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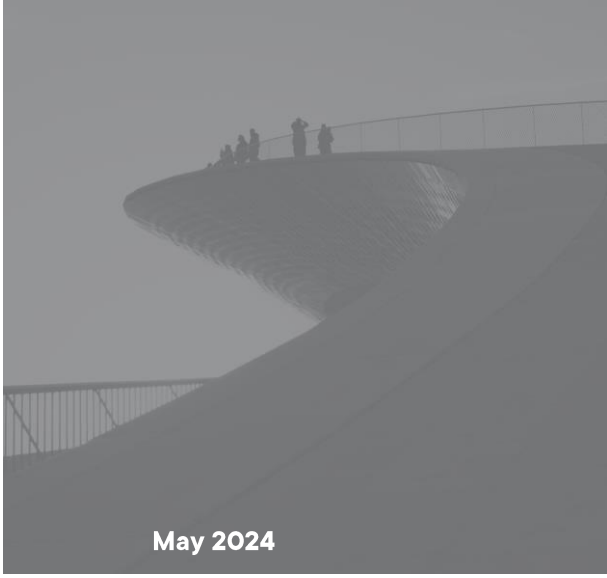

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Update

Real Estate, Tourism and Urban Planning

Sector | Energy

Prior control of urban planning operations in renewable energy projects

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In order to simplify procedures for the production of energy from renewable sources Decree-Law No. 30-A/2022 of 18 April 2002, as amended by Decree-Law No. 72/2022 of 19 October 2002, has introduced as a prior control procedure for urban planning operations included in projects for the production of renewable energy a special regime of prior communication with deadline.

The legislator intended to establish a more favourable regime for the prior urban planning control of the installation of renewable energy power stations, storage facilities, UPACs and facilities for the production of hydrogen by electrolysis from water, in order to meet the objectives of accelerating renewable energy projects, compared to the legal regime on infrastructures and buildings matters, approved by Decree-Law no. 555/99, of 26 December (the 'RJUE').

The treatment given, in practical terms, by the Portuguese administrative authorities, namely the municipalities, to these prior communications has often been contrary to the above-mentioned regime, either due to lack of knowledge or due to misinterpretation and misapplication of the provisions of its article 4-A which governs the prior communication with deadline proceeding.

In this article we briefly analyse the main specificities of the urban control regime established by the aforementioned legal provision.

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I. Application and instruction analysis

First of all, with regard to the processing of the application, in accordance with Article 4-A(4) of Decree-Law 30-A/2022 of 18 April:

i. The prior notification may be rejected outright on the grounds of a lack of supporting documents when these are legally required, and such rejection may only occur within eight days of the submission of the prior notification.
ii. The lack of legally required supporting elements related to the identification of the applicant, the request, the location of the works to be carried out, the legally required opinion, authorisation, license or registration, which is indispensable to the processing of the request and whose absence cannot be rectified ex officio, shall give rise, within the same eight-day period, to the interested party being notified to perfect the request, specifying the missing elements or attaching the required supporting documents.

If, after the legally prescribed period for perfecting or outright rejecting a prior communication has elapsed, the municipality *(i)* has not remedied the absence of supporting elements that it could have remedied by itself, and *(ii)* has not notified the interested party to complete the prior communication, the law presumes that the application has been correctly instructed, as follows from article 11(5) of the RJUE.

Consequently, once the application has been duly instructed, the municipality may not raise any questions about the fulfilment of the application, nor may it subsequently reject the application outright on the grounds that the supporting elements are missing or deficient.

It should be noted that, in any case, the municipality cannot reject the application on the grounds of the procedural issues raised without first rectifying them of its own motion, or without first notifying the applicant to improve the prior communication application in relation to the procedural issues.

II. The need to expressly reject the Prior Communication

On the other hand, the prior communication regime with a deadline introduced by Decree-Law no. 30-A/2022, of 18 April, also diverges in terms of enshrining the possibility of express rejection.

According to article 4-A(5) of the aforementioned decree-law, in the absence of an order for improvement or outright rejection within the legally prescribed period, the prior communication can still be rejected within 30 days from the date of submission of the application. It should be noted that

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this rejection can only be based on issues relating to the project's compliance with the applicable urban planning rules.

