organizing the services of the competent authority, and the applicant is not affected by any disorganization or inefficiency of the competent authority.

- The addition of paragraph 6 to article 130 of the Administrative Procedure Code (CPA) establishes the general rule that lack of payment of administrative fees or expenses does not prevent the formation of tacit approval.

In order to give life to tacit approvals, which are normally not enforced by promoters due to the legal uncertainty surrounding their verification, a mechanism for certifying tacit approvals is also foreseen, with the possibility for interested parties to request directly to an entity the issuance of a certificate attesting to the formation of tacit approvals or other type of positive effects associated with the lack of response from the competent authorities.

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Instructional and Monitoring Committee

The Proposal provides for the creation of a specific procedural conference, named the Instructional and Monitoring Committee (CIAc) for projects subject to the Environmental Impact Assessment (EIA), Serious Accident Prevention (SEVESO) and/or Integrated Pollution Prevention and Control (PCIP) regimes.

The CIAc can be set up at the request of the promoter in cases of more complex procedures, namely due to the intervention of several authorities for the purpose of decision and/or opinion.

The CIAc is responsible for coordinating and monitoring the environmental assessment procedure, serving as a means of centralizing the positions of the various competent authorities.

- Promote the realization of a procedural conference;
- Hold meetings with the administrative authorities and/or the promoter, whenever necessary;
- Inform the promoter of the status of the procedure;
- Prepare the work schedule until the end of the procedure;
- Monitor projects and compliance with schedules until all decisions are issued.

CIAc members are competent to adopt all decisions regarding the entities they represent, without the need to delegate powers for this purpose.

The purpose of this new procedure is the selection of more environmentally sustainable alternatives for the development of linear water, electricity and gas infrastructure corridors, provided they are built by the respective concessionaires.

Single Environmental Report

The Proposal establishes that the follow-up and monitoring obligations provided for in the environmental legislation, for which the Regional Coordination and Development Commissions (CCDR) or the Portuguese Environmental Agency (APA) are competent, will now be carried out through a new figure: the Single Environmental Report (RAU), through the SILiAmb. These regimes include: SEVESO, EIA, PCIP, General Regime for Waste Management (RGGR), amongst others.

According to the preamble of the Proposal, the objective is that the submission of a given report feeds other reports, promoting their simplification and the automation of their filling.

Environmental analysis of corridors

The Proposal provides for the creation of a special administrative procedure in relation to essential service infrastructure corridors. This procedure is not intended to replace the Strategic Environmental Assessment (SEA), EIA or any other procedure, but aims to increase the speed of procedures such as the EIA that may be necessary to be carried out under the respective regime.

The purpose of this new procedure is the selection of more environmentally sustainable alternatives for the development of linear water, electricity and gas infrastructure corridors, provided they are built by the respective concessionaires, as well as public transport in its own corridor.

The coordinating entity for the environmental analysis of corridors is the APA.

The procedure, which should not take more than 120 days, begins with the presentation to the APA of an Environmental Study of Alternative Corridors (EAAC) for the development of linear infrastructures and ends with a decision by the Technical Commission, whose constitution is promoted by the APA.

The Technical Commission decision binds all those involved in the procedure (each of the Technical Commission entities, the APA and the promoter) for 4 years. The binding period can be extended by the APA, at the request of the promoter in a procedure designed to assess the need for an extension and maintenance of the conditions that were the subject of evaluation.

Amendments to the environmental impact assessment regime

Regarding the EIA, the Proposal foresees several amendments, aimed at:

- Not subjecting certain projects or project changes to the EIA procedure;

- The simplification of the procedure;
- Reinforcement of the guarantees of promoters, namely in terms of substantiating the acts that are issued in the procedure and controlling the proportionality of the constraints that may be imposed by the authorities.

Firstly, it is foreseen to change the thresholds of subjection to EIA of various types of projects, with a special focus on the production of electricity from renewable sources. Automatic exclusions from case-by-case analysis are also provided for:

It is foreseen to change the thresholds of subjection to EIA of various types of projects, with a special focus on the production of electricity from renewable sources.

- With regard to the production of solar energy, it is expected that the criterion of the affected area will be taken into account, sometimes to the detriment of the traditional criterion of installed capacity. Thus, it is expected that the subjection to mandatory EIA of solar parks will be subject to the following thresholds: occupied area equal to or greater than 100 ha, in the general case, or an area equal to or greater than 10 ha, if in a sensitive area;
- Wind farms and respective over-equipment are allowed in a greater number of situations without mandatory EIA, and cases of exemption from EIA of electrical lines increase;
- With regard to the industrial sector, it is foreseen in several cases that the cumulative fulfillment of certain conditions excludes a case-by-case analysis, namely: (i) location in an industrial park or industrial complex, (ii) distance of at least 500 m of residential areas, (iii) area smaller than 1 ha;
- In terms of alteration and expansion of projects, the exclusion of case-by-case analysis is also foreseen in several other cases for which this is not foreseen at this time.

