

Gas Regulation

In 30 jurisdictions worldwide

Contributing editors

David Tennant and Torquil Law



2015

GETTING THE
DEAL THROUGH 

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DEAL THROUGH 

Gas Regulation 2015

Contributing editors

David Tennant and Torquil Law

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Preface

Gas Regulation 2015

Thirteenth edition

Getting the Deal Through is delighted to publish the thirteenth edition of *Gas Regulation*, which is available in print, as an e-book, via the GTDT iPad app, and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the 30 jurisdictions featured. Our coverage this year includes new chapters on Hungary and Sweden.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to David Tennant and Torquil Law of Dentons UKMEA LLP, the contributing editors, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
March 2015

Portugal

Mónica Carneiro Pacheco and Marisa Apolinário

CMS Rui Pena & Arnaut

Description of domestic sector

1 Describe the domestic natural gas sector, including the natural gas production, liquefied natural gas (LNG) storage, pipeline transportation, distribution, commodity sales and trading segments and retail sales and usage.

The Portuguese natural gas sector has been undergoing a consolidation of the liberalisation started in 2006 with the unbundling of the activities of transport, distribution and supply. Among the most significant events are Decree-Law 230/2012 and Decree-Law 231/2012, both of 26 October 2012, which have completed the transposition of Directive 2009/73/EC by:

- reinforcing the provisions regarding independence and unbundling of supply activities and the operation of transmission networks; and
- assigning new powers to the national regulatory entity, reinforcing its independence in carrying out its functions of regulating, monitoring and certifying entities.

There is no domestic production of natural gas in Portugal, although there is some shale gas prospecting currently taking place in central Portugal. Therefore, the natural gas consumed in Portugal comes from third countries either through high-pressure pipelines or marine tankers (LNG).

In relation to transmission, Portugal has opted for full ownership unbundling of the transmission activity. REN Gasodutos, SA (the transmission system operator) operates the national transport network, while the activities of reception, regasification and storage of LNG are operated by REN Atlântico, SA. The activity of subterranean storage of natural gas is performed by REN Armazenagem, SA and Transgás Armazenagem, SA. All these activities are performed through public service concession contracts entered into with the state that regulate the rights and obligations of the parties.

The distribution networks are operated by several private companies. Portugal's natural gas supply market has been fully liberalised since January 2010; since such time, customers have been free to choose their suppliers.

2 What percentage of the country's energy needs is met directly or indirectly with natural gas and LNG? What percentage of the country's natural gas needs is met through domestic production and imported production?

Portugal does not produce natural gas. It imports 100 per cent of its gas from the preferential markets of Algeria and Nigeria (LNG). According to data made available by Redes Energéticas Nacionais SGPS SA (REN) in 2013, natural gas consumption totalled 47.9 TWh, which represents a decrease of 4.6 per cent in relation to 2012 consumption. In 2013, the input share to the National Natural Gas System (SNGN) of natural gas corresponded to 56 per cent while the LNG input corresponded to 44 per cent.

Government policy

3 What is the government's policy for the domestic natural gas sector and which bodies set it?

The domestic natural gas sector is a regulated sector, namely, in respect of access to the networks, quality of supply and determining prices and tariffs.

Regarding the national level of regulation, it is possible to differentiate between two sub-levels:

- state regulation that is exercised by government bodies (the Directorate General for Energy and Geology (DGEG)); and
- independent regulation that is carried out by independent regulatory entities.

At the latter level, alongside horizontal regulation (through the Portuguese Competition Authority (the AdC)), there is also vertical regulation (specialised) that is carried out by the Regulatory Entity for Energy Services (ERSE) and by other entities (such as the Portuguese Securities Commission).

DGEG depends on the Ministry of the Economy. Its primary functions are to issue, amend and withdraw registers for natural gas supply and to oversee the security of supply.

The regulation of access to the networks, quality of supply and determining prices and tariffs are attributed to ERSE, which can also impose fines on energy companies for non-compliance with the laws and applicable regulations. ERSE is an independent administrative entity with administrative and financial autonomy and its own assets. Besides its functional independence, ERSE is also independent from the government. In fact, ERSE's board members are independent, and not subject to instructions or specific guidelines.

