



TAX AND PROJECTS AND ENERGY

Recent developments on the clawback mechanism

On 20 March 2020, the Portuguese Energy Services Regulatory Authority (ERSE) issued Directive no. [4/2020](#), of 20 March (Directive no. 4/2020), which provides further regulation on the clawback mechanism.

This note offers a brief outline of the measures now introduced by Directive no. 4/2020.

Overview of the clawback mechanism

The clawback mechanism is a fee or levy introduced by Decree-Law no. 74/2013, of July 4 (DL no. 74/2013) following the introduction of the power generation tax in Spain, which affected electricity generators operating in this country. This mechanism was created to correct any potential distortions in the energy market and therefore to avoid any windfall profits to Portuguese producers.

Decree-Law no. 104/2019, of 9 August (DL no. 104/2019) introduced some amendments to the scope of the clawback mechanism, having been significantly broadened. The clawback then became applicable to:

- Energy producers under the ordinary arrangements;
- Energy producers from hydroelectric power plants with an installed capacity of 10 MVA (or more); and
- Energy producers without guaranteed remuneration (certain exceptions applying).

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For these purposes, the concept of 'guaranteed remuneration' was clarified through Order no. 8/2019/SEAEne, of 2 January (Order 8/2019/SEAEne) and read as referring to remuneration for the sale of electricity which is not dependent, directly or indirectly, on the Iberian Electricity Market (MIBEL) price formation. Accordingly, producers with certain Power Purchase Agreements (PPA) in place (fixed price) would fall outside the scope of the clawback and be fully exempt from it.

DL no. 104/2019 also provided that the clawback mechanism would be calculated based on a new set of parameters and paid through advance payments on account of the final liability. These parameters were set through Ministerial Order no. 282/2019, of August 30 (Ministerial Order no. 282/2019), to then be the basis upon which ERSE will complete a study on the Spanish levy (ongoing) and the market distortions which gave rise to the clawback mechanism to begin with.

In order to carry out and complete this analysis, ERSE will require a set of information on non-market events within the European Union which play a role on the calculation of the average electricity prices in the Portuguese wholesale market. Directive no. 4/2020 now introduces a set of measures in this regard.

Scope of Directive no. 4/2020

Directive no. 4/2020 seeks to put the principles laid down in Decree-Law no. 74/2013 (as further amended) and Ministerial Order no. 282/2019 into motion. For these purposes, the Directive sets out:

- i) The procedures for the normal functioning of the commercial relationship between the Transmission System Operator (TSO) and electric energy producers, notably to make the advance payments;
- ii) Reporting obligations for electricity producers (including for those exempted);
- iii) The unit values to be charged by the TSO to producers under the advance payments; and
- iv) The invoicing procedure.

Relationship between the TSO and electricity producers

By 30 September of each year, the TSO must request from the Directorate General of Energy and Geology (DGEG) the list of power plants which are already active or expected to become active by the end of the year, with an installed power of at least 5MW.

This list will not include the producers that are exempt from the clawback, which the Directive classifies as being those with a remuneration not indexed to MIBEL daily prices (directly or indirectly), in particular, those with fixed-price PPA.

Reporting obligations applicable to electricity producers exempt from the clawback

Every month, these producers must submit to the TSO a form outlining the parties and main conditions of the agreements in place for the sale of energy (PPA) (start and end dates, offtaker details, etc.). The form and the information to be reported are as included in Annex A.I. of Directive no. 4/2020.

Reporting obligations applicable to electricity producers subject to the clawback mechanism

Electric energy producers subject to the clawback must submit to ERSE, within 30 calendar days of ERSE's request, the information necessary to calculate the amounts referring to non-market events borne by each power plant owned or operated by the energy producer.

Determination of unit values relevant for advance payments

To calculate the advance payments, Directive no. 4/2020 provides that the unit values to be applied by the TSO in year "t" (e.g. FY 2020) are based on the unit value defined by the Portuguese Government by December 31 of the year "t-1" (e.g. FY 2019), and, in the absence of this, the last approved advance payment. Furthermore, the TSO will also apply, in year "t", any necessary adjustments referring to year "t-2".

The unit value for 2020 was set in Order [8521/19](#), of 16 September, issued by the Secretary of State for Energy.

Invoicing procedure

The TSO must issue invoices for the advance payments charged to energy producers subject to clawback, on a monthly basis and within 15 days of the closing date of the month to which the invoices refer. The invoices must provide a breakdown of the relevant items according to the applicable contractual rules and technology, and must include, among others:

- The energy volume to be considered for invoicing;
- Any volume adjustments from previous months;
- The amount assessed through the application of the unit values mentioned above; and
- The amount relating to any ex-post adjustments and calculated in accordance with the legislation in force.

The TSO is also to invoice the amounts charged as a result of yearly adjustments referring to year "t-2", on a monthly basis, in 12 sequential invoices for the same amount, as from the first month of year "t+2". ■