JAN. 22

INFORMATIVE NOTE

PUBLIC LAW | ENERGY AND NATURAL RESOURCES

Legislative reform of the National Electricity System

Decree-Law 15/2022 of 14 January ("**Decree-Law 15/2022**") has been published to establish the new rules for the organisation and operation of the National Electricity System ("**SEN**"). In doing so, it incorporates into Portuguese law (i) Directive (EU) 2019/944 of the European Parliament and of the Council, on common rules for the internal market for electricity, and (ii) Directive (EU) 2018/2001 of the European Parliament and of the Council on the promotion of the use of energy from renewable sources.

The approval of this Decree-Law follows the public consultation on the draft decree-law that took place last November, and PLMJ's Energy and Natural Resources team published an Informative Note about this.

In this note, we will set out the main legislative changes resulting from the approval of this new law for the Portuguese electricity sector. In describing these changes, we will focus in particular on the new features of the final version now approved compared to the one which had been put out to public consultation.

Electricity generation

Periods

- A period of 1 (one) year from the issuance of the capacity reservation permit (*título de reserva de capacidade* – "**TRC**") is established to issue the generation licence, when an Environmental Impact Assessment ("**EIA**") procedure has to be carried out. Alternatively, if this procedure is not required, the maximum period is 6 (six) months. Therefore, a shorter period is established for these projects and this was not provided for in the version submitted to public consultation.

"The period of one year from the granting of the generation licence to obtain the operating licence is maintained, as proposed in the public consultation draft."

- The period of 1 (one) year from the granting of the generation licence to obtain the operating licence is maintained, as proposed in the public consultation draft. However, there are different rules for auctions. Cases where the operating licence cannot be issued due to delays in the grid connection processes are expressly considered as exceptions to this deadline, and the possibility of extension is also maintained.

Inês Pinto da Costa
João Marques Mendes
Joana Campelo
Rui Vasconcelos Pinto
Public Law | Energy and natural resources team

"The prohibition, proposed in the public consultation draft, on any change in control over the promoter until the operating licence is issued has been eliminated. Moreover, the rules on the transfer of the licence itself have also been made more flexible."

Transfer of the licence and change of control

- The prohibition, proposed in the public consultation draft, on any change in control over the promoter until the operating licence is issued has been eliminated. Moreover, the rules on the transfer of the licence itself have also been made more flexible.

- The new rules equate cases of transfer of the licence and change of control of the licensee. They also make the authorisation of both subject to increasing the security by half of the legally established amount. Thus, the increase in the security is intended to act as a deterrent to purely speculative transactions.

- The encumbrance of shareholdings in favour of licensing entities and the constitution by the licensee of SPVs wholly owned by it to develop the project are not subject to any increase in the security.

Grid connection and licensing

- Decree-Law 15/2022 maintains the provision in the public consultation draft that allows the Public Service Electricity Network ("**RESP**") operators to change the substation or grid connection level (except in the case of a TRC awarded following a tender procedure). However, the ground for making this change are specified (technical reasons and reasons not attributable to the applicant) and the reference to the possibility of this change being made at the request of the applicant is eliminated.

- The Decree-Law also maintains the proposal in the public consultation draft that makes the issuance of a TRC in the general form subject to the prior payment of compensation to the electricity system of €1500.00 per MVA. However, it is not made clear whether the value of the co-financing with the networks will be maintained and what happens in the event of expiry of the TRC due to the opening of an auction.

- Access to the network in the form of an agreement with the network operator depends on the annual setting of a quota by the member of the Government responsible for energy, as proposed in the public consultation draft. This may be differentiated by technology and by generation for self-consumption, and the procedure for selecting projects in this form is heavily regulated. The final version that has now been approved makes it clear that the signature of agreements between applicants for requests for agreements and the ORD (distribution network operators) are subject to the existence or creation of reception capacity in the national transport network ("**RNT**") substations that feed the national distribution network ("**RND**") in the areas subject to these requests for agreements.

