

## THE ENERGY SECTOR PENALTY REGIME



### ENERGY

#### I. OVERVIEW

The penalty regime applicable to the energy sector (**RSSE** <sup>(1)</sup>) will enter into force today, 27 February 2013. This regime was approved by Law no. 9/2013, of January 28, which transposed into the Portuguese legal order, in accordance with Decree-Laws no. 29/2006 and 30/2006, of February 15, the Community instruments of the “*Third Energy Package*” (Directives 2009/72/EC and 2009/73/CE, of the European Parliament and the Council, of July 13).

In accordance with one of the measures set forth in the Economic and Financial Assistance Programme for Portugal, RSSE subjects all the operators of the National Electricity System (**SEN** <sup>(2)</sup>) and the National Natural Gas System (**SNGN** <sup>(3)</sup>) that engage in the regulated activities of those sectors to the sanctioning power of the Energy Services Regulatory Authority (**ERSE** <sup>(4)</sup>).

In this document, some of the major aspects of this new legal regime, both from the substantive and procedural point of view, will be highlighted.

#### II. SUBSTANTIVE ASPECTS

The administrative offences provided under the RSSE are attributable, alternative or cumulatively, to natural or legal persons (art. 37(1) and (5)).

In particular, legal persons are held liable when the facts have been performed by members of its corporate bodies, authorized representatives or employees, in the performance of their duties, acting on its name or on its behalf (art. 37(2)), being their liability excluded when the relevant natural persons acted against the legal person's express orders or instructions.

The RSSE qualifies as administrative offence the violation of a wide range of duties and obligations applicable within the SEN (art. 28) and the SNGN (art. 29). To this effect, a system of cross-references was adopted, being punished facts related to the subjects expressly laid down in the subparagraphs of arts. 28 and 29.

<sup>(1)</sup> Abbreviation of the regime's title in Portuguese (*Regime Sancionatório do Sector Energético*).

<sup>(2)</sup> *Sistema Eléctrico Nacional*.

<sup>(3)</sup> *Sistema Nacional de Gás Natural*.

<sup>(4)</sup> *Entidade Reguladora dos Serviços Energéticos*.

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Besides, RSSE also qualifies as an administrative offence, on a residual basis, the violation of duties that, although not directly mentioned in the RSSE, are provided within other statutes, namely, (i) the basic laws of the electricity and natural gas sectors, (ii) Regulations (EC) 714/2009 and 715/2009, of the European Parliament and the Council, of July 13, (iii) laws or regulations whose application or supervision is subject to the ERSE, and (iv) the duties that arise from the decisions of ERSE (arts. 28(3), j) and 29(3), j)).

The administrative offences are graduated, according to their severity, as very serious (arts. 28(1) and 29(1)), serious (arts. 28(2) and 29(2)) and minor (arts. 28(3) and 29(3)). The administrative offences are punished by fines amounting, for each entity concerned, respectively up to 10%, 5% or 2% of the turnover of the year immediately preceding the final decision issued by the ERSE (art. 32(2), (3) and (4)).

In case of very serious administrative offences, the fine established for natural persons may not exceed 30% of their annual income deriving from the exercise of their functions in the entity concerned (including, among others, salaries, gratifications, commissions, subsidies, bonuses or any other additional economic advantage). The fine is reduced to 20% or 5%, respectively, in case of serious or minor administrative offences (art. 32(6), a), b) and c)).

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*In case of very serious administrative offences, the fine established for natural persons may not exceed 30% of their annual income*

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Simultaneously to the application of fines, accessory sanctions, such as prohibition to exercise activity and prohibition to exercise the position of administration or management, may be applied (art. 35). In addition, the ERSE may decide to impose a periodic penalty payment (“*sanção pecuniária compulsória*”) amounting to a maximum of 5% of the average daily turnover of the relevant entity, considering the year immediately before the decision is issued, per each day of non-compliance with ERSE’s decision imposing a penalty or the adoption of specific measures (art. 36).

As an alternative to fines, an admonition can be rendered when the infringement at stake is of minor severity and no damage has been caused to the regulated sector concerned (art. 34).

### III. PROCEDURAL ASPECTS

The RSSE establishes a general duty of regulated entities or any other persons to provide information and documentation to the ERSE. The information and documentation requested shall be provided within a time limit not less than 10 working days counted from the respective request (art. 7(2)).

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The breach of such duty is deemed as a very serious administrative offence (arts. 28(1), m) to o) and 29(1), o) to q)). In addition, the information and documentation obtained by the ERSE within its supervisory functions or as part of sanction proceedings may be presented as evidence within the infringement proceedings currently pending or yet to be initiated (art. 23(4)).

