

## Legal implications for the energy sector as a result of the COVID-19 state of alert in Spain

On 14 March 2020, Royal Decree 463/2020, of the same date, came into force, declaring the state of alarm for the management of the health crisis caused by the coronavirus COVID-19 ("RD 463/2020"). In this context, the Spanish government has adopted measures of a socio-economic nature to try to mitigate the harmful effects that the pandemic is causing to Spanish society and which have implications for the energy sector.

Since Spain has been in a state of alarm, the government has drawn up various packages of social and economic measures to try to mitigate the harmful effects of COVID-19. Some of the measures adopted have legal implications in the energy sector, such as those aimed at guaranteeing the supply of energy within the national territory, the suspension of the regime of liberalisation of certain foreign investments and the extension of the validity of permits for access and connection to the electricity grids.

### 1. Guarantee of energy supply within the national territory

Some of the measures that have entered into force are aimed at guaranteeing the supply of energy to all consumers within the national territory. In this regard, on 1 April 2020, Royal Decree Law 11/2020 of 31 March was published in the Official State Gazette, adopting additional urgent measures in the social and economic sphere to deal with COVID-19 ("RDL 11/2020"), which extends the already existing measures relating to the guarantee of energy supply. In particular, the following is expected:

- Prohibiting power cuts to domestic consumers in their homes.
- The group of potential recipients of the social electricity bond is extended, and may include, on an exceptional and temporary basis, individuals in their habitual residence (i) who are entitled to contract the Voluntary Price for Small Consumers (PVPC), (ii) who have an income equal to or less than certain thresholds referenced to the IPREM, and (iii) who can prove to the energy suppliers at

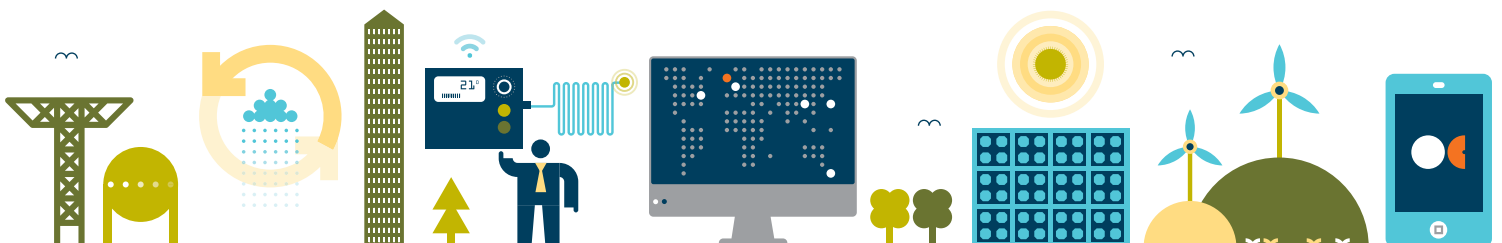
regulated prices (comercializadoras de referencia) that they have ceased their professional activity as self-employed professionals or that their turnover has been reduced by an average of 75% compared to the previous six months.

- Self-employed persons and companies are allowed to temporarily suspend their supply contracts or modify their contract modalities without penalty. They are also allowed to change the access toll and adjust the contracted power - increase or decrease - free of charge.
- A mechanism has been established to suspend payment of electricity bills for the self-employed and SMEs.

Furthermore, with regard to the guarantee of supply, Article 7 of Law 24/2013 of 26 December on the electricity sector ("LSE") and Articles 49 and 101 of Law 34/1998 of 7 October on the hydrocarbons sector ("LH") contain mechanisms to guarantee the supply of electricity, petroleum products and natural gas.

In this sense, RD 463/2020 declaring the state of alarm refers to the articles and regulations indicated to recall that the government could, if it deemed it necessary, i.e. if the exceptional circumstances contemplated in the aforementioned regulations (LSE and LH) were given, adopt any of the measures provided for therein. The assumptions are as follows:

- Certain risk for the provision of the electricity supply.
- Situations of shortage of one or more of the primary energy sources.



- Situations that could result in a serious threat to the physical integrity or safety of persons, apparatus or installations or to the integrity of the electricity transmission or distribution grid.
- Situations where there are substantial reductions in the availability of production, transport or distribution facilities or in the quality of supply rates attributable to any of them.

In these cases, the government could apply one of the following measures:

- Exceptions to the system of energy tenders (i.e. exceptions to the obligation to go to the organised market for production, through the submission of competitive bids for the sale of electricity) or to the existing generation dispatch in isolated electricity systems.
- Direct operation of generation, transmission and distribution facilities.
- Modification of the general conditions of regularity of supply in general or referring to certain categories of consumers.
- Limitation, temporary modification or suspension of the rights and guarantees of access to the transmission and distribution grids by third parties.
- Limitation or allocation of primary energy supplies to electricity producers.
- Measures to guarantee the supply of petroleum products within the national territory (e.g. limitations on the maximum speed of road traffic on public roads, imposing an obligation on the holders of hydrocarbon exploitation concessions to supply their product for national consumption).
- Establishment of the conditions under which strategic natural gas reserves may be used.

