

CUATRECASAS, GONÇALVES PEREIRA



NEWSLETTER | PUBLIC LAW

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I NATIONAL LEGISLATION

Energy and Water Sector

Notice No. 8/2014, of 10 January

Making known that on 10 October 2013, the Government of the Portuguese Republic deposited the Letter of Acceptance of the Amendments to article VI and paragraph A of article XIV of the Statute of the International Atomic Energy Agency, approved in the 43rd ordinary session of the General Conference of the International Atomic Energy Agency, held in Vienna on 1 October 1999.

Directive of ERSE No. 3/2014, of 10 January

Revision of the maximum transitional natural gas tariffs applicable to consumers with annual consumption of more than 10 000 m³, to take effect as from 1 January 2014.

Directive of ERSE No. 4/2014, of 10 January

Revision of the maximum transitional natural gas tariffs to take effect as from 1 January de 2014.

Decree-Law No. 13/2014, of 22 January

Amending for the third time Decree-Law No. 104/2010 of 29 September, altering the method of establishment of the period in which transitional tariffs for the supply of electricity to end customers with high, medium and special low voltage consumption is applied.

Ordinance No. 27/2014 of 4 February

Establishing the date until which last resort traders can continue to supply electricity to end customers with high, meditum and special low voltage consumption, who have not contracted such supply on the free market.

Decree No. 1873/2014 of 6 February

Determining the payment to be made by electricity generating centres, in accordance with the provisions of article 3 of Ordinance No. 288/2013 of 20 September.

Decision of ERSE No. 1/2014 of 3 March

Approving the «Information Memorandum 2014-2015» relating to the processes of capacity allocation at the natural gas virtual interconnection point between Portugal and Spain.

Decree No. 4321-B/2014 of 24 March

Setting the maximum limit of variation of the social sale tariff to end customers of last resort traders from gas year 2013-2014 to gas year 2014-2015, for the purposes of the application of natural gas tariffs of gas year 2014-2015.

Law No. 10/2014 of 6 March

Approving the Statutes of the Water and Waste Services Regulator.

Law No. 12/2014 of 6 March

Amending for the second time Decree-Law No. 194/2009 of 20 August, setting out the legal framework of the municipal public services for water supply, urban waste water sanitation and municipal waste management, amending the billing and misdemeanour provisions.

Town planning

Decree-Law No. 17/2014 of 4 February

Approving the Organic Law of the Ministry of Environment, Spatial Planning and Energy.

Law No. 79/2013 of 26 November

Amending for the fourth time Law No. 91/95 of 2 September, on the process of conversion of urban areas of illegal origin.

Public Contracts and Administrative Organisation

Decree-Law No. 35/2014 of 7 March

Repeals Decree-Law No. 31/2003 of 17 February, that modifies and replaces the bases of the concession of public telecommunications service.

Decree No. 4125/2014 of 19 March

Set up of a commission to renegotiate the concession contract of design, construction, supply of equipment and rolling stock, financing, exploitation, maintenance and servicing of the whole light-rail metro system on the south bank of *Tejo*, concluded between the Portuguese Government and *MTS – Metro, Transportes do Sul, S.A.*.

Decree-Law No. 44/2014 of 20 March

Establishing the transfers' regime of the Faro and Portimão ports from the Port and Maritime Transports Institutes, I.P. (*Instituto Portuário e dos Transportes Marítimos, I.P.*), to *APS – Administration of the Ports of Sines and Algarve, S.A.*.

Environment

Ordinance No. 58/2014 of 7 March

Establishing the ports for the discharge or transshipment of species taken in Union waters or in areas managed by Regional Fisheries Organisations.

Resolution of the Council of Ministers No. 19/2014 of 10 March

Amending for the second time Resolution of the Council of Ministers No. 176/2008 of 24 November, that approves the Plan of *Parque Natural do Tejo Internacional*.

Decree-Law No. 47/2014 of 24 March

Amending for the first time Decree-Law No. 151-B/2013 of 31 October that lays down the legal framework of the environmental impact assessment (EIA) of public and private projects liable to bring about significant environmental effects, transposing Directive No. 2011/92/EU of the European Parliament and of the Council of 13 December 2011, on the assessment of the effects of certain public and private projects on the environment.

Resolution of the Council of Ministers No. 24/2014 of 26 March

Creating the monitoring group of the land pool.

