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Update

Environment

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The Environmental Simplex has arrived: Decree-Law no. 11/2023

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I. Background

Simplification is the watchword. In a balance between increasing the country's economic competitiveness, attracting national and foreign investment, and the necessary protection of the public interest (in matters of public health, cultural heritage, environment, etc.), the Government approved **Decree-Law no. 11/2023, 10 February** ("SIMPLEX"), which aims at simplifying existing licensing.

At a first level, SIMPLEX adopts measures with a transversal impact, applicable to the generality of the administrative activity, although they also have a relevant impact on the environmental area. On a second level, SIMPLEX promotes the amendment of several legal diplomas specifically in the environmental area, such as those related to **environmental assessment**, **environmental licensing**, and the **water and waste sector**. It also covers measures in urbanism and territorial planning (the subject of a separate update by Sérvulo).

II. Transversal Changes to General Administrative Activity

a) Single Environmental Report (SRE)

The monitoring and follow-up provided for in the various environmental legislation under the responsibility of APA and the CCDR's will now be carried out in a dematerialised manner on the SILiAmb

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platform through a single report of information, with all entities involved being notified of the submissions made by the operator.

b) Tacit approval

The most famous measure of the Simplex Environmental during the public consultation phase prior to the publication of this decree-law was the creation of a **mechanism for the certification of tacit approval**, through an amendment to Decree-Law no. 135/99, of 22nd April. This measure guarantees that interested parties may request the Administration to issue a certificate attesting to the occurrence of any tacit approval, which must be issued within three working days of receiving the request.

Two observations are required in relation to this mechanism: (*i*) the fact that the non-payment of fees does not prevent the recognition of the formation of tacit approval exposes the regime to the criticism that it creates situations of inequality in relation to the private individual who receives express approval, who is naturally obliged to pay fees; (*ii*) the provision that the designation of the competent entity to carry out certification acts is made by a mere administrative act raises doubts as to its constitutionality.

With the aim of clarifying and facilitating the obtaining of tacit deferrals currently provided for, amendments are also introduced to several legal regimes in the environmental field:

i. In the Legal Framework for Environmental Impact Assessment (hereinafter "RJAIA"), the deadlines foreseen for the issue of tacit approval of EIS will now count "from the date of submission of the request through the electronic platform"; additionally, when the EIS foresees the obtaining of opinions or authorization in special legislation and these have not been issued within the legal deadline, tacit approval is formed;

ii. In the Legal Regime of Industrial Emissions Applicable to Integrated Pollution Prevention and Control, the unclear formula on the conditions of tacit deferment of the environmental permit is now entirely dependent on the factor "compliance with deadlines" and "notification", and the condition "and if no cause for refusal is found", which was a cause of great ambiguity in the application of the precept, no longer operates;

iii. As for the Regime for the Use of Hydric Resources, the verification of any of the presuppositions that would impose the rejection of the claim also ceases to constitute a presupposition of tacit deferral.

c) Simplification in administrative procedures (amendments to the CPA)

Within the scope of the alterations made to the Administrative Procedure Code, the possibility of the Public Administration suspending decision deadlines through procedural expedient is limited. Thus,

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administrative entities may only request documentation/information once and, whenever they do so, the time limit will not be suspended provided that the individual replies within 10 days.

As regards opinions, a reduction of the time limit to 15 days is foreseen (without the possibility of setting a different deadline); if this deadline is not observed, the competent administrative entity is prevented from issuing the opinion and the procedure must continue its normal course until the respective decision is issued.

III. Changes to Specific Environmental Legislation

In order to pursue the purposes explained in point I, SIMPLEX has introduced relevant changes to several specific environmental diplomas, among which the following should be highlighted.

a) Legal Regime of Environmental Impact Assessment

Guided by a logic of "zero licensing", the main objective of the new decree-law is to improve the application of the LREIA without compromising the requirements related to environmental protection, through the elimination of certain administrative requirements considered to be disproportionate and too slow.

It thus operates a ***generic reduction of the scope of application of the LREIA***, either by limiting the cases in which the conduct of EIA procedures depends on a discretionary decision of the competent entities (case-by-case analyses), or by restricting the situations in which the EIA procedure is always mandatory, or even by purely and simply eliminating cases of duplication of EIA, as well as the need to carry them out, verified certain assumptions. More specifically:

i. A **case-by-case examination** is reserved for projects which *a*) are located outside sensitive areas and *b*) fall neither under the thresholds set nor *c*) the exclusions expressly provided for in Annex II, which also clearly sets out the cases where no discretionary decision is possible;

ii. The situations of **mandatory EIA** are substantially reduced (although the possibility of case-by-case analysis is maintained), being significant the changes introduced in Annex II of Decree-Law no. 151-B/2013, of 31 October, which review the thresholds for subjection to EIA of various types of projects, with special focus on the production of electricity from renewable sources. Specifically, submission to EIA is no longer required, for example, in the case of *a)* solar electricity generating plant projects when the area occupied by the panels and inverters is less than 100 hectares, *b)* wind farm projects when these are composed of less than 20 towers (through the inclusion of several express exceptions to the general cases provided for in Annex II), or 10, if located in sensitive areas and *c)* facilities intended for the transport of electricity up to 20 km and 110 KV.

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iii. The need to **duplicate EIA and case-by-case analysis** for industrial development parks or poles, industrial and logistics zones and logistics platforms previously subject to strategic environmental assessment has been eliminated, as has the need to trigger procedures and obtain other permissive acts when **the projects have already been analysed under the EIA**, particularly in the case of areas subject to the National Ecological Reserve and the National Agricultural Reserve;

iv. Finally, in addition to Annex II now containing a broad set of exceptions to be subject to EIA, this is no longer required whenever projects are concerned with the production of hydrogen from renewable sources and water electrolysis.

