

In Portugal the low voltage electricity distribution is, historically, exclusively assigned to municipalities, which may directly develop this activity (direct operation) or transfer the operation to private entities under concession contracts awarded either by the municipalities or by associations of municipalities, following public tender procedures (*concursos públicos*)<sup>1</sup>.

The vast majority of said distribution networks is currently operated by private entities under 20 years municipal concession contracts which, for the most part, have already or will shortly expire, which motivated the approval of [Law no. 31/2017, of 31 May](#). Currently there are 11 concessionaires in mainland Portugal, EDP Distribuição - Energia, S.A. acting as concessionaire in 278 out of 308 municipalities and representing 99.5% of the low voltage clients.

The main challenges the upcoming concessions face are noteworthy: (i) safeguard the uniformity of tariffs and service to final clients; (ii) ensure greater efficiency in the performance of the activity; (iii) put forward responsiveness to developments in the sector; (iv) promote the participation of the municipalities in the distribution network operators' activity with greater impact in the local populations; (v) ensure the distribution network operators' role in the energy market; and (vi) take into consideration the requirements of unbundling of the activity vis-à-vis the production and trading activities.

Considering its pertinence at this point in time, we highlight below the most relevant features of the forthcoming process for the granting of low voltage electricity distribution concessions, particularly the main aspects of Law no. 31/2017, of 31 May, that sets forth uniform procedures and the synchronized launch of the public tenders, therefore safeguarding the territorial dispersion and the potential loss of economic efficiency in such activities.

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<sup>1</sup> Unless the public tender procedure has no bidders, in which case the concession contract may be directly awarded, *inter alia* to the concessionaire of the National Electricity Distribution Network (*Rede Nacional de Distribuição de Electricidade em Alta e Média Tensão*, which comprises the medium and high voltage electricity distribution networks).



## I. Legal framework

The following legal acts set forth the most relevant statutory provisions regarding the organization of the national electricity grid system and the process for the granting of low voltage electricity distribution concessions:

- [Decree-Law no. 29/2006, of 15 February](#), as subsequently amended the last time by Law no. 42/2016, of 28 December, which sets forth the general principles on the organization and operation of the national electricity grid system, on the activities of production, transportation, distribution and trading of electricity, and on the organization of electricity markets;
- [Decree-Law no. 172/2006, of 23 August](#), as subsequently amended the last time by Law no. 114/2017, of 29 December, which sets forth the regime for the activities of production, transportation, distribution and trading of electricity, that also sets forth the basis of these concessions;
- [Law no. 31/2017, of 31 May](#), that sets forth the principles and general rules applicable to public tenders for the award of low voltage distribution networks concessions in the Portuguese mainland (“**Law no. 31/2017**”);
- [Resolution of the Council of Ministers no. 5/2018, of 11 January](#), that approves the program of actions and studies to be developed by the Portuguese Energy Services Regulatory Authority (“ERSE”, *Entidade Reguladora dos Serviços Energéticos*) in the granting, by contract, of concessions intended exclusively for the operation of municipal low voltage distribution networks.

## II. Low voltage electricity distribution networks in Portugal

The concessions, which are subject to economic regulation established by ERSE, comprise the establishment and operation of the municipal low voltage electricity distribution networks, including (i) the operation and maintenance of the respective networks, (ii) the management of the network electricity flows, (iii) the planning, construction and technical management of the network and (iv) the public lighting networks. In particular, the low voltage electricity distribution network includes the transformer substation (*posto de transformação*), the low voltage lines, branches (*ramais*), the equipment and accessories intended for the respective operation, as well as regards public lighting networks the branches (*ramais*), the lamps and other associated equipment.

The concessions are awarded under an exclusivity regime – with the relevant City Council’s prior consent, the concessionaire may carry out other activities provided that the same are developed in the benefit of the concession – for a 20-year maximum period and are subject to a public service regime, the activities and facilities comprised thereof being of public utility.

As consideration the municipalities are entitled to a rent, included in the tariffs for the use of low voltage distribution networks, as provided for in the [Tariff Regulation](#); this rent may be replaced by other consideration mechanisms, provided that they do not penalize the rights of the municipalities.



### III. Public tender procedures

The public tender procedures for the granting of low voltage electricity distribution concessions are launched with the sole scope of low voltage networks by municipalities or inter-municipal entities.

The tender specifications (*caderno de encargos*) and the procedure program (*programa do procedimento*), are approved by the grantor, following consultation with ERSE, pursuant to the general principles applicable to public tenders<sup>2</sup>.

