Sérvulo & Associados | Sociedade de Advogados, SP, RL

# THE NEW LEGAL REGIME OF THE NATIONAL ELECTRICITY SYSTEM

## I. The Decree-Law No. 15/2022, of 14th January – A Response to the Challenges Posed by the Energy Transition

The new Decree-Law No. 15/2022 entered into force on the day following its publication, transposing Directive (EU) No. 2019/944, of the European Parliament and of the Council, of 5 June 2019 («Fourth Energy Package Directive», which establishes common rules for the internal market for electricity) and Directive (EU) No. 2018/2001, of the European Parliament and of the Council, of 11 December 2018, on the promotion of the use of energy from renewable sources.

The decree-law that has now been published is based on the draft that was subject to public consultation on 10 November, in which the Energy team at Sérvulo & Associados participated.

Thus, in this newsletter we highlight the main new features of this diploma in relation to the previous regime, given that the approved version of the decree-law included contributions from several companies that participated in the above-mentioned public consultation, particularly with regard to the licensing deadlines, the possibility of transferring titles of reserve capacity and prior control, and the temporal scope of application of the decree-law.

# II. Main New Features

## 1. Energy Production

### *a) Beginning of a procedure - Grid Capacity Reservation*

The award of grid capacity reservation will continue to be carried out according to the same procedures previously established, with slight changes to applicable regime, namely with regard to applicable grid bond. As such, to obtain a grid capacity title the following procedures may apply:

| Type | Grid Bond |
|---|---|
| **General Access** | This procedure applies to the situations where the grid has capacity to receive energy and such request is filled with applicable grid operator.<br><br>**Grid Bond Amount**: EUR 10 000.00 per MVA of reserve capacity to be granted, with a maximum limit of EUR 10 000 000.00.<br><br>The Grid Bond must be valid for a minimum of 30 months, extendable until the power plant, the UPAC or the storage facility comes into operation, under penalty of expiry of the procedure.<br><br>The issuance of TRC is also dependent on the prior payment of a compensation to the SEN, in the amount equivalent of EUR 1,500.00 per MVA, in turn subsequently sent to the Operator of the National Transport Network. |
| **Agreement with grid operator** | Procedure to obtain grid capacity that implies the entry into an agreement with grid operator, according to which applicant would support the cost of construction/extension of the grid to receive additional energy.<br><br>Government shall issue, up until January 15 of each applicable years, relevant quotas to be submitted to this modality, an applicants shall submit their request to DGEG up until March 15 of the applicable year.<br><br>Grid Bond Amount: EUR 15 000.00 per MVA of reserve capacity to be granted, with a maximum limit of EUR 10 000 000.00.<br>The Grid Bond must be valid for a 24 month-period. |
| **Competitive procedure** | The amount of the grid bond, the time limit, the type of provision and the entity to which it is provided are set out in the parts of the procedure. |

It should also be noted that the installation of power plants, including hybrid or hybridised electricity power plants, storage facilities and the respective connection lines to the interconnection point that have obtained the title of reserve capacity for injection into the RESP ***under a competitive procedure*** is recognised as being of public interest and public utility for all the purposes set out in legal or regulatory provisions, namely for the purpose of constituting public utility easements and expropriation.

However, what appears to be a heavy restriction in favour of projects resulting from solar auctions (and other competitive procedures which may be processed) ends up being softened through article 54, no. 2 of the diploma, from which it follows that the construction of the connection between the power plant and the RESP is made under the conditions legally established for the concessionaires of the national transmission and distribution grids, including those established in article 112. **In practice, this means that also the connection lines to the RESP of projects that do not result from competitive procedures may benefit, among others, from the rights to request the constitution of public utility easements and expropriations.**

### *b) Prior control procedures*

The new legal regime established the **unification of the licensing procedures for the activity of energy production in Portugal,** having eliminated the distinction between the ordinary production regime and the special production regime.

