MACEDO VITORINO

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THE OFFSHORE WIND POWER PRODUCTION LICENSING

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CONTENTS

FOREWORD

Portugal took its first steps in offshore wind power production in 2011 through the WindFloat pilot project. Later, in 2019, Windfloat Atlantic was a pioneering project, through the installation of three wind turbines, with a capacity of 8.4 MW each, located 18 km off the coast, off Viana do Castelo.

More recently, BayWa R.E. Projects España, S.L.U. (BAYWA) has started the procedures to install and explore an offshore wind farm with a total capacity of up to 750 MW in the Pilot Zone off Viana do Castelo, submitting a contract proposal for planning.

The National Maritime Space Planning Situation Plan (PSOEM) included Viana do Castelo as one of the pilot zones in the Portuguese coastal areas for the development of renewable energy.

Despite this growth, the wind energy potential in Portugal is far from exhausted, and offshore wind energy has the possibility to contribute to the National Energy and Climate Plan (PNEC2030) and to the Carbon Neutrality Roadmap (2020-2050).

Recently, the Government has committed to achieve the production of energy through renewable sources by 80% in the end of 2026 (four years earlier that the goal set out in the PNEC2023).

As a result, the Government established, on late 23rd September, a Task Force for the planning and operationalization of electro-producing centers based on renewable energy sources of oceanic origin. This working group must produce a report, until May 31, 2023, containing a set of proposals covering several issues raised regarding this type of energy production, such as: mapping the most suitable locations; the titles of private use of maritime space model; the technical and investment model for the development of electrical infrastructure in offshore.

An offshore wind auction is expected tb be launched in later 2023 for the installation of 10 GW of capacity. Considering that in Portugal the production of hydroelectric power and onshore wind represent 7.3 GW and 5.6 GW respectively, we can better understand the meaning and dimension of this auction.

LICENSING GENERAL RULES

In general, the production of electricity is submitted to a prior control system under the following terms:

- **Production and Exploration License:** production and self-storage with installed capacity over 1 MW, or if it is submitted to an EIA or environmental incidences assessment procedure.
- **Previous Registration and Operation Certificate:** production with installed capacity higher than 30 kW and equal to or less than 1 MW and self-storage with installed capacity lower than 1 MW
- **Prior Communication**: production with installed capacity higher than 700 kW and equal to or less than 30 kW
- Production projects with installed capacity equal to or less than 700 W are exempt from prior control.

The emission of the Production License depends on the previous attribution of a reserve title of injection capacity at the RESP ("TRC").

The TRC can be obtained through one of the following three modalities:

- **General Access:** This applies if there is reception capacity at the RESP. It is dependent on the payment of a deposit to DGEG in the amount of EUR10,000.00/MVA for a minimum period of 30 months, or until the power station and/or storage facility comes into operation.
- **Agreement with the operator of the RESP:** This applies if there is no reception capacity at the RESP and the maximum annual injection capacity at the RESP has been defined by Government order, to be allocated in this modality until January 15 of each year. Conditioned to the payment of a security deposit to the operator of the RESP in the amount of EUR15,000.00/MVA for a minimum period of 24 months. After the agreement is signed, the deposit is returned and it is mandatory to provide a new deposit to DGEG under the terms of the General Access.
- **Competitive Procedure:** This applies if the Government has determined that a competitive procedure for the award of the TRC should be opened. The terms and conditions of the award of the TRC and of the provision of the guarantee are set out in the pieces of the procedure.

LICENSING STEPS

The installation of a electricity producer follows a licensing process with several steps, as follows:

- **Environmental analysis:** projects with an installed capacity of more than 50 MW, or more than 20 MW but located in sensitive areas are submitted to EIA, or to an environmental incidences analysis procedure when, regardless of the installed capacity, they are located in sensitive areas.
- **Production License (installed capacity over 1 MW):** The process is instructed with the elements mentioned in Annex I of DL 15/2022.
- **Prior Registration** (production with installed capacity higher than 30 kW and equal to or less than 1 MW with installed capacity lower than 1 MW): The process is instructed with elements referred to in DGEG Order 6/2020 of February 18
- **Municipal control**: Construction of power generation centers or storage facilities are dependent on obtaining a building permit or a prior communication. Exempt from municipal control the installation of photovoltaic panels that do not exceed the roof area of buildings and the height of the building by 1m.
- **Connection to the RESP:** Connection of the RESP connected infrastructures built at the promoter's expense. The promoters may request expropriation for public utility, as well as request the constitution of easements on the properties required for the installation of the electricity infrastructure that will be an integral part of the RESP.
- **Exploration License:** Must be requested within one year from the date of the issue of the Production License, with the possibility of extension, once only, for another year.
- **Exploration Certificate:** must be requested within nine months from the date of issue of the Previous Registration, with the possibility of extension, for a single time, for another half of the initial period.