DGEG's decisions may be challenged by appeal to the Minister of the Economy. In any case, decisions from any of the regulatory entities may always be challenged by court proceedings.

Regarding the unconventional natural gas sector, which is at the moment in a preliminary stage of studies and data collecting, there is no specific legislation regulating the exploration and production of shale gas in Portugal. Therefore, this is subject to the same legal framework that applies to the prospecting of and exploration for petroleum (eg, Decree-Law No. 109/94, 26 April), regulated by DGEG.

Regulation of natural gas production

4 What is the ownership and organisational structure for production of natural gas (other than LNG)? How does the government derive value from natural gas production?

Not applicable.

5 Describe the statutory and regulatory framework and any relevant authorisations applicable to natural gas exploration and production.

Not applicable.

6 Are participants required to provide security or any guarantees to be issued with a licence to explore for or to store gas?

As previously stated, there is no exploration of natural gas in Portugal. Activities of storage of natural gas and LNG are performed under a public concession contract (see question 8), under which the grantees are obliged to provide bank guarantees or a cash deposit in the amount of €5 million.

Regulation of natural gas pipeline transportation and storage

7 Describe in general the ownership of natural gas pipeline transportation, and storage infrastructure.

Transportation activities and storage (subterranean storage and LNG storage in the Sines terminal) are exercised according to a public service concession regime. According to this regime, the ownership of transportation and storage assets belongs to the concessionaire during the concession's period, being transferred to the state at the end of the concession.

Natural gas pipeline transportation is wholly owned by REN, which is the national network concessionaire. Subterranean storage facilities are currently owned by REN Armazenagem (wholly owned by REN) and Transgás Armazenagem, SA (a company within the Galp Energia Group). REN Atlântico, SA (wholly owned by REN) owns the facilities for the reception, regasification and storage of LNG.

Transportation and storage operators are subject to requirements of direct and indirect unbundling from other activities of the SNGN.

8 Describe the statutory and regulatory framework and any relevant authorisations applicable to the construction, ownership, operation and interconnection of natural gas transportation pipelines, and storage.

Transportation and storage activities are exercised according to a public service concession regime. Transport activity is performed exclusively by one company in the whole continental Portuguese territory: REN Gasodutos, SA is currently the only transport network operator. REN Armazenagem, SA and Transgás Armazenagem, SA are the subterranean storage operators. REN Atlântico, SA is the operator of the Sines Terminal. All these activities are regulated by DGEG and ERSE. The regulation includes supervision, namely, supervision of the enforcement by the operators of legal and regulatory provisions applicable to the concession contracts (which are, mainly, in DGEG's competence) and the promotion of competition between operators to assure access to the networks in equal circumstances (ERSE's competence).

Projects involving construction of natural gas transportation pipelines and storage facilities are subject to an approval from the government and to DGEG's licence. Civil works are subject to a licensing procedure (including environmental licensing) involving several administrative entities (namely, municipalities).

9 How does a company obtain the land rights to construct a natural gas transportation or storage facility?

The transportation network and storage facilities are public concessions granted by the state and therefore are subject to a specific regime, namely concerning rights for the use of the land.

The approval of projects grants the party the right to use the public domain or goods belonging to the state and the municipalities for the installation of storage facilities or passage of integral parts of the network, as well as to request the expropriation by urgent public utility or the establishment of administrative easements regarding immoveable assets necessary for the installation of the network or storage facility.

10 How is access to the natural gas transportation system and storage facilities arranged? How are tolls and tariffs established?

Access by third parties to the natural gas infrastructure (eg, the storage facilities infrastructures or transmission network) is one of the cornerstones of the SNGN. As a result, it is the operators' duty to grant all system users access to the infrastructure on a non-discriminatory and transparent basis.

