

Electricity Regulation 2020

Contributing editor
John Dewar



Publisher**Tom Barnes**

tom.barnes@lbresearch.com

Subscriptions**Claire Bagnall**

claire.bagnall@lbresearch.com

Senior business development managers**Adam Sargent**

adam.sargent@gettingthedealthrough.com

Dan White

dan.white@gettingthedealthrough.com

Published by

Law Business Research Ltd

Meridian House

34-35 Farringdon Street

London, EC4A 4HL, UK

Tel: +44 20 3780 4147

Fax: +44 20 7229 6910

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between August and October 2019. Be advised that this is a developing area.

© Law Business Research Ltd 2019

No photocopying without a CLA licence.

First published 2003

18th edition

ISBN 978-1-83862-170-4

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



Electricity Regulation 2020

Contributing editor**John Dewar****Milbank LLP**

Lexology Getting The Deal Through is delighted to publish the eighteenth edition of Electricity Regulation, which is available in print, as an e-book, and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank the contributing editor, John Dewar of Milbank LLP for his assistance with this volume. We also extend special thanks to Kirsti Massie of White & Case, who contributed the original format from which the current questionnaire has been derived, and who helped to shape the publication to date.



London

October 2019

Reproduced with permission from Law Business Research Ltd

This article was first published in October 2019

For further information please contact editorial@gettingthedealthrough.com

Contents

Global overview	3	Japan	99
John Dewar Milbank LLP		Nagahide Sato, Sadayuki Matsudaira and Junya Ohashi Nishimura & Asahi	
Angola	7	Mexico	107
Ricardo Andrade Amaro and Pedro Capitão Barbosa Morais Leitão, Galvão Teles, Soares da Silva & Associados, Sociedade de Advogados, SP, RL		Rogelio López-Velarde, Amanda Valdez and Daniela Monroy Dentons López Velarde, SC	
Argentina	14	Netherlands	116
Hugo Martelli Martelli Abogados Rogelio Baratchart Tecnolatina SA		Sophie Dingenen and Margot Besseling Bird & Bird LLP	
Australia	20	Nigeria	124
Andrew Monotti, Simon Cooke and William Osborn King & Wood Mallesons		Ike C Ibeku, Ifeyinwa Ufodu and Shammah Vidal Benchmac & Ince	
Belgium	29	Panama	133
Arnaud Coibion, Lothar Van Driessche and Philippe Jonckheere Linklaters LLP		Erika Villarreal Z, José A Brenes and Ixalondra Chee Chong Anzola Robles & Asociados	
Brazil	37	Portugal	142
Marcello Lobo and Pedro Ícaro Lopes Vargas Pinheiro Neto Advogados		Ricardo Andrade Amaro, Joana Alves de Abreu and Pedro Capitão Barbosa Morais Leitão, Galvão Teles, Soares da Silva & Associados, Sociedade de Advogados, SP, RL	
Croatia	46	South Africa	150
Ivana Manovelo and Miran Macesic Macesic & Partners LLC		Jonathan Behr Werksmans Attorneys	
Ecuador	52	Spain	159
Roque Bustamante Bustamante & Bustamante Law Firm		Gonzalo Olivera and Alberto Artés King & Wood Mallesons	
Ghana	59	Turkey	166
Kimathi Kuenyehia, Sarpong Odame, Kojo Amoako and Kafui Quashigah Kimathi & Partners, Corporate Attorneys		Değer Boden Akalın, Şeyma Olğun and Ayşegül Önel Boden Law	
India	71	United Kingdom	179
Neeraj Menon and Akshita Amit Trilegal		John Dewar and Seyda Duman Milbank LLP	
Ireland	83	United States	186
Peter McLay, Eoin Cassidy and William Carmody Mason Hayes & Curran		Daniel Hagan, Jane Rueger and John Forbush White & Case LLP	
Italy	92		
Arturo Sferruzza and Ginevra Biadico Norton Rose Fulbright Studio Legale			

Portugal

Ricardo Andrade Amaro, Joana Alves de Abreu and Pedro Capitão Barbosa

Morais Leitão, Galvão Teles, Soares da Silva & Associados, Sociedade de Advogados, SP, RL

GENERAL

Policy and law

1 What is the government policy and legislative framework for the electricity sector?

Electricity legislation and policy in Portugal is defined at the national and European Union level.

At the level of the European Union, electricity policy is currently based on the 'Energy 2020' strategy; the 'Clean Energy for all Europeans' package, which includes eight different legal acts and emphasises key objectives, such as putting energy efficiency first, achieving global leadership in renewable energies, providing a fair deal for consumers, and a strategic long-term vision for a prosperous, modern, competitive and climate-neutral economy by 2050.

Regarding EU legislation, the main instruments are Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009, which sets out common rules for the internal market of electricity, and Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009, which promotes the use of energy from renewable sources. Also relevant is Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012, on energy efficiency.

The following legislative acts of the Clean Energy for all Europeans package have been recently approved, but while Regulations apply directly to all EU member states, Directives must be transposed into the national law:

- Directive 2018/844 of the European Parliament and of the Council amending Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency;
- Regulation (EU) 2018/1999 of the European Parliament and of the Council on the Governance of the Energy Union and Climate Action;
- Directive (EU) 2018/2001 of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast);
- Directive (EU) 2018/2002 of the European Parliament and of the Council amending Directive 2012/27/EU on energy efficiency;
- Regulation (EU) 2019/941 of the European Parliament and of the Council on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC;
- Regulation (EU) 2019/942 of the European Parliament and of the Council establishing a EU Agency for the Cooperation of Energy Regulators;
- Regulation (EU) 2019/943 of the European Parliament and of the Council on the internal market for electricity; and
- Directive (EU) 2019/944 of the European Parliament and of the Council on common rules for the internal market for electricity and amending Directive 2012/27/EU.

