
MEMORANDUM

TO: CARRIE DAVIES (ACIS – ASSOCIAÇÃO DE COMÉRCIO E INDÚSTRIA)
FROM: JOSÉ MANUEL CALDEIRA, ASSMA NORDINE AND VANESSA CHIPONDE
RE: ANALYSIS AND LEGAL FRAMEWORK WITH RESPECT TO THE PERFORMANCE OF THE NATIONAL INSPECTORATE FOR ECONOMIC ACTIVITIES (INAE).
DATE: 22 APRIL 2013

This memorandum has been prepared following your request for legal assistance, received by e-mail on 26 February 2013, regarding an analysis and background of the performance of the National Inspectorate for Economic Activities (“INAE”), with special attention to the legality of the current inspections in the absence of an order to integrate the inspectors of the various ministries into the permanent staff of the INAE.

The following legislation was used for the preparation of his memorandum:

- Constitution of the Republic of Mozambique (hereafter the “CRM”);
- Law 7/2012 of 8 February, which approves the Basic Law on Public Administration Organization and Functioning (hereafter “Law 7/2012”);
- Law 14/2011 of 10 August, which regulates the formation of the will of public administration, establishes the standards of the defence of individual rights and interests (hereafter “Law 14/2011”);
- Law 26/2009 of 29 September, which approves the regime for the organization, functioning and procedures of the 3rd Section of the Administrative Court (hereafter “Law 26/2009”);
- Law 14/2009 of 17 March, which approves the General Status of Public Servants and Agents (hereafter “EGFAE”);
- Law 8/2003 of 19 May, which sets out the principles and organization standards, competences and functioning of the local State bodies at provincial, district, administrative post and locality level, with the changes introduced by Law 11/2012 of 8 February (hereafter “Law 8/2003”);
- Law 9/2001 of 7 July, which governs the Contentious Administrative Procedure (hereafter “Law 9/2001”);
- Decree 46/2006 of 19 August, which creates the National Inspectorate for Economic Activities – INAE (hereafter “Decree 46/2009”);
- Decree 62/2009 of 8 September, which approves the Regulations of Law 14/2009 of 17 March, which approves the General Status of Public Servants and Agents, with the changes introduced by Decree 24/2011 of 12 August, hereafter “EGFAE Regulations”);

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- Decree 30/2001 of 15 October, with the changes introduced by Law 16/2012 of 14 August, which approves the Operating Standards of the Public Administration Departments (hereafter “Decree 30/2001”);
- Ministerial Diploma 19/2013 of 30 January, which approves the Rules of Procedure of the INAE (hereafter “Rules of Procedure of the INAE”);
- Ministerial Diploma 292/2012 of 7 November, which Creates the Provincial Offices of the INAE (hereafter, “DM 292/2012”);
- Resolution 9/2011 of 2 June, which approves the Statutes of the INAE (hereafter “Statutes of the INAE”);
- Order of the Prime Minister, dated 28 January 2012, which appoints José Rodolfo for the post of Inspector General of the INAE;

We also had a clarification meeting with INAE representatives and technicians, on 26 March of the current year.

The remaining part of this memorandum will be structured as follows:

- Section 1: Background;
- Section 2: Organization and functioning of the INAE;
- Section 3: Clarifications obtained from the INAE;
- Section 4: Legal Analysis;
- Section 5: Final Comments.

1. BACKGROUND

The INAE is a national public institution, with legal personality and administrative autonomy, created by Decree 46/2009 of 19 August. Its objective is “to carry out sectoral inspections in a single act and consequently contribute to the improvement of the business environment in the country.”¹ The INAE is supervised by the Minister of Industry and Trade.²

According to article 4 of Decree 46/2009, the duties of the INAE are, among others, to supervise and inspect any activity in the commercial, industrial, service and tourism sectors, as well as environmental issues, related to hunting, energy and electricity, transport, mining activities and fisheries. Thus, the competences of the INAE are the supervision and inspection of the activities of the following Ministries:

- (i) Ministry of Industry and Trade;
- (ii) Ministry of Tourism;
- (iii) Ministry of Health;
- (iv) Ministry for the Coordination of Environmental Affairs;
- (v) Ministry of Energy;
- (vi) Ministries of Transport and Communications;
- (vii) Ministry of Education and Culture;

¹ First paragraph of the Basis of the Rules of Procedure of the INAE.

