**EFET**

**European Federation of Energy Traders**

Amstelveenseweg 998 / 1081 JS Amsterdam
Tel: +31 20 5207970 / Fax: +31 20 64 64 055

E-mail: secretariat@efet.org

Webpage: www.efet.org

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 **[WORKING DRAFT]**

STATUS: 28 January 2020

These Guidance Notes have been prepared in relation with the Individual Power Purchase Agreement for Corporates and Utilities (hereafter referred to as “PPA”), issued by EFET on 26 June 2019. The Spanish Guidance Notes are designed to inform users of the PPA about issues relating to:

1. Their choice of Spanish law to govern the PPA;
2. Spanish entities are party to the PPA;
3. Spanish electricity is the underlying,

and more general on issues from a Spanish market perspective.

Comments are provided in the table below. They may be addressed in an *ad hoc* appendix or in the Election Sheet (in the Section specified as per the table). Our analysis has not included a review of tax provisions under a Spanish tax law perspective.

| **Reference** | **Comment** |
| --- | --- |
| **PART I (Individual Terms**) |
| **Section A: Commercial Provisions** |
|  |  |
| 2.1 Contract Quantity  | It is frequent in the Spanish market practice that Parties selecting physical delivery wish to expand the definition of “Metered Output” to make clear that the Metered Output will be the volumes nominated day-ahead in the declaration of bilateral physical contracts to the Market Operator (*Operador del Mercado Ibérico de Electricidad (OMIE)*).Parties may do so by including said clarification in Section C. |
| 3.3(b) EECS Certificates – Additional Requirements | Additional Requirements may need to be stated to distinguish whether the EECS Certificates must be eligible for “Export” in accordance with applicable law.Parties may do so by including in point 3.3(b) of Section A wording addressing the following points:- that *“the Seller shall ensure that EECS Certificates are eligible for “export” in accordance with applicable law [N.B. the concept of “applicable law” to include all Spanish Law referred to in paragraph 10 (Certificates) below] and industry documents (including the EECS Domain Protocol for Spain published and maintained by the National Markets and Antitrust Commission (Comisión Nacional de los Mercados y de la Competencia (CNMC))”*; and- that *“the Seller shall waive any domestic subsidy or support schemes in respect of the facility and/or the production in order to ensure that all EECS Certificates are and remain eligible for “export””*.EECS Domain Protocol for Spain and all relevant Spanish law can be found at: https://gdo.cnmc.es/CNE/accesoInformacionGeneral.do |
| 4. General Provisions & Facility - “Balancing Responsible Party” | The provision will need to be adapted so that it includes the appointment by the Seller of a market representation agent (which may also be the Balancing Responsible Party – if providing imbalance management services) and for the circumstances where the Market Representation Agent (and Balancing Responsible Party) is replaced.Parties may appoint a Market Representation Agent, which may be also the Balancing Responsible Party, by including in Section C wording addressing the following points:*- that “the Seller has appointed […] as Market Representation Agent, [and that said Market Representation Agent will be also the Balancing Responsible Party]”;* *- that “the Seller and the Market Representation Agent have entered, or will enter, into a Market Representation and Services Agreement for the sale and purchase of electricity by the Market Representation Agent on behalf of the Seller as its duly authorised market representative to and from the Market Operator in the intraday electricity market for the sole purpose of and to the extent necessary to adjust for any deviations between nominations and actual production”; and**- that “the Market Representation Agent will be replaced in the following scenarios: [e.g., loss of capacity to provide market representation services in the Spanish electricity wholesale market ]”.**“****Market Representation Services Agreement****” means the market representation services agreement entered into or to be entered into between the Seller and the Market Representation Agent on or around the date of this Agreement for the provision of market representation services in the Spanish electricity wholesale market.**“****Market Representation Agent****” means […] or any replacement market representation agent appointed by the Seller.* |
| 4. General Provisions & Facility - “Balancing Costs” | It is common in the Spanish market practice that Parties wish to set out that the Balancing Costs will comprise all imbalance adjustments in accordance with the market activity rules, and will remain the responsibility of the Seller (which is managed via the Market Representation Agent / Balancing Responsible Party).Parties may do so by including said language in point 4 of Section A, and including a definition of market activity rules:*“****Market Activity Rules****” means the* Reglas de Funcionamiento del Mercado de Producción de Energía Eléctrica *and the Day-Ahead and Intraday Electricity Market Operating Rules (*Reglas de Funcionamiento del Mercado Diario e Intradiario de Producción de Energía Eléctrica*), both published and maintained by the Market Operator, the Operating Procedures (Procedimientos de Operación Peninsulares) published and maintained by the System Operator, the Electric Power Code (*Código de la Energía Eléctrica*) published and maintained by the Ministry of Energy, Tourism and Digital Agenda (MINETAD) and the State Agency Official State Gazette (BOE), with the participation of the CNMC and all other agreements, documents or codes (whether or not in existence at the date of this Agreement) with which the Buyer or the Seller: (a) is obliged to comply under Applicable Law; or (b) a reasonable and prudent operator is required to enter into in order to participate in the system.*  |