In Portugal, government policy for the energy sector (including electricity) is set out under the National Plan of Action for Energy Efficiency 2013–2016 (PNAEE 2016) and the National Plan of Action for Renewable Energies 2013–2020 (PNAER 2020), both approved by Council Resolution No. 20/2013 of 10 April. These policy instruments aim to:

- comply with all commitments (on energy efficiency and renewable energy) assumed by Portugal in an efficient manner from an economic viewpoint;
- significantly reduce greenhouse gas emissions, within a framework of sustainability;
- buttress diversification of primary energy sources, resulting in the increase of Portugal's supply security;
- increase the economy's energy efficiency, in particular in the public sector, resulting in the decrease of public spending and efficient use of resources; and
- contribute to the increase in the economy's competitiveness, through reducing consumption and costs associated with the management of companies and home economics, freeing resources to stimulate internal demand and new investments.

Pursuant to Regulation on the Governance of the Energy Union (Regulation (EU) 2018/1999), the Portuguese government has recently submitted a preliminary National Plan for Energy and Climate for 2021–2030, which will replace PNAEE 2016 and PNAER 2020. The National Plan includes ambitious targets, such as setting energy consumption from renewable resources at more than 45 per cent by 2030, which implies duplicating installed capacity, and a reduction of greenhouse gas emissions from 45 per cent to 55 per cent, compared to 2005. The National Plan was subject to a public consultation and should be finalised later in 2019.

The Portuguese government has also presented its Roadmap to Carbon Neutrality for 2050, aiming at decarbonisation and ambitious targets, such as setting electricity generation from renewable sources at 80 per cent in 2030 and 100 per cent in 2050. Recently, Resolution of the Council of Ministers No. 107/2019, of 1 July, approved the Roadmap to Carbon Neutrality 2050, that establishes all the decarbonisation vectors and action lines for a carbon-neutral society in 2050.

The main legislative instruments for the electricity sector are Decree-Laws Nos. 29/2006 of 15 February (which establishes the general framework for the organisation and functioning of the Portuguese electricity system – SEN) and 172/2006 of 23 August (which regulates the legal regime applicable for pursuing the activities of generation, transmission, distribution and supply of electricity and for the organisation of electricity markets), which were last amended, respectively, by Law No. 42/2016 of 28 December and Decree-Law No. 76/2019 of 3 June.

Organisation of the market

2 | What is the organisational structure for the generation, transmission, distribution and sale of power?

Under the Portuguese electricity market framework, activities relating to generation, supply and management of organised markets are liberalised and only require previous compliance with a licensing, authorisation or registration process. Transmission, distribution and supply of last resort are regulated activities provided through the award of licences or concessions.

Furthermore, transmission and distribution of electricity are subject to an unbundling regime, whereby: the company that operates the electricity national transmission network (TSO) may not integrate any group of companies dedicated to the generation or supply of electricity or natural gas; and operators of distribution networks (DSO) must be independent from a legal, organisational and decision-making process standpoint from other activities unrelated to distribution. Distribution companies that serve fewer than 100,000 clients are not subject to the legal unbundling regime, but they must still implement accounting and functioning unbundling measures.

It is also worth noting that the wholesale of electricity in Portugal is organised through an Iberian (ie, comprising Portugal and Spain) integrated electricity market, MIBEL. MIBEL operates an electricity spot market, which includes daily and intraday markets that are managed by a Spanish market operator, Mercado Ibérico de Energía - Polo Español, SA (OMEL), and an electricity forward market that is managed by a Portuguese market operator, Pólo Português, SGMR, SA (OMIP).

Wholesale of electricity may also be performed through other means, such as bilateral power purchase agreements and procurement of electricity or derivative electricity instruments in non-regulated platforms. Electricity generators can also participate in system service markets for the sale of electricity or electricity capacity (with the purposes of ensuring reliability and security in electricity supply).

REGULATION OF ELECTRICITY UTILITIES – POWER GENERATION

Authorisation to construct and operate generation facilities

3 | What authorisations are required to construct and operate generation facilities?

In general terms, any person wishing to set up an electricity generation plant in Portugal will be subject to a prior control procedure, whether informing the licensing entity of such intention or requesting the attribution of a generation licence. The permit entitles the applicant to proceed with the construction of the power plant, provided that a construction licence is issued by the relevant municipality and all applicable legal regimes with regards to environmental impact, waste or hydric resources are complied with. The applicant is required to attach several documents to the communication or request, namely and when applicable, an environmental impact statement.

Following the successful obtainment of the relevant permit and the construction of the power plant, the owner shall request an inspection of the facilities and the attribution of an operation licence, which authorises the commencement of the power plant's industrial operation.

If generation is carried out under a 'special regime' of electricity generation (notably through renewable energy sources or cogeneration) with guaranteed remuneration (such as a feed-in tariff), the promoters must be selected upon the conclusion of a public tender procedure, or a proceeding that allows any interested parties that comply with the applicable requirements to be established, as per fair and transparent criteria, determined by the ministry responsible for the energy sector.

The promoter must then request a network interconnection point to be allocated by the network operator. Once the network interconnection point is secured (which may entail the provision of a bond), the aforementioned licensing formalities apply.