Within the scope of the case-by-case analysis, it is now established that APA silence, i.e. the absence of a decision within 25 days, determines the subjection to EIA of the projects and respective alterations or extensions, but only in cases where these are located in sensitive areas.

The content of the conditioned favourable DIAs is also clarified and the conditions set to be adopted throughout the development of the project must be justified with reasons in fact and in law and be the object of a proportionality judgement taking into consideration the nature, location and size of the projects, as well as the impacts they are likely to cause on the environment. This amendment is particularly important when, as is common knowledge, the compensatory measures determined by the competent administrative authorities, in the context of the EIA procedure, are often manifestly excessive and out of touch with the real environmental consequences of the projects.

Finally, contrary to what resulted from the document submitted for public consultation, a procedure for environmental analysis of corridor alternatives coordinated by the APA for linear infrastructures associated with the provision of essential public services, to be built by respective concessionaires, is included in the LREIA diploma itself, with a view to ensuring the selection of more environmentally sustainable alternatives for their development.

b) Regimes of Industrial Emissions and Prevention and Control of Pollutant Emissions to Air

Already in Decree-Law no. 127/2013 of 30 August, which approves the industrial emissions regime, the need for renewal of the Environmental Permit is eliminated, as it is considered that the concerns of monitoring and control of emissions are already covered by the applicable regime. Thus, in light of the new wording of article 40 of this law, the Environmental Permit will no longer need to be renewed after 10 years, relieving individuals of the need to undertake (yet another) administrative procedure. With a clear aim to avoid duplicate emission licensing, the new wording of article 5 of Decree-Law no. 39/2018,

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of 11 June, waives the requirement to obtain an air emissions permit (TEAR) for facilities that have already obtained an Environmental Permit under the industrial emissions regime.

c) Water Resources Use Regime

The main change to be noted within the scope of this regime is related to the establishment of the principle of "***one title for the use of hydric resources per operator***", departing from the previous situation according to which the user of hydric resources should obtain as many titles as he intends to use them for (which generates excessive costs). Therefore: whenever the ***same developer*** is involved and the titles to be obtained concern the same establishment, although the ***developer*** remains bound to submit several simultaneous applications for the allocation of the necessary licences or authorisations, a single title for the private use of water resources will be issued, through a unified procedure, which will consist of one licence.

The ***renewal of licences*** for the use of water resources will no longer depend on the interested party's request and will be automatic, as long as the conditions under which they were granted remain unchanged, unless the holder expressly objects.

The ***time limits*** set out in Decree-Law no. 226-A/2007, of 31 May, are also transversally reduced, in particular *i)* the reduction of the deadline for the decision on the request for prior information from 45 to 30 days, *ii)* the fixing of the deadline for the promotion of consultations with external entities at 5 days instead of 15, *iii)* the stipulation of a deadline of 10 days so that, in the event of the consulted entities not issuing an opinion *iv)* the reduction of the time limit from two months to 45 days for the formation of the act of tacit approval in the absence of an express decision on the request for authorisation referred to in the new wording of article 17 of the diploma. Finally, the Decree-Law

Finally, the decree-law revokes the regime for the transfer of titles set out in Decree-Law no. 226-A/2007, of 31 May, which is now only set out in the Water Act. From now on, in accordance with article 72 of the Water Act, a distinction must be made between private water resources and public water resources, given that, while the transfer of the former depends merely on prior communication to the competent authority for the respective issue, the transfer of the latter requires an authorising act to be obtained. This regime also applies to the transfer of shareholdings that ensure the ownership of the company that holds the title - a concept that, as is now clarified, must be met in light of the Securities Code.

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d) Legal regime of production of water for reuse, obtained from the treatment of waste water

The main amendments to Decree-Law No. 119/2019 of 21 August are intended to favour the principles of the circular economy, while simplifying the procedures for the production and use of water for reuse and more specifically delimiting the scope of application of the law through the inclusion of a new paragraph 3 in Article 2. The main new feature ***is the exemption from the need to obtain a licence*** for the production of water for reuse ("ApR") in decentralised systems and for its use in centralised and decentralised systems. It is worth noting that one of these cases relates to the use of ApR produced in centralised systems for energy production, namely hydrogen, which thus now only presupposes the issue of a declaration by the user which, in the absence of a statement by the APA within 20 days, is a sufficient condition for the commencement of the activity.

Despite innovatively providing that the permit under the prior notification procedure is ***automatically renewable*** for periods of 10 years (like water resource use permits), regrettably the legislator did not take the opportunity to enshrine a similar solution for ApR production permits which have yet to be issued under this regime.

Finally, it is clarified that no **fees** are due under the wastewater administrative procedures, and any collection of costs, including the water resources charge, is even prohibited.

e) General Waste Management Regime and Legal Regime of Landfill Waste

Within the scope of waste management, the minimum value for the production of hazardous waste from which the producer must submit a ***waste minimisation plan*** to APA/CCDR is increased from 100 t to 1000 t. This change may make it more difficult to meet the national targets for the reduction of hazardous waste production.

As regards waste disposal, provision is made for the ***reinjection of leachates*** and concentrates into landfills for non-hazardous waste and, on the other hand, for changes to the limit values for landfill of non-hazardous waste, granting APA/CCDR the possibility of defining additional parameters for the purposes of assessing admissibility.

IV. The entry into force

According to Article 39, concerning the entry into force of the decree-law, it will come into force as early as tomorrow - 11 February 2023. However, this "hasty" entry into force is hindered by the rule on the effects of the decree-law, which states that it will only come into effect on 1 March 2023. The provisions of articles 2 (concerning the single environmental report) and 30 (amendment to the CPA) will only come into force on 1 January 2024.

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