Regardless of the possibility of an express rejection within the 30 days deadline, the prior communication procedure does not require a written decision from the Administration, allowing the interested party to carry out the intended activity after the deadline for the Administration to 'reject' has passed. Rather, it 'shifts' responsibility for the procedure onto the promotor. Thus, the lack of a decision or a decision after the 30-day deadline cannot be treated in the same way as the lack of a decision or a decision after the deadline in a licensing procedure, in which a tacit act may be formed if there is no decision within the time limit laid down by law, but rather as a way of obliging the promotor to reinforce compliance with the legal and regulatory rules applicable to the development of the works.

Thus, if a final decision of express rejection is not issued within the time limits set by law, under the terms of article 4(5) of Decree-Law 30-A/2022, the promotor will have the right to carry out the works referred to in the prior communication, provided that urban fees are duly paid.

It should be noted that, unlike what has been happening in some prior communication procedures with a deadline filed in this context, the law does not allow the municipality, after the deadline for rejection has passed, to jeopardise the urban planning right to carry out the project by allegedly revoking a tacit act of acceptance of the prior communication. In fact, as mentioned failure to reject within the deadline does not legally correspond to a tacit act (tacit approval or tacit acceptance) in this case, contrary to what some municipalities have been claiming. This is expressly stated in article 134(3) of the Administrative Procedure Code, according to which *'In situations of prior communication with a deadline, the absence of a decision by the competent body does not give rise to an act of tacit approval, but does entitle the interested party to carry out the intended activity (...)'*.

Thus, since it is legally impossible to annul an administrative act that does not exist in legal terms.

III. Successive control powers (post-procedural phase)

The way that article 4-A of Decree-Law 30-A/2024 has been interpreted by the municipalities also rises legality issues, when it comes to successive control powers of the municipalities. In fact, after the 30-day period for issuing the express rejection has elapsed, the right to start the works in question cannot, in any case, be prevented by legal or material acts (even if based on the illegality of the works) by the municipality, as follows from the combined provisions of paragraphs 9 and 10 of the same article 4-A of Decree-Law no. 30-A/2022, of 18 April.

Unlike the general regime for prior communications provided for in the Administrative Procedure Code and the regime for prior notices provided for in article 35 of the RJUE – according to which, in general,

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the Administration may exercise its powers to control legality in the post-procedural phase, when carrying out the intended activity –, for the specific type of urban planning operations intended for the installation of renewable energy power stations, Decree-Law no. 30-A/2022, of April 18, expressly rules out the Administration's powers of successive control.

The regime is, in our opinion, very clear: after the time limits set out in the law has elapsed, the Municipality is prevented, even in an inspection, from invalidating the execution of the works subject to prior communication or from promoting the measures aimed at restoring urban legality, even when it finds that the legal and regulatory rules and constraints have not been complied with, or that these have not been preceded by a pronouncement, mandatory under the terms of the law, from the competent external entities, or that the works do not comply with it.

This means, therefore, that if the prior communications concerning the installation of renewable energy power stations that have not been expressly rejected by the administration, even if the project violates the applicable legal and regulatory rules, the works in question cannot be affected by any measure to restore urban legality (e.g. demolition).

The only possibility of exercising successive control powers relates to the inspection of the technical conformity of the works with the project to which the prior communication respects.

In short, contrary to what has been the position and practice of some municipalities, within the special regime for prior urban planning control of renewable energy production projects, established by article 4-A of Decree-Law 30-A/2022, the absence of an express rejection within the 30-day period provided for in the law constitutes the right of the promotor to carry out the work as soon as the appropriate urban planning fees have been paid. Once the right is established, it is consolidated in the legal order and cannot be prevented by material or legal acts that make it unfeasible, as follows from the provisions of paragraphs 9 and 10 of article 4-A of Decree-Law no. 30-A/2022, of 18 April, which expressly rules out the powers of successive control provided for in article 35 of the RJUE.

We accept that the rule is innovative and that its wording is not the most fortunate, but we are concerned about the practice that is taking hold in these proceedings, with express rejections being issued after the deadline based on the understanding that this is the revocation of a tacit act, a practice that in our opinion has no legal support and which could jeopardise the fulfilment of the European objectives of speeding up renewable energy projects. We hope that these misunderstandings about the legal regime will not lead to litigation between promoters and municipalities soon, which, given the slow pace of administrative justice in Portugal, could effectively jeopardise the objectives and goals that Portugal has set itself in this area.

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