Right of access to the infrastructure is granted by entering into a written agreement regarding the use of such infrastructure. Pursuant to these agreements, operators have the right to receive compensation for the use of their facilities and inherent services. This compensation is set out by ERSE in the Tariffs Regulation specifically for each type of infrastructure. Setting out regulated tariffs assures not only equal treatment for the infrastructure users, avoiding the risk of discrimination between said users, but also that the amount of the tariffs is not subject to over-inflated increases defined by the relevant operators as a consequence of the networks being natural monopolies.

Decree-Law No. 230/2012 of 26 October opened up the possibility of concessions for underground storage benefit from a system of negotiated access.

11 Can customers, other natural gas suppliers or an authority require a pipeline or storage facilities owner or operator to expand its facilities to accommodate new customers? If so, who bears the costs of interconnection or expansion?

As a general principle, operators may reasonably refuse to grant access to their infrastructure based on a lack of capacity or lack of connection.

As a consequence of the transposition of Directive No. 2009/73/EC, the transmission system operator was given the obligation to elaborate, every two years, a long-term plan for the development of the transportation and storage facilities as well as the reception, storage and regasification of the LNG system. The current and predicted demand of customers is a key factor in the elaboration of this plan, which is approved by the government. Operators shall comply with the terms and deadlines stated in the plan, with this obligation being supervised by ERSE.

Further, the government has the power to require operators to expand the transportation and storage facilities as well as the reception, storage and regasification of the LNG system, in situations mentioned in the concession contract.

Additionally, the transportation system operator has the obligation to undertake necessary improvements to the infrastructure, directly bearing the costs of that investment, whenever it is economically viable. In any case, the operator is compelled to perform said investment whenever there is a potential client interested and willing to pay for it.

The costs of this expansion are taken into account in the determination of the regulated tariffs.

12 Describe any statutory and regulatory requirements applicable to the processing of natural gas to extract liquids and to prepare it for pipeline transportation.

Not applicable.

13 Describe the contractual regime for transportation and storage.

As stated above, transport and storage activities are regulated activities. Therefore, the general terms and conditions of contracts for the use of the infrastructures are approved by ERSE. These contracts are valid for one gas year (the period between 12am on 1 July and 12pm on 30 June of the following year), and shall be automatic and successively renewed for equal periods.

Regulation of natural gas distribution

14 Describe in general the ownership of natural gas distribution networks.

During the concessions or licence periods, the distribution networks are owned by the concessionaires or licensees, being transferred to the state at the end of the concession contract or of the licence. There are also some parts of the infrastructure that are privately owned (eg, private distribution networks).

15 Describe the statutory and regulatory structure and authorisations required to operate a distribution network. To what extent are gas distribution utilities subject to public service obligations?

Distribution activity can be performed through a concession or a public service licence. The distribution networks' operators have exclusive rights regarding the relevant parts of the national territory within the concessions or the licences for local distribution. Nevertheless, local distribution licences regarding areas where there is already a regional distribution concession may be exceptionally granted if the concessionaire considers that it is unable to cover the relevant area due to technical or economic reasons duly justified and acknowledged by the assigning entity.

In 2006, along with the unbundling process regarding distribution and supply, the concession contracts and the licences pursuant to the distribution of natural gas were adapted. However, the 11 relevant concessionaires and licensees, most of which are companies within the Galp Energia Group, kept their concessions and licences. All of them are private companies, subject to private law.

The distribution operator is subject to a legal, organisational and decision-making unbundling from other activities of the SNGN.

The operation of a natural gas distribution network is a regulated activity, subject to the ERSE's regulation.

Undertakings are subject to public service obligations relating to security, environmental protection and consumer protection, as set out in article 8(2) of Decree-Law No. 140/2006, of 26 July, as amended. These obligations are similar to those applicable to the concessionaires that carry out transport, reception, regasification and storage activities.

16 How is access to the natural gas distribution grid organised? Describe any regulation of the prices for distribution services. In which circumstances can a rate or term of service be changed?

