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The Permanent Mission of Portugal to the United Nations Office and other International Organizations in Geneva presents its compliments to the Special Procedures Branch of the Office of the United Nations High Commissioner for Human Rights and referring to the joint allegation letter, dated 21 June 2013, of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, the Working Group on the issue of human rights and transnational corporations and other business enterprises, the Special Rapporteur on extreme poverty and human rights, the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights and the Special Rapporteur on the human right to safe drinking water and sanitation, has the honour to enclose the reply by the Portuguese Authorities.

The Permanent Mission of Portugal avails itself of this opportunity to renew to the Special Procedures Branch of the Office of the United Nations High Commissioner for Human Rights the assurances of its highest consideration.

Geneva, 26 September 2013



Special Procedures Branch
Office of the United Nations High Commissioner
for Human Rights
Geneva



**REPLY OF PORTUGAL TO THE JOINT ALLEGATION LETTER
FROM SPECIAL PROCEDURES OF THE HUMAN RIGHTS
COUNCIL ON THE PROTECTION OF THE HUMAN RIGHTS TO
WATER AND SANITATION IN THE CONTEXT OF ONGOING
PROCESSES OF PRIVATE SECTOR PARTICIPATION IN THE
PROVISION OF WATER SERVICES**

Portugal would like to thank the Special Rapporteur on adequate housing, the Special Rapporteur on extreme poverty, the Working Group on the issue of human rights and transnational corporations and other business enterprises, the Independent Expert on the effects of foreign debt and the Special Rapporteur on the human right to safe drinking water and sanitation for their joint letter on the protection of the human rights to water and sanitation in the context of ongoing processes of private sector participation in the provision of water services.

We highly value and welcome your work and we recognize your important contribution to the realization of human rights.

In line with Portugal's continuous support to the work of the Human Rights Council's Special Procedures and to the improvement of the Human Rights situation in our country, careful consideration was given to your joint letter.

The following information was provided by the Ministry of Environment, Territorial Planning and Energy, the Ministry of Solidarity, Employment and Social Security and by the Ministry of Foreign Affairs.

1. In the Portuguese legislation opening access to private sector participation in the provision of water services, how were human rights safeguarded?

In Portugal, private operators can provide water services under concession agreements which are subject to the same standards of quality of service and public service obligations as public operators are. This opening to private sector participation was closely followed by the creation of a regulatory authority (ERSAR) with the objective of ensuring adequate protection for consumers and users of water and waste services, avoiding possible abuse of exclusive rights with regard to the guarantee and quality control of the public service provided, on the one hand, and supervision and control of prices, on the other. Regulation is essential due to



the natural or legal monopoly situation of these services and constitutes a valuable tool to a human rights based approach.

ERSAR is also responsible for ensuring that there is equality and transparency in the access and operation of water and waste services and respective contractual relationships, as well as for consolidating an effective public right to general information regarding the sector and each of the operators.

The main objective of regulation is to protect the interests of consumers and the sustainability of the operators, by promoting the quality of service and guaranteeing socially acceptable pricing, materialized in the following principles: essentialness, indispensability, universality, equity, reliability and cost efficiency associated with the quality of the service.

As far as end-users rights are concerned, public or private ownership of water providers is not relevant. Regulation follows and aims to enforce that principle.

2. Which measures have been taken by the Portuguese public authorities to ensure that the principles of meaningful participation, transparency and access to information are safeguarded, when considering the decision of delegating service provision to the private sector, including in the case of Odivelas?

The right to information is guaranteed by law. Decisions to delegate water services are taken by municipal bodies and follow general rules of transparency in administrative procedures, namely the public disclosure of the minutes of the meetings. The final decision is taken on a public meeting of the deliberative body (*Assembleia Municipal*). The selection of private operators for the concession of water services follows a public procurement procedure (Decree-Law no. 18/2008, of 29 January). General administrative law guarantees the access of every citizen to administrative documents that may concern either of the aforementioned procedures (Law 46/2007, of 24 August).

The law that regulates Portuguese utilities (Law no. 23/96, of 26 July) explicitly states that user's associations are entitled to be consulted regarding the definition of utilities legal framework and other general decisions or acts between the State, Autonomous regions and/or municipalities and concessionaires. For this purpose, user's associations must be informed of the drafts or proposals in due time and be allowed a reasonable period of time to comment of at least 15 days.

This rule is not explicit about the acts that must be subject to this participatory procedure and there is no information indicating if it has been a general practice in the decision of delegating service provision to the private sector.