² Statutes of the INAE, Article 2, Paragraph 1.

- (viii) Ministry of Natural Resources; and,
- (ix) Ministry of Youth and Sports.

Decree 46/2009 laid down two relevant aspects to accomplish the competences of the INAE with respect to the inspection activities previously performed directly by each one of the Ministries listed above, namely:

- a) The inspection competences set forth in the Statutes of the inspectorate of the Ministries covered by the competences of the INAE were explicitly annulled³; and,
- b) The need to integrate the employees currently assigned to the previous inspection activities of said Ministries into the INAE was determined. This should be done through a joint order of the Minister of Industry and Trade and the Ministers of origin of the employees in question, as well as the integration of the material resources assigned to these Ministries into the INAE for the continuation of their previous inspection competences. This should be done through a joint order of the Minister of Industry and Trade and the Minister of Finance.⁴

It is observed that at this moment the inspection activities on the part of the INAE are already ongoing. However, we have no information to date about the publication of the joint orders so as to implement the integration of the employees and the material resources into the INAE, as referred to above. This aspect is dealt with in greater detail in the following sections.

2. ORGANIZATION AND FUNCTIONING OF THE INAE

The Rules of Procedure of the INAE determine that this institution comprises a general directorate, operations directorates, autonomous departments and provincial offices.⁵

The INAE is headed by an Inspector General, who is assisted by a deputy Inspector General, both appointed by the Prime Minister, upon proposal of the Minister of Industry and Trade.⁶ Thus, the Prime Minister appointed José Rodolfo for the post of Inspector General of the INAE, through an Order dated 28 January 2012.

At provincial level there are eleven Provincial Offices, which were created by Ministerial Diploma 292/2012 of 7 November, and are led by heads appointed by the Minister of Industry and Trade.⁷

The Rules of Procedure of the INAE determine that the National Directors that lead each one of the specialized directorates of the INAE, as well as the heads of department,

³ Decree 46/2009, Article 7.

⁴ Decree 46/2009, Article 5, paragraphs 1 and 2

⁵ Rules of Procedure of the INAE, Article 10.

⁶ Rules of Procedure of the INAE, article 13, paragraph 1 and Decree 46/2009, Article 9.

⁷ Cfr. O País, *Nomeados Provincial Heads da INAE*, 22 de Março de 2012, available at <http://www.opais.co.mz/index.php/economia/38-economia/19541-nomeados-delegados-provinciais-da-inae.html>.

will be appointed by the Minister of Industry and Trade, after consulting the Inspector General. The heads of the sub-departments will be appointed by the Inspector General.

Regarding the workforce of the INAE, the Statutes of the INAE established that the Minister of Industry and Trade should submit the staffing plan for approval by the competent body by the beginning of September 2011 (90 days from the publication date of the Statutes of the INAE⁸). According to information provided by the INAE, the staffing plan is currently in the process of being approved (see Section 3 below).

At this moment the INAE does not have approved specific (and uniform) rules regarding the procedures for the respective inspection activities. Thus, it is understood that the INAE will follow the inspection procedures under the legally established terms in sectoral legislation, in accordance with the sector being inspected.