Access to the distribution grids depends on the prior execution of an agreement for its use and on the payment of the regulated tariffs published by ERSE. The agreement's terms and conditions are also approved by ERSE. Therefore, both the rates and the agreements cannot be freely modified by the parties. The execution of an agreement is not required for retail traders who belong to a company that is party to a concession contract, or that holds distribution licences with fewer than 100,000 connected customers and has not unbundled its supply activity from the distribution activity. The gas distributor's obligations include provision of information to consumers, switching suppliers, quality of supply and metering.

17 May the regulator require a distributor to expand its system to accommodate new customers? May the regulator require the distributor to limit service to existing customers so that new customers can be served?

Similar to the transport and storage operators, the distribution operators may, as a general principle, reasonably refuse to grant access to their infrastructure based on lack of capacity or lack of connection.

As a consequence of the transposition of Directive No. 2009/73/EC, the distribution system operator was attributed the obligation to elaborate, every two years, a medium-term plan for the development of the distribution facilities. The current and predicted demand of customers is a key factor in drafting this plan, which is approved by the government following an opinion issued by ERSE. The operators shall then comply with the terms and deadlines stated in the plan, this obligation being supervised by ERSE.

Further, the government has the power to require operators to expand distribution facilities in the situations mentioned in the concession contract.

Additionally, the distributor operator has the obligation to undertake necessary improvements to the infrastructure, directly bearing the costs of that investment whenever it is economically viable. In any case, the operator is compelled to perform the said investment whenever there is a potential client interested and willing to pay for it.

The costs of this expansion are taken into account in the determination of the regulated tariffs.

18 Describe the contractual regime in relation to natural gas distribution.

The general terms and conditions of agreements for the use of the network are approved by ERSE. These agreements are valid for one gas year (the period comprehended between 12am on 1 July and 12pm on 30 June of the following year), and shall be automatically and successively renewed for equal periods, unless they are rejected by the system user, which shall give 60 days' notice as to the term of the agreement or its renewal.

Regulation of natural gas sales and trading

19 What is the ownership and organisational structure for the supply and trading of natural gas?

The Portuguese natural gas supply market has been fully open since January 2010. Therefore, customers can buy natural gas from the supplier they choose, with which they agree a supply contract that has to follow some parameters established by law (for the protection of the consumer). The prices are set freely. There are still, however, suppliers of last resort who are obliged to supply household consumers until the end of 2015 and, after that, to supply economically vulnerable consumers as defined by law. In this case, the tariffs are set by ERSE. Suppliers of last resort are also obliged to supply consumers whose supplier has been prevented from exercising its activity, and also consumers who do not have the possibility of choosing a supplier because there is no supplier in their region.

20 To what extent are natural gas supply and trading activities subject to government oversight?

Suppliers are subject to a prior registration or licensing procedure (supplier of last resort) by DGE. Otherwise, the oversight and regulation of said activities is carried out by ERSE, for instance, regarding some information duties that these companies are obliged to fulfil towards ERSE (eg, information related to prices).

Please note that these companies are also subject to national competition law.

21 How are physical and financial trades of natural gas typically completed?

Physical and financial trades of natural gas are typically completed through bilateral contracts entered between suppliers and buyers.

There are still no organised markets for natural gas (there are already organised markets for electricity trading within the Iberian Electricity Market).

22 Must wholesale and retail buyers of natural gas purchase a bundled product from a single provider? If not, describe the range of services and products that customers can procure from competing providers.

Wholesale or retail buyers purchase natural gas from the supplier, which takes on the responsibility for the gas's availability to its clients. The supplier thus acts as an intermediary between the client and the infrastructure operators, entering into the necessary agreements for the use of the grids and paying the regulated tariffs set out in the Tariff Regulation on behalf of its clients. All rights and obligations, namely those regarding the granting of guarantees, regulated services and compensations for breaches in the quality standards, may also be transferred from the clients to the suppliers.

A supplier may choose to provide other services jointly or additionally to the provision of natural gas. Thus, for example, there are suppliers in the Portuguese market who jointly provide natural gas and electricity to their clients.