ERSAR also plays an important role in promoting transparency, even though on a more broader sense, when it monitors operators performance, collects, validates, processes and publicly discloses sound information delivering a global perspective of the sector and of each operator, periodically updated, namely on the *Annual Report*



on Water and Waste Services in Portugal (RASARP), among other means. The aim is to consolidate and make effective the right of the public to general and detailed information about the sector and each of the operators.

3. Has your Excellency's Government ever undertaken or is it planning to undertake a human rights impact assessment, before deciding to delegate service provision to the private sector? If yes, please provide details including whether the assessment includes the principle of equality and non-discrimination and the normative contents of the human rights to water and sanitation and the right to adequate housing.

The decision to delegate service provision to the private sector belongs to the municipalities and not to the central government. The decision must be preceded by a technical and economic assessment of the sustainability of the concession, and the expected gains from this option, namely in what concerns risk allocation and efficiency. Human rights are thus, even though indirectly, safeguarded, since quality of service (namely water and sanitation service coverage) and affordability are important criteria of such assessment. The regulatory authority (ERSAR) issues a non-binding opinion about this assessment and about the decision to open a public procurement procedure and its terms. In its analysis, human rights are a cross-cutting concern.

4. Having decided to delegate service provision and involve non-State actors, which measures have been taken to ensure transparency, non-discrimination and accountability throughout the process?

As stated above, the selection of private operators follows Portuguese public procurement general rules. EU rules concerning public procurement do not presently apply *per se* to the award of concessions but Portuguese law has extended its application to these procedures. One of the main goals of these rules is to ensure the transparency of the award procedure and the equal treatment of all candidates and tenders.

Accountability mechanisms also exist to make municipalities publicly responsible for their decisions: decision makers are required to justify any non-compliance with regulator recommendations concerning the delegation of public service (Decree-Law no. 194/2009, of 20 August); any violation of legal rules in these procedures can be subject to judicial review.

The above mentioned monitoring, gathering and disclosure of information by ERSAR also contributes to transparency and accountability of concession procedures and of private operators.

5. What guarantees has your Excellency's Government included in the contracts with the private sector to ensure that part of the profits are



invested in ensuring the quality of water, the maintenance and modernization of the system?

All concession contracts include obligations for the concessionaires concerning drinking water quality and infrastructure asset management. In order to comply with these obligations, operators have to invest in the maintenance and modernization of the systems.

ERSAR has been recommending to municipalities to include quantitative and measurable targets in the concession contracts concerning infrastructure asset management, based on the performance indicators developed to assess the quality of water and waste services in Portugal (indicators are described in Technical Guide 19 - *Guia de avaliação da qualidade dos serviços de águas e resíduos prestados aos utilizadores - 2.ª geração do sistema de avaliação*, and the results of the assessment are presented in the *Annual Report on Water and Waste Services in Portugal*, vol 3).

6. Under its international obligation to protect the right to water, which requires States to prevent third parties from interfering in any way with the enjoyment of the right, what structures, systems or mechanisms has your Excellency's Government's put in place to monitor compliance of non-State service providers in relation to human rights standards?

Concession contracts include the obligation for the operator to periodically report to the municipality on the execution of the contract and set penalties for breaches in the contract (such as interruptions of service longer than a given time limit established in the contract).

In the field of the regulation of operators' behaviour, ERSAR monitors the compliance of operators and other stakeholders with the applicable law and contracts, during all the services' life cycle (besides analysing the procurement procedures to transfer the service to private operators, as referred above, it also examines modifications and terminations of contracts, reconfiguration and fusions of systems, or intervenes when necessary in the conciliation of parties). It also promotes the regulation of prices (to secure efficient and socially acceptable prices without harming the financial sustainability of the operators) and the assessment of the quality of the service rendered by the operators using performance indicators targeted at efficiency improvements. At the same time ERSAR is the national authority for drinking water quality, evaluating the quality of the water supplied to end-users, comparing it with other operators and following up on non-compliance in real time, thus promoting greater quality of water (results of the assessment are presented in the *Annual Report on Water and Waste Services in Portugal*, vol. 4). Finally, ERSAR examines end-users' complaints and promotes reconciliation between end-users and operators.

Consumer claims can be reviewed by normal courts, special non-judicial courts (*Julgados de Paz*) or consumer arbitration centres. These last two options allow for more simple, informal, prompt and less expensive review procedures.



7. What measures have been taken to ensure that water services, whether privately or publicly provided, are affordable for everyone? In cases where, as a result of private sector participation in the provision of services, the prices of water suffered a substantial increase, what measures have been taken by your Excellency's Government's to address this situation, in particular in relation to people living in poverty?