3. CLARIFICATIONS OBTAINED FROM THE INAE

In order to allow a better understanding about the current functioning and performance of the INAE, we have sought to obtain clarifications from INAE heads and technicians. In short, the following points resulting from an informal conversation should be retained⁹:

- a) The INAE is an institution formally created by a competent body and all inspectors who act on its behalf are State employees, having only been assigned to the inspection area. Thus, their acts are valid, because they are performed on behalf of the INAE.
- b) The inspectors who act on behalf of the INAE are only responsible for the supervision and the issuance of a notification. These acts are subsequently ratified by the Provincial Head or the Inspector General, as these have already been duly appointed by the Minister of Industry and Trade and installed by the Governor of the respective provinces.
- c) The inspectors who are currently acting on behalf of the INAE are not yet employees of this institution, they only work in the INAE, while their salaries are still being processed and paid by the respective Ministries of origin. At this moment, the approval of the staffing plan of the INAE (which is already in the process of being approved) is being awaited in order to integrate the inspectors into this institution, in order to safeguard the rights acquired by them in the course of the years of service in their Ministries of origin.
- d) Although there has been no formal integration of the inspectors into the INAE, in practical terms an integration was performed at local level, so that the inspectors can carry out inspections on behalf of the INAE. This integration was done by the Provincial Heads, without intervention of the central bodies, in accordance with Law 8/2003 of 19 May.

⁸ Statutes of the INAE, Article 22.

⁹ Informal means that there were no written statements, only verbal clarifications during a meeting that had been requested for this purpose.

- e) The orders for the appointment of the Provincial Heads of the INAE have already been issued, while only the authorisation of the Administrative Court was being awaited in order to proceed to their publication.
- f) The INAE has been using the inspection procedures previously approved for each sector covered, since these remain in force while only the competence has changed. The approval of its own standards is not foreseen, only the updating of the various procedures in force.

4. LEGAL ANALYSIS

4.1. DUTIES AND COMPETENCES

Any body, agent or office holder of a Public Administration body, when acting, is faced with a double limitation: on the one hand, he or she is limited by his or her own area of competence, and cannot invade the sphere of competence of other bodies of the same legal person to which he or she belongs and, on the other hand, is limited by the duties of the legal person on whose behalf he or she acts, and cannot perform any acts regarding issues outside the duties of the legal person to whom he or she belongs.¹⁰

The competences and duties can only be conferred, restricted or withdrawn by law. This is the principle of legality, according to which it is always the law that fixes the powers of the Public Administration bodies¹¹. This principle has the following consequences:

- a) *The duties and competences are not presumed*: there are only duties and competences conferred on a given body by law;
- b) *The duties and competences are unchangeable*: neither the Public Administration nor individuals can change the contents of the duties or competences established by law.
- c) *The duties and competences cannot be waived and are inalienable*: the administrative bodies cannot perform acts through which they surrender their powers or transmit them to other Public Administration bodies or private entities. However, this rule does not impede the delegation of powers, in cases and within the limits established by law.¹²

4.1.1. Duties

The Basic Law on Public Administration Organization and Functioning, approved by Law 7/2012 of 8 February, defines duty as “*the purpose or purposes of the legal person*”. The duties are, thus, the purposes and interests that the law imposes on the legal persons to follow. In order to do that, the public legal persons need powers, the so-called functional powers. The set of functional powers is called competence.¹³

¹⁰ Diogo Freitas Do Amaral, *Curso do Direito Administrativo*, Volume I, 2ª Edição, Coimbra, 2000, Page 604 - 605.

¹¹ Law 7/2012, Article 19 and Law 14/2011, Article 4.

¹² Diogo Freitas Do Amaral, *Op. Cit.*, Page 608.

¹³ *Idem*, Page 604.

As mentioned above, the duties of the INAE are established in article 4 of Decree 46/2009 and comprise the supervision and inspection of any activity in the commercial, industrial, service and tourism sectors, as well as environmental issues, related to hunting, energy and electricity, transport, mining activities and fisheries.

In general, the acts performed outside the duties are null and void¹⁴ (absolute incompetence). Among others, the law considers those acts fundamentally null and void when they are outside the duties of the legal persons considered as State bodies under this Law.¹⁵

Invalidity can be invoked at any time by any interested party, and can be declared at any time by any court or administrative body. It should be noted that under Law 14/2011, article 130, paragraph 1, a null and void act does not produce any legal effect, irrespective of the declaration of invalidity and, under article 133, paragraph 1, of the same law, null and void or legally non-existent acts are not subject to ratification, amendment or transference.

