



The Portuguese energy clawback tax and the rule of law

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A tax wind from Spain

It all started in 2013 when Spain published Ley 15/2012, of 27 December (later amended by Law 9/2013, of 13 July), with a special tax of 7% charged to electricity producers, and the Portuguese Decree-Law no. 74/2013, of June 4 (the "Clawback Law") created a mechanism to correct imbalances between electricity producers, caused by distortions resulting from external events or measures taking place in other Member States of the European Union.

The Spanish energy tax has been controversial. The Spanish Supreme Court argued the illegality of this mechanism considering that this tax would not be exclusively an environmental tax, since it would tax all energy producers indiscriminately. Also, it created a possible double taxation issue with the Tax on Economic Activities that energy production was already subject to. Nevertheless, the Spanish Constitutional Court rejected this understanding and decided for the adequacy of the energy tax to the Spanish Constitution.

In 2018, the Spanish authorities decided to suspend the energy tax for six months with the purpose of reducing the electricity prices for costumers. This decision was temporary, and the energy tax was re-enacted in 2019. Again, Spanish electricity companies increased their wholesale prices. This influenced the market price at OMIE (the MIBEL daily market) and allegedly benefited the Portuguese producers integrated in the same market and were not paying the Spanish tax, thus receiving windfall profits.

Lead to a long list of regulations in Portugal

In Portugal, the Government imposed a charge on energy production (the "Clawback Charge") of EUR 6.5/MWh, through Order no.11566-A/2015, of 3 October, that Order no. 9955/2017, would decrease to EUR 4.75/MWh. This was done under the cover of the Clawback Law, with the above argument that Portuguese producers were receiving windfall profits. Subsequently, the Portuguese Energy Secretary of State suspended the Clawback Charge in the period corresponding to the suspension of the energy tax in Spain, from 1 October 2018 until 31 March 2019.

Decree-Law no. 104/2019, of 9 August, amended the Clawback Law to allow a pre-payment to temporarily mitigate the time lag between the verification of the external event (in this case, the verification that the Spanish energy tax remains in place) and the respective compensation (i.e. the Portuguese Clawback Charge). It also allowed to adjust the external event to the electricity production technology on which it is focused, to avoid distortions of undifferentiated application to different energy production sources. Important to note that new Article 1.º-A of the Clawback Law expressly established that the clawback charges apply to electricity producers.

ERSE, the Portuguese Energy market regulator, was requested by Decree no. 282/2019, of 30 July, to submit, on a yearly basis, a report on the impact on the formation of the average price of electricity in the Portuguese wholesale market for measures and events recorded in the European Union. ERSE published its first report in September 2019, where it considered that the re-enactment of the Spanish energy tax was an event that could cause a market imbalance requiring compensation through the clawback mechanism.



As a consequence, the Clawback Charge on Portuguese producers in respect of the energy output was set at the value at EUR 6.27/MWh for 2018 and at EUR 4.18/MWh for 2019, by Order no. 8521/2019, of 26 September.

The pre-payment for 2020 was adjusted to EUR 2.24/MWh by Order no. 6740/2020 of June 30 to internalize local events that affected the Electric National System (“SEN”) such as the taxation of petroleum products and energy; the extraordinary contribution on the energy sector and; the social tariff for electricity.

Followed by more than simples rulings and clarifications

All this complex regulatory output raised many doubts among producers, first on how the clawback mechanisms would work, as the initial version of the Clawback Law was missing the tools to calculate the amount that would charge to producers. Subsequently, on to whom would the clawback charge apply to.

The Portuguese Energy Secretary of State issued on December 16, 2019 a ruling (the “Ruling”) stating, firstly, that the triggering of the Clawback Law mechanism is limited to external events to the SEN with effects on the formation of wholesale prices in OMIE; in second place that all electricity producers selling electricity at a price by reference to OMIE, regardless of the primary source used by the respective power plants, would be covered by this regime.

On the other hand, electric producers that operate power plants with remuneration not depending directly on the MIBEL daily market are not covered by this mechanism, even if they participate in OMIE, provided that the income obtained by the respective power plants is predetermined in the respective off-taking contracts, and does not change according to the evolution of prices in the MIBEL daily market.