| **Section B Elections** |
| 15.1 Definition of Force Majeure | The definition of Force Majeure in Section 15.1 is narrowly defined, being limited to performance of the delivery and acceptance obligations and not wider obligations under the PPA. The examples of Force Majeure events are similarly focussed on scheduling failures and malfunctions of transfer systems etc and not more conventional force majeure events such as acts of God etc.Parties may therefore wish, when selecting Spanish Law as governing law, to widen (or replace) the definition of Force Majeure in Section B, including wording addressing the following points:* - that “*Force Majeure shall include any event outside the reasonable control of the Party affecting its ability to perform any of its obligations under the agreement and which could not have been foreseen, prevented or avoided by a reasonable and prudent operator, or which is otherwise in accordance with Article 1105 of the Spanish Civil Code*”;
* - that “*Force Majeure will include acts of war, natural disaster, national strikes or other industrial action, threat of war, terrorist act, blockade, revolution, riot, insurrection, civil commotion, public demonstration, sabotage, lightning, fire, storm, flood, earthquake”*; and
* - that *“lack of funds, strikes, negligence, breach or default only of a Party’s own employees and/or its contractors shall not constitute Force Majeure”*.
 |
| **PART II (General Provisions)** |
| 4 Construction and Commissioning of Facility | It is common in the Spanish market practice that Parties wish to address delivery and pricing regime for deliveries taking place pre-Commercial Operations Date. Parties may do so by including the relevant regime they would like to establish for deliveries taking place pre-COD in Section C. |
| 4.5 Reduction of Capacity where Commissioning not Completed | (a) The definition of “Partially Commissioned” suggests that the actual installed capacity must be lower than the Capacity less the “Capacity Tolerance” before the Buyer can elect to reduce the Capacity. It is not infrequent in the Spanish market practice that the Buyer would seek to reduce the Capacity on an absolute basis without any tolerance at the Commissioning Longstop Date and that the tolerance is only applicable to termination.Parties may therefore wish to set the capacity tolerance at zero in point 4 of Section A, or include specific wording in this regard in Section C.(b) In addition, on reducing capacity, it is frequent in the Spanish market practice that the Buyer may seek to recover damages to compensate for a reduced capacity over the Total Supply Period. Parties may therefore wish to include specific wording in this regard in Section C. |
| 4.6 Termination where Commissioning not completed | Termination is only exercisable following the Commissioning Longstop Date, where the Facility has only been “Partially Commissioned” by that date. In the Spanish market practice, Parties may clarify that “Partially Commissioned” includes zero capacity being commissioned. Parties wishing to do so may amend the definition for "Partially Commissioned" in Section C in the following manner:***"Partially Commissioned"*** *means where the capacity of the Facility has been Commissioned is lower than the Capacity reduced by the Capacity Tolerance. For the avoidance of doubt, it also includes zero capacity being Commissioned.* |
| 10 Certificates | Particular regulation and the status of Guarantees of Origin under Spanish Law (incl. regarding transfer) needs to be taken into account.Parties may wish to address this in Section C by including specific reference to:(i) “*Spanish regulations relating to Guarantees or Origin (inc., inter alia, Order ITC/1522/2007, of 24 May, which regulates guarantees of origin of power installations from renewable sources and cogeneration of high efficiency, and Circular 1/2018, of 18 April, of the Market Regulator, which regulates the management of the guarantees of origin system of power installations from renewable sources and cogeneration of high efficiency) (as amended from time to time)*”; and(ii) the fact that “*transfer of Guarantees of Origin shall comply with all requirements said out in applicable regulation and any interpretation from the CNMC*”.Relevant Spanish law can be found at: <https://gdo.cnmc.es/CNE/accesoInformacionGeneral.do> |
| 16.2 Change in Law and Price Adjustments | (a) In Spanish market practice, Parties may wish to limit Change in Law to those changes in law coming into effect after the date of the agreement, and to exclude those changes in law which might be foreseeable (e.g. proposed in consultation prior to the date of the agreement, etc.). (b) In Spanish market practice Parties may wish to address the impact of any update of remuneration system for renewables (including restricting the ability to negotiate price).Information on the remuneration system for renewables and update thereof can be found at: <https://www.cnmc.es>(c) In the Spanish market practice, Parties may wish to address shared allocation of responsibility for the Electricity Generation Tax (*Impuesto sobre el Valor de la Producción de la Energía Eléctrica (IVPEE)*). Regulation of IVPEE can be found at the link below[[1]](#footnote-1). Parties may do so by agreeing specific wording in that regard in Section C. |
| 18.4 Automatic Termination | Please refer to advice provided in legal opinions on the EFET General Agreement as available through secretariat@efet.org |
| 18.5(b) Winding-up / Insolvency / Attachment | On Spanish insolvency law matters, please refer to legal opinions on the EFET General Agreement. The Spanish legal opinion can be procured by contacting secretariat@efet.org  |
| 18.5(d) Long Term Force Majeure | Depending on the scale, complexity and generation technology of the Facility, a twelve-month termination trigger for prolonged force majeure may not be appropriate in the Spanish market (e.g. for solar PV a shorter period may be more common).Parties may therefore wish to accommodate the period in Section C.  |