Regulation of LNG

23 What is the ownership and organisational structure for LNG, including liquefaction and export facilities, and receiving and regasification facilities?

There is currently only one LNG terminal in Portugal, located near the port town of Sines. This terminal is, since 2006, owned by REN Atlântico, SA, a company within the REN Group. REN Atlântico, SA entered into a public service concession contract with the state that granted it the performance of reception, storage, regasification and delivery of LNG to the national natural gas transmission network. Under said contract, REN Atlântico, SA also performs the loading and dispatching of tank trucks and marine tankers.

24 Describe the regulatory framework and any relevant authorisations required to build and operate LNG facilities.

Building LNG facilities is subject to a licensing procedure (including environmental licensing) involving a number of administrative authorities, municipalities included.

Operation of LNG facilities is subject to the public service terms and conditions set out in the public service concession contract. Said operation and activity is also subject to ERSE's regulation according to the terms specified above.

25 Describe any regulation of the prices and terms of service in the LNG sector.

Access to the LNG terminal at Sines depends on entering into an agreement for the use of the infrastructure, as well as on the payment of the relevant tariff approved by ERSE. The general terms and conditions of the said contract are approved by ERSE.

Mergers and competition

26 Which government body may prevent or punish anti-competitive or manipulative practices in the natural gas sector?

The entity responsible for the prevention and punishment of anti-competitive or abusive (exploitative or exclusionary) practices is the AdC.

Nevertheless, the legal competition framework establishes that the AdC shall work in close cooperation with and consult other regulatory authorities in areas where their supervision powers overlap. Such is the case in the natural gas sector, which is regulated and supervised by ERSE.

27 What substantive standards does that government body apply to determine whether conduct is anti-competitive or manipulative?

The substantive standards applicable under Portuguese law are similar to the ones applicable at the Community level. As with European competition law, two main practices are prohibited under Portuguese competition law:

- (i) agreements or concerted practices between undertakings and decisions of associations of undertakings that may have as their object or effect the prevention, restriction or distortion of competition in Portugal or in a significant part thereof; and
- (ii) the abuse of a dominant position by an undertaking within the Portuguese market. Portuguese competition law also prohibits the abuse of economic dependence, an exploitative conduct practiced by a non-dominant undertaking.

In regard to the conduct described in (i), such conduct may be deemed justified (and therefore exempted from the application of the prohibition) if it:

- contributes to improving the production or distribution of goods and services, or promotes technical or economic progress;
- allows users of such goods and services to obtain a fair share of the resulting benefits;
- does not impose on undertakings restrictions that are indispensable to reach the objectives of the conduct; and
- does not afford such undertakings the possibility of eliminating competition in with respect to a substantial part of the relevant market.

There is a presumption that agreements that would be considered justified under the EU block exemptions, but that do not have an effect on Community trade, would also be considered justified under Portuguese competition law.

With regard to (ii), abuse of a dominant situation, there are no relevant specificities in Portuguese competition law, in comparison with EU competition law, with regard to the criteria used for determining the existence of a dominant position: a company enjoying a position of economic strength, capable of behaving to an appreciable extent independently of its competitors, customers and ultimately consumers, will be considered to have a dominant position and, therefore, would be able to prevent effective competition. Further, there are no similar block-exempted practices for the conduct of undertakings that are in a dominant position, which, therefore – under the special responsibility that is vested upon dominant entities – requires that all actions be assessed for an eventual detrimental effect on competition and, should that be the case, for the strength of the efficiencies generated by such practices.

28 What authority does the government body have to preclude or remedy anti-competitive or manipulative practices?

Regarding practices that could be construed as anti-competitive or manipulative (described in question 27), the AdC has the power, on the one hand and under its own initiative, to initiate sectoral inquiries from which (non-binding) recommendations could ensue; or, on the other, ex officio or following a complaint, to initiate proceedings against companies that could be involved in anti-competitive practices.

Should the AdC determine the existence of an anti-competitive practice, it may impose sanctions on the infringing undertakings (fines), as well as remedies of a structural or behavioural nature.