MARITIME SPACE PLANNING

Law No. 17/2014, of April 10, establishes the bases of the National Maritime Space Planning and Management Policy, and determine that the planning of the national maritime space is carried out through:

Situation plans for one or more areas and or volumes of areas of the national maritime space, with the identification of places for the protection and preservation of the marine environment and the spatial and temporal distribution of current and potential uses and activities;

Plans for the allocation of areas and/or volumes of national maritime space zones to different uses and activities.

In turn, the same law states that maritime space is, as a rule, for common use and enjoyment; however, its private use may be admissible "by reserving an area or volume for an environmental or marine resource use or ecosystem services that is greater than that obtained through common use and that results in an advantage to the public interest".

The private use is developed under a title of private use of maritime space ("TUPEM").

The law also expressly provides that the award of a TUPEM "does not grant its holder the right to use or exploit maritime space resources", and is also subject to a concession, which may have a maximum duration of 50 years, and is awarded by the respective concession contract.

MARITIME SPACE PLANS

DL 38/2015, of March 12 develop the Basis, which, together with the legal scheme for territorial management instruments, establishes the articulation and compatibility of territorial programs and plans with national maritime space management plans.

Specifically, in accordance with DL 38/2015, the Situation Plan represents and identifies the space and time distribution of existing and potential uses and activities in the national maritime space, considering those that are being developed under a TUPEM. Its material content includes, among other elements, energy resources and renewable energy.

The Situation Plan was approved by Council of Ministers Resolution no. 203-A/2019, of December 30,

In turn, the allocation plans allocate areas or volumes of national maritime space to uses and activities not identified in the Status Plan, establishing, where applicable, the respective parameters of use.

Allocation plans may be initiated by public initiative (similar to the situation plan), but also by private initiative.

Those who are interested in the preparation of an allocation plan may submit to the member of the Government responsible for the area of the sea a proposal for a planning contract that has as its object the preparation of an allocation plan, which must contain the objectives and rationale for its preparation, as well as the geo-spatial representation with the identification of the spatial and temporal distribution of uses and activities to be developed.

Once the contract for land use planning is signed, the interested party prepares and completes the land use plan project.

The final version of the allocation plan is submitted to the government for approval by resolution of the Council of Ministers.

Whenever the allocation plan has been prepared by a private entity, by means of a development contract, with the approval of the allocation plan the interested party is awarded the corresponding title for private use of the national maritime space.

ENVIRONMENTAL IMPACT ASSESSMENT

The environmental assessment aims to identify and evaluate "any significant effects on the environment resulting from a plan or program" and is materialized, namely, in the preparation of an "environmental report", as determined by the Plan and Program Assessment Regime approved by Decree-Law no. 232/2007, of June 15.

With regard to maritime spatial plans, and as already mentioned, according to the Situation Plan, Portugal has a pilot area off Viana do Castelo for the installation of renewable energy, with the installation of the WindFloat Atlantic Offshore Wind Power Plant already planned.

Thus, if it is intended to install the offshore wind power plant outside the pilot area, the process of obtaining the title of use will necessarily have to be preceded by the approval of an allocation plan for the projected area of the installation.

In this regard, Law 38/2015, specifically in its article 23, for the purposes of applying the scheme for Environmental Impact Assessment (EIA Decree-Law), approved by Decree-Law 151-B/2013 of 31 October, compares the allocation plan to a project.

As a result, it is in the EIA Decree-Law that we will find the answer to the legal need/requirement to subject the plan/project to environmental impact assessment, which, where applicable, should always take into account the environmental report that accompanied the environmental assessment of the situation plan.

A wind farm project is subject to EIA if:

i. Reaches the thresholds provided for in the EIA Decree-Law; or

ii. It is located, even partially, in a sensitive area and the EIA authority understands that it is likely to cause significant impact, in accordance with no. 6 of art. 3; or

iii. Not reaching the thresholds and not being located in a sensitive area, the EIA authority understands that it is likely to cause significant impact, under the terms of art. 3.

ENVIRONMENTAL IMPACT ASSESSMENT (II)

It is important to verify if the project is located on a sensitive area (protected areas, Natura2000 grid, special conservation areas and special protection areas) or if the "general case" rules apply.

In terms of thresholds, and according to point 3(i) of Annex II of the RJAI, wind farms are subject to EIA in the following situations:

- **General case**: number of wind turbines equal to or higher than 20;
- **Sensitive area:** number of wind turbines equal to or higher than 10.