Public Administration

Ordinance No. 8-A/2014 of 15 January, subjected to the Rectification Statement No. 10/2014 of 19 February

Regulating the programme of employment termination by agreement for senior technical staff to be implemented in the direct and indirect State administration, setting out its duration, requirements and the specific conditions to be applied and the handling of the process prior to the termination of open ended employment contracts in the civil service.

Ordinance No. 48/2014, de 26 February

Regulating the terms and handling of the prior hiring procedure of workers being retrained.

II COMMUNITARY LEGISLATION

Commision Delegated Regulation (EU) No. 110/2014 of 30 September 2013, published on 7 February 2014, on the model financial regulation for public-private partnership bodies referred to in Article 209 of Regulation (EU, Euratom) No. 966/2012 of the European Parliament and of the Council.

Regulation (EU) No. 253/2014 of the European Parliament and of the Council of 26 February

Amending Regulation (EU) No. 510/2011 to define the modalities for reaching the 2020 target to reduce CO₂ emissions from new light commercial vehicles.

Regulation (EU) No. 256/2014 of the European Parliament and of the Council of 26 February

Regulation concerning the notification to the Commission of investment projects in energy infrastructure within the European Union, replacing Council Regulation (EU, Euratom) No. 617/2010 and repealing Council Regulation (EC) No. 736/96.

Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC

III NATIONAL CASE LAW

Judgment of the Constitutional Court No. 80/2014, Case No. 911/12

After the North Central Administrative Court held the provisions of Articles 25, 25-A and 26 of Decree-Law No. 233/2004 of 14 December, as amended by Decree-Laws Nos. 243-A/2004 of 31 December, 230/2005 of 29 December and 72/2006 of 24 March, unconstitutional (*inconstitucionalidade orgânica*) the Public Prosecutor appealed against the said judgment to the Constitutional Court (CC).

The decision appealed against rejected the application of the above-mentioned articles inasmuch as, since Decree-Law No. 233/2004 of 14 December transposed Directive No. 2003/87/EC of the European Parliament and of the Council of 13 October, and established a penalty framework in the said Directive – application of fines –, the legislative competence is reserved to the Parliament (*AR*), and the Government did not obtain the relevant legislative authorisation, for which reason those provisions are unconstitutional (*inconstitucionalidade orgânica*), on grounds of the breach of Article 165(1)(d) of the Portuguese Constitution (*CRP*).

Accordingly, it concludes that the “penalty” provided for cannot be qualified as misdemeanour, and the monetary value established in the same cannot be considered as an administrative fine. In light of the above, the court concludes for the non unconstitutionality inasmuch as the matter under consideration does not fall within the scope the reserved legislative powers of the Parliament, set out in Article 165(1)(d) of the Portuguese Constitution.

However, it analysis the nature of the “penalty” so as to establish if the Government could have intervened with legislation on this matter. It is thus indicated that this “penalty” could fall within the scope of environmental taxes.

In this case, the CC despite the fact that it acknowledges certain difficulties in the qualification of the tax, as no actual commutative relation exists other than in a very diluted way, the CC considers that, having regard to its framework, the same cannot be made fall within either the unilateral category of a tax, or the bilateral category of a fee, but rather comes close to other types, generally referred to in the Constitution as “*other financial contributions towards public entities*”.

The CC concludes that the legislators of the Constitution considered that the best way to establish the legal setting of these “other financial contributions towards public entities”, without losing agility in their creation, was to require the approval of only one general scheme by the parliament, without the need for its intervention in the individual creation of those contributions and in the concrete establishment of its framework. The CC considers that, for the launching of this type of contributions in the legal system to be legal it was therefore enough that the legal framework thereof be established by the Parliament. However, no general framework of the financial contributions has been approved yet, which has raised doubts concerning the legitimate nature of those contributions. Nevertheless, the CC recalls that it has already admitted that this type of contributions be established by legislative acts of the Government covered by previous legislation enacted by the Parliament defining the essential traits of the same.

However, with regard to the penalties provided for in Article 25 of Decree-Law No. 233/2004 of 14 December, their essential traits where not previously defined by the Parliament.

In spite of this, the CC notes that environmental protection is expressly provided for in the Constitution.

