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PROJECTS AND ENERGY

Coronavirus: Impacts on energy licensing and the energy market

A global public health emergency was declared by the World Health Organization on 30 January 2020 as a result of the spread of the new virus COVID-19. The virus was later classified as a pandemic on 11 March 2020. As a result, it is important guard against any negative impact of the events relating to COVID-19 on ongoing energy licensing processes and on the energy market as a whole, particularly in the light of Decree-Law 172/2006 of 23 August (“DL 172/2006”).

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In response to the current situation resulting from the spread of the new virus COVID 19 in Portugal, on 12 March, the Portuguese Council of Ministers adopted a set of extraordinary measures, provided for in Decree-Law 10-A/2020 of 13 March ("DL 10-A/2020"). To date, there is no new legislation specifically addressing the area of energy law and the possible impacts of events relating to COVID-19.

1. Impacts on ongoing energy licensing processes

A state of alert was declared by the Minister of Internal Administration and the Minister of Health on 13 March. With this declaration and the set of measures adopted, we now need to look at the possible impact of this situation on ongoing energy licensing processes. This includes processes to obtain production and operation licences under DL 172/2006. We would highlight, in particular:

- Deadlines in Environmental Incidence Assessment and Environmental Impact Assessment procedures under articles 10-A et seq. of DL 172/2006 or Decree-Law 151-B/2013 of 31 October;
- Deadlines for the licensing body (the DGEG) to decide on production licence applications; and,

- The deadline for the production licence holder to begin to operate an electricity generating plant.

Specifically in relation to the deadlines for tacit approval and licensing, article 17 of DL 10-A/2020 provides that (i) the deadlines that give rise to tacit approval by the administration of permits and licences requested by individuals are suspended, and (ii) the deadlines that give rise to tacit approval by the administration of permits and licences in the context of the environmental impact assessment, even if not requested by individuals, are also suspended. The scope of application of this rule will have to be examined on a case-by-case basis to determine whether the expiry of the period will amount to tacit approval, because the above suspension will only occur in this case.

In addition, regarding the deadline to begin operation of an electricity generating plant, article 15(4) of DL 172/2006 has already made it clear that the period to start operation begins to run from the date the licence is granted and it may not exceed: (a) for electricity generating plants under the special rules, two years or, in the case of hydroelectric plants, six years – these periods may be extended by the licensor for half of the period originally set; and (b) for electricity generating plants under the ordinary rules, three years – this period may be extended for successive periods of one year up to a maximum of three years.

In this context, article 15(5) and (6) of DL 172/2006 provides for exceptional possibilities to extend the period to begin operating an electricity generating plant. These exceptional possibilities could end up being applied in the current situation:

- On the one hand, in exceptional circumstances, these deadlines may be extended by order of the member of the government responsible for energy. To date, this has not happened, but it might do at some point in the future;

- o On the other hand, the above deadlines to begin the operation of electricity generating plants may also – in exceptional circumstances and at the request of the production license holder – be extended by order of the member of the government responsible for energy. This only happens at the initiative of the licence holder and it must justify the exceptional circumstances (that is, the existence of a pandemic) and the extent to which this situation has impacted the its ability to meet the deadline to begin operation.

In the same context, and in addition to the above legal tools, the DGEG has published Order 27/2020 of 20 March 2020. This Order approves a package of exceptional and temporary measures applicable to electricity sector licensing and it was issued in response to the COVID-19 crisis.

The Order decreed the suspension of procedural deadlines governed by the electricity sector legislation and by the Code of Administrative Procedure. This includes deadlines for the acts and formalities laid down in the documents of the competitive procedures governed by the legislation for the sector. This suspension begins on 16 March, the date on which the premises of the DGEG closed to the public.

The suspension ends with a declaration by the DGEG announcing the reopening of its premises, or when the end of the exceptional situation is formally declared.

Any procedural periods that end during the suspension will be extended for a period corresponding to the number of working days between the beginning of the suspension and the deadline in question, beginning on the first working day following the reopening of the DGEG.

Additionally, the new Order has determined the suspension, until the end of April 2020, of the filing of any new applications concerning (i) capacity reservation permits, (ii) agreements to allocate reception capacity in the RESP, (iii) UPP or UPAC registrations, (iv) licences for electrical energy production under the PRO, cogeneration and PRE, and (v) licences to establish network infrastructures.

The Government has also informally announced the second competitive procedure to allocate capacity reservation for injection into the public service electricity network for photovoltaic solar energy (solar auction). This is planned to start in the first half of this year and it will do so as soon as the market allows it. The tender documents are expected to be published shortly.

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2. Impacts on contracts to supply electrical energy

It is also important to evaluate the impact of events relating to COVID-19 on existing contractual relationships under electricity supply contracts. This evaluation should begin by looking to the solutions already provided for in the contracts. In particular, the contract may contain a *force majeure* clause covering pandemics. Alternatively, it may contain clauses on changes in circumstances, or suspension or extension of deadlines due to events outside the control of the parties, among others.

If they exist, the validity of these clauses should be checked under the law applicable to the contract. If there are no contractual solutions, the law applicable to the contract will determine the rules to be taken into account in seeking legal solutions not provided by the contract. These rules include the ones that apply to a change in circumstances and to impossibility of performance. The latter applies only if it is possible to prove a causal link between the COVID-19 event and the impossibility of performing the obligation agreed.

In general, the supply of electrical energy must be permanent. It may only be interrupted in the cases provided for in the Commercial Relations Regulation, in particular for reasons relating to unforeseeable events or cases of *force majeure*. Article 70 of the Commercial Relations Regulation provides that interruptions due to unforeseeable events or *force majeure* are the ones classified as such in the Quality of Service Regulation.

Article 8 of the Quality of Service Regulation defines the concepts of “unforeseeable event” and “*force majeure*”: all those events that simultaneously meet the requirements of being unpredictable, unavoidable and outside the control of the parties, in light of good practices or the applicable mandatory technical rules. Article 8(3) of this Regulation specifically defines a case of *force majeure* as a natural event or human action that could have been predicted, but that the event itself and its harmful consequences could not have been avoided. The rules that complement this Regulation are set out in the Quality of Service Procedures Manual.

Nevertheless, the newly published Regulation 255-A/2020 of the ERSE establishes special measures relating to the conditions to provide energy supply services, due to crisis caused by the spread of COVID-19, that merit special attention¹.

"To date, there has not been any new legislation that specifically addresses the impacts of COVID-19 on the energy market."

3. Impacts on the energy market

As far as the energy market is concerned, article 33-B of DL 172/2006 (“emergency measures”) addresses the possibility, due to a serious accident or other event of *force majeure*, of (i) a sudden crisis in the energy market, (ii) a threat to the safety and physical integrity of people, equipment, facilities and networks. Clearly, the events relating to COVID-19 could fall under the concept of *force majeure*. If one of these circumstances does arise, the member of the Government responsible for the area of energy can take the necessary protective measures on a transitional and temporary basis.

Furthermore, article 33-B(2) addresses the case of a disruption in supply. In such a case, the member of the Government responsible for the area of energy may, in particular, decide to use emergency stocks of fuel and they may also impose measures restricting demand.

These emergency measures must be communicated to the European Commission. The measures must also ensure that, whenever possible or appropriate, operators in the transport network have the opportunity to provide a first response to disruptions in supply.

To date, apart from the new legislation described above, we do not expect any further legislative changes relating to the impacts of COVID-19 on the energy market ■

¹ For a detailed analysis, see our Informative Note “Coronavirus: Extraordinary measures in the energy sector”