

# NEWS

## PROJECTS, ENERGY & NATURAL RESOURCES

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## EDITORIAL

*Vanda Cascão*

On the day I am writing this editorial, VdA is united in a CO2 emissions reduction initiative, planting trees at the Tapada de Mafra (an action promoted by the "Green Project" group of the firm).

Besides the corporate social responsibility that we all have the duty to promote, this project demonstrates the importance that energy themes (in their wider meaning) occupy in our lives.

At a time of crisis, it is highly relevant the importance that world leaders are devoting to these matters and the recent visit of the MIT President to Portugal (in the context of the graduation ceremony of the first graduates of the Energy MIT Portugal Program) shows the commitment of all the community towards innovation and energy efficiency. The awaited closing (expected to occur quite soon) of the largest project financing in Portugal of renewable energy assets currently in the market shows the strength of the sector.

For the purposes of consolidation of this area, it is crucial that the Government has an integrated, realistic and credible vision of the future of energy in Portugal, by ensuring a mix which is adequate to the national and international needs.

As such, it is imperative that the long awaited articulated and integrated legal regime for renewable energy is defined and that the remuneration policy is adequate to a long term and sustained investment. Only on this basis we may continue to see our *entrepreneurs* being successful, foreign investment being attracted to Portugal and our national policy in this area continuing to be credible.

This leads me inevitably to the infrastructure projects debate. I am not going to discuss here the need (or not) for certain projects.

However I must underline that while careful attention and care must be given to renewable energy, ensuring an "integrated vision for the future",

further care needs to be given in this context to the infrastructure projects (in the context of energy we may count on, and take advantage from, the "positive wave" arising from the world and EU commitments).

Stepping back, hesitating, delaying, suspending projects is undoubtedly a cost too high to be paid by the country if unjustified – infrastructure projects are long term projects transversal to the society and as such they cannot be approached in a shallow manner, whether in respect of conception, launching or supervision. For the sake of us all. Pursuing a national and strategic policy taking into account the future is essential in times of crisis. And only those who prepare for the aftermath of the crisis shall be winners.

May 2010 be a year full of Energy and Projects for all of us, both at a personal and a professional level.

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# NEW WORLDS

## Renewable Energy

Ana Luís de Sousa and Raquel Isaac Petisca

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The international climate change conference held in Copenhagen brought, once again, the discussion on renewable energy to the front row of European politics. While awaiting the results of this conference, the Member States shall try to achieve the goal of “20 by 2020”<sup>1</sup> set out in the climate change package. In order to comply with those goals, the EU acknowledges that attaining these objectives requires the fixing of different targets for each Member State (considering their energy mix and their potential of renewable generation), as well as providing priority access to the grid (optimizing the flow of renewable electricity), and creating efficient aid regimes and stable regulatory frameworks that grant the confidence investors need and that promote technological development.

Portugal is clearly focused on renewable energies and has taken advantage of all the natural resources available in the country – one should note that in 2005 renewable consumption was already 20,5%, more than twice the renewable consumption of other Mediterranean countries with similar geographic and climate characteristics.

Notwithstanding the Portuguese Plan for Hydroelectric Projects (Programa Nacional de Barragens com Elevado Potencial Hidroeléctrico) the goal of which is to reach at least 7 000 MW until 2020, Portugal created also an efficient aid regime (by granting the right to sell to the grid all the energy produced and a feed-in tariff for a 15 year period) which permitted the installation of more than 3100 MW of wind power, to be gradually increased in the years to follow. An important amount of that capacity was attributed by means of public tender, based on a discounted feed-in tariff and on the development of an industrial cluster promoting technological and regional development, which confirms the maturity of the wind energy sector in Portugal. Hopefully the skills obtained with these public tenders will be replicated for other energy sources.

On the other hand, the country is also paying attention to the development of solar technologies with lesser production costs and increased efficiency. As a consequence of the progress in this area applications for connection to the grid of small scale

experimental solar projects were admitted earlier this year. The Portuguese government acknowledged that those applications will anticipate larger scale projects in the future.

The launching of pilot projects to capture wave and off-shore wind energies, the two geothermal plants installed in Azores, together with a dozen of biomass plants, reveal the entrepreneurial spirit that Portugal has in the renewable sector by expanding and taking advantage of the available natural resources. In the context of the more favourable regulatory framework, we will certainly witness the increase of investment and the development of technologies in the renewable sector. New paths, new opportunities are to be expected and, taking into consideration the present environmental and technologic revolution, Portugal will, once again, contribute to the discovery of “new worlds”.

<sup>1</sup> A 20% reduction in greenhouse gas emissions, a 20% improvement in energy efficiency, and a 20% share for renewables in the EU energy mix.

# GRANTING OF PERSONAL GUARANTEES BY THE STATE

Teresa Empis Falcão and Filipa Serra

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In the context of the global economic and financial crisis we are living in, the feasibility of the major infra-structure projects announced by the Government may entail, to a certain degree, the granting of guarantees by the Portuguese State. In line with this context and taking into account the major role carried out and to be carried out by the European Investment Bank in those considered to be the major infra-structure projects of our country, it is particularly relevant to analyze the possibility of replacing the collateral required by that entity, and traditionally granted by means of bank guarantees provided by commercial banks, with personal guarantees granted by the Portuguese State, with an unquestionable positive impact on the financial costs of the relevant projects.