New coordination rules between the EIA regime and other related regimes are also foreseen, namely:

- With the AAE regime, according to which the AAE of industrial development parks/poles or logistic platforms – as long as outside sensitive areas – replaces and waives EIA, without prejudice to each of the projects to be installed in these parks, poles or platforms may be subject to EIA;
- The double assessment of projects subject to EIA (or AIncA) by other entities is eliminated, namely in the following terms:

  i) When there are areas subject to the National Ecological Reserve regime, the favorable opinion of the CCDR, provided that it is in the execution project phase, does not require prior communication;

  ii) When there are areas subject to the National Agricultural Reserve regime, the favorable opinion within the scope of the EIA in the execution project phase, does not require the opinion of the regional entity of the RAN. It is not clear which entity is responsible for the assent within the scope of the EIA when all entities that make up the regional entity of the RAN are not present and unanimous;

iii) There is no need for authorization for cutting or pulling up cork oaks and holm oaks in cases where the EIA (or AIncA) process has taken place in the execution project phase and the cutting or pulling up of the same has been foreseen in the environmental impact statement and has obtained a favorable opinion from the ICNF, although it is not clear to what extent this exempts the promoter from obtaining a declaration of essential public interest provided for in the legislation applicable to those tree species.

It is now expressed that only elements "directly relevant to form its reasoned conclusion on the significant effects of the project on the environment" can be requested.

Regarding the EIA and its assessment, it should be noted that the Proposal provides for the completely dematerialized delivery of the EIA and its elements, via the licensing entity's electronic platform or, if it does not have one, via the SILiAmb, as well as the reduction of the discretionary margin of the EIA authority regarding what it can request as additional information, as it is now expressed that only elements "directly relevant to form its reasoned conclusion on the significant effects of the project on the environment" can be requested.

From a procedural point of view, several measures are foreseen that aim to speed up the EIA processes and reduce the cases of discretion in the suspension of deadlines. At this point, however, the body of the diploma seems to fall short of the intention expressed in the preamble, since it states that it is intended to ensure that the deadlines for tacit approval begin with the submission of the EIA and not the moment the authority of EIA considers that all the instructive elements have been presented, but this is not clearly reflected in the body of the proposed amendments, since there is no proposal to revoke the special rule where the current regime is provided for.

At a material level, it is now expressly required that the conditions included in the decisions rendered in the EIA process must be unequivocally substantiated, and must be proportionate to the nature, location and size of the project, the significance of its environmental impacts and present the detail appropriate to the phase in which the project is subject to EIA.

In terms of post-assessment, the Proposal foresees that if, after the opinions issued in post-assessment by the entities (which are issued within 10 working days from the request of the EIA authority), there is a need to condition the licensing or project authorization or the start of the construction phase, the EIA authority issues its opinion on the matter within 20 working days.

Amendments to the integrated pollution prevention and control regime

Regarding the PCIP, the following amendments should be considered:

- The emission monitoring data is no longer mandatorily validated prior to its submission to the APA by qualified verifiers, and such prior validation becomes merely optional;

- The possibility for the APA to determine the need to update the Environmental License (LA) is now provided for, or, optionally, whenever the legally foreseen facts are verified and the promoter has not requested the opening of the respective update procedure, with the suspension of the license in case the promoter does not request it;

- The unclear formula on the conditions of the tacit approval of the LA is now entirely dependent on the factor "compliance with deadlines" and "notification", the condition "and no cause of denial" ceasing to operate, which was the cause of ambiguities in the application of the norm;

- The rule of precedence of the Livestock Effluent Management Plan (PGEP) in relation to the LA is replaced by the rule that the LA can be issued without PGEP, provided that it is issued with a suspensive condition for the approval of said plan;

As for the facilities in the chemical sector that are subject to the PCIP regime, it is determined that "the existence of a commercial purpose does not in itself determine the existence of an industrial scale".

- As for the facilities in the chemical sector that are subject to the PCIP regime (Annex I of Decree-Law no. 127/2013), it is determined that "the existence of a commercial purpose does not in itself determine the existence of an industrial scale", which obliges the competent authorities to carry out a duly substantiated case-by-case analysis;

Amendments on Water Resources

1. Simplification of the regime for the production and use of water for reuse

The Proposal intends to simplify the regime for the production and use of water for reuse. On the one hand, the production and use of water for reuse (treated wastewater) for own use is now subject to prior notices with a deadline, without the need to obtain a license, provided that the entities that manage them do not receive raw wastewater or treated water belonging to third parties and the water thus treated is intended for exclusive use in the facilities where their production is located

On the other hand, the need to obtain a license for the use of water for reuse resulting from the production of water from the treatment of wastewater carried out by urban wastewater treatment systems covered by Decree-Law no. 152/97, is eliminated, a prior notice with a deadline being sufficient in cases of washing urban roads and streets, washing vehicles and urban waste collection equipment, use in cisterns, use as water for cooling in a closed circuit and the production of energy, namely hydrogen.