- In the case of auctions, the recognition of the public interest and public utility for all legal purposes of the installation of electricity generation plants and their lines is maintained, as had been proposed in the public consultation draft. However, in the final version approved, it is expressly clarified that this recognition is relevant, in particular, for the constitution of easements and public utility expropriation.

PL
MJ

- Except in the case of auctions, the rights of promoters are equated to the rights of network operators. These are the rights of expropriation and of constitution of easements, but only over lines connecting to the network.

- The compensation mechanism for municipalities where electricity generating plants with an injection power exceeding 50 MVA are installed, as provided for in the consultation, is maintained. The promoter is obliged to install, in municipal buildings, self-consumption production units ("**UPACs**") with an installed power equivalent to 0.3% of the power connection of the electricity generating plant. As an alternative, the final version now published allows the installation of electric vehicle charging stations located in public spaces and intended for public use with equivalent capacity.

"The possibility of awarding rights to inject electricity into the grid with restrictions is maintained. This contrasts with the possibility of awarding them in a firm way."

- The alternative possibility of a one-off compensation payment of €1500.00 per MVA of injection power is maintained for these transfers of UPACs or of electric vehicle charging points.

- For electricity generation and storage facilities with assigned connection power equal to or less than 50 MVA and more than 1 MVA, it seems to be indicated (although there is a reference error that renders this unclear) that they are subject to the single compensation payment of €1500.00 per MVA of injection power.

- These assignment arrangements are only applicable to owners of renewable source electricity generating plants or storage facilities that have obtained a permit to inject reservation capacity into the RESP after the entry into force of Decree-Law 15/2022.

- The possibility of awarding rights to inject electricity into the grid with restrictions is maintained. This contrasts with the possibility of awarding them in a firm way, as provided for in the version put out to public consultation, and the concepts of firm capacity and restricted capacity are clarified.

- Any substantial change in the generating plant will once again have an exhaustive (closed) definition. This is a reversal of what was proposed in the public consultation draft. It depends on the following main characteristics of the installation: the generation technology, the fuel or primary energy source used, and, in the case of thermoelectric or hydroelectric generating stations, the number of generator groups. It also depends on the boilers, turbines and generators used, and there is no longer any express reference to installed capacity as such. The provision that non-substantial alterations will now be subject to an authorisation system rather than a mere prior notification system is maintained.

- The obligation provided for in the public consultation draft to present a closure plan when applying for a generation licence is maintained. However, the need to guarantee the closure by means of a security deposit or an annual contribution from the promoter is eliminated.

Small generation units

- To avoid artificial fragmentation of licensing processes, Decree-Law 15/2022 maintains the proposal in the public consultation draft that whenever two power plants (or storage facilities) subject to prior registration are less than 2 km apart, the prior control rules applicable to the joining of the installed capacity of two or more projects must be followed.

- Nevertheless, in the final version of the law now published, it is clarified that this rule is not applicable to prior control procedures that started before the entry into force of Decree-Law 15/2022.

Hybridisation, over-equipment and repowering

- In the version of the decree-law made available for public consultation, the definition of over-equipment only referred to an increase in installed power resulting from the installation of more generating equipment. In the version published, a reference was added to the possibility of increasing installed power also by virtue of the installation of inverters.

"Another change is that the unification of the technical management of distribution networks will require an amendment to the concession contracts in force."

- As a rule, the installation of over-equipment cannot be transferred autonomously in relation to the pre-existing electricity generating plant, even in cases where the over-equipment is considered to be legally separate. An exception is now expressly provided for in cases where the transfer of legally separated over-equipment takes place by virtue of group restructuring operations that do not imply a change in the beneficial owner.

- The version now published establishes two criteria to define the increased power as a result of retrofitting, when the minimum power of the generating equipment existing in the market exceeds the value of the initial connection power plus a maximum of 20%. In these cases, the increase will correspond to: (i) the minimum value of the minimum power of the generating equipment or, alternatively, (ii) an assessment of it on the basis of the aggregation of the electricity generating plant of the same holder located in the same grid area, and this takes place at the connection point to the RESP which has the best technical conditions for the injection of the allocated capacity, among those to which the aggregated generating plants connect. The competent RESP operator will determine the alternative that best guarantees the security and reliability of the RESP.