According to Law 58/2005, of 29 December (transposition of the Water Framework Directive) and the Strategic Plan for Water Supply and Wastewater Services, water services prices should balance the social and the economic value of water. This requires the promotion of universal access to water for human consumption, with a socially acceptable price that is not a factor of discrimination or exclusion. The current or potential scarcity of the resource is also considered since it requires an economically efficient use of water, based on the polluter-pays and users-pays principles.

The competence to approve tariffs of municipal services belongs to the municipalities. In case of concessions contracts celebrated with private operators, the tariffs and its revisions formula are defined in the contract as a result of the tender procedure. Due to the small scale of the operators, there are ultimately more than 300 decision makers regarding tariffs.

Today there is no binding regulation in Portugal setting an uniform tariff structure or maximum values for water and sanitation tariffs (even though this is likely to change in the near future).

This has resulted in a very diverse reality in each municipality, concerning both affordability and cost-recovery.

In 2009 and 2010, ERSAR issued two recommendations focusing on the design of water and waste tariffs and on the definition of reference values, aiming to harmonize tariff structures and provide reasonable, clear and affordable prices. Affordability can be achieved through mechanisms such as:

- The use of a two part increasing block tariff, with a fixed monthly tariff (to cover availability expenses) and a first block tariff for domestic users at an affordable price to everyone, independently of the users income, and a growing price for the following blocks. The first block price should be lower than the volumetric charge applicable to other users and cover a sufficient amount of water for basic domestic uses. The growing prices for the following blocks subsidise the first and promote efficient use of water resources.
- A social water and waste services tariff for low income households. These households are defined as those whose annual income (for tax purposes) does not exceed a given value established by the operator, which shall not exceed a value representing twice the national minimum income.

This will be achieved by the exemption to pay the fixed tariff charge and by applying (in an increasing block tariff structure) the first block tariff (designed for the first 5 cubic meters) up to the 15th cubic meter.



- A family water and waste services tariff for larger households. In an increasing block tariff structure large households are penalized when compared with ordinary households. Therefore, in order to ensure equitable water pricing, the characteristics of the households have to be taken into account. ERSAR recommendation advocates an extension of tariff blocks depending on the number of members of the household.

- The elimination of subscription charges and the gradual reduction of the set-up costs for connection to water supply and wastewater services networks, whenever the network is within the range of availability (20 meters), in order to promote access by users that are not yet served (since such charges might constitute an economic barrier to the service).

The loss of revenues from these charges should be accompanied by an increase in general monthly tariffs, implementing solidarity between users in order to ensure a broader service coverage: all users pay a little bit more each month in order to finance the connection costs of those who are not served yet. This measure should be implemented gradually in a five year time frame in order to prevent sudden increases in monthly tariffs. ERSAR recommendation assumes a gradual reduction of 20% each year in relation to the first year of application in order to ensure its abolishment in a five year period.

Both social and family tariffs are applicable as long as users meet the respective criteria, depending therefore of a periodic request.

Based on an evaluation of tariff structures applied to domestic end-users in 278 Portuguese municipalities, in 2012, the Portuguese operators' average level of compliance of tariff structure is satisfactory: 70% in drinking water supply services and 68% in urban wastewater services. 2014 should be the final year of the adaptation period, but urban wastewater services show a significant delay: 15% of the operators still don't comply with at least some of the aspects of the recommendation.

According to another recent study made by ERSAR, nearly one half of the water service operators had some kind of social support to certain groups of end-users in 2011, and the majority of these had household income as main eligibility criterion, among others. The number of beneficiaries of social tariffs is estimated to be around 45.000 and the per capita subsidy is estimated to be around 62€/year, or a total of 2.8 million EUR. However, this is not the only source of subsidization.

Affordability is also an indicator used by ERSAR as part of its benchmarking evaluation of water and waste operators as of 2012. In order to have a good quality of service, charges for each service (drinking water supply and urban wastewater) must be under 0.5% of the average available income. ERSAR considers that there is a poor quality of service on this indicator if service charges represent more than 1% of the average available income. Between these values, quality of service is considered regular. The results of the first assessment using this indicators show that charges to consumers with water and sanitation services represent, on



average, less than 0.7% of the annual disposable income (consumption of 120 m³/year). This means that, on average, affordability is not a problem in Portugal.

In order to eliminate another financial barrier to access water services, the law has prohibited operators to demand a deposit (as a guarantee for payment) to domestic users in the moment when the service is requested.

It is important to note that changes in water prices following the delegation of services to private operators may also be explained by the fact that, prior to such delegation, the municipality (public provider) was not recovering the costs of such services through tariffs (due to an insufficient knowledge of those costs or to a deliberate subsidization policy), but requires the private operator to do so.