Grid connection policies

4 | What are the policies with respect to connection of generation to the transmission grid?

Access to transmission and distribution networks of electricity must be regulated through objective, transparent and non-discriminatory criteria, in order to ensure all market participants have the same opportunities and promote competition between the industry's players.

Access to regulated infrastructures is subject to the following key principles:

- safeguard of the public interest, including the maintenance of security of supply;
- equal treatment and opportunities for all users;
- reciprocity on the use of interconnections by the entities responsible for the management of the grids to which the national electricity system is connected; and
- payment of the applicable tariffs.

Despite the principle of equal treatment and opportunities for all users and for the purposes of ensuring an efficient use of energy sources available at each given moment, both the TSO and the DSOs are bound to grant priority access to the grid for electricity generated using renewable energy sources (except for electricity generated by hydropower plants with an installed capacity greater than 30MW). Also, network operators must implement adequate measures aiming to prevent or minimise limitations to the transmission and distribution of electricity generated using renewable energy sources.

Additionally, in general terms, applicants who wish to install a power plant shall be granted a generation licence (and proceed with the plant's construction and operation) only if the relevant network operator confirms that there is enough grid capacity for such project. If the electricity is not purchased under the terms of a power purchase agreement entered into by and between the generator and the supplier of last resort, a grid use agreement must be executed between the generator and the relevant grid operator.

Alternative energy sources

5 | Does government policy or legislation encourage power generation based on alternative energy sources such as renewable energies or combined heat and power?

Following the enactment and transposition of several EU directives on renewable energy, Portugal has been committed to the promotion of renewable energy through economic incentives attributed to renewable energy generation and the setting of mandatory national targets for the overall share of energy and for the share of energy from renewable sources in transportation.

Economic incentives to renewable energy generation were established through feed-in tariffs from which renewable generation plants were able to benefit, as per the provisions of Schedule II of Decree-Law No. 189/88 of 27 May (as amended). This statute set out a specific formula for calculating the tariffs to be paid to generators, for the electricity generated by power plants using renewable energy (excluding large hydropower plants), that initiated their licensing procedure prior to the entering into force of Decree-Law No. 215-B/2012 of 8 October. Co-generation (combined generation of heat and electricity) also benefits from a favourable remuneration regime through other statutory provisions.

Renewable energy generators benefiting from feed-in tariffs also enjoy priority over conventional generators in dispatching their energy to the grid and the guarantee that electricity generated is purchased by an offtaker at the feed-in tariff rate.

Notwithstanding these feed-in tariffs still being in force for currently operating renewable energy plants:

- feed-in tariff periods were curbed for small hydro and wind power generators pursuant to Decree-Law No. 35/2013 of 28 February (although wind generators and the government were able to negotiate a 'net present value-neutral' payment to SEN to partially offset the effects of such reduction to the feed-in tariff period);
- there is currently no applicable feed-in tariff for renewable generation plants with generation licence granted after 9 April 2013 (as the relevant legislation has not yet been enacted), with the exception of renewable cogeneration and small scale generation; and
- the Portuguese government has launched a competitive bid procedure to grant grid capacity to solar energy projects against either a payment of a contribution to the National Electric System or a discount over a reference tariff determined by the government – both remuneration schemes (ie, the payment of the contribution and the feed-in tariff resulting from such discount) shall apply during a period of 15 years.

Regarding, on the other hand, renewable energy targets, Decree-Law No. 141/2010 of 31 December, as amended by Decree-Law No. 68-A/2015, of 30 April (transposing Directive 2012/27/UE into national law) established national targets for renewable energy in gross final consumption of energy and for the share of energy from renewable sources in transportation.

Climate change

- 6 | What impact will government policy on climate change have on the types of resources that are used to meet electricity demand and on the cost and amount of power that is consumed?**

The main policy instrument enacted for the purposes of fighting climate change is Resolution of the Council of Ministers No. 56/2015 of 30 July, which approved the Strategic Framework for Climate Policy, the Climate Change National Programme and the National Strategy for Climate Change Adjustment. This Resolution, among other things, also determined that Portugal must reduce its greenhouse gas emissions from 18 per cent to 23 per cent by 2020 and from 30 per cent to 40 per cent by 2030, both calculated on the basis of the 2005 levels, contingent on the results of European negotiations.

The Resolution also set the following targets, in line with the commitments assumed by Portugal and the EU under the Kyoto Protocol: an increase in the proportion of renewable energies in final energy consumption of 40 per cent and an increase in energy efficiency through a reduction of 30 per cent over the baseline energy in 2030, which translates into an energy intensity ratio of 101 tep/per millions of euros of gross domestic product.

The Resolution of the Council of Ministers No. 107/2019, of 1 July, which approved the Roadmap to Carbon Neutrality for 2050, has established the goal of reducing the emissions of greenhouse gases between by 85 per cent to 90 per cent until 2050, compared to 2005, and compensate the remaining emissions by using soil and forests, which shall be achieved by gradually reducing such emissions by 45 per cent to 55 per cent until 2030, and between 65 per cent to 75 per cent until 2040, compared to 2005. The Roadmap also sets out, among other targets, to decarbonise electricity generation, by eliminating generation through coal until 2030 and completely decarbonise the electricity generation system by 2050, by promoting generation through renewable endogenous resources.