Waiver of EIA

In cases where the size of wind farms determines that they must be submitted to an EIA, the developer may request its waiver.

After the EIA authority (in this case, the Portuguese Environment Agency, pursuant to article 8 (1) of the EIA Decree-Law) has given its opinion, the government approves the total or partial waiver of the EIA.

The waiver of the EIA is followed by the determination of compliance with measures to minimize environmental impacts considered relevant to be imposed in the licensing of the project and also, when justified, the need to proceed to another form of environmental assessment.

Final notes:

Since the regime presented above has been designed to apply to onshore production projects, the absence of a special regime for offshore projets. could raise doubts regarding the suitable and legal regime applicable: the general; the wind production; or the combination of the previous.

It is, therefore, highly reccomendable that the recently created Task Force look into this matter and propose a clear, specificic and simplified regime for offshore projects.

THE TITLE FOR MARITIME SPACE PRIVATE USE

The right of private use of national maritime space is given by one of the following modalities: concession, license or authorization.

In the case of the installation of an offshore wind power plant, the private use of maritime space is given by concession (which maximum duration is 50 years), since it is the applicable procedure when a prolonged use (duration equal to or greater than 12 months) of an area or volume of national maritime space is in question.

When the private use of national maritime space allowed by the respective title involves the performance of works, the right of private use covers the powers and obligation to carry out the works and to install mobile structures, namely floating or submerged.

Applications for the emission of titles of use of national maritime space (TUPEM) are decided by the DGRM (Directorate General of Natural Resources, Security and Maritime Services) or, in the case of maritime areas adjacent to the archipelagos, between the baselines and the outer limit of the territorial sea, the exclusive economic zone and the continental shelf up to 200 nautical miles, by the competent services and bodies of the Autonomous Regions.

However, the procedure for granting the title of use can only be initiated by the interested party if the use or activity is foreseen as potential in the situation plan.

If the intended use or activity is not foreseen as a potential use or activity in the situation plan, the granting of a private use permit depends on the prior approval of an allocation plan.

In any case, all interested parties may submit a request to DGRM for prior information on the possibility of using the national maritime space for uses or activities not provided for in the national maritime spatial planning instruments, and the information request will be decided within 30 days of receipt.

If any restrictions are identified that make it impossible to develop the use or activity in the terms presented, the DGRM will issue an unfavourable opinion, with definitive character. If this is not the case, the DGRM notifies the interested party of the procedure to be adopted to obtain the right of private use of the national maritime space for the intended use or activity, informing it of the limitations to such use.

OBTAINING THE TITLE OF USE (I)

The request for emission of the title of use is addressed to the DGRM (or to the competent entities of the Autonomous Regions) and submitted by filling out a form, through the electronic shop (through the Public Administration Interoperability Platform - iAP).

The application must be addressed to the competent authority and contain a statement of the facts on which the request is based and, when possible, the respective legal grounds. The application must also contain the following elements:

- The **indication of the request** in clear and precise terms
- The **exact geographical definition of the area** and or volume for which booking is required, using the geographical coordinates ETRS89 or its projected equivalent EN TM06 and, in the case of areas bordering the Autonomous Regions, the geographical coordinates ITRF93 or its projected equivalent UTM (local time zone)
- The **detailed description of the use or activity**, including, in the case of renewable energy exploitation, the presentation of the descriptive memory and justification of the project
- **Certificate proving the regularized tax and contributory situation** of the applicant, and;
- **Commitment regarding the deposit to be made**
- The descriptive and justificatory memory of the project should include:
- a description of the process, the equipment, including floating structures, and materials to be used, with an indication of the installations to be built and the characteristics of the work to be carried out,
- the proposal for the monitoring program to be implemented,
- the forms of warning signs and safety standards to be adopted,
- the indication and characterization of the infrastructures in the national maritime space and on land that are needed to carry out the activity, and
- the emergency or contingency plan.

OBTAINING THE TITLE OF USE (II)

Within 5 days of the automatic validation of the application, the entity responsible for the concession of the private use title will make an order of (i) perfecting the application (with the applicant being notified to correct or complete the application within 10 days under penalty of inadmissibility), or (ii) inadmissibility.

If there is no preliminary rejection or invitation to perfect the application, the application is presumed to have been properly prepared.

Once the sanitation and preliminary examination phase is concluded, the application is distributed to the entities obliged to issue an opinion, authorization or approval on the utilization request, which must issue their opinion within 20 days from the date the process is made available.