8. Please provide details on the specific changes in personal or household financial costs associated with changes in the water and sanitation service provision to the private sector, as a proportion of the costs associated with housing and other basic costs. If available, please provide disaggregated information on the impact in the cost of living of these changes.

ERSAR has been monitoring tariffs of drinking water supply services and urban wastewater management services since 2007 and evaluates end-users tariff charges with these services to a reference monthly consumption of 10m³ of drinking water in all municipalities of continental Portugal. These, in turn, are compared with the average monthly disposable income of households in each municipality to produce an affordability indicator. The table presents tariff charges and the affordability indicator for the five cases of delegation of public service to private operators between 2008 and 2011.

Public operator	Household charges (consumption of 120 m ³ /year)	Affordability (%)	Private operator	Household charges (consumption of 120 m ³ /year)	Affordability (%)
2007			2011		
CM Elvas	136,00 €	0,41	AquaElvas	152,04 €	0,53
CM Vila do Conde	170,40 €	0,54	Indaqua Vila do Conde	256,32 €	0,76
CM Azambuja	192,00 €	0,60	Águas da Azambuja	215,04 €	0,62
CM Cartaxo	112,08 €	0,32	Cartágua	213,36 €	0,81



CM Fundão	187,13 €	0,72		Aquafundalia	226,08 €	1,07	
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The figures show that there was an increase of household charges with water services in this timeframe. However, the service remains mostly affordable with the delegation of public service to private operators.

It is also important to note that in 2007, public operators Câmara Municipal (Municipality) de Elvas and Câmara Municipal de Vila do Conde did not have a tariff for urban wastewater management services and Câmara Municipal do Cartaxo only had a monthly fixed tariff of 0.5 € for this service. These situations have since then been corrected (with the delegation of the service), following the recommendations of ERSAR, with no specific problem of affordability as shown. There are examples of the aforementioned evolution from a casual and admittedly unsustainable pricing to a rationally founded pricing, consistent with good practices.

More important than the adopted management model, it is essential that prices are efficient, sustainable and affordable, ensuring an adequate quality of the service. The regulator of water services must safeguard this balance by monitoring the concession contracts and the compliance of the operators with their contractual obligations, as well as the economic and financial sustainability of services.

There is no available data for comparing water services charges with the costs associated with housing and other basic costs.

9. Please provide information on specific steps taken by your Excellency's Government to ensure that the costs required ensuring access to water and sanitation is commensurate with a reduction in income levels and increase in poverty levels.

Measures that specifically concern end-users include, as stated before, the existence of social tariffs as recommended by ERSAR. Operators have been progressively adopting these recommendations. ERSAR has also been assessing affordability in water and waste services tariffs since 2007.

On the other hand, there are measures that specifically regard the operators of water services. For example, tenders for applications to public subsidies have some criteria for evaluation which include the expected increase in efficiency, the additional population served, the environmental outcomes, impact on the expected tariff in terms of affordability, among others.

The Portuguese Government established the use of affordability indicators to allocate subsidies to infrastructure investments by the National Strategic Reference Framework (*Quadro de Referência Estratégico Nacional*, QREN). This indicator measures the weight of the annual water bill for a typical family (120 m³/year) on the average annual disposable income of families in the respective region.



The Strategic Plan for Water Supply and Wastewater Services upholds the regional aggregation of water services to enable scale economies and the cross-subsidization between areas with lower costs to areas with higher costs. This is especially true for bulk services, although there is a growing trend for aggregation in retail services.

In addition, Social Security Services may pay water debts of families or individuals who are in difficult economic situations, during a specific period of time. Individuals or families in situations of proven economic need - per capita income lower than the social pension, updated annually - are entitled to such benefits.

This kind of grants/benefits aim at paying expenses that cannot be postponed, such as provision of basic services as water and sanitation.

This cash benefits may be granted by means of:

- One-off payment when a temporary economic need is identified;
- Monthly allowances for a maximum of 6 months, when the economic need or the integration path of individuals/families justify it.

Prior to granting this type of benefits, it is mandatory that the social security services collect the necessary information to complete a social diagnosis and the study of the economic situation of the individual/family.

There is a common reference, which is taken into account when social security services grant any kind of benefit or subsidy, to promote the access of families or individuals in need to services and goods. The common reference establishes that the following conditions must be observed:

- Lack of other adequate means and/or resources within the social security system to the situation identified;
- Evidence of identity of the individual/family;
- Evidence of residence of the individual/family in the geographical area covered by the local service of social security;
- Availability of the individual/family to subscribe the social integration plan.