In addition, Portugal has transposed Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009, concerning the Community's greenhouse gas emission allowance trading scheme, as well as Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 into law (Decree-Law No. 38/2013 of 15 March, as amended by Decree-Law No. 10/2019, of 18 January). Revenues from auctioning of said greenhouse gas emission allowances for the promotion of renewable energies are regulated by Ministerial Order No. 3-A/2014, and include compensation for renewable energy 'over-costs' in the tariff system and the funding of the Environmental Fund (a government-sponsored scheme that, among other things, has the ability to financially support renewable energy and energy efficiency projects).

Storage

- 7 | Does the regulatory framework support electricity storage including research and development of storage solutions?**

Although pumped hydro storage has existed in Portugal for several decades and battery storage is expected to gain traction in the near future, electricity storage has only recently been specifically acknowledged as a National Electric System activity under the main legislative bodies of electricity regulation (notably Decree-Law No. 172/2006 of 23 August, as amended by Decree-Law No. 76/2019, of 3 June), but it shall be further addressed by legislation to be approved.

Also, no specific research and development incentives for energy storage are attributed pursuant to the electricity regulatory framework in Portugal.

Government policy

- 8 | Does government policy encourage or discourage development of new nuclear power plants? How?**

Portugal does not generate energy from nuclear energy sources and its only nuclear reactor has been built and is operating for investigation and education purposes only.

There has been an ongoing public debate in Portugal (notably in the 1970s and the 2000s) regarding the merits and disadvantages of having nuclear power and in particular in pursuing the construction of a nuclear power plant, but no project ever came to fruition and apparently no licences for such purposes were attributed.

Notwithstanding the multiple international treaties Portugal is a party to regarding the use of atomic energy (notably the EURATOM treaty), there is currently no specific government policy towards encouraging or discouraging the promotion of nuclear energy.

REGULATION OF ELECTRICITY UTILITIES – TRANSMISSION

Authorisations to construct and operate transmission networks

- 9 | What authorisations are required to construct and operate transmission networks?**

Electricity transmission is carried out through the national transmission network; rights to construct and operate the national transmission network are exercised under an exclusive concession granted by the Portuguese government for a 50-year period (currently until 2057). The incumbent TSO is REN – Rede Eléctrica Nacional, SA (REN), a subsidiary of REN – Redes Energéticas Nacionais, SGPS, SA.

Portuguese law establishes a certification procedure for the transmission system operator (in order to ensure compliance with unbundling obligations), which is carried out by the Portuguese Regulatory Authority for Energy Services (ERSE). On 9 September 2014,

ERSE issued a decision certifying that REN complies with the relevant legal requirements to be considered a transmission system operator compliant with unbundling obligations, subject to the conditions set out therein.

In turn, layout and expansion of the national transmission network is based on a 10-year plan (reviewed every two years) for development and investment of the network (PDIRT), which takes into account:

- the supply safety monitoring report prepared by the government;
- technical characteristics of the network and electricity supply and demand; and
- coordination with the planning of the networks which are inter-connected with the national transmission network (including neighbouring networks).

PDIRT must be submitted to the Directorate General of Energy and Geology (DGEG) and must contain at least:

- information on infrastructure to be constructed or modernised in the following 10-year period, including indication of the investment decided by the TSO (and, among these, those projects that are to be executed within the next three years), and respective execution calendar;
- obligations arising from MIBEL and objectives set out under Regulation 714/2009 of the European Parliament and of the Council of 13 July 2009; and
- joint measures adopted by the Agency for the Cooperation of Energy Regulators and European Network of Transmission System Operators for Electricity, notably the non-binding 10-year plan for a European-wide transmission network.

PDIRT is subject to public consultation, prior opinion of ERSE, discussion by the parliament and approval by the member of government responsible for energy affairs.

PDIRT 2018-27 was approved by the member of the government for energy affairs in 2019.

Eligibility to obtain transmission services

10 Who is eligible to obtain transmission services and what requirements must be met to obtain access?

The TSO must provide non-discriminatory and transparent access to the transmission network. In fact, the legal unbundling criteria approved by Portuguese law eliminate, and prevent, the risk of discrimination with regards to transmission network access.

Access to the networks and interconnections is automatically recognised for any interested entity upon completion of the connection of the relevant installation to the network, which in itself may be subject to licensing procedures.

Government transmission policy

11 Are there any government measures to encourage or otherwise require the expansion of the transmission grid?

At the moment there are no government policies to encourage or require expansion of the transmission grid. As a matter of fact, taking into account the economic and financial constraints the country faced at the start of the decade, coupled with efforts made to reduce the tariff deficit of the SEN, government policy has been working the other way around (ie, curbing expansion in the transmission network) for the purposes of keeping network access tariffs down.

This effort to curb expansion in the transmission network in order to restrict increases in network access tariffs is evident in the opinions of ERSE regarding the latest PDIRTs.

Rates and terms for transmission services

12 Who determines the rates and terms for the provision of transmission services and what legal standard does that entity apply?

Transmission activity is subject to ERSE's regulation, which determines the tariffs applicable to the provision of such services by the TSO. The determination of such tariffs must comply with certain legal principles that, in particular, aim at guaranteeing transparent and efficiency-driven pricing, as well as the protection of electricity consumers and equality of treatment. The methodology for the calculation of the mentioned tariffs is approved by ERSE's Tariff Regulation of the electricity sector.

Entities responsible for grid reliability

13 Which entities are responsible for the reliability of the transmission grid and what are their powers and responsibilities?

