

New EIA regulation in Portugal: a stepbackwards

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Margarida Lameiras¹ and Júlio de Jesus²

Abstract

Following an international trend, Portugal adopted in 2023 changes to the EIA regulations, with the aim of simplifying and reducing bureaucracy, avoiding repetition of licensing processes. The main driver of this change is the massive investment in renewable energies (particularly solar power plants). The paper presents the main changes, both in terms of thresholds, deadlines, and procedures. It highlights the non-compliance with obligations arising from the European Union's EIA directive, particularly regarding the generalization of a tacit approval mechanism. The paper also addresses the limited reactions from society, NGOs, and the IA community of practice.

European Union regulatory framework

The Charter of Fundamental Rights of the European Union (2012/C 326/02), states, on article 37 (Environmental protection) that “[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”

In 2020 emerges the EU Regulation 2020/852 of the European Parliament and of the Council, of 18 June 2020, on the establishment of a framework to facilitate sustainable investment. Its article 9 states the environmental objectives, them being:

- (a) climate change mitigation;
- (b) climate change adaptation;
- (c) the sustainable use and protection of water and marine resources;
- (d) the transition to a circular economy;
- (e) pollution prevention and control;
- (f) the protection and restoration of biodiversity and ecosystems.

Two years later, in 2022, the Council Regulation (EU) 2022/2577, came into being as a result of socio-economic pressures, the main reason

being Russia's invasion of Ukraine. The aim of this regulation is to lay down a framework to accelerate the deployment of renewable energy.

In the context of this presentation, it is important to mention the articles 3 and 4 relating to the overriding public interest and to the acceleration of the permit-granting process for the installation of solar energy power plans, respectively.

Article 3, concerning the overriding public interest, states the following:

“1. The planning, construction and operation of plants and installations for the production of energy from renewable sources, and their connection to the grid, the related grid itself and storage assets shall be presumed as being in the overriding public interest and serving public health and safety when balancing legal interests in the individual case, for the purposes of Article 6(4) and Article 16(1)(c) of Council Directive 92/43/EEC(5), Article 4(7) of Directive 2000/60/EC of the European Parliament and of the Council(6) and Article 9(1)(a) of Directive 2009/147/EC of the European Parliament and of the Council(7). Member States may restrict the application of those provisions to certain parts of their territory as well as to certain types of technologies or to projects with certain technical characteristics in accordance with the priorities set in their integrated national energy and climate plans.

¹ Júlio de Jesus Consultores (Portugal), ml@juliodesusconsultores.com

² Júlio de Jesus Consultores (Portugal), jj@juliodesusconsultores.com

2. Member States shall ensure, at least for projects which are recognised as being of overriding public interest, that in the planning and permit-granting process, the construction and operation of plants and installations for the production of energy from renewable sources and the related grid infrastructure development are given priority when balancing legal interests in the individual case. Concerning species protection, the preceding sentence shall only apply if and to the extent that appropriate species conservation measures contributing to the maintenance or restoration of the populations of the species at a favourable conservation status are undertaken and sufficient financial resources as well as areas are made available for that purpose.”

Article 4, concerning the acceleration of the permit-granting process for the installation of solar energy equipment, states:

“1. The permit-granting process for the installation of solar energy equipment and co-located energy storage assets, including building-integrated solar installations and rooftop solar energy equipment, in existing or future artificial structures, with the exclusion of artificial water surfaces, shall not exceed 3 months, provided that the primary aim of such structures is not solar energy production. By way of derogation from Article 4(2) of Directive 2011/92/EU, and Annex II, points 3(a) and (b), read alone or in conjunction with point 13(a) of Annex II to that Directive, such installations of solar energy equipment shall be exempted from the requirement, if applicable, of being subjected to a determination whether the project requires an environmental impact assessment, or from the requirement to carry out a dedicated environmental impact assessment.

2. Member States may exclude certain areas or structures from the provisions of paragraph 1, due to reasons of cultural or historical heritage protection, or for reasons related to national defence interests or safety.

3. For the permit-granting process regarding the installation of solar energy equipment, including for renewables self-consumers, with a capacity of 50 kW or less, the absence of a reply by the relevant authorities or entities within 1 month following the application shall result in the permit being considered as granted, provided that the capacity of the solar energy equipment does not exceed the existing capacity of the connection to the distribution grid.

