

Draft bill on inframarginal electricity levy

In October 2022 the European Commission decided to impose, by means of a [Regulation](#), a mandatory cap on the market revenues of certain electricity producers. In order to implement this in the Netherlands, the Ministry of Economic Affairs and Climate Policy and the Ministry of Finance published a draft bill on Friday, January 27, 2023 that must introduce a temporary levy on the market revenues from inframarginal electricity production. This concerns electricity generated in the Netherlands or in the Dutch territorial waters of the North Sea, which has been fed into the electricity grid or into a direct line of which the power plant has an installed capacity of 1 megawatt (MW) or more. Only electricity generated with the inframarginal energy sources wind energy, solar energy, hydropower, biomass fuels, biogas, waste and nuclear energy fall under the levy, although electricity generated from coal will also fall under the levy.

The aim is to introduce the levy with retroactive effect to December 1, 2022; the entire levy period will cover the months December 1, 2022 through June 30, 2023. The draft bill is addressed in more detail below.

Substantive structure

Who is subject to the levy?

The inframarginal electricity levy will be imposed on producers of Dutch electricity from wind energy, solar energy, hydropower, solid biomass fuels, biogas, waste, nuclear energy and coal.

Only power plants with an installed capacity of 1 MW or more will fall under the levy. The own use before electricity is fed into the grid is irrelevant for determining whether or not a plant falls under the levy. A plant of 1.5 MW, of which, as a result of own use, 0.5 MW on average is fed into the grid or into a direct line, therefore falls under the levy. However, in determining the amount of the levy, the amount that a producer has fed into the grid is subsequently taken into account, because that is where it is always measured.

A producer of Dutch electricity is a natural person or a legal entity that generates electricity in the Netherlands or in the Dutch exclusive economic zone and supplies it to the electricity grid or to a direct line. The producer does not have to be the owner of the power plant; it is the natural person or legal entity that generates electricity with the power plant and to whom the generated electricity and thus the generation risk is attributed.

Levy period

The inframarginal levy will apply with retroactive effect for a period of seven months from December 2022 through June 2023. The European Commission will evaluate it no later than April 30, 2023, on the basis of which the mandatory application of the inframarginal electricity levy may be extended or amended.

Taxable market revenues

The taxable market revenues will be calculated for each calendar month of the levy period. To do so, the amount of electricity generated from a particular energy source, or

the amount of electricity generated from a particular energy source with a particular power plant will be multiplied by the difference between the total market revenues from electricity and the exempted amount of market revenues per megawatt hour (MWh).

For the purposes of the term 'market revenues', it is the revenue that is considered and not the costs or the profit. Total market revenues are the revenues from the sale of electricity on the Dutch electricity markets. This may also be negative revenues if the production is less than projected and electricity has to be purchased on an electricity market. Positive and negative revenues from hedges, such as futures, forwards and power purchase agreements are also included in market revenues, so that the cap only applies to realized market revenues. Revenues from the sale of electricity in the balancing energy market and from compensation for redispatching and countertrading do not fall under the term 'market revenues'.

The Regulation prescribes that Member States must ensure that the cap on market revenues is actually applied in cases where producers are controlled by or are partially owned by other companies, in particular if they are part of vertically integrated companies. That is why the draft bill contains rules on how the market revenues should be determined if the producer is a member of a group as referred to in Section 24b of Book 2 of the Dutch Civil Code and electricity generated by the producer is sold to a related group company. In that case, the market revenues are treated the same as the revenues from similar agreements concluded between independent parties in the wholesale electricity market.

The exempt amount per megawatt hour

The draft bill contains, with the exception of several aberrant exempt amounts per MWh, a general exempt amount of EUR 130 per MWh. This general exempt amount applies, in particular, to wind energy, solar energy, hydropower, waste and nuclear energy, unless another exempt amount applies as a result of the Sustainable Energy Subsidy. For solid and gaseous biomass fuels, the exempt amount has been set at EUR 240 per MWh. The levy does not apply if green gas from the gas grid is used as energy source. The exempt amount for coal as an energy source will initially also be EUR 130 per MWh, but may be adjusted upward depending on the price of coal and emission rights under the Emissions Trading System.