2. Titles for the Use of Water Resources

The diploma under consultation proposes the replacement of the license for the use of water resources by a prior notice with a deadline in cases of construction of buildings inserted in an urban tissue with a second generation Municipal Master Plan, and in cases of recovery of existent structures without change to its initial characteristics.

It is also proposed the adoption of a principle of only one permit for the use of water resources per operator for applications submitted simultaneously.

It is also proposed the reduction of the decision period for the license for the use of water resources to 10 working days (although the wording of the proposal is not entirely clear, since the preamble of the draft decree-law refers to the reduction of this period to 30 working days) – currently stands at 45 working days –, also reducing the period for other entities to issue opinions.

It is also proposed the adoption of a principle of only one permit for the use of water resources per operator for applications submitted simultaneously, avoiding an administrative procedure for each permit – the regime currently in force requires the user of water resources to obtain as many titles as the number of uses of water resources (for example, if the operator intends to drill three boreholes to capture water, he must obtain three titles, with different procedures).

Finally, the automatic renewal of user licenses is foreseen, provided that there are no changes to the use – exempting the interested party from initiating a license renewal procedure.

Amendments on Waste Management

As regards waste management, the following amendments are foreseen:

- As they are subject to a specific waste management regime, provided for in Decree-Law no. 10/2010 (which transposes Directive 2006/21/EC of the European Parliament and of the Council), waste related to mineral masses and deposits (cf. Decree-Law no. 270/2001, Law no. 54/2015 and Decree-Law no. 30/2021) are excluded from the RGGR. The real proposed change is the extension of the exception: if until now "waste generated in processing units not defined as operating annexes" were subject to the RGGR under the terms of Law no. 54/2015, now these residues are outside the scope of the RGGR; The *de minimis* goes from 100t to 1000t for the obligation to submit a plan to minimize hazardous waste for a period of 6 years and, consequently, to comply with the obligation to communicate every 2 years the situation of operation and compliance with said plan;

- The APA President is empowered to issue standards for harmonized classification of the European Waste List, further establishing that these standards may be issued especially in case of conflict between the producer and the treatment operator;

- Exemption from waste licensing is granted to artistic creation activities (CAE 90030) as well as artisanal activities, in any case, as long as they only involve non-hazardous waste;

- In terms of requirements for non-hazardous landfills, a new possibility is established for the humidification of waste for the purposes of biological degradation and mass temperature reduction, through "concentrate from an advanced membrane treatment unit, provided that it is not affected by stability of the mass of waste deposited and that potential adverse impacts on the environment are minimized";

- In terms of Limit Values for the admission of waste to landfills for non-hazardous waste, reference should be made to the repeal of Table No. 5 (Other Limit Values for Non-Hazardous Waste Landfills), which included parameters such as COT, BTEX, PCB, Mineral oil (C10 to C40) and PAH. In return for this repeal, it is established that the APA may define additional parameters for assessing the admissibility of non-hazardous waste in landfills, for certain types of waste, namely regarding the obligation of treatment prior to disposal provided for in article 5 of the legal regime for disposal of waste in a landfill approved by Decree-Law no. 102-D/2020 or the assessment of the hazardousness of waste;

It is established that the APA may define additional parameters for assessing the admissibility of non-hazardous waste in landfills.

- The R 13 A activity (Waste storage within the scope of collection) is eliminated from the list of recovery operations contained in Annex II of the RGGR.

In terms of coordination between the RGGR and the Responsible Industry System (SIR) it is provided that:

a) The Digital Operating Title to be issued within the scope of the SIR after a binding opinion from the competent authority for licensing the waste treatment activity is a sufficient condition for the exercise of the waste treatment activity in a SIR facility, whether it is an intrinsic treatment facility or extrinsic to industrial activity. Failure to issue a binding opinion within the period provided for in the SIR determines the tacit approval, a solution that was already in place for the situations currently provided for in al. a) of paragraph 1 of article 86 of the RGGR. This amendment determines the elimination of paragraph 3 of article 86 of the RGGR;

b) The Integrated Waste Electronic Registration System (SIRER) now also aggregates information on the characterization of waste, to be submitted by the subjects obliged to submit data in this System in accordance with the RGGR;

c) For the purposes of determining the typology of the industrial establishment within the scope of the SIR, it is clarified that "the replacement of raw materials by waste, whenever the process allows for their recovery, does not change the typology of the industrial establishment".

d) Implementation or alteration of industrial facilities included in establishments with CAE 38 (Waste collection, treatment and disposal; material recovery) or CAE 39 (Decontamination and similar activities) have as their main activity title the one issued under the RGGR, after issuance of binding opinion issued within 30 days - under penalty of equivalence to a favorable opinion - by the competent entity for the licensing of industrial activity, such RGGR title constituting a sufficient condition for the exercise of industrial activity. However, the law does not specify whether CAEs 38 or 39 are main CAEs of the establishment or if the rule applies even if they are secondary CAEs. ■