Contingent allowances may be combined with other measures of support to the household

10. Please provide information on the existence of remedies to challenge these measures and policies including in relation to threats to the enjoyment of the right to adequate housing due to increases in the cost of water and sanitation services, such as inability to pay rent, evictions, displacement and homelessness, due to increases in the costs of water and sanitation services. Personal or household financial costs



associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised.

As mentioned above, the affordability indicator shows there is no relevant macro affordability problem (tariffs are affordable to the average household income, for each municipality), but does not allow an analysis focused on the most economically vulnerable households.

In the framework of a pilot project to assess equitable access to water and sanitation, promoted by the UNECE and the WHO-EURO Protocol on Water and Health, ERSAR collected data from the Institute of Social Security according to which there is no national policy regarding preventive or curative social protection measures.

However, as it was answered in question 9, in the framework of the Portuguese social protection system, Social Security Services may pay water debts of families or individuals who are in difficult economic situations, during a specific period of time. Individuals or families in situations of proven economic need - per capita income lower than the social pension, updated annually - are entitled to such benefits.

This cash benefits may be granted by means of:

- One-off payment when a temporary economic need is identified;
- Monthly allowances for a maximum of 6 months, when the economic need or the integration path of individuals/families justifies it.

Technical intervention by the social security services is mandatory prior to granting these benefits, to collect the necessary information to complete a social diagnosis and the study of the economic situation of the individual/family. These measures are not included in the national strategy for the water sector.

11. What has led so many end users to rescind from their contracts? Were these rescissions caused by a lack of means to pay? If so, which measures is your Excellency's Government's taking to ensure that these people will continue to have access to water and sanitation?

As of 2011, ERSAR included in the quality of service assessment an indicator to evaluate the connection to the service (number of households connected to water networks within households with access to the service). The results show that only 86.6% of households in Portugal with access to retail drinking water supply services and 87% of households in Portugal with access to retail wastewater management services are connected to these networks. These figures are considered unsatisfactory service quality according to the standards set by ERSAR (a good quality of service would be above 95%). There is no data for previous years.

The alternative to the connection to water and wastewater networks is, mostly in peri-urban or rural areas, the use of boreholes and septic tanks. Even though the law does not allow the use of such alternative solutions whenever public networks



are available, they are significantly less expensive and therefore adopted by users, even when they are not under an extreme economic need.

12. What is your Excellency's Government's position on the disconnection of water services for lack of payment?

According to the law regulating utilities in Portugal, water services can be disconnected in case of lack of payment, but operators must inform the users 20 days in advance, having the possibility to avoid interruption by paying their debt before the date set for disconnection.

The burden of proof regarding the respect of due process belongs to the operator. Even though the law does not require a specific notification procedure, ERSAR recommends that the prior notice of disconnection is sent by registered mail or any other way that allows a written register of expedition.

13. Has your Excellency's Government received a letter from the European Commission instructing the imposition of water privatization as a condition for a "rescue" package? If so, please provide detailed information on this conditionality because it is concerning if privatization policies are pushed by loans' conditionalities instead of a democratic decision-making process.

The strategy for the restructuring of Águas de Portugal (AdP) water and waste sectors, has been discussed during recent Memorandum of Understanding reviews (Portugal's rescue programme) and is being implemented after revising its legal framework. Regarding AdP's water branch, it will be further restructured along 2014 to eventually consider the launch of private sub-concessions to private management and capital, at a later stage. The restructuring of AdP water business activity envisages to raise efficiency by merging 19 bulk operator companies into just 4, that should progressively, and along the next years, integrate retail activities.

14. What steps has your Excellency's Government taken to implement the UN Guiding Principles on Business and Human Rights?

In June 2012, Portugal created a Working Group on Business and Human Rights, within the framework of the Portuguese National Human Rights Committee (PNHRC). The mandate of the Working Group is to evaluate the best way to implement the obligation emerging to EU Member States from Action 25 c) of the EU Plan of Action on Human Rights and Democracy.

The Working Group is led by the Ministry of Economy and includes representatives from the following Ministries and State Departments: Foreign Affairs, National Defence, Home Affairs, Justice, Environment and Territorial Planning, Health, Education and Science, Solidarity, Employment and Social Security, Culture, Media, Citizenship and Gender Equality, Immigration, Youth and Sports. The Portuguese Ombudsman, the National Human Rights Institution, also participates in the work of



this

Group.

This Working Group created a draft document that compiles all the existing or planned measures (legislative, policies or others) at the national level, that can be considered as already implementing the UN Guiding Principles on Business and Human Rights. The final version of this document shall be approved during the next meeting of the PNHRC, later this year, and forwarded to the EU and to the UN by the end of 2013."