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*Within the scope of administrative offence proceedings, the ERSE may carry out searches, examinations, collection and seizure of accounting data or other documentation, in the premises, property and means of transport of the regulated entities or other entities (including banks or any other financial institutions)*

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It follows that, under the threat of an administrative offence, an entity can be obliged to contribute to its own incrimination. Hence, at least at first sight, there are solid grounds to question the compatibility of such provisions with the right to remain silent and the right against self-incrimination.

Within the scope of administrative offence proceedings, the ERSE may (art. 10):

- a) Interrogate the regulated entity and other persons involved in the case, as well as request them to present documents and other information;
- b) Interrogate any other persons and request them to present documents and other information;
- c) Carry out searches, examinations, collection and seizure of accounting data or other documentation, in the premises, property and means of transport of the regulated entities or other entities (including banks or any other financial institutions);
- d) Seal off the premises of the regulated entities or any other entity where relevant documentation is or may be found, including computers and other data storage electronic equipment;
- e) Request assistance from any service that is part of the Public Administration, including the police.

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*ERSE may also perform searches on private premises of partners, members of the board of directors, employees or anyone who works with the regulated entities or any other entity*

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In addition, ERSE may also perform searches on private premises of partners, members of the board of directors, employees or anyone who works with the regulated entities or any other entity, when duly authorized by the responsible judge after requested by the ERSE (art. 11(1)).

Searches may also be carried out in law firms or in doctors' surgeries, being mandatory, during such operations, that the responsible judge is present after duly authorizing them (art. 11(7)).

The seizure of documents must be ordered or validated subsequently by the public prosecutor (when the seizure is made during the search or whenever there is urgency or danger in delaying). In special cases, such as seizure in banks or other financial institutions and law firms, the investigation is subject to the explicit authorization of the responsible judge, who must be present during the seizure as well (art. 12).

Regarding appeals, the general principle is that all decisions handed down by the ERSE, either final or interlocutory (notably, decisions concerning the admission of means of evidence, submission of procedural invalidity or application of interim measures) are subject to appeal, being competent, to this effect, the Competition, Regulation and Supervision Court (art. 46(1) and (3)), which may reduce or increase the fines or the periodic penalty payments determined by the ERSE.

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*As a general rule, even in case of a decision imposing fines, the appeal will not suspend the effects of the appealed decision*

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Only the decisions that relate merely to bureaucratic procedures or the decisions to close the case, with or without imposing conditions, may not be subject to appeal (arts. 14(13), 19(8) and 46(2)).

As a general rule, even in case of a decision imposing fines, the appeal will not suspend the effects of the appealed decision, except when the party concerned requests the appeal to have suspensive effect, grounded on the considerable harm that the execution of the decision may cause him, and offers to pay a guarantee in amounts equivalent to the fines applied (art. 46(4) and (5)).

The statute of limitation for administrative offence proceedings is, in principle, five years from the day when the offence was committed, except, in the case of minor administrative offences, where the time limit is three years (art. 39(1), *a*) and *b*)).

#### IV. CONCLUSION

In conclusion, the essential aspects of the RSSE are as follows:

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*The statute of limitation for administrative offence proceedings is, in principle, five years, except in the case of minor administrative offences, where the time limit is three years*

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- The RSSE, which enters into force today, 27 February 2013, subjects all the operators of SEN and SNGN that engage in regulated activities of those sectors to the sanctioning power of the ERSE;
- The acts that constitute administrative offences in accordance with the RSSE can be attributable to legal or natural persons, namely the members of the board of directors and employees of the regulated entities;
- The RSSE qualifies as administrative offences the violation of a wide range of duties and obligations expressly mentioned in this legislative act. In addition, on a residual basis, it is also qualified as administrative offence the violation of duties, although not expressly set forth in the RSSE, contained in other statutes and regulations applicable in the context of SEN and SNGN;
- The administrative offences are graduated, according to their severity, as very serious, serious and minor. They are punished, respectively, by fines up to 10%, 5% or 2% of the turnover of the entity concerned; the fine set for natural persons is up to 30%, 20% or 5% of their annual income;
- In tandem with the fine, accessory sanctions and/or periodic penalty payment may be applied;
- The RSSE establishes a general duty of regulated entities or any other persons to provide information and documentation to the ERSE, when requested. Such information and documentation may be presented as evidence in administrative offence proceedings currently pending or yet to be initiated, being the breach of such duty deemed as a very serious administrative offence, circumstance that may give rise to serious doubts as to the constitutionality of the provisions concerned;

- The ERSE has a wide range of powers of inquiry and taking of evidence, such as carrying out searches and seizures in the premises of the entities concerned, in the private premises and vehicles of partners, members of the board of directors and employees of the entities, and, finally, in banks and law firms;
- All decisions handed down by the ERSE are subject to appeal to the Competition, Regulation and Supervision Court, which may reduce or increase the fines or periodic penalty payment determined by the ERSE. As a general rule, the appeal will not suspend the effects of the decision;
- The statute of limitation of administrative offence proceedings is five years, except in the case of minor administrative offences, where the time limit is three years.

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