4. Where the application of the capacity threshold referred to in paragraph 3 of this Article leads to a significant administrative burden or constraints to the operation of the electricity grid, Member States may apply a lower threshold provided that it remains above 10,8 kW.

5. All decisions resulting from the permit-granting processes referred to in paragraph 1 of this Article shall be made public in accordance with existing obligations.”

Decree-Law no. 11/2023, also known as the "Environmental Simplex"

In a context of energy crisis, drought and the fight against climate change, there is a need to speed up the realisation of the changes that need to be made.

Decree-Law no. 11/2023, also known as the "Environmental Simplex", came into force in Portugal with the aim of "initiating a reform to simplify existing licensing simplifying companies' activities without compromising environmental protection." The objectives of the changes in the Decree-Law are mainly:

- To make a general simplification for the Public Administration resulting in greater celerity by avoiding the suspension of decision deadlines and preventing opinions from being issued after the deadline.
- To reduce bureaucracy by: reducing the obligation to carry out EIAs; reducing or eliminating duplication of procedures, authorisations and opinions and eliminating the need to renew environmental licences.
- To attract investment
- To reduce costs for the industry.

But what exactly are the main changes of this regulation and how do they come to play with EU regulations?

The main changes of this regulation apply to:

- EIA exclusions and waivers
- Elimination of certain procedures
- Transfer of responsibility
- Non-suspension of deadlines
- Tacit approval
- Presumptions of public interest

This paper highlights the following: (1) exclusions; (2) thresholds; (3) urban development projects and (4) tacit approval.

Exclusions

Simplex introduced the exclusion from the application of the EIA for some types of Annex II projects, outside designated areas (Natura 2000, protected areas and cultural heritage sites), in particular **intensive fish farming** and the **production of hydrogen from renewable sources or electrolysis of water**. Designated areas cover approximately 30% of the territory.

Thresholds

The Simplex introduced a change in the thresholds for compulsory submission to EIA for some types of Annex II categories:

- Agriculture, livestock farming and aquaculture.
- Extractive industry.
- Energy industries.
- Textile, leather, wood and paper industries.
- infrastructure projects.
- Other projects.

It is worth highlighting that in the previous legislation, regarding the energy industry, an EIA was mandatory when the installed power was greater than or equal to 50 MW.

With the new regulations, projects of solar renewable electricity are subject to a mandatory EIA only when the total surface of the solar panels and inverters are equal to or greater than 100 ha, irrespective of the total area of the plot of land.

Urban development projects

The EIA Directive Annex II category “Urban developments” was translated as “Urban allotments operations + shopping malls”. This means that all urban developments (except shopping malls), regardless of their size or location, when they do not involve a formal allotment operation are never subject to EIA.

Tacit approval

The altered act provides tacit approval for everything in the EIA procedure, including the

opinions of the competent authorities and the final decision.

There is already an electronic platform that allows to issue tacit approval certificates within 8 days.

Conclusions

There is a great deal of pressure to speed up the licensing of renewable energy projects, with a focus on solar energy. But the main concern is that these new regulations could put environment at risk and infringe the EU EIA Directive and other EU regulations.

Simplifying licensing processes is and should be a positive thing. However, the simplification brought about by the new EIA regulation comes at the expenses of

- The possible decrease of the quality of the EIA studies.
- The burden on human resources, requiring greater efforts in a less amount of time.
- The increase of the responsibility of the licensing authorities, deciding on a case-by-case basis if a project should be subject to EIA.
- The mitigation of negative environmental and social impacts.
- The relevance of public participation.

The public reaction to the new legislation has been limited, not only from professionals but also from the media and NGOs.

The Portuguese Environmental Agency (*APA – Agência Portuguesa do Ambiente*) organised in February 2024, one year after the entry into force of the new EIA regulations, a discussion forum on the changes and the practice during that year. A large majority of the stakeholders (environmental authorities, EIA consultants, developers) agreed that the changes raised many doubts and could jeopardize the environment. One of the conclusions of that forum was the need, after one year of enforcement, to weight if the EIA Simplex is a progress in simplification or a regulatory step backwards.