Networks and system management

- It is expressly provided that until the integrated technical manager of the high, medium and low voltage distribution networks takes office, the operation of distribution networks will continue to be coordinated under the terms of the current concessions.

- Another change in relation to the version submitted for public consultation is that the unification of the technical management of distribution networks provided for in Article 108(3) will require an amendment to the concession contracts in force to safeguard their economic and financial equilibrium.

- Decree-Law 15/2022 maintains the extension in the public consultation draft of low voltage distribution concession contracts may be extended until the end of the calls for tender still to be launched regarding the future development of this activity. These contracts may also be amended to allow for adaptation to the new realities of smart grids and new technologies. Compared to the version subject to public consultation, the terms of these contractual alterations must be agreed within three months of the entry into force of Decree-Law 15/2022 January, between the concessionaire of the distribution network and the ANMP (National Association of Portuguese Municipalities), in coordination with the member of the government responsible for the energy area. Furthermore, the Portuguese Energy Services Regulatory Authority ("**ERSE**") must be informed.

"Closed Distribution Network operators must ensure the network register and use meters and materials compatible with those used by the network."

- In a change from the version submitted for public consultation, the new law provides that until the effective entry into operation of the winner of the bid to operate the concession, the concessionaire of the low-voltage electricity distribution network must send the grantor, annually, an updated register, in open digital format. This register must detail (i) specific assets of a concession, which includes all the assets identified as being allocated to a specific concession; and (ii) assets shared by groups of concessions by identifying the assets that are subject to shared use and the concessions that are benefiting from this use; and (iii) assets shared by all the concessions. This includes any assets that are used anywhere in mainland Portugal.

- The network operation regulations must be revised to accommodate the principles of flexible (and no longer probabilistic and dynamic, as suggested in the public consultation draft) network management. This revision must be carried out within the period to be set in the regulations that apply to the implementation of the flexible management model of the various networks. The reference to a period of one year as from the entry into force of those regulations is eliminated.

- The rule that investments in fixed assets not approved in the network investment and development plan are not considered for tariff purposes (except in the case of urgent investments) ceases to apply to the network transmission operator. However, it is maintained for the distribution network operator.

- The rule that failure, within the following three years, to make investments that should have been made under the ten-year network development plan allows a step in by the ERSE to ensure the investment in question is made by a third party ceases to apply to transmission system operators that are not independent (which is the case in Portugal).

- If the Closed Distribution Network's prior control permit is revoked, the operator of the network to which the RDF is interconnected will, on a transitional basis, take over the management and maintenance of the Closed Distribution Network. This had been anticipated in the public consultation draft. However, the final version of the law makes it clear that, to allow the correct transition of operations, the Closed Distribution Network operators must ensure the network register and use meters and materials compatible with those used by the network operator that the closed distribution network is interconnected with.

- Decree-Law 15/2022 eliminates a rule put out for public consultation which determined that, within one year of the Decree-Law coming into force, the ERSE would have to prepare a study in cooperation with the network operators and representatives of the municipalities granting the low voltage activity. This study would have involved an assessment, in the context of the energy transition objectives set out in the approved national plans and strategies, the advantages and disadvantages for the SEN arising from (i) the separation and autonomy of the system's global technical management functions and from (ii) the unification, in the context of the overall management of the system, of the integrated management of the RNT, RND and low voltage distribution networks.

PL
MJ

Storage

- The definition in the public consultation version of "storage facility" has been changed and it is now defined as the facility where energy is stored. The facility can be autonomous when it has a direct connection to the RESP and is not associated with an electricity generation centre or a UPAC. This excludes storage facilities that are part of the electrical installation of the user facility. Therefore, the exclusion of storage facilities that are part of the electrical installation of the user facility was added, because, in these cases, the general rules on private service electrical facilities in Decree-Law 96/2017 will apply.