29 Does any government body have authority to approve or disapprove mergers or other changes in control over businesses in the sector or acquisition of production, transportation or distribution assets?

The AdC is the authority responsible for merger control in Portugal, and the procedure is governed by Portuguese competition law.

According to Portuguese law, a concentration that meets one of the following thresholds must be notified to the AdC:

- market share: creation or reinforcement of a market share exceeding 50 per cent on the national market for a particular good or service or on a substantial part of it;
- turnover: an aggregate turnover, in Portugal, of more than €100 million, as long as each of at least two of the undertakings concerned achieve a turnover of more than €5 million in Portugal; and
- mixed criterion: the creation or reinforcement of a market share exceeding 30 per cent on the national market for a particular good or service or on a substantial part of it, as long as each of at least two of the undertakings concerned achieve a turnover of more than €5 million in Portugal.

Regarding the substantive appraisal of the merger, according to Portuguese competition law, the main criterion considered when assessing a concentration is if such merger leads to a significant impediment to effective competition in the Portuguese market or of a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position.

30 In the purchase of a regulated gas utility, are there any restrictions on the inclusion of the purchase cost in the price of services?

Restrictions arise from the method of establishing the tariffs and costs that are allowed to be included.

31 Are there any restrictions on the acquisition of shares in gas utilities? Do any corporate governance regulations or rules regarding the transfer of assets apply to gas utilities?

The sole existing restrictions concern the purchase of shares of companies that are the concessionaires of the national transport network and the existing LNG terminal. In fact, no one (national or foreign) may hold, directly or indirectly, more than 25 per cent of the share capital of each company that is the concessionaire of said infrastructures. These restrictions do not apply to the state, to companies controlled by the state and to the relations of domination within the corporate group that operates the transportation network operator or the LNG terminal operator.

Besides the above-mentioned restrictions, no other specific limitations to the transfer of shares apply solely to the natural gas sector. However, as most activities comprehended in said sector are performed under a concession contract, it is common for these contracts to submit the transmission of shares in the relevant companies, as well as the transfer of assets to authorisation by the competent government member. Failure to request said authorisations renders the transaction null and void.

International

32 Are there any special requirements or limitations on foreign companies acquiring interests in any part of the natural gas sector?

Decree-Law 138/2014 of 15 September 2014 has been recently approved, and sets out a special regime for the transfer of strategic assets in public utilities sectors. According to this regime, the transfer of such assets to foreign companies (outside the European Union) can be rejected by the Portuguese government where such acquisition compromises national security and defence, as well as the country's security of supply.

33 To what extent is regulatory policy affected by treaties or other multinational agreements?

As Portugal is a member of the European Union, natural gas regulation is highly influenced by European law.

Update and trends

As in previous years, the development of the Portuguese natural gas market has been witnessed in 2014. With the end of the regulated tariffs, the number of consumers that have switched to a market regime has been increasing. According to ERSE data, at the end of September 2014, the number of clients that have switched has increased by about 64 per cent when compared with the same period in 2013. These figures show that the measures (including legislation) that have been adopted have been correct.

The legislative package enacted in 2006, which deeply restructured the natural gas sector, derives directly from the Second Gas Directive No. 2003/55/EC, which sets out the common rules for the natural gas internal market. As a member state, Portugal was compelled to transpose said Directive.

The same occurred with the Third Gas Directive, approved by Directive No. 2009/73/EC, which obliged Portugal to introduce some adjustments

in its legislation, namely concerning unbundling requirements, the powers of the national regulator and customers' rights.

34 What rules apply to cross-border sales or deliveries of natural gas?

There are no specific rules. It is, however, expected that with the implementation of the Iberian Natural Gas Market, requirements for connection between the grids and the management of capacity between Portugal and Spain would be established.

Transactions between affiliates

35 What restrictions exist on transactions between a natural gas utility and its affiliates?

Not applicable.

36 Who enforces the affiliate restrictions and what are the sanctions for non-compliance?

Not applicable.

C/M/S'

Law . Tax

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