Law no. 31/2017 furthermore sets forth the principles and general rules applicable to these public tenders in the Portuguese mainland – therefore is not applicable to the low voltage electricity distribution networks of the Autonomous Regions of Madeira and Azores –, *inter alia* the following:

- Promotion of **economic efficiency** and of **conditions for the effective performance of the concessions**, namely with respect to the quality and scope of the public service;
- Promotion of **territorial cohesion** as regards the sustainability of concessions and the level of quality of the service provided;
- Safeguard of **tariff uniformity** throughout the country;
- **Leveling of the structural conditions for the development of the electricity distribution activity**, namely in terms of costs and increase of the quality standards of public service;
- Promotion of **energy management and energy efficiency by municipalities**, without this effort burdening the consideration due to municipalities as grantors.

With regard to the **procedural aspects of the public tenders**, Law no. 31/2017 rules in particular the synchronized launch of procedures, the delimitation of areas where the procedures are to be launched, and the features of the procedure documents. Thus:

#### a) Synchronized launch of tender procedures

As regards all the municipalities or inter-municipal entities that have not opted for the direct operation of the respective distribution networks, with respect to the territorial areas previously delimited following ERSE's proposal, the **public tender procedures will be launched synchronously in 2019** – simultaneous publication of the respective announcements and notices under the Portuguese Public Contracts Code and simultaneous dates for submission of proposals.

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<sup>2</sup> Set forth in the Portuguese Public Contracts Code, approved by Decree-Law no. 18/2008, of 29 January, last amended by Decree-Law no. 111-B/2017, of 31 August (modifications came into effect on 01.01.2018).



The municipalities or inter-municipal entities whose **concession contracts reached their term prior to 2019**, and do not opt for the direct operation of the respective distribution networks, must enter, on an exceptional basis and without other formalities, into a written agreement with the respective counterparty in the concession contracts and stipulate an extension of the terms of the respective contracts up and until the entrance into force of the new concession contracts.

The **concession contracts whose term ends after 2019** shall remain in force until the respective terms, notwithstanding the execution of the new ones following the synchronized procedures. In this case, the new concessionaires will only start operation of the respective municipal concessions with the term of the current concession contracts.

Although the public tender procedures are to be launched synchronously, after the award decision each awarding entity – the grantor will be each municipality or the inter-municipal entities – shall enter into a **separate concession agreement with the selected bidder**.

#### **b) Delimitation of areas**

Each public tender procedure shall be launched with respect to a territorial area defined by the relevant municipalities or inter-municipal entities, upon ERSE's proposal on the basis of technical and economic studies.

**ERSE's role in this matter is preponderant.** The definition of a territorial area different from that proposed by ERSE is conditioned to the demonstration of material advantages to the public interest, based on technical and economic studies with the same level of detail as those produced by ERSE, if necessary accompanied by the stipulation, in the procedure documents, of the provisions of the contracts to be concluded.

Following public consultation, ERSE recently published its [Proposal for the territorial delimitation of procedures for the award of low voltage electricity distribution concessions](#).

#### **c) Standard features of the procedure documents**

The standard-tender specifications (*caderno de encargos tipo*) and the standard-procedure program (*programa do procedimento tipo*) are to be approved by ministerial order of the Minister of Economy, following consultation with National Association of Portuguese Municipalities, ERSE and inter-municipal entities. Such standard-procedure documents will serve as base to the municipalities' decisions, leaving them with the definition of the aspects of the service that incorporate the decentralized nature of the municipal attributions – definition of the relevant area (within the above mentioned limits), approval of prices, award of the concession as well as monitoring and supervising the same.

As a result, **each grantor must comply with said standard-documents' provisions** when approving the respective public tenders' procedure documents. Furthermore, each public tender procedure documents must be approved by all entities forming part of the consortium of contracting entities (*agrupamento de entidades*



*adjudicantes*), when applicable, and shall specify all the aspects of the execution of the contracts to be submitted to competition.

Following public consultation, ERSE recently published its [Proposal on the standard features of the procedure documents](#).

#### IV. ERSE's proposal on the delimitation of areas and the features of the public tender procedures

As referred to above, following Resolution of the Council of Ministers no. 5/2018, of 11 January, ERSE released for public consultation the proposal on the delimitation of the territorial area of **each tender procedure to be launched**, as well as on the **main features of the standard procedure** for awarding concessions, which led to the recent publication of the [Proposal for the territorial delimitation of procedures for the award of low voltage electricity distribution concessions](#) and the [Proposal on the standard features of the procedure documents](#).