In the case of renewable energy projects, the following entities must be consulted: (i) Nacional Maritime Authority , (ii) Portuguese National Guard, (iii) Portuguese Environment Agency, (iv) The Directorate-General for Energy and Geology, (v) Directorate-General for Cultural Heritage, (vi) Nature and Biodiversity Conservation Institute (vii) National Entity for the Fuel Market and (viii) The Regional Coordination and Development Commission.

After the 20 day consultation period, the competent entity, within 30 days, issues a positive decision or rejects the application for the attribution of the title.

There is a rejection when:

- The request violates the national maritime space planning instrument or any other legal or regulatory provision that applies;
- The application has been submitted to a negative opinion or refusal of approval or authorization by any entity consulted, whose decision is binding;
- The licensing entity considers predominant the grounds included in a non-binding negative opinion of any entity consulted.

In case of a positive decision, the licensing entity establishes a public consultation period of no less than 15 days, opening the possibility for other interested parties to request the emission of the title with the same object and purpose, or to present objections to its attribution.

If the objections to the attribution of the title formulated during the public consultation process are considered founded, the competent entity rejects the application.

OBTAINING THE TITLE OF USE (III)

If another interested party submits an identical application for the attribution of a title within the period of public consultation, the licensing authority shall open a tender procedure.

If, within the public consultation period, no other application with the same object or purpose is received, no objections have been filed or, if they have been filed, they are unfounded, the applicant is awarded the title of private use of the national maritime space.

In the case of the installation of an offshore wind power plant, the title is materialized in the execution of a concession contract with the licensing entity.

The allocation of the use title is subject to:

- **Provision of a deposit** (intended to ensure the maintenance of physical-chemical and biological conditions of the marine environment and to ensure, upon termination of the right of private use, the removal of works and mobile structures inserted in the area or volume assigned to the title), the amount of the deposit is established in Ordinance No. 125/2018, of May 8.
- **Celebration of a civil responsibility insurance contract** (intended to cover damages arising from its activity caused to third parties, by its own actions or omissions, of its representatives or of people at its service, for which they may be civilly responsible), being the minimum conditions of the civil responsibility insurance and the minimum mandatory capital established in Ordinance no. 239/2018, of August 29

RIGHTS AND EXPECTATIONS

Article 18 of Law 17/2014 states that the attribution of a TUPEM "does not grant its holder the right to use or explore maritime space resources".

However, under the terms of article 72 of DL 38/2015, the simple will of the issuing entity is not a cause of termination of the TUPEM. In fact, the act of cancellation of the TUPEM is not free or discretionary.

The Law requires the entity that issues the TUPEM to justify its decision, which is preceded by a prior hearing of the interested parties and may be challenged under the general terms of the law.

The justification itself is, on the one hand, limited to the cases provided by law and, on the other hand, has as a condition that the use, reduced or displaced, of the licensed activity is not possible.

The extinction of the TUPEM can therefore only take place if:

- There are natural causes that put at risk the safety of people and property or the environment; or
- It is necessary to maintain the good environmental status of the marine environment and the good status of coastal and transitional waters.

In both cases, as mentioned above, the cancellation of the TUPEM is only legally admissible if its reduction is not possible or if the relocation of the activity is not possible.

Thus, although the attribution of a TUPEM does not grant the holder a right to explore maritime space resources and, as a result, is not able to guarantee per se the approval of subsequent procedures, particularly production and exploration licenses, its termination without just cause (including when applicable the legally binding non-option of favoring the reduction of the title or the relocation of the activity to extinction) may confer on the respective holder the right to compensation.

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LICENSING STEP PLAN

1

Proposed contract for planning with a view to preparing an Allocation Plan (if offshore wind farm operation is not in the Situation Plan area)

2

Celebration of the Contract for Ordnance Planning

3

Environmental Assessment on Allocation Plan

4

Allocation Plan Conclusion

5

Government approval of the Allocation Plan

6

Provision of a guarantee to DGRM to ensure the maintenance of physical-chemical and biological conditions of the marine environment and to ensure the removal of the works and mobile structures inserted in the affected areas

7

Provision of a guarantee to DGRM to ensure the maintenance of physical-chemical and biological conditions of the marine environment and to ensure the removal of the works and mobile structures inserted in the affected areas

8

Title of private use of the National Maritime Space through the celebration of a concession contract with DGRM

9

Provision of a Guarantee to DGEG to cover the obtainment of the Production License

10

Capacity Reservation Title

11

Environmental Assessment on Wind Power Central

12

Production License

13

Construction License / Prior Communication

14

Communication by the grid operator that the connection conditions are met

15

Exploration Licence

16

Connection to the RESP

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ABOUT US

WHO WE ARE & WHAT WE DO

ABOUT US

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