Rate

The rate is 90% of the taxable market revenues in the levy period. The inframarginal levy is a separate levy imposed in addition to existing taxes. The inframarginal electricity levy is deductible for corporate income tax purposes.

Formal structure

The draft bill also contains various procedural law provisions. In summary, the following are just some of what has been provided for in these provisions:

- The electricity producer is obliged to calculate the taxable market revenues for the purposes of the inframarginal electricity levy and include them in a market revenues report.

- The market revenues report is subject to separate regulatory oversight and enforcement by the Dutch Emissions Authority (*Nederlandse Emissieautoriteit*; NEa). Substantive disputes about the taxable market revenues will be settled by the NEa.
- The inframarginal electricity levy will be a remittance-based tax and will require tax returns to be filed. Those subject to the levy will determine the tax payable themselves and pay this by means of filing a tax return.
- The tax return must be filed within six months of the end of the calendar year in which the levy period ends. If the levy period is not extended in the interim, then June 30, 2024 will be the last day on which the tax return can be filed with the remittance-based levy.
- The tax returns must be sent to the Dutch Tax and Customs Administration, which will be responsible for collecting the levy. The deadline for filing a tax return is the same as the deadline for submitting the market revenues report.
- If a producer is a member of a group as referred to in Section 24b of Book 2 of the Dutch Civil Code, the group company that heads the group in the Netherlands will prepare the market revenues report and it must file the tax return on behalf of the party/parties subject to the levy.
- It can be stipulated by ministerial regulation that the market revenues report must, in certain cases, be verified by an auditor or another external verifying party.
- The deadline for imposing additional tax assessments is five years, but may be extended if there is disagreement about the taxable market revenues.
- The administrative penalty provisions of the General Taxes Act will apply to non-compliance with the filing deadline and failure to pay all or part of the levy (specified in the tax return), either intentionally or not, or failure to do so within the deadline.
- All companies that are or were members of the same fiscal unity for corporate income tax purposes as the producer during the relevant period will be jointly and severally liable for the (non-payment) of the inframarginal electricity levy. Any other producer that is a member of the group, and the group company that heads the group in the Netherlands, will be liable for the inframarginal electricity levy payable by a producer.

KPMG Meijburg & Co comments

On November 30, 2022 the Dutch government announced the Dutch implementation in a [letter](#) to the Lower House of Parliament and the revenue from the levy was projected to be EUR 1.8 billion. However, this will largely depend on how electricity prices evolve during the levy period December 2022 through June 2023.

The Dutch inframarginal electricity levy is expected to affect some 1,500 power plants. However, far more parties will be subject to the levy because there may be multiple natural persons or legal entities generating electricity with the same power plant, such as a general partnership or a limited partnership.

According to the explanatory notes, the Dutch Tax and Customs Administration will invite the target group to file tax returns. The explanatory notes also mention that those

subject to the levy will mostly represent a new target group for the NEa. This raises the question of the extent to which this target group has been properly identified. Because the methodology is remittance-based, requiring a tax return to be filed, a party subject to the levy that knows that tax is payable but has not been invited to file a tax return, must ask the Dutch Tax and Customs Administration to send them an invitation to file a tax return.

The inframarginal levy is a levy whose features resemble an (excessive) value added tax, where it is prescribed how the turnover (in this case: the market revenues) must be calculated. Determining the market revenues realized from supplies to a group company is expected to be challenging under this draft bill, and it would therefore be a good idea if examples about its impact are included in the final bill.

Given the retroactive effect of the draft bill to December 1, 2022, if you think that you may be subject to the levy you should consider creating a provision for tax purposes in 2022 and/or 2023. The direct effect of the Regulation offers a sufficient basis for doing so for tax purposes.

Internet consultation

The draft bill will be open for internet consultation through to February 16, 2023, which will serve to aid any subsequent political decisions to be taken on the bill. Responses to the draft legislation can be submitted via the website [Overheid.nl | Consultatie Inframarginale elektriciteitsheffing \(internetconsultatie.nl\)](https://overheid.nl/consultatie/inframarginale-elektriciteitsheffing).

Please do not hesitate to contact your tax advisor at Meijburg to find out more about the potential impact of this draft bill. They would be happy to help you.

KPMG Meijburg & Co
February 2023

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