The entity responsible for ensuring grid reliability is the TSO. To achieve this goal the TSO uses its attributions as the global manager of SEN, notably through its functions of system technical management, system services procurement and market-making, energy planning and transmission network planning.

REGULATION OF ELECTRICITY UTILITIES – DISTRIBUTION

Authorisation to construct and operate distribution networks

14 What authorisations are required to construct and operate distribution networks?

Electricity distribution occurs through the national distribution network, consisting of a medium- and high-voltage network, and through the low-voltage distribution networks.

Currently, the national distribution network is operated through an exclusive concession granted by the Portuguese state. This exclusive concession for the activity of electricity distribution in high and medium voltage levels is held by EDP Distribuição, a subsidiary of EDP – Energias de Portugal, SA, pursuant to article 70 of Decree-Law No. 29/2006 of 15 February, as a result of converting the licence held by EDP Distribuição under the former regime into a concession agreement, which was signed on 25 February 2009, for a 35-year term. The terms of the concession are set forth in Decree-Law No. 172/2006 of 23 August.

The low-voltage distribution networks continue to be operated under concession agreements granted by the municipalities.

Layout and expansion of the national distribution network is based on a five-year plan (which is reviewed every two years) for development and investment of the network. That takes into account and facilitates measures of demand management and electricity distributed generation.

A PDIRD must be submitted to the DGEG and contain, at least:

- technical characteristics of the distribution network (notably substation installed capacity);
- the supply safety monitoring report prepared by the government;
- safety standards for the planning of the distribution network; and
- requests for buttressing of the delivery capacity presented by concessionaires of low-voltage networks and generation licences, as well as other grid connection requests by generation facilities.

PDIRD is subject to public consultation, prior opinion of ERSE, discussion by the Parliament and approval by the member of government responsible for energy affairs.

PDIRD 2017–2021 was approved by the member of the government for energy affairs in 2017.

Access to the distribution grid

15 | Who is eligible to obtain access to the distribution network and what requirements must be met to obtain access?

Access to the distribution network must be regulated through objective, transparent and non-discriminatory criteria, in order to ensure all market participants have the same opportunities and promote competition between the industry's players, pursuant to the regulations put into force by ERSE regarding access to the networks, infrastructures and interconnections.

As such, all entities which are considered market participants in the SEN (in particular generators, suppliers and consumers of electricity) will be eligible to access the distribution network.

Access to regulated infrastructures is subject to the following key principles:

- safeguard of the public interest, including the maintenance of security of supply;
- equal treatment and opportunities for all users;
- reciprocity on the use of interconnections by the entities responsible for the management of the grids to which the national electricity system is connected; and
- payment of the applicable tariffs.

As a consideration for the access to regulated infrastructures, users must pay access tariffs, which are determined by ERSE on an annual basis and must be equal for all categories of users.

Government distribution network policy

16 | Are there any governmental measures to encourage or otherwise require the expansion of the distribution network?

No. As for the distribution network, government and regulatory policy (notably feedback to the distribution network plans prepared by the distribution network operator) has been directed at restraining expansion of the distribution network to ensure that increases in network access tariffs are also limited. However, due to the increase of requests for grid capacity to install renewable energy projects (in particular, solar photovoltaic power plants), developments to the grid are expected to be made under the terms of PDIRD, particularly during the next two years to allow those projects to connect to the grid.

Rates and terms for distribution services

17 | Who determines the rates or terms for the provision of distribution services and what legal standard does that entity apply?

Distribution activity is subject to ERSE's regulation, which determines the tariffs applicable to the provision of such services by the DSO. The determination of such tariffs must comply with certain legal principles that, in particular, aim at guaranteeing transparent and efficiency-driven pricing, as well as the protection of electricity consumers and equality of treatment. The methodology for the calculation of the mentioned tariffs is approved by ERSE's Tariff Regulation of the electricity sector.

REGULATION OF ELECTRICITY UTILITIES – SALES OF POWER

Approval to sell power

18 | What authorisations are required for the sale of power to customers and which authorities grant such approvals?

Electricity supply is open to competition, subject only to a registration regime before the DGEG. Suppliers may freely buy and sell electricity. For this purpose, they have a right of access to the national

transmission and distribution networks upon payment of access tariffs set by ERSE.

As required by the Electricity Directive, the Electricity Framework also establishes a last-resort supplier that is subject to licensing by DGEG and regulation by ERSE. The last-resort supplier is responsible for the purchasing of all electricity generated by special regime generators which benefit from a guaranteed remuneration scheme (ie, feed-in tariff), and for the supply of electricity to customers who purchase electricity under regulated tariffs, and is subject to universal service obligations. The last-resort supplier is expected to exist until the free market is fully competitive.

Power sales tariffs

19 | Is there any tariff or other regulation regarding power sales?

There are tariffs concerning sales of electricity by a supplier of last resort, which are subject to extensive regulation. Final customer tariffs applicable to the regulated market are differentiated by voltage level, tariff option and the period of electricity consumption. These tariffs, when set, should be uniform throughout mainland Portugal within each voltage level, subject to specified exceptions based on volume.

The price of electricity sold by suppliers operating under a 'liberalised' market system is not administratively set and as such said suppliers may define the price they wish. Nevertheless, consumers must also pay network access tariffs and 'global use of system' tariffs in addition to the electricity price set by suppliers.

Rates for wholesale of power

20 | Who determines the rates for sales of wholesale power and what standard does that entity apply?

In Portugal, the wholesale market for electricity is liberalised and organised at an Iberian level (through the MIBEL), without prejudice of the possibility of market agents entering into bilateral power purchase agreements.