Law 112/97, dated 16 September (Law 112/97”), sets out the legal framework for the granting of personal guarantees by the Portuguese State (or by other public entities), expressly establishing as a general principle that the granting of those guarantees shall have an extraordinary nature, based on the manifest interest for national economy and respect of the principle of equality, the national and European rules on competition and the rules set out in the diploma.

The legal framework for the granting of personal guarantees by the Portuguese State includes, *inter alia*, the following rules:

- The guarantees shall be granted to financial and credit transactions regarding undertakings or projects of manifest interest to the national

economy and which have as beneficiaries public entities or national companies (or any other companies which shall have an equal treatment to those);

- Personal guarantees shall be granted by means of a *fiança* or an *aval*;
- The availability period of the guaranteed credits shall not exceed the duration of 5 years and they shall be fully repaid within 20 years of the date of execution of the relevant contracts;
- The Portuguese State enjoys a general priority right over the assets of the beneficiaries of the guarantee for the amounts effectively enforced thereunder, on any grounds whatsoever.



The priority right granted to the Portuguese State by Law 112/97, as any other right of priority, is a deviation to the principle of equal treatment of creditors set out in the Portuguese law and jeopardizes to a certain extent the trustworthiness and safety of the legal commerce given that it grants the State, irrespective of any registration, the ability of being preferentially paid in relation to other creditors in light of the origin of the respective credits. Notwithstanding, it is the view of the Constitutional Court (*vide* determination nr. 153/02 of the Constitutional Court) that, in the case of personal guarantees granted by the Portuguese State, that deviation and differentiation of treatment is justified by the economical, social or humanitarian interest which is in the origin of those credits or by the relevance of the interests at stake and hence, it does not violate the principle of equality foreseen in the Portuguese Constitution.

This point is particularly delicate for financing entities interested in the major projects, since, in most cases, the Portuguese State's personal guarantee only covers part of the financing which will result in the coexistence and need to articulate, in terms of priority or preference in the payment, the right of

the Portuguese State to be reimbursed of amounts effectively paid under the personal guarantee with the credit rights of the financial entities.

In a typical financing, under a project finance regime, which structure is likely to be used in all major infrastructure projects in pipeline, the majority of the financial entities will benefit from a comprehensive security package, including security over all assets and rights of the sponsors and the vehicle which are capable of being given as security and other contractual instruments by way of security in respect of assets and rights over which, by any reason whatsoever, it is not possible to create security interests. In this respect, we note that the general priority right granted to the State (differently from the security interests given to the financing entities), notwithstanding being a security interest which guarantees a certain obligation, shall not be defined as a right *in rem* in the sense that it does not refer to a specific asset, and being so does not benefit from the right of sequel and ranks behind other rights *in rem*. In this manner, the fact of benefiting from a personal guarantee granted by the Portuguese State does not deprive the sponsors or vehicle from the right to transfer or encumber, either

free of charge or for a consideration, any assets from its property, being those transfers or encumbrances opposable to the Portuguese State whom, notwithstanding, shall enjoy a general right to revocatory action (*impugnação pauliana*).

This being the case, the financing entities, as holders of rights *in rem* in relation to assets also falling under the priority right of the Portuguese State and held against the latter, shall have the right to have their credits discharged with the proceeds of the sale or the value of the appropriation of the relevant assets ahead of Portuguese State for its credit rights under the personal guarantee. Please note, however, that the other contractual instruments entered into by way of security and which form part of the security package in a typical project finance do not grant rights *in rem* to the relevant creditors and therefore, are not held against the Portuguese State, not prevailing over the right of priority given to that entity under Law 112/97.

We trust that the awaited upturn in the economy will grant in the short run a renewed trust to the finance sector which allows for the development of the major investments with no need to resort to this exceptional mechanism.

## AUDIT COURT

### Visto Refusals for Major Infra-structure Concession Contracts

Manuel Protásio and Frederico Quintela

The intervention of the Audit Court in the context of the procedures for implementation of public-private partnerships (PPP) has recently gained an increased relevance with the flow of news on the refusal of the Court to grant approval ("visto") to some of the most important and costly infrastructure projects in Portugal.

The first refusal of visto to projects of this size took place still in 2008 in the context of the Management Contract for the Cascais Hospital. In this case, the Court considered that the subject matter of the Management Contract did not fully correspond to that established in the tender specification. It added to this argument that the result of the final negotiation of the contract terms with the preferred bidder did not entirely observed the risk allocation matrix arising from the tender specification nor the preliminary draft of the contract delivered to bidders during the competitive phase of the negotiations (in spite of the fact that such delivery was not supposed

to take place during that phase of the proceedings). More recently, the visto was refused on five tender procedures for the award of road subconcessions. The arguments which the Audit Court has brought in each of these procedures are essentially the same. To start with, the lack of a public sector comparator determined prior to the launching of the tender, permitting the assessment of the advantages of the PPP to the public partner when compared to an alternative direct public performance of the service. This alleged breach of procedural rules is connected to a complex discussion around the applicability of the PPP legislation to a company wholly-owned by the State as is the case of EP – Estradas de Portugal, S.A. (the awarding entity in these concessions). Although state owned companies are not caught by the terms of said legislation, the Audit Court sustains that the principles of the PPP legal regime should apply, on such wide terms that almost no rule is set aside.