All the production and storage activities is subject to prior control procedures, as established hereunder (cf. article 11):

| Prior Control Procedures | Activities involved |
|---|---|
| **Production and Operation License** | • Production of electricity from non-renewable energy sources;<br>• Production of electricity from renewable energy sources for total grid injection or for self-consumption with an installed capacity ***greater than 1 MW***;<br>• Autonomous storage of electricity with an installed capacity ***greater than 1 MW***;<br>• Autonomous production or storage when subject to the environmental impact assessment or environmental incidences assessment procedure, under the terms of the applicable legislation;<br>• **All electricity production and storage activities that are not subject to prior registration, certificate of operation and prior notice or exempt from prior control.** |

| | |
|---|---|
| **Prior Registration and Certificate of Operation** | • Production of electricity from renewable energy sources for total grid injection, with an installed capacity ***equal to or less than 1 MW***;<br>• Production of electricity for self-consumption with an installed capacity ***greater that 30 kW and equal to or less than 1 MW;***<br>• Autonomous storage of electricity with an installed capacity ***equal to or less than 1 MW***;<br>• Research and development projects, demonstration and testing, in a real environment, of technologies, products, services, processes and innovative models, in the scope of production, storage and self-consumption activities with an installed capacity ***greater than 30 kW***. |
| **Prior Notice** | • Production of electricity for self-consumption with an installed capacity ***greater than a 700 W and equal to or less than 30 kW***;<br>• Research and development projects, demonstration and testing, in a real environment, of technologies, products, services, processes and innovative models, in the scope of production, storage and self-consumption activities with an installed capacity ***greater than 700 W and equal to or less than 30 kW***;<br>• ***Re-equipment*** of a power plant, of solar or wind primary source, when it maintains or reduces the installed power initially established in the prior control procedure. |
| **Finally, exempt from prior control are**:<br>• Exercise of the activity of electricity production for self-consumption with an installed capacity ***equal to or less than 700 W, without injection of the surplus into the grid;***<br>• Research and development projects with an installed capacity ***equal to or less than 700 W.*** | |

### *c) Time limits for issuing of the prior control titles (cf. articles 14 and 58):*

| Action to be performed | Time limit |
|---|---|
| **Application for the grant of the Production License** | **1 year after the issuance of the TRC** if subject to an environmental impact assessment or **6 months**, in the other cases |
| **Issuance of the Production License** | 1 year from the respective request |
| **Issuance of the Operation License** | 1 year from the date of the attribution of the Production License |
| **Application for the issuance of the Certificate of Operation** | 9 months after the issuance of the proof of prior registration (18 months in the case of hydroelectric plants) |
| **Possibility of extending time limits:**<br>• upon request of the applicant, by the licensing authority, for one time only, with a maximum limit of one year when the time limit proves to be insufficient<br>• without limit, by order of the member of the Government responsible for the energy sector, under exceptional circumstances and upon duly justified request of the applicant. | |

### d) *Transfer* of Titles

Contrary to what was foreseen in the preliminary draft, the new law establishes the rule of transmissibility of the TCR until the issuance of the production license, which is transferable, under the same conditions, until the issuance of the operation license, by means of an annotation in the title to be made by DGEG or the competent grid operator. The title is considered to have been transferred whenever there is a direct or indirect change of control over the respective holder, **with the request depending on the reinforcement of the deposit, except in the following cases:**

*i)* Incorporation of a commercial company whose corporate purpose includes the exercise of the activities of construction and operation of a power plant or storage facility or UPAC and whose sole shareholders are the holders of the TRC or the production license;

*ii)* Pledging of shares in favor of financing entities, changes of the direct ownership of the holder resulting from the execution of pledges of shares under agreements concluded with the same financing entities or changes of the direct ownership in the context of group restructuring operations that do not imply a change in the beneficial owner registered in the Central Register of Beneficial Owner (RCBE).

### e) Remuneration Scheme

According to the recently approved Decree-law, the production and storage of electricity will be paid under market prices and/or other contractual arrangements between private parties. In fact, and in line with most recent practise, the guaranteed remuneration regime is eliminated.

This elimination does not affect the application of guaranteed remuneration schemes already allocated, maintained or extended by previous legal diplomas, which shall apply until the end of period for which they were established.

Furthermore, in the scope of the competitive procedures for the attribution of reserve capacity titles, support schemes for production from renewable sources may be defined, namely through subsidies, fixed or variable, with or without minimum or maximum thresholds, with a view to recovering the opportunity cost of investment. It is in this scope that the remunerative regime of "premium for differences" that has

already been adopted in the 2020 and 2021 solar auctions (in progress) fits, which ensures the payment to the promoter of the difference between the price set in the auction and the market price.