"It is also established that network operators can make any storage capacity not used to meet the priority objectives set out in the previous point available to third parties."

- Another difference to the version submitted for public consultation is the possibility for network operators to own and operate electricity storage facilities intended primarily to provide system services, to guarantee the safety and reliability of the networks, and to contribute to the synchronisation of the different components of the SEN (National Electricity System).

- It is also established that network operators can make any storage capacity not used to meet the priority objectives set out in the previous point available to third parties. This is done against payment and under terms to be regulated by ERSE.

Trading and aggregation

- As for the activity of the aggregator of last resort, the acquisition of electricity from electricity producers from renewable energy sources and from self-consumers that inject surplus energy into the RESP can now also take place when the aggregator is prevented from performing the activity of electricity aggregator. In this case, the reference tariffs defined by ERSE will apply. For this purpose, producers of electricity from renewable sources and self-consumers must, within four months, contract the acquisition of electricity with a registered aggregator, in accordance with the rules defined in the ERSE regulations.

- Peer-to-peer (P2P) energy trading had been eliminated in the public consultation draft, but it is now reintroduced. It consists in the sale of renewable energy between market participants. Energy is sold under a contract with predetermined conditions that govern the automated execution and settlement of the transaction directly between the market participants or indirectly, through a third party market participant. When such a contract comes into effect, this does not affect the rights and obligations of the parties involved in their capacity as final consumers, individual or collective self-consumers, producers or independent aggregators.

- The published version introduces the possibility of suspending the registration of supply activity. This depends on a request from the interested party and authorisation from the Directorate General for Energy and Geology ("**DGEG**"), to be issued in accordance with the procedure established to register supply, with the necessary adaptations.

PLMJ

Self-consumption and energy communities

- In the case of the licensing of UPACs, the requirement proposed in the public consultation draft that the production licence must identify the Delivery Point Code (*código de ponto de entrega* – "**CPE**") of the user installation is maintained. This assumed that the CPE already existed when construction of the power plant begins. However, it is provided that, if the CPE does not yet exist, the production licence must expressly state that the award of the licence to operate the UPAC will depend on the assignment of the CPE.

- The definitive version published provides that renewable energy communities (*comunidades de energia renovável*- "**CERs**") will be able to share and trade the renewable energy produced by UPACs among their members. No such provision was made in the version subject to public consultation.

- Renewable energy projects may also be owned and operated by the CPE or by third parties, provided that they are for the benefit and service of the CPE.

- The possibility of the CPE allowing the withdrawal of any of its participants has been maintained, but the final definitive version of the law imposes the condition of complying with the obligations that bind it.

- Provision is made for the possibility of implementing dynamic coefficients in the sharing of electricity produced by UPACs and dynamic management systems managed by an entity outside grid operators (for example, the entity managing collective self-consumption). This is provided that intercommunication and interoperability with the grid operators' systems is ensured, under terms to be regulated by the ERSE. The minimum period for maintaining sharing coefficients is reduced from twelve to six months.

- The proximity criterion relevant to self-consumption and energy communities has been redefined compared with the public consultation version. It is now provided that this criterion is always fulfilled in the case of *(i)* self-consumption by internal network or direct line, regardless of physical distance and *(ii)* in the case of self-consumption by the RESP if the UPAC is no more than 2 (two) km from the user installation or both are connected to the same transformation point, in the case of low voltage, and 4 (four) km, 10 (ten) km and 20 (twenty) km, in the case of medium, high and very high voltage connections, respectively. The criterion may also be considered fulfilled in other cases that do not meet these requirements.

- In the final version of the law, it is no longer necessary for the specific dynamic management systems to acquire the data necessary for their operation and to transmit to the distribution network operator the consumption measurements of each user installation, for settlement and invoicing purposes.

"Renewable energy projects may also be owned and operated by the CPE or by third parties, provided that they are for the benefit and service of the CPE."