With regard to the [Proposal for the territorial delimitation of procedures for the award of low voltage electricity distribution concessions](#), and considering the determinations set forth in Law no. 31/2017 that such territorial delimitation should (i) have as a preferential reference the intermunicipal communities, (ii) ensure economic efficiency and financial neutrality and territorial cohesion, sustainability and (iii) not jeopardize tariff uniformity, ERSE proposes the territorial delimitation in three tender procedure areas:

- Territorial Delimitation of the North, incorporating the intermunicipal communities of Alto Minho, Cávado, Ave, Alto Tâmega, Terras de Trás-os-Montes, Área Metropolitana do Porto, Tâmega e Sousa, and Douro;
- Territorial Delimitation of the Center, incorporating the intermunicipal communities of Aveiro, Viseu, Dão e Lafões, Beiras e Serra da Estrela, Coimbra, Leiria, Médio Tejo, Beira Baixa and Oeste; and
- Territorial Delimitation of the South, incorporating the intermunicipal communities of Lezíria do Tejo, Alto Alentejo, Área Metropolitana de Lisboa, Alentejo Central, Alentejo Litoral, Baixo Alentejo, and Algarve.

As regards the **main features of the standard procedure** for awarding concessions proposed by ERSE, we highlight the following:

- The standard procedure should be a limited public tender with prior qualification, with international publicity, according to technical and financial capacity requirements;
- The standard-tender specifications shall stipulate that the tender specifications for each procedure shall identify the assets of the concessions and foresee a procedure for the detailed identification of the assets including the participation of a Monitoring Committee (*Comissão de Acompanhamento*);
- Also with regard to the assets, the standard-tender specifications should define the methodology for calculating the amount of compensation to be paid to the current concessionaire, as well as determine the terms of payment of the compensation and the transfer of all assets assigned to the concession, including the procedure of transfer of assets between the outgoing concessionaire and the municipality or the new



concessionaire. Furthermore, luminaires installed directly by the municipalities (and financed by themselves or by third parties other than the concessionaire) may become part of the assets of the new concession as co-participation;

■ The standard-tender specifications shall foresee that employment contracts of the workers currently allocated to the concession's activity shall be transferred to the concessionaire, with maintenance of the respective legal framework;

■ The tender specifications of each procedure should contain mandatory information on the service contracts (external and intragroup) whose term of validity covers the new concession, subject to independent verification. These contracts shall form part of the assets of the concession and must be transferred to the new concessionaire;

■ The standard-tender specifications should clarify that, as a general rule, the rights and obligations are not passed on to the new concessionaire, remaining with the current concessionaire even after the transfer of the concession, including the following: (i) tariff adjustments (definitive and provisional) to the income from the low voltage electricity distribution activity, (ii) costs with the restructuring plans of employees recognized by the regulator, (iii) annual amortization arising from actuarial gains and losses accepted by the regulator, (iv) debts of suppliers to the network operator arising from the relationship with the outgoing concessionaire, and (v) debts of municipalities to the outgoing concessionaire;

■ With regard to public lighting, each municipality should have the right to opt for the operation of public lighting comprised within low voltage electricity distribution networks or separately, in which case the award to third parties should be based on an autonomous procedure with specific rules and the municipality shall be entitled to remuneration correspondent to the costs that are currently borne by the regulated tariffs of the low voltage distribution network;

■ Also regarding the public lighting, the standard-procedure program should foresee that each procedure must identify the public lighting management model defined in each concession, whereas the new concession contracts should provide for the existence of a technological framework for public lighting and its periodic review reflecting the best energy and economic efficiency practices;

■ The standard-tender specifications should stipulate that the tender specifications for each procedure may define information and innovation requirements as differentiating factors from the candidates' offers or as binding elements of the offers;

■ The operators of electronic communications networks that use the infrastructure of the low voltage electricity distribution network shall pay a remuneration to the concessionaire, and the amount of compensation due to the municipality shall be agreed between the latter and the concessionaire;

■ With regard to the transition between the current concessionaire and the future concessionaire (or the municipality, in the event of opting for direct exploitation), the standard-procedure program should define that



the transition period has a maximum duration of one year and that during this period the current concessionaire maintains the obligation to provide the distribution service and cooperation with the new concessionaire in the transfer works, maintaining also the right to remuneration.

## **V. Final remarks**

Following ERSE's initiative on publishing the proposals for the main features of the standard procedure documents and the delimitation of areas of the concessions, the Government shall now regulate, and subsequently the municipal entities shall decide, in order to launch the public tender procedures in the present year.

As a final remark, it is worth noting ERSE's recommendation that it would be in the interest of the tenders that the end of the concessions that would end later than 2023 could be aligned with the others by at least December 31, 2023 (when it is estimated that the transition period could end), which would increase the value of tenders, attract more bidders and simplify the transition process. Considering that alterations in the term of the current concessions depends on negotiation between each grantor and the respective concessionaire or, unilaterally, a concession redemption by the grantor (which entails a right to compensation to the concessionaire), ERSE suggests the implementation of a negotiation process be established between current concessionaires and grantor with a view to aligning the terms of the current concession agreements, in particular the contracts whose term occurs after 2023.

**The preparation towards the public tender procedures is expected to occur at any time, thus enabling simultaneous launch of the procedures in 2019.**