Thus, wholesale rates are generally determined by supply and demand, notwithstanding special rules applicable to offtaker purchases and sales of electricity.

The offtaker, which is also the supplier of last resort, is obliged to: acquire the electricity generated from renewable and cogeneration plants which benefit from a feed-in tariff; and acquire electricity necessary to supply its clients through MIBEL in the quantities and at auctions defined by DGEG. All electricity purchased by this entity which exceeds the amount of power required to supply its clients must be resold in the market.

Public service obligations

21 | To what extent are electricity utilities that sell power subject to public service obligations?

Electricity suppliers must comply with certain public service obligations to ensure the quality and continuity of supply, as well as consumer protection with respect to prices, access tariffs and access to information in simple and understandable terms.

As required by Directive 2009/72/EC, Decree-Law No. 29/2006 also establishes a last-resort supplier that is subject to licensing by DGEG and regulation by ERSE. The last-resort supplier is responsible for the purchasing of all electricity generated by special-regime generators which benefit from a guaranteed remuneration scheme, and for the supply of electricity to customers who purchase electricity under regulated tariffs, and is subject to universal service obligations. The last-resort supplier is expected to exist until the free market is fully competitive, as provided for in Directive 2009/72/CE.

REGULATORY AUTHORITIES

Policy setting

22 | Which authorities determine regulatory policy with respect to the electricity sector?

Responsibility for regulation of the Portuguese energy sector is shared between DGEG, ERSE and the Portuguese Competition Authority, according to their respective functions and responsibilities.

Scope of authority

23 | What is the scope of each regulator's authority?

The national regulatory authority of the electricity, natural gas and liquefied petroleum gas industries is ERSE, a public entity with administrative and financial independence. ERSE's bylaws were enacted by Decree-Law No. 97/2002 of 12 April, and amended by Decree-Law No. 212/2012 of 25 September, by Decree-Law No. 57-A/2018 of 13 July, and by Decree-Law No. 76/2019 of 3 June.

ERSE is in charge of regulation, supervision and sanctioning in the aforementioned sectors, from generation to supply. Recently, Law No. 9/2013, which came into force on 28 January 2013, established the Energy Sector Sanctioning Regime, which substantially reinforced ERSE's sanctioning competence and powers. Later, Decree-Law No. 84/2013 of 25 June revised ERSE's bylaws, completing the implementation of Directives 2009/72/EC and 2009/73/EC.

Alongside ERSE, the DGEG, a state-administered entity with financial independence, has the task of implementing and developing the state's policies regarding energy matters and the exploitation of geological resources.

As such, and in most cases, the DGEG is the competent entity for granting licences and other administrative authorisations concerning energy related activities, such as generation or exploration licences.

The Portuguese Competition Authority enforces rules concerning anti-trust provisions contained in the Treaty on the Functioning of the EU and in Council Regulation (EC) No. 139/2004 of 20 January 2004. The Portuguese Competition Authority is empowered to fully apply those rules in respect of the economic principle of market economy and free competition, in view of an efficient functioning of the markets, an effective distribution of resources and the interests of consumers.

Establishment of regulators

24 | How is each regulator established and to what extent is it considered to be independent of the regulated business and of governmental officials?

DGEG, although it has 'legal autonomy' to execute administrative actions as well as financial independence, is an entity that is part of the central government and therefore may not be considered as being independent.

ERSE and the Portuguese Competition Authority, on the other hand, beyond the privilege of legal and financial autonomy, also enjoy full independence (organic, functional and technical) from the central government and have broad supervisory, regulatory and sanctioning powers.

Independence of ERSE from the government is only constricted by:

- approval by the latter of the budget and annual accounts; and
- the government's prerogative to establish the general guidelines of energy policy, notably in matters related to:
 - security of supply;
 - consumer rights;
 - negotiation and execution of international agreements in the energy area;
 - energy efficiency;

- environmental sustainability; and
- sustainability of the SEN.

Besides applicable legislation, the Portuguese Competition Authority's independence is limited by it requiring the government to approve its budget and annual accounts.

Challenge and appeal of decisions

25 | To what extent can decisions of the regulator be challenged or appealed, and to whom? What are the grounds and procedures for appeal?

Decisions adopted by the regulators can be challenged in general on the grounds of the non-conformity of such decisions with legal or regulatory provisions or with general principles of public or criminal or misdemeanour law (depending on the decision adopted).

Decisions of DGEG may be appealed internally and may further be challenged before the administrative courts pursuant to general public procedural law provisions.

Decisions of ERSE imposing misdemeanour liability are appealable before a specialised court, the Court for Competition, Regulation and Supervision. Other decisions shall be challenged before the administrative courts pursuant to general public procedural law provisions.

Decisions of the Portuguese Competition Authority imposing misdemeanour liability or concerning administrative procedures pursuant to the Portuguese Competition Act (such as 'merger control' procedures) are also appealable to the Court for Competition, Regulation and Supervision.

ACQUISITION AND MERGER CONTROL – COMPETITION

Responsible bodies

26 | Which bodies have the authority to approve or block mergers or other changes in control over businesses in the sector or acquisition of utility assets?

The regulatory body that has the authority to approve or block mergers or other changes in control over businesses in the energy sector is, in general, the Portuguese Competition Authority. Other entities, such as ERSE and the central government, may also play a role in 'merger control' review of energy assets, in particular if such transactions involve the TSO or the DSO (entities subject to unbundling requirements) or to assets considered strategic under the terms of Decree-Law No. 138/2014, of 15 September.