| 19.3 Outstanding Debt Termination Amount | (a) It is common in the Spanish market practice that it is the ***outstanding*** senior debt and interest (i.e. a mandatory prepayment triggered by termination of the PPA) which is taken into account and not historic debt service payments previously made to the Senior Lenders.(b) In addition, the equity rate of return may be difficult to objectively ascertain or verify. The equity return rate should be specified in the PPA from the outset or some sort of escrow or benchmarking methodology used if disclosure of the equity return rate at the outset is commercially sensitive.Parties may therefore wish to clarify said points in Section C, or draft a new termination amount under §19.4 in Section B. |
| 20.1 Maintenance of Insurance | In the Spanish market practice, Parties may wish to ensure that the Seller and the Facility / works are insured throughout the construction period and not only after commencement of the Total Supply Period (i.e. following Commissioning).Parties may do so by amending this Section to cover the construction period, or alternatively introducing a separate provision with different policies in Section C. |
| 21.2 Exclusion of Liability | Save in respect of certain remedies expressly provided, liability for losses and damages are excluded other than gross negligence, intentional default or fraud.This is tantamount to an exclusive remedies provision meaning that in the event of breach of the agreement (e.g. breach of representation and warranty etc), the remedies are limited to those expressly provided for in the PPA (e.g. compensation for failure to deliver, payment of the Termination Amount etc.) ***unless*** the breach resulted from gross negligence, intentional default or fraud.Buyers in the Spanish market may wish to change that approach.Alternative wording for liability may be drafted in Section C. |
| 21.2 Intentional Default, Fraud and Fundamental Rights | It Spanish Law applies, gross negligence *(negligencia grave)* should be included. Parties may include said wording in Section B or C.  |
| 21.6 Indemnity | Each Party is obliged to indemnify and hold harmless the other Party for certain liabilities arising from construction or operation of the Facility.In the Spanish market practice, Buyers may wish to amend this so that the indemnity is only given by the Seller. Relevant provisions may be incorporated in this regard by the Parties in Section C. |
| **OTHER ISSUES** |
| Operational Performance | The EFET PPA can be on a “pay-as-produced” basis or on fixed scheduled delivery quantities (i.e. “clips” or forward blocks). In respect of pay-as-produced, it is frequent in the Spanish market practice to include specified requirements for operational performance of the Facility – e.g. minimum annual availability levels or minimum annual production volumes etc.Relevant provisions may be incorporated in this regard by the Parties in Section C. |
| Negative Price Periods | In the Spanish market practice, Buyers may seek to place restrictions or limits on paying for negatively priced electricity where wholesale market prices are negative – as may Sellers if an electricity reference price is used.Relevant provisions may be incorporated in this regard by the Parties in Section C. |
| Environmental Attributes | In the Spanish market practice, Parties might want to deal, in addition to EECS Certificates and National Schemes Certificates, with any other environmental attributes or benefits which may be available in respect of the Facility and the Metered Output at the time the agreement is entered into or may subsequently become available in the future.Parties may customise this in Section B. |
| Market Representation | If physical delivery is selected, it would be necessary to include a reference to a Market Representation and Services Agreement, and include a brief outline of representation and services that will be provided thereunder.Relevant obligations and reference provisions may be incorporated in this regard by the Parties in Section C. |
| Financial instrument | Conversely, if financial settlement is selected, or if physical delivery is selected (but the Agreement includes features or structures -floors, collar etc- which could be seen as embedded financial instruments), comfort should be obtained as to regulatory capacity to enter into the Agreement from Seller’s or Buyer’s perspective (as the case may be), as well as to compliance with relevant laws.Relevant obligations and reference provisions may be incorporated in this regard by the Parties in Section C. |
| REMIT, EMIR, Market Abuse Regulation  | In the Spanish market practice, it is common to include provisions dealing with financial regulation of commodity and derivative trading such as REMIT (in case of physical), EMIR and MAR. This will be particularly relevant in circumstances where financial settlement is selected rather than physical delivery.Parties may therefore wish to incorporate the relevant provisions in Section C. |
| Direct Agreement | In the Spanish market practice, it is frequent that a Direct Agreement is entered into in connection with the PPA, providing for cure periods, step-in rights etc.Parties may therefore wish to append on an individual basis a Direct Agreement to the PPA and incorporate subject to appropriate references in Section C.  |

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Contact: secretariat@efet.org

1. https://www.agenciatributaria.es/AEAT.internet/Inicio/La\_Agencia\_Tributaria/Aduanas\_e\_Impuestos\_Especiales/\_Presentacion/Impuestos\_medioambientales/\_IMPUESTOS/Impuesto\_sobre\_el\_valor\_de\_la\_produccion\_de\_la\_energia\_electrica/\_INFORMACION/\_Informacion\_general\_/\_Informacion\_general\_.shtml [↑](#footnote-ref-1)