4.1.2. Competences

Law 7/2012 defines competences as “*the set of powers conferred to bodies, employees or agents of a legal person.*” In other words, competences are functional powers that the law confers on bodies, employees or agents, in pursuit of the duties of a legal person, as mentioned above.

Paragraph 2 of article 21 of Decree 30/2001 stipulates that Public Administration employees and agents have the power to perform administrative acts related to the functions and duties of the body to which they are assigned, as well as to execute the higher-level directives and instructions and perform the duties conferred to them by delegation.

The acts performed outside the competence of the body performing them can be annulled (relative incompetence). Article 131 of Law 14/2011 determines that administrative acts performed offending the applicable legal principles or standards can be annulled, without other sanctions.

As stipulated by article 132 of Law 14/2001, administrative acts that can be annulled are open to appeal to the Administrative Court, under the terms established by law. However, the possibility of annulment should be defended within 90 (ninety) days, from the date at which the act starts to produce effects¹⁶. It should be noted that in cases of an intentional act, as happens in the case of an inspection, the term for defending the possibility of annulment starts from the date of the actual notification.

We also observe that, unlike what happens in the case of null and void acts, acts that can be annulled are subject to ratification, amendment or transference, while in cases of

¹⁴ Idem, Page 606.

¹⁵ Law 14/2011, article 129, paragraph 2, clause c)

¹⁶ Conjugation of Law 14/2011, article 132, paragraph 1, and article 137, with Law 9/2001, article 30, paragraph 2.

incompetence, the power of ratification belongs to the body that is competent for its performance.¹⁷ Furthermore, acts that can be annulled can be settled simply by the passage of the legally fixed time for contesting them.

4.2. ACTUAL PERFORMANCE OF THE INAE

An analysis of the relevant legislation results in the following main findings:

- a) The INAE is a national public institution, with legal personality and administrative autonomy, with legal powers to carry out inspections of any activity in the commercial, industrial, service and tourism sectors, as well as environmental issues, related to hunting, energy and electricity, transport, mining activities and fisheries.
- b) The previous inspection competences of the Ministries whose sectors of activity are covered by the performance of the INAE have legally been revoked. Thus, the INAE has the necessary duties and competences for the inspection activities it is performing.
- c) A different issue is linked to the validity of the acts performed by the inspectors of the Ministries concerned, in the absence of an order to integrate them in the permanent staff of the INAE. The doctrine distinguishes between agents *by law* (those who have been regularly appointed) and agents *de facto* (those who are accepted publicly and peacefully as administrative agents and perform functions of public interest, but were irregularly invested with their functions). From the above, we understand that at this moment the inspectors referred to are agents *de facto*, also called putative agents, whose legal situation, towards the public, can in general be accepted that the respective acts, if performed in conformity with the law, are valid, for two fundamental reasons: (i) safety, because people in general trust that the public services function normally and they cannot always demand proof of the capacity of the employee or agent and the regularity of his investiture; and (ii) legal logic, according to which the will of the agent *de facto* is not his will, but a normative will, so that if the act is not invalid for other reasons, it cannot be so because of the irregularity of the agent's investiture. However, this does not mean that the approval of the joint order of the Minister of Industry and Trade and the Ministers of their respective origin is not necessary and important, especially because the inspectors cannot carry out the inspections also on behalf of the Ministries to which they are currently assigned, because, as already referred to, those duties of said Ministries were explicitly revoked.
- d) The other issue that arises is about the appointment of the Provincial Heads, who already took office and are performing their functions. Up to this date we have no information about the publication of the orders concerning these appointments. According to the clarifications obtained from the INAE, said orders have been submitted to the Administrative Court for the purpose of obtaining their approval, in conformity with the provisions of Law 26/2009 of 29 September. We should take into consideration that, with respect to the appointment of a Government official,

¹⁷ Law 14/2011, article 133.