Another argument put forward by the Audit Court in this series of refusals relates to the fact that the price for each of the relevant projects, measured as the net present value (NPV) of the payments to be made by the public partner under the partnership, has increased from a public burden's perspective. Specifically, the Court condemns the fact that the NPV of the awarded bid is higher than that of the initial bid, ignoring, in its judgment, the obvious effects of the international crisis in the financing conditions of the projects.

One of the most critical aspects of the visto refusals relates to the fact that the construction of the relevant infrastructures is already well progressed. Indeed, the public partners have succeeded in negotiating in those subconcession contracts that the expropriations and works commence before the visto of the Audit Court has been granted.

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In this manner and during this period, the construction of those infrastructures is exclusively supported by private partners' risk, given that there is no certainty as to the approval of the payments of the public partner (as evidenced by the referred to situations) and that the banks only accept to finance the construction during the period before the granting of the visto provided that any drawings made are guaranteed by the equity support guarantees. We can anticipate that two serious problems will arise as a result of the above: on one hand, the compensation to be paid to the private partners for the costs incurred in the construction of the infrastructures (which will certainly amount to several

hundreds of millions of euros) will need to be discussed; on the other hand, there is the risk (at least when there are no longer amounts available under the equity support guarantees to guarantee the drawings) that the entities financing the projects in question accelerate their financings, rendering unfeasible the development of the relevant projects. We can fairly easy see that such situation will not only cause some of the major Portuguese companies to face economic difficulties but also create a trust crisis in this procurement and financing model with unpredictable consequences.

It is certainly curious that the main line of reasoning used by the Audit Court – the financial damage to

the public partner (resulting from the inexistence of a public sector comparator and the increase of the project costs when compared against those set out in the initial bid) may result in a scenario where the Portuguese State, despite not having the infrastructures, may incur in damages amounting to hundreds of millions of euros.

In the case of the Cascais Hospital, the refusal of the Audit Court to grant the visto (and the consequent financial burden to the Portuguese State) was overcome by introducing amendments to the concession contract following the award of the same. We hope that a similar (and less burdensome) solution may be achieved in the present situation.

# THE MUNICIPAL SERVICES OF WATER SUPPLY AND SEWERAGE

## New Framework

*Matilde Horta e Costa and Ricardo Saraiva*

The restructuring of the Portuguese water sector, reflecting the objectives outlined in the Resolution of Ministers Council no. 72/2004, of 16 June, related to the implementation of such restructure, addresses a set of concerns which have for a long time been expressed by the various players in this sector, namely in relation to the evaluation and redefinition of the strategy and the corporate governance models of the water resources. In this context, the Portuguese Government approved a revised legal regime for the municipal services of water public supply, urban sewerage and urban waste management by means of Decree-law no. 194/2009, published on 20 August (“DL 194/2009”).

This diploma aims to aggregate and standardize the existing legislation regulating the activities in connection with those municipal services, previously scattered across several pieces of legislation, and also to implement management models allowing the modernization and qualification of the standards used up to the present date with a view to achieve the economic, financial, infrastructural and operational sustainability of the systems.

It also intends to address the need to ensure equal treatment and transparent conditions in the access to the activities at stake, as well as greater supervision and control of the prices and establishment of quality and protection parameters in respect of the environment, public health and the interests of the users.

More specifically, in relation to the provision of water public supply, urban sewerage and urban waste management services under a concession regime, we note that DL 194/2009 establishes innovative measures with regard to the balance of powers and risk sharing, namely by identifying the financial liabilities which are transferred to the concessionaires and those which remain with the grantors or even those which impact will be reflected in the tariffs applicable to the users. We also highlight that the term imposed for those concessions shall be of 30 or 15 years, depending on whether or not the relevant concession contract foresees significant investment on the expansion, modernization or rehabilitation to be carried out by the concessionaire.

DL 194/2009 provides new mechanisms of periodic

adjustment or rebalance processes of the concessions under pre-determined terms, by means of which the concession contracts may be revised where and to the extent that the financial impact resulting from risks assigned to the parties so justifies.

We note that existing concession contracts relating to any of the relevant municipal services also fall within the scope of DL 194/2009 which imposes the obligation of the same being adapted to the new regime within 3 years of its publication.

The procedures required for such adaptation process (which we anticipate will be very complex) with possible impact on the services provided to users and the relevant tariffs, is not regulated and, therefore, the definition of the terms under which the interests and commitments of the concessionaires and their legitimate expectations – which are based on the initial contractual conditions – shall be accommodated (and this is of major importance where the financing is structured on a project finance basis) will inevitably depend on the good faith bargaining and diligence of the grantors, concessionaires and respective advisers.

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