CESE, THROUGH THE LABYRINTH OF UNCONSTITUTIONALITY

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AS FAR AS CESE IS CONCERNED, IT IS DIFFICULT TO UNDERSTAND ITS CLASSIFICATION AS A CONTRIBUTION, GIVEN THAT THERE IS NO TANGIBLE SERVICE THAT BENEFITS ENTITIES AS DIVERSE AS THOSE THAT OPERATE.

On April 23, 2024, the Constitutional Court, in Ruling No. 338/2024, declared that the Extraordinary Contribution to the Energy Sector (CESE), insofar as it applies to renewable electricity generating centers, is unconstitutional for violating the principle of equality.

At the root of this decision is an assessment for 2019 that was unsuccessfully challenged by the Tax Authority and the Braga Administrative and Fiscal Court, after which the company appealed to the Supreme Administrative Court, where it also lost. In the end, the Constitutional Court reversed the decision and ruled in favor of the company, marking the first time the Constitutional Court has ruled on the application of the CESE to renewable energy producers.

The CESE was created in 2014 as part of the implementation of the Economic and Financial Assistance Program agreed with the European Union and the International Monetary Fund (the Troika) with the aim of financing mechanisms that would promote the systemic sustainability of the energy sector and the creation of a fund that would contribute to reducing tariff debt and financing social and environmental policies in the energy sector.

The CESE was thus created in the 2014 State Budget as an exceptional contribution (a real crisis tax!) on tangible fixed assets, applicable to companies that hold an operating license for power stations or a license to produce electricity, concessionaires for electricity transmission, or distribution activities, concessionaires for natural gas transmission, distribution, and storage activities, and holders of local distribution licenses, operators of crude oil refining and the treatment or distribution of petroleum products, and wholesale traders in crude oil, electricity, or petroleum products.

However, the reality of things and the passage of time have shown that the CESE is anything but an extraordinary tax. In fact, not only has the duration of the CESE been successively extended, turning it into an annual tax, to reduce the costs associated with the tariff debt of the National Electricity System (SEN); it has also extended its scope of application, first in 2015 to natural gas suppliers and then, in 2019, to renewable energy power plants covered by guaranteed remuneration schemes (except hydroelectric plants with an installed capacity of 20 MW or more).

One of the most famous stories in Greek mythology is that of the struggle between the Athenian hero Theseus and the Minotaur, a dark monster with the head of a bull and the body of a man, hiding in the labyrinth that the king of Crete had built to imprison him. When you try to find out what the CESE is, whether it's a tax, a contribution, or a fee, you find yourself in a labyrinth just like the one in which the Minotaur was hidden, where it's hard to see where you are, and with a sinister outcome for those who face it.

Traditionally, public taxes are distinguished between taxes and fees. Taxes are defined as a coercive and unilateral provision, dissociated from any provision by the public entity, while fees are characterized as a consideration for services provided or enjoyed by the taxpayer. Contributions, on the other hand, appear as an intermediate category

of public taxes, halfway between a fee and a tax, in that they do not result from an exchange between the private individual and the public entity, but from an exchange between the public entity and a group of private individuals.

Among the contributions, the General Tax Law, in Article 4(3), defines "special" taxes as those that "*are based on the taxpayer obtaining benefits or increases in the value of his property as a result of public works or the creation and expansion of public services or the special wear and tear of public property caused by the exercise of an activity*...".

As far as the CESE is concerned, it is difficult to understand its classification as a contribution, given that there is no tangible provision that benefits entities as diverse as those operating, in particular, in the natural gas or renewable energy sectors. If it is not a contribution, it can only be a tax in the strict sense, and therefore subject to a more demanding regime in constitutional terms.

The interpretation of the CESE system has already been the subject of several decisions by the Constitutional Court, which, like Theseus navigating the labyrinth of the Minotaur, has ruled either that it is constitutional or that it is unconstitutional. On March 16, 2023, the Constitutional Court admitted the unconstitutionality of the regime for the first time, considering that the rule that obliges natural gas transmission, distribution, or underground storage concessionaires to pay this tax is invalid due to a violation of the principle of equality since it is no longer possible to affirm that these companies are presumed to be the cause or beneficiary of the public benefits that the Fund for the Systemic Sustainability of the Energy Sector (FSSES) is responsible for providing.

However, a few months later, in May 2023, the Constitutional Court took a different view, noting that "the charge to which the applicant is subject through the CESE cannot be understood to be out of context or disproportionate to the benefits it receives." The Constitutional Court also said that if natural gas companies were excluded from the CESE, this would represent unequal and unjustified tax treatment between operators.

As early as March 2024, the Constitutional Court was asked to rule on the application of the CESE to wholesale traders in crude oil and oil products and ruled that it was unconstitutional, considering that the levy had ended up becoming a tax and that the electricity tariff debt was not caused by the oil sector. The most recent episode was Ruling No. 338/2024, of April 23, 2024, which declared the unconstitutionality of the CESE when applied to renewable electricity generating centers for violating the principle of equality. The Constitutional Court held, in the same vein as the ruling of March 16, 2023, that, in particular, since the law was amended in 2018 and the majority of CESE revenue is now earmarked for reducing the electricity sector's tariff debt, it is no longer possible to say that companies owning renewable electricity generating stations can be held responsible for achieving the objectives of the CESE, let alone causing or benefiting from the public benefits of the FSSES.

The Constitutional Court noted that the CESE is not characterized as a financial contribution because, since there is no correlation between the taxable persons and the objectives of the collection of the tax, it translates into a real tax, and since there is no presumption that the taxable person causes or takes advantage of certain administrative services, the collection ends up violating the principle of legal equivalence (a corollary of the principle of equality).

Of course, all this can have its consequences.

The Constitutional Court's unconstitutionality rulings on the application of the CESE have the following consequences: they allow companies that challenged the collection of the contribution (tax!) to recover a few tens of millions of euros that they had to pay, as well as annulling the contested CESE assessments that the companies will not have to pay. On the other hand, the Constitutional Court's rulings open the door for other companies affected by the CESE

to now challenge its collection (past and future), either by asking the Tax Authority to review the assessments paid or by filing a legal claim against its payment with the Administrative Courts.

In this respect, two situations should be distinguished: (i) companies that have paid the CESE and still have time to claim or challenge it can do so within the respective deadline, and (ii) companies that have paid the CESE but can no longer claim or challenge it because the respective deadline has passed can ask the AT to review the assessments.

In any case, and although the Constitutional Court's rulings are only effective in the specific cases that gave rise to them, and do not oblige the AT to return the CESE to other companies, nor the Administrative Courts to follow the Constitutional Court's understanding, it is expected that companies will use the arguments invoked by the Constitutional Court to refuse to pay the CESE because it is unconstitutional, with strong litigation expected between the companies affected and the AT.

It should be noted that any court decision that contradicts the Constitutional Court's rulings requires an appeal to the Constitutional Court itself, promoted by the Public Prosecutor's Office, with the third declaration of unconstitutionality in three cases involving the same interpretation of the rule having general binding force - i.e. applicable to all situations. This could therefore be the basis for challenging or complaining about acts of assessment of the CESE or, for those who are no longer within the time limit, for reviewing the assessment with the AT, using the arguments set out in the judgments to defend the illegality of the respective collection.

However, the story of the CESE could be different if, truly inspired by the hero Theseus, the new government has the courage and, without the help of Ariadne, kills the Minotaur, which is to say the CESE, putting an end to this extraordinary contribution once and for all.

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