Review of transfers of control

27 | What criteria and procedures apply with respect to the review of mergers, acquisitions and other transfers of control? How long does it typically take to obtain a decision approving or blocking the transaction?

Merger control review shall be triggered by:

- a merger between two or more hitherto independent undertakings;
- the acquisition of control, by one or more undertakings, over other undertakings or parts of other undertakings to which a market turnover can clearly be attributed; and
- the creation of a full-functioning joint venture on a lasting basis, provided that certain market share or turnover thresholds are exceeded.

Transactions meeting said thresholds are subject to mandatory notification and cannot be implemented before a non-opposition decision is issued by the Portuguese Competition Authority.

A decision by the Portuguese Competition Authority for merger control review must generally be taken within (counting from the date of filing of the corresponding request) 30 business days, if an 'initial investigation' is required, and 90 business days, if an 'in-depth investigation' is required).

In the investigation, the Portuguese Competition Authority shall assess whether the transaction will cause a 'material hindrance to effective competition'. If it does, the Authority shall issue a decision prohibiting the completion of the deal (without prejudice of the intervening parties negotiating remedies in order for the transaction to be cleared).

Prevention and prosecution of anticompetitive practices

28 Which authorities have the power to prevent or prosecute anticompetitive or manipulative practices in the electricity sector?

The Portuguese Competition Authority is the entity that is primarily responsible for preventing and prosecuting anticompetitive and manipulative practices in the electricity sector.

ERSE is in charge of: fostering and ensuring compliance with competition provisions in the electricity sector; and reporting to the Portuguese Competition Authority any anticompetitive practices in the electricity sector of which it has knowledge, and further collaborating with the latter in the corresponding misdemeanour procedure.

ERSE must also issue an opinion prior to a decision being taken by the Portuguese Competition Authority on alleged anticompetitive practices in the electricity sector.

Determination of anticompetitive conduct

29 What substantive standards are applied to determine whether conduct is anticompetitive or manipulative?

Conduct by electricity companies is generally deemed to be anticompetitive if it breaches the provisions of articles 101 and 102 of the Treaty on the Functioning of the EU and articles 9 and 11 of the Portuguese Competition Act, the substantive content of which is essentially equivalent to the Treaty provisions. In general terms, such provisions make the following unlawful:

- agreements between undertakings, and concerted practices or decisions by associations of undertakings, which have the effect of impeding, distorting or restricting competition (entirely or partially) in a material manner; and
- the abuse of market power (dominant position), in particular exclusionary abuse aimed at harming the dominant operator's competitors and preventing them from competing effectively in the market.

For the purposes of assessing whether said rules have been breached, the Portuguese Competition Authority bases its decisions on the interpretation of said legal provisions coupled with support of precedents (Portuguese and European) from regulatory practice and decisions in prior infringement proceedings and from court rulings.

Preclusion and remedy of anticompetitive practices

30 What authority does the regulator (or regulators) have to preclude or remedy anticompetitive or manipulative practices?

The following powers (among others) are exercised by the Portuguese Competition Authority and may be relevant to the effect of precluding or remedying anticompetitive practices or, more generally, in deterring anticompetitive practices. The following may be used:

- unannounced on-site inspections to target companies' premises (ie, dawn raids);
- mandatory requests for information and documentation; and

- in certain cases where the Portuguese Competition Authority suspects anticompetitive practices, notably in cases not involving restrictions by object, informal negotiations between the Authority and the companies involved may be held with the purpose of designing commitments to remedy and put an end to said anticompetitive practices without the imposition of fines.

INTERNATIONAL

Acquisitions by foreign companies

31 Are there any special requirements or limitations on acquisitions of interests in the electricity sector by foreign companies?

Decree-Law No. 138/2014, of 15 September introduced a legal framework to safeguard strategic assets essential to ensure national defence and security and to guarantee the supply of services fundamental to the public interest related to the energy, transport and communications sectors. Under the legal framework, a change in energy utilities' control structure involving direct or indirect control by a person or persons from a country that is not a member of the EU or the European Economic Area may be denied by the Portuguese government under certain circumstances if there are real and serious reasons to believe that national defence and security or the safety of supply of energy are at risk.

Authorisation to construct and operate interconnectors

32 What authorisations are required to construct and operate interconnectors?

Interconnectors with other national transmission networks are constructed and operated by the TSO, pursuant to the attributions granted to it under the respective concession agreement.

Interconnectors depend on bilateral or regional agreements for their construction because they are by definition cross-border. In the EU, in particular, interconnectors are planned by a grid development plan prepared by European TSOs (through ENTSO-E, the European Network of Transmission System Operators).

In this respect, several interconnectors may be deemed as being projects of common interest (Portugal-Spain energy corridors are included in this category) pursuant to Regulation (EU) 347/2013 of the European Parliament and of the Council of 17 April 2013, which sets out that said projects are granted 'priority status', entailing streamlined licensing procedures and, potentially, access to incentives and European financial assistance.

As stated above, the TSO must take into account the projects envisaged by this pan-European network development plan in its own plan for the transmission network, the PDIRT.

Interconnector access and cross-border electricity supply

33 What rules apply to access to interconnectors and to cross-border electricity supply, especially interconnection issues?

EU electricity cross-border flows are governed primarily by Regulation (EC) No. 714/2009 of the European Parliament and of the Council of 13 July 2009.