PL
MJ

Customers

- Provision is made for the right of all customers to enter into several supply contracts with several suppliers for the same point of delivery. Until now, this was only available to small customers (and for cases of self-consumption).

- Consumer rights regarding access to consumption data in the context of smart metering will be strengthened.

Electro-intensive customers

- The status of electro-intensive customer is created and this entails the application of special rules on access to and use of the grid. The definition of the minimum degree of electro-intensity for this purpose, to be defined by the ratio between annual electricity consumption and gross value added, will be done by ministerial order.

"The status of electro-intensive customer is created and this entails the application of special rules on access to and use of the grid."

- In the final published version of the law, electro-intensive customers are no longer obliged to participate in the system services market by submitting daily offers on the replacement reserve market or the regulation reserve market, or the market that will replace it.

- Transitional arrangements are to be put in place. These appear to allow electro-intensive customers who enter into contracts to buy renewable energy directly from generators to benefit from a total exemption from the costs of general economic interest ("**CIEGs**") for energy acquired under that contract. However, it is not clear under what terms and for period this benefit will be granted, or whether it will also apply to contracts for differences with guarantees of origin (financial PPAs).

Free zones for technology (ZLTs)

- The new law sets out the regulations for Free Zones for Technology (*Zonas livres tecnológicas* – "**ZLTs**"), as provided for in the public consultation draft. The definitive version approved allows ZLTs to be managed directly by the DGEG or by means of a concession awarded through a competitive procedure.

- In line with the public consultation text, three ZLTs are now created. The first is in Viana do Castelo and it will develop offshore and nearshore renewable energies. This was not provided for in the public consultation text. The second is in Abrantes and it will carry out innovation and development projects in the context of the closure of the Pego Thermoelectric Power Plant, just as provided for in the public consultation text. The third one is in the Mira Irrigation Perimeter and it will be used for pilot projects for the simultaneous use of land for electricity production and agricultural activity, also under the same terms provided for in the public consultation text.

PL
MJ

- The capacity for injection into the RESP allocated under the procedure to set up scientific research and development projects in the ZLTs is included in the document certifying registration and is limited in time. As provided for in the public consultation draft, the period cannot exceed six years from the time the infrastructure connecting to the RESP is made available. The final version of the law increased the maximum period from three to six years. Nevertheless, with the authorisation of the DGEG, this period may be extended by half the initial period. This possibility for extension was not included in the public consultation text.

"The innovative projects to be developed in the ZLTs will be exempt from paying network access tariffs and the construction costs of the network connection branches."

- The innovative projects to be developed in the ZLTs will be exempt from paying network access tariffs and the construction costs of the network connection branches. This was provided for in the public consultation draft. These projects will also be exempt from paying other charges relating to the cost-sharing in the networks, and this was not provided for in the version of the legislation put out to public consultation.

- As already provided for in the public consultation draft, these projects will be subject to the payment of an amount to be defined by ERSE to share network costs. These projects also benefit from a simplified licensing system and are exempt from payment of a licensing fee.

Application to projects under development and existing projects

- Provision is made for the new rules to apply to proceedings pending before the DGEG, without prejudice to acts already carried out. The public consultation text also provided for the continuity of application of the guaranteed remuneration schemes already awarded, maintained or extended. These are maintained in the terms and with the periods under which they were awarded. The definitive version of the law adds a provision to the effect that, in pending prior control procedures, any time periods that have already started to run have the duration established in the legal framework in force on the date they began to run, and they apply in the subsequent stages of the procedure.

- In projects developed in agreement with the operator and covered by the terms of reference, the provision for requests that have not received specific studies from the network operator or which do not have a favourable environmental impact statement to expire is eliminated. It is established that all projects that have already obtained a final classification will continue in accordance with their terms.

- The final version of the law establishes that, in pending prior control procedures, the time periods that are already running have the duration established in the legal framework in force on the date they began to run, and Decree-Law 15/2022 applies in the subsequent phases of the procedure. ■