the law in general stipulates that the appointment can only produce effects after having obtained approval from the Administrative Court and having been published in the *Boletim da República*¹⁸. The law considers a few exceptions in which the appointment can become effective at a date prior to the approval, among which the possibility that State employees with a definitive appointment¹⁹ may perform certain functions temporarily in a special regime, including service leave, secondment, replacement and accumulation of functions.²⁰

- e) In the cases of special regimes indicated in the previous paragraph, the EGFE, its respective Regulations and Law 26/2009 stipulate that the member of Government or competent entity must submit a written statement to the Administrative Court that the case is of urgent convenience of service. The appointment processes should be sent to the Court within 30 days from the date of the authorization, under penalty of cessation of the respective effects, save serious grounds that the Court may assess.²¹
- f) Considering that the appointments in reference have not yet been published in the *Boletim da República*, as stipulated by the EGFAE Regulations, Article 21, paragraph 3, it is not possible to confirm if any special regime has been asserted to justify the effectiveness of these appointments before the approval of the Administrative Court.²² In case no special regime has been used, the law stipulates that the acts circumventing prior supervision are not executable.²³

5. FINAL COMMENTS

The discussion we presented in this memorandum arises from the existing uncertainty with respect to the performance of the INAE, taking into consideration the above treated aspects. In order to remove the issues that are raised and in favour of the principles of legality and transparency in the performance of Public Administration, it is fundamental that the integration orders determined by Decree 46/2009 are approved. Nevertheless and while this does not happen, we understand that the INAE should endeavour to carry out inspections only with the staff already attached to its workforce of technicians and inspectors.

It is important to note that the usefulness and need to maintain the continuity of public service at all times, determine that special and/or exceptional situations may occur, within the legal limits and procedures defined for this purpose. Thus, Article 15 of Law 7/2012 stipulates that the “continuity of public service” is a principle of the performance

¹⁸ EGAFE, article 9, paragraph 1, and article 13, paragraph 2. One should take into account that the appointment may exceptionally produce effects from the date of the act of appointment, in cases duly established in special legislation – EGAFE, article 13, paragraph 3.

¹⁹ Having elapsed two years after the temporary appointment, under the EGFAE, article 13, paragraph 5.

²⁰ EGAFE, article 20 and following articles and Regulations for the EGAFE, article 21 and following articles

²¹ Law 26/2009, article 73.

²² It is noted that in cases in which the decision about the granting or refusal of the approval has not been taken within 45 days after their request, the act in question is considered approved, in conformity with Law 26/2009, article 74.

²³ Law 26/2009, article 78.

of Public Administration, according to which *“The organization of Public Administration should guarantee, through its bodies, employees and other agents, that public service is not interrupted because of the unavailability of who has the legal duty to provide it.”* In addition, Article 22 of the EGFAE stipulates, in the scope of the general activity and inactivity regimes, the “staff mobility” rule, according to which *“By decision of the President of the Republic, the Prime-Minister, an agreement between central and local body heads or by decision of the entity supervising the public service area, employees may be transferred within the State apparatus, without prejudice to acquired rights.”*

Finally, we also consider it relevant to mention that the economic agents should also act in conformity with the law and in collaboration with the competent public authorities. Any supposedly illegal acts of public agents or employees should be judged on a case by case basis, in accordance with and within the legally fixed terms to this effect, under penalty of the economic agent being subject to legal sanctions stipulated for cases of hindrances to the performance of Public Administration.

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This memorandum aimed at responding to the request presented by ACIS about the performance of the National Inspectorate for Economic Activities (INAE), and especially regarding a legal analysis of the acts performed by the inspectors who are not yet integrated into the workforce of the INAE. The memorandum does not deal with other topics in addition to those that were explicitly treated here and is given solely for the benefit of and in connection with the request from ACIS. This memorandum cannot be referred to by any other person or entity and can neither be used for any other purpose, including, among others, its application to any specific cases. This memorandum reflects our judgement about said subject-matter at this date, and we do not assume responsibility for updating or complementing it after this date. We expect that it will be useful to you. For any doubt arising from this memorandum or any additions you may need, please, feel free to contact us.

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