This statute provides rules concerning:

- compensation between transmission system operators;
- grid access tariffs;
- information exchange; and
- general principles of congestion management.

In accordance with said Regulation, fees applicable by TSOs in particular must be transparent, take into account the need for network security and reflect actual costs incurred insofar as they correspond to those of an efficient and structurally comparable network operator and are applied in a non-discriminatory manner. Tariffs must also be non-distance related.

TRANSACTIONS BETWEEN AFFILIATES

Restrictions

34 | What restrictions exist on transactions between electricity utilities and their affiliates?

From a regulatory perspective (ie, not taking into consideration company or tax law issues) restrictions on transactions between utilities and affiliates apply to players in the electricity value chain that are integrated in vertically integrated companies, in particular the TSO (if the latter had been certified as an 'Independent Transmission Operator', pursuant to the provisions of the Electricity Directive, which is not the case) and DSO, pursuant to unbundling obligations implemented by the Electricity Directive.

Notable restrictions include:

- the Independent Transmission Operator (currently not the case regarding the TSO) cannot subcontract personnel or render services to undertakings that are part of the vertically integrated company, unless such services are not discriminatory to network users and said services are approved by ERSE;
- a DSO must ensure that its image and communication are different from the remainder of the companies acting in the SEN, including if said DSO is part of an integrated utility; and
- a DSO that belongs to a vertically integrated utility must have the necessary human, technical, financial and material resources to operate, maintain and develop the network, and it must have effective and independent decision-making power relative to the vertically integrated utility.

Enforcement and sanctions

35 | Who enforces the restrictions on utilities dealing with affiliates and what are the sanctions for non-compliance?

ERSE has powers to monitor compliance with the aforementioned rules concerning restrictions on transactions between utilities and affiliates and to initiate misdemeanour procedures in case of breach of such rules.

UPDATE AND TRENDS

Key developments of the past year

36 | Are there any emerging trends or hot topics in electricity regulation in your jurisdiction?

There is currently growing attention paid by investors to the development of solar energy projects in Portugal. Therefore, we have recently witnessed a significant increase in capacity licensing requests for solar energy projects, which resulted into a shortage of grid capacity. This shortage has already determined the establishment of capacity assessment tenders and has put pressure on the approval of new investments in the Portuguese transmission and distribution networks. This has been the case, even though the majority of these newly licensed greenfield projects will not benefit from a guaranteed remuneration scheme. In June 2019, the Portuguese government launched a competitive bid procedure to grant grid capacity to solar projects, establishing two remuneration schemes that shall apply for 15-year periods.

M **MORAIS LEITÃO**
L GALVÃO TELES, SOARES DA SILVA
 & ASSOCIADOS

Ricardo Andrade Amaro

ramaro@mlgts.pt

Joana Alves de Abreu

jabreu@mlgts.pt

Pedro Capitão Barbosa

pccbarbosa@mlgts.pt

Rua Castilho, 165

1070-050 Lisbon

Portugal

Tel: +351 213 817 400

Fax: +351 213 817 499

www.mlgts.pt

Other titles available in this series

Acquisition Finance	Distribution & Agency	Investment Treaty Arbitration	Rail Transport
Advertising & Marketing	Domains & Domain Names	Islamic Finance & Markets	Real Estate
Agribusiness	Dominance	Joint Ventures	Real Estate M&A
Air Transport	e-Commerce	Labour & Employment	Renewable Energy
Anti-Corruption Regulation	Electricity Regulation	Legal Privilege & Professional Secrecy	Restructuring & Insolvency
Anti-Money Laundering	Energy Disputes	Licensing	Right of Publicity
Appeals	Enforcement of Foreign Judgments	Life Sciences	Risk & Compliance Management
Arbitration	Environment & Climate Regulation	Litigation Funding	Securities Finance
Art Law	Equity Derivatives	Loans & Secured Financing	Securities Litigation
Asset Recovery	Executive Compensation & Employee Benefits	M&A Litigation	Shareholder Activism & Engagement
Automotive	Financial Services Compliance	Mediation	Ship Finance
Aviation Finance & Leasing	Financial Services Litigation	Merger Control	Shipbuilding
Aviation Liability	Fintech	Mining	Shipping
Banking Regulation	Foreign Investment Review	Oil Regulation	Sovereign Immunity
Cartel Regulation	Franchise	Partnerships	Sports Law
Class Actions	Fund Management	Patents	State Aid
Cloud Computing	Gaming	Pensions & Retirement Plans	Structured Finance & Securitisation
Commercial Contracts	Gas Regulation	Pharmaceutical Antitrust	Tax Controversy
Competition Compliance	Government Investigations	Ports & Terminals	Tax on Inbound Investment
Complex Commercial Litigation	Government Relations	Private Antitrust Litigation	Technology M&A
Construction	Healthcare Enforcement & Litigation	Private Banking & Wealth Management	Telecoms & Media
Copyright	Healthcare M&A	Private Client	Trade & Customs
Corporate Governance	High-Yield Debt	Private Equity	Trademarks
Corporate Immigration	Initial Public Offerings	Private M&A	Transfer Pricing
Corporate Reorganisations	Insurance & Reinsurance	Product Liability	Vertical Agreements
Cybersecurity	Insurance Litigation	Product Recall	
Data Protection & Privacy	Intellectual Property & Antitrust	Project Finance	
Debt Capital Markets		Public M&A	
Defence & Security		Public Procurement	
Procurement		Public-Private Partnerships	
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)