

ENVIRONMENTAL IMPACT ASSESSMENT

PUBLIC LAW

On November 1st, 2013 the **new legal framework for Environmental Impact Assessment (EIA)** entered into force, which was approved by Decree-Law no. 151-B/2013 of October 31st, thus transposing into the Portuguese legal system EU Directive no. 2011/92/EU of the European Parliament and of the Council dated as of December, 13th. Firstly, it should be noted that, in principle, this law does not apply to procedures that are pending at the date of its entry into force. To these pending procedures is applicable the former Decree-Law no. 69/2000 of May 3 (as amended by Decree-Law no 197/2005 of November 8), which has been revoked by this new law. However, this general rule holds some exceptions, as certain provisions of the new law apply to pending proceedings, as well as to previous decisions, including Environmental Impact Declarations (EID) already issued. This is the case of Article 23, which establishes a **4-year term of expiration for EID, setting a different term from the previous legal framework, which established a period for expiration of only 2 years. So, as a result, EID issued under Decree-Law no. 69/2000 have seen their expiration dates doubled.**

With regard to the scope of the new legal framework for EIA, in other words, the projects (public or private) that are subject to EIA, we observe substantial differences between the former legal regime and the one now published, either with respect to projects referred in Annex I, or with regard to Annex II. Indeed, certain projects that were not subject to EIA according with Decree-Law no. 69/2000, are now subject to it, while others are not covered by the new legal framework. In addition to the above, the Decree -Law no. 151-B/2013 introduces profound changes in the previous legal framework.

Let us analyse some of these legal innovations, especially those that have more positive impact on the activity of economic agents (promoters of investment projects).

Firstly, note that **EIA's administrative procedure may now run simultaneously with the licensing/ authorization procedure of the construction/ installation of the project**, although, of course, its final decision may not be given before EID's issuance.

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Secondly, as mentioned above, **the EID's validity is extended from 2 to 4 years**, thus providing a longer period of time for the promoter of the project to execute it. This fact notwithstanding, it is possible to request an extension of that period under the terms and conditions set forth in Article 24. On the other hand, the EIA authority, on its own accord or at the request of the promoter, may, throughout the period of the EID's validity, modify the mitigation and compensation measures initially established, so as to adjust those measures to be adjusted to the current status of the project.

Thirdly, **there is a substantial reduction in the procedural periods and deadlines for decision, namely for issuing the EID**. The projects subject to industrial licensing are differently treated, as their deadlines are reduced. In fact, the EID is issued within 100 days (reduced to 80 days in the case of industrial projects), while in the previous legal framework that period was 140 or 120 day, according on whether the projects were included in Annex I or not. The public consultation period is now set at 20 days (reduced to 15 days in the case of industrial projects), against 50 and 30 days provided for in the Decree-Law now revoked, respectively, for Annex I projects and other projects.

Finally, note that **the new legal framework creates the "accredited entity"**, presumably a private entity, which shall be responsible for performing certain activities within EIA, which until now were exclusively done by the Public Administration. Among such activities is the analysis and **certification of compliance of the Environmental Impact Study**, which was made by an Evaluation Committee, in the previous legal regime.

As to negative aspects, or inadequately treated by the new diploma, we may refer as an example, the relationship between the EIA's procedure now approved, and other similar legal frameworks (and procedures), such as the assessment framework for environmental plans and programs contained in Decree-Law no. 232/2007, of 15 June, and the system of prevention and control of pollution (environmental licensing), established by Decree -Law no. 127/ 2013 of 30 August. It is true that the legislator refers to those other legal regimes in Article 45. However, we believe that he did it inadequately, as he could have gone further in the direction of an effective compatibility (or even unification) of the legal frameworks mentioned. Moreover, as no. 3 of Article 2 of the Directive 2011/92/EU concerning EIA now transposed, states that the Member States may establish a **single procedure for the purpose of EIA** and prevention and control of pollution (environmental licensing), nothing stood in the way of the Portuguese legislator to do so, condensing a single legislative matters now regulated in the legal framework under review and Decree-Law no. 127/2013. And even with regard to the connection of legal frameworks, we consider to be no valid reason to subject projects included in land-use plans, which have undergone environmental assessment (pursuant to Decree -Law no. 232/2007), to the same

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type of EIA procedure applicable to projects not covered by such plans (as to the procedure rule), all of which would justify the creation of a streamlined procedure EIA to apply to those projects. On the other hand, the law does not regulate certain matters which deserved a specific legal treatment. Among others, there is the case of the specification/ definition of projects that should be considered relevant for the assessment of so-called “*cumulative impacts*”. The legislation now approved, as the previous law, has nothing in this area. However it would be useful to end a number of doubts in this matter. In order to do it, one needed only appeal to a number of written texts on the subject, including the document of the European Commission (DG XI) entitled “*Guidelines for the Assessment of Indirect and Cumulative Impacts as well as Impact Interactions*”. It should be remembered that the absence of criteria, set by law, to determine the relevant projects based on assessment of “*cumulative impacts*” has led to numerous disputes and litigation that could be avoided if such matter was duly regulated.

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