The same understanding should apply to power purchase agreements between electricity producers that do not benefit from any fixed remuneration mechanism and final customers/suppliers, for the physical delivery of electricity at a specific point, at a specific price, since it will not generate any windfall profit.

But if they generate any windfall profit, even though Article 1.º-A of the Clawback Law only established that this charge is to be applied to electricity producers, the Ruling extend the Clawback to electricity suppliers as well.

In an additional clarification, dated of July 27, 2020 (the Clarification”), the Portuguese Energy Secretary of State determined that in the case where the supplier acquires electricity from a producer under a fixed price PPA to sell it at OMIE, receiving the respective marginal price as return, there will be an increase in gain with the nature of a windfall profit in the sphere of the supplier, which must be subject to the Clawback Law mechanism. In these cases, the supplier should pay the Clawback Charge amount to the producer, being the latter responsible for delivering it to the REN (which, as the transport network operator, has been chosen as responsible for the collection of the Clawback Charge).

That disrupted the energy market and the trust in regulators

When it created the Clawback Charge using the Clawback Law for that purpose, the Portuguese Government (and ERSE) assumed that a variation in the Spanish taxation of energy creates an extra-market advantage in Portugal that has to be counter balanced through the Clawback Law mechanism.

This assumption is arguable, to say the least. The Clawback Law intent was to protect the electricity market by the correction distortions not originated by the market itself. But, by their nature, we cannot include in such distortions those caused by any voluntary action of the Iberian Governments, particularly if those actions take the form of a tax. The differences between the Portuguese and Spanish taxes are not eligible to be balanced by the simple clawback mechanism created by the Clawback Law: the lower VAT rates applicable in Spain, are a good example, as they have not yet caused and should not cause the Portuguese



Government to provide any incentive to Portuguese energy producers to counterbalance the higher Portuguese VAT rate.

Any charge imposed upon Portuguese energy producers or suppliers to balance a new tax on energy in Spain is in substance a new tax in Portugal, a charge generally imposed by the Portuguese State on a specific type of transactions: in our case, the sale of energy when it is sold at OMIE or at an OMIE related price. In Spain there were never doubts about the tax nature of the substantially identical contribution (even if with a broader scope) that energy producers have been called to pay pursuant to the Spanish energy tax law.

Article 165.^o et seq. of the Portuguese Constitution establish that all new taxes, any changes to the scope of a tax or to the tax subjects and tax rates require the enactment of a formal law from the Portuguese Parliament. Consequently, any charge created under the cover of the Clawback Law (which, by the way, is a Decree-law enacted by the Portuguese Government within its legislative powers, and not by the Parliament) that materially corresponds to a new tax, as it happens with the Clawback Charge, violates the Portuguese Constitution.

To make it worse, the Ruling and the Clarification modified the Clawback Charge and extended it to electric energy suppliers, overriding article 1.^o-A of the Clawback Law, which clearly states that only the producers are subject to the clawback mechanism, with no reference to suppliers. The Ruling and the Clarification were enacted within the executive powers of the Portuguese Energy Secretary of State, adding a second layer of Constitution issues and legal problems: the Portuguese Energy Secretary of State does not have the legal power to rule on the scope and on the taxable subject of the Clawback Charge, this power belongs to the Portuguese Parliament; nor has he the power to amend a decree-law issued by the Government.

This long succession of events, that we tried to summarise in this article, lead our country to a situation where the Portuguese electricity market competitiveness is being penalised by a random tax which, one day applies only to producers and to a certain kind of transactions but the next day can apply to different transaction types and to other market agents, with variable and unforeseeable tax rates, all by decision of one member of the Government. The Clawback Charge not only undermines the creation of a market for financial PPAs in Portugal, depriving all market agents from its benefits; but it adds, at a time Portugal is putting an enormous effort to foster the national solar photovoltaic production, a high degree of concern, particularly amongst the renewables' market players who do not know anymore what to expect from the Portuguese decision makers on the taxation of energy.

More importantly, the Clawback Charge has been put in place in a manner which, in our view, disregarded the boundaries for the protection of all taxpayers set up in the Portuguese Constitution. This, of course, creates another kind of concern being felt throughout the World these days, even in places where we still take the principle of separation of powers for granted.

November 12, 2020

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