Accordingly, the CT concludes that, both under the Constitution and under the Base Law of Environment, the tax legislator is qualified to launch eco-taxes. In this way, the Parliament, in addition to identifying, among the environmental policy instruments, the launching of contributions to be «*applied for the use of natural resources and environmental components, as well as for the rejection of effluents* », gives the Government the power to intervene in this matter.

In the absence of a general framework of financial contributions, the powers conferred may be taken to enable a legislative intervention of the Government in this matter in furtherance of the directives set out in the constitutional text and in the above mentioned Base Law, in particular by launching concrete taxes to be «*applicable to the use of natural resources and environmental components* » without any prior definition of their essential traits by the Parliament.

Nevertheless, the CC concludes that, since the provision arises from the transposition of Directive No. 2003/87/EC, and that because the provision of the Directive is precise, clear and unconditional as regards the “penalties” to be imposed for excess emissions, setting out exact provisions concerning its amounts, which leaves the Portuguese State with no discretion margin, the possible existence of a general framework approved by the Parliament would not be liable to interfere in the choices of the legislator.

Also for this reason, it considers that the lack of a general framework of financial contributions does not justify, with regard to the provision under consideration, the requirement that the Parliament intervene in the definition of its essential traits, considering the almost entire absence of freedom of the national legislator in that matter.

Judgment of the Supreme Administrative Court No. 2/2014, Case No. 1790/13

The Council of Braga brought an appeal to settle the case law of the North Central Administrative Court (North-CAC), of 30/07/2013, as it considered that it was in conflict with the judgment of the Supreme Administrative Court (SAC), of 03/04/2003, in case No. 116/02.

The question to be solved was the following: the ranking of the tenders submitted in an call for tenders is duly substantiated with the score obtained by them in the «elements, factors, parameters or criteria» set out in the applicable classifying grid?

The judgment appealed against (judgment of the North-CAC, of 30/07/2013) considered that the ranking of the tenders in a call for tenders, stating the grades obtained by each such tender, does not provide enough substantiation, and that additional factual clarification was needed to explain the reasoning that subsumed the tenders in each item, so as to explain the weighting they obtained there.

On the other hand, the main judgment, of the Supreme Administrative Court (SAC) of 03/04/2003 issued in case No. 116/02, considered that the duty to substantiate the ranking is fulfilled if the grades attributed to each item are shown in the classifying grid previously prepared by the jury, and that, after that, the grades obtained are set out in the minutes, with no need to justify the grading, at the risk of substantiating the substantiation itself.

In the judgment under consideration, the SAC considers that, by imposing on the jury the duty to prepare a “substantiated final report”, Article 148 of the *CCP* does not impose any special substantiating requirement and that the general parameters set out in the *CPA* are maintained. This conclusion was essential to make it possible to compare the two judgments, inasmuch as the main judgment deals with the question in light of the *CPA*, at a time prior to the very existence of the *CCP*.

The SAC concludes that the case law established in the main judgment should be maintained, inasmuch as the weighting of the tenders submitted at a call for tenders by

referring them to the items of a sufficiently complete classifying grid, followed by the arithmetic operations quantifying the tenders and enabling to reciprocally grade them, immediately expresses and reveals their individual value. The opposite conclusion would lead to a requirement to substantiate what is already substantiated.

Accordingly, by furthering the function of substantiation, namely to clarify any recipient as to the reasons underlying the grades given to the tenders, the position sustained does not breach any constitutional provisions or principles, as it permits the interested parties to understand the substantiation of the classifying act and to react accordingly.

In short, the case law is settled as follows: the assessment of the tenders submitted at a call for tenders is considered to have been substantiated with the ranking obtained by such tenders in the various items of a sufficiently complete classifying grid.

CONTACT

CUATRECASAS, GONÇALVES PEREIRA & ASSOCIADOS, RL

Sociedade de Advogados de Responsabilidade Limitada

LISBOA

Praça Marquês de Pombal, 2 (e 1-8º) | 1250-160 Lisboa | Portugal

Tel. (351) 21 355 3800 | Fax (351) 21 353 2362

cuatrecasas@cuatrecasasgoncalvespereira.com | www.cuatrecasasgoncalvespereira.com

PORTO

Avenida da Boavista, 3265-7º | 4100-137 Porto | Portugal

Tel. (351) 22 616 6920 | Fax (351) 22 616 6949

cuatrecasaporto@cuatrecasasgoncalvespereira.com | www.cuatrecasasgoncalvespereira.com

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