### f) Production for self-consumption

One of the main lines of the changes made by the new Decree-Law relates to the focus on consumers and the role they can now play within the SEN, allowing them to move from being mere passive consumers to active agents who produce electricity for self-consumption or to sell surpluses, store and offer flexibility services and aggregate generation.

These changes therefore have a profound impact on the legal regime for self-consumption, which is subject to the prior control procedures already mentioned above. The difference is that, in this case, the titles are issued in individual self-consumption to the respective self-consumer and, in the case of collective self-consumption, to EGAC or, if they exist, to CER or CCE (new energy communities).

One of the main novelties in the preliminary draft is the consecration of the concept of electrical proximity, in order to confer greater breadth and legal certainty to the expansion of the activity of self-consumption. In accordance with Article 83(2):

*"The concept of proximity is understood to include UPAC's and the IU(s) connected by direct line or internal network or, when operating through the RESP:*

a) *When, in the case of UPACs connected to LV electricity distribution networks, the IU and the UPAC are no more than 1 km apart or, alternatively, are connected to the same transformer station;*

b) *They are connected at the same substation, in the case of UPCUs connected to the National Distribution Network and the National Transmission Network, provided that the distance between the UPCUs and the IU does not exceed 2 km in the case of MV connection, 5 km in the case of HV connections and 10 km in the case of VHV connections.*

In addition to these cases, the proximity relation may also be assessed on a case-by-case basis by DGEG, taking into account the relevant technical elements.

Rules are also set out for the installation of UPAC in common parts of buildings, with the main new features being the obligation for self-consumers to give prior notice to the condominium management of their intention to install UPAC(s) in the common parts of the buildings which are not allocated to their exclusive use. In this context, Article 85 regulates, in innovative terms, the possibility of opposition by the condominium (allowed only in the cases listed in paragraph 4) and appeal to the condominium assembly.

**With specific regard to collective self-consumption:**

o The internal regulations must now be communicated to the DGEG within a maximum period of three months after the UPAC starts operating;
o The following energy sharing models may now be adopted:

a) Sharing in fixed coefficients differentiated by working days and holidays or weekends that may or may not take into account the seasons of the year. This sharing model will be defined by ERSE;

b) Sharing in dynamic coefficients based on the consumption measured in each period in the time period defined by the Guide for Measurement, Reading and Availability of Electricity Data in mainland Portugal;

c) A combination of any of the methods referred to in the previous sub-paragraphs.

## 2. Legislative framing and densification of new realities

### *a) Storage of electricity*

Energy storage is defined in subparagraph d) of article 3 of the legislative draft as *"the transfer of the final use of electricity to a moment later that when it was generated through its conversion into another form of energy, namely chemical, potential or kinetic".*

For the first time seen as an activity of the National Electricity System ("SEN"), it constitutes an activity carried out on a free access regime, by means of the granting of a license in a manner in all similar to production. The holders of the storage facilities are now considered participants of the SEN.

The Decree-Law has only two articles (cf. articles 79 and 80) autonomously to the storage of electricity, establishing that, in cases where production is accompanied by storage, the prior control procedure applicable to production covers the storage activity. Thus, when the storage activity is autonomous, it is licensed under the terms set out above.

It is also foreseen that the holder of the storage facilities may provide simultaneously system services and that the storage facilities are subject to a single incidence of the grid use tariff for charging and injection to avoid the double charging of the stored electricity, being also exempt from paying charges corresponding to the costs of general economic interest (the "CIEG").

### *b) Over-equipment and re-equipment*

Under the provisions of article 3 of the Decree-Law, it is considered:

*a)* **Over-equipment**: the alteration of the renewable energy power plant consisting in an increase in the installed capacity achieved through the installation of more generating equipment or inverters up to a limit of 20% of the connection power assigned to the power plant in the initial production license.

b) **Re-equipment**: the total or partial replacement of the generating equipment of the renewable primary source power plant, without altering the location of the implantation polygon of the pre-existing power plant.

***Over-equipment*** and ***re-equipment*** will now be considered as non-substantial changes to the pre-existing prior control title and may ***even*** be request after the issuance of the production license (i.e., a formal " re-equipment ", at a time when there may not even exist original equipment yet) without this constituting an autonomous procedure for alteration of the prior control title. The main features of their regimes are the following:

| ***Over-equipment*** | ***Re-equipment*** |
|---|---|
| • All renewable energy sources power plants, excluding hydroelectric plants with a connection power greater than 10 MVA, can be over-equipped.<br>• **Allows an increase of the installed capacity up to 20% without changing the connection power of the plant.**<br>• An injection interruption regime of the additional energy and over-equipment is envisaged.<br>• The over-equipment can be legally separated from the pre-existing power plant, being registered in the pre-existing prior control title in the name of a legal entity other than the holder of the power plant to be over-equipped that is controlled by the latter.<br>• The over-equipment installation cannot be transferred independently from the pre-existing power plant, even in the case if legally separated over-equipment, ***except when the transfer is made in the context of group restructuring operations that do not involve a change of registered ultimate beneficial owner.*** | • All renewable energy sources power plants can be re-equipped.<br>• **Allows for an increase of 20% of the initially allocated connection power, if full re-equipment is implemented, until the PNEC 2030 targets are met for the respective primary source.**<br>• An injection interruption regime of the additional energy and re-equipment is envisaged.<br>• The energy is remunerated at market prices, without prejudice to the fact that, in cases where the power plant benefits from a guaranteed remuneration regime or another bonified remuneration support regime, that regime remains applicable. |

### *c) Hybrids and Hybridization*

Under the provisions of article 3 of the Decree-Law, it is considered:

a) **Hybridization**: the addition to an existing power plant or UPAC of new production units that use several primary renewable energy sources, without changing pre-existing injection capacity of the power plant or the UPAC.

b) **Hybrid**: the power plant or UPAC that, in the prior control procedure, simultaneously presents more than one production unit using several primary renewable energy sources.

With regard to ***hybrids*** and ***hybridization***, it should be highlighted the new legal framework that facilitates and promotes the use of the same point of grid injection by various technologies with different primary sources.
With regard to the licensing, these follow the prior control procedures explained for the other activities, with the installation of new production units using different primary sources or storage facilities (in the particular case of hybridization) in an existing power plant, being subject to the prior control applicable to them under the terms set out above, with the respective titles being annotated to the pre-existing titles regarding or the power plant.

The greatest novelty concerns the express contemplation of «separation in hybridization», i.e., the possibility of this being granted to an applicant other than the holder of the power plant or UPAC to be hybridized, even if the latter is not in a control relationship with the applicant, the rules of the separation of over-equipment being applied.

With regard to the transfer of the prior control title issued within the scope of hybridization, it is established that for the autonomous transfer of the subsequent prior control title issued within the scope of hybridization the provisions on transferability of prior control titles shall apply, without prejudice to:

a) The transfer depending on the authorisation of the holder of the pre-existing power plant or UPAC;
b) The grid capacity reservation title remaining in the ownership of the holder of the pre-existing power plant or UPAC.

### *d) Transitory regime*

Pursuant to article 276, no. 1, **the Decree-Law applies to procedures pending at the DGEG**, without prejudice to acts already carried out. Notwithstanding, several **transitional provisions** are foreseen depending on the matters in question, namely:

*i)* In pending prior control procedures, the time limits in progress shall have the duration established in the legal framework in force on the date of commencement of the respective term, and the provisions of the Decree-Law shall apply (only) in the subsequent phases of the procedure.

*ii)* For procedures pending at DGEG that are expecting grid reception capacity, following a draw and with deposit already provided, grid injection capacity will be granted as soon as it becomes available, as well as the corresponding production license.

*iii)* Regarding procedures which have obtained grid injection capacity prior to the entry into force of Decree-Law 76/2019, of 3 June, but have not yet obtained a production or operating licence, or registration or operating certificate, as the case may be, the respective candidates have a period of six months, after the date of entry into force of the Decree-Law, to submit the respective request, under penalty of the procedure being terminate, in which case the capacity will be available for new distribution. In this case, the prior control procedure follows the regime set out in the Decree-Law.

*iv)* The new rule that establishes the cumulation of requests between electricity generation centres which are less than 2 km apart, does not apply to prior control procedures that began before the entry into force of the Decree-Law.

*v)* Procedures relating to the signing of an agreement between the interested party and the grid operator for the creation or reinforcement of network infrastructures that have already obtained the final classification, in accordance with the list published on DGEG's website at the date of entry into force of the new regime, shall continue. The other procedures shall automatically lapse, without prejudice to the possibility of resubmission of the request.