In addition, the specific rights of producers of electrical energy from renewable energy sources, cogeneration and waste established in Article 26.2 of the LSE could be limited, modified or temporarily suspended, among which are, in general, the following:

- Energy dispatch priority. Priority access and connection to the transmission and distribution grid.
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If the government were to adopt any of the above measures, it would have to determine the specific remuneration applicable to the activities concerned, ensuring in any case that the costs were shared in a balanced way.

As has been mentioned previously, the measures indicated are included in the energy regulations and therefore they are not the result of the exceptional state of alarm. In addition, neither at the present time nor in the immediate future is there any perceived risk to the guarantee of supply, a situation of shortage of primary energy sources, a serious threat to the integrity of the electricity transmission or distribution grid, or substantial reductions in the availability of production, transmission or distribution facilities or in the quality of supply.

Furthermore, the government would already be acting to avoid these scenarios, for example, by protecting the so-called critical infrastructure and the restrictions on foreign investment in Spain, which will be analysed below. Therefore, the provision of these measures, without prejudice to their absolute needlessness, should be considered more as a mere reminder of their existence in the general regulations, rather than as an express warning of their possible application, which is perceived as remote.

## 2. Exemption of traders from payment of tolls and excise duty in the event of suspension of payment of invoices and access to guarantees

In the event that the self-employed or SMEs have made use of the mechanism for suspending payment of their electricity, natural gas and certain petroleum products bills, RDL 11/2020 establishes the following for the energy suppliers:

- Exemption from payment of the toll for access to the transmission and distribution grids (electricity) or from the term of transmission and distribution toll (natural gas).
- Exemption from the obligation to pay VAT and excise duty on electricity or excise duty on hydrocarbons, where applicable.
- Possibility of accessing the line of guarantees established in Article 29 of Royal Decree Law 8/2020, of 17 March, on urgent extraordinary measures to deal with the economic and social impact of COVID-19 ("RDL 8/2020"), or any other line of guarantees enabled for this specific purpose.

## 3. Suspension of the regime of liberalisation of certain foreign direct investments in Spain

RDL 11/2020 also introduces new amendments to Article 7 bis of Law 19/2003 of 4 July on the legal regime of capital movements and economic transactions abroad and on certain measures to prevent money laundering ("Law 19/2003"), which was introduced by RDL 8/2020 in order to suspend the regime of liberalization of certain foreign direct investments in Spain.

The first amendment introduced by RDL 11/2020 to Article 7 bis of Law 19/2003 is the extension of the concept of foreign direct investment in Spain established by RDL 8/2020. This concept now includes all those investments in which the investor holds a stake equal to or greater than 10% of the Spanish company's share capital, or when as a result of the corporate operation, act or legal transaction,

the investor effectively participates in the management or control of the company, provided that one of the following circumstances applies:

- That they are carried out by residents of countries outside the EU or the European Free Trade Association (the only case mentioned so far in Article 7 bis of Law 19/2003).
- That are carried out by residents of EU or European Free Trade Association countries whose real ownership corresponds to residents of countries outside this territory. Such ownership will be deemed to exist when non-resident indirect investors ultimately own or control, directly or indirectly, a percentage of more than 25% of the investor's capital or voting rights, or when they exercise control, directly or indirectly, of the investor by other means.

In this context, some foreign direct investments in Spain affecting the energy sector (which is considered a strategic sector) may be subject to the obligation to obtain prior authorization. In particular, investments relating to *critical infrastructure*, whether physical or virtual, and land and real estate that are key to the use of such infrastructure, as well as the supply of essential inputs (including energy), could be subject to this regime.

At times, the concept of *critical infrastructure* is not easy to define. However, the analysis must be carried out in the terms of Law 8/2011 of 28 April, which establishes measures for the protection of critical infrastructure, to which paragraph a) of the second point of Article 7 of Law 19/2003 refers. In this sense, critical infrastructures would be those installations and networks whose operation is indispensable and does not allow for alternative solutions, so that their disruption or destruction would have a serious impact on essential services (including energy supply).

In practice, one could ask whether, for example, so-called greenfield projects (i.e. those in their promotion or development phase and without construction having started) would be affected by this *ex ante* control regime of foreign investments. In light of the above, it appears that such projects would not fit too well within the definition of critical infrastructure. The same doubt arises with respect to investments in generation plants using renewable sources, insofar as, individually considered, they could hardly be considered indispensable for the operation of essential services. In any case, as long as these questions are not clarified by the development regulations, the application of the principle of prudence and some preliminary pronouncements of the General Directorate of Foreign Investments advise to consider the investment in renewable generation projects or plants as foreign investments subject to such regulations, so each case must be carefully analysed.

In short, it will be necessary to analyse - from a subjective (i.e. who the investor is) and objective (i.e. what sector the investment affects, amount of investment, installed capacity of the plant, location) point of view - the operations to be carried out in Spain in order to determine, on a case-by-case basis, whether they would be subject to this authorisation regime. It may also be advisable to consult the competent authorities to clarify any possible doubts.

Another significant measure introduced by RDL 11/2020 in Article 7 bis of Law 19/2003 is the establishment of a transitional simplified procedural regime to expedite the processing and resolution of applications for prior administrative authorisation of subsequent foreign direct investments:

- Transactions for which there is evidence by any legally valid means of agreement between the parties or a binding offer in which the price was fixed, determined or determinable prior to the entry into force of RDL 8/2020 (i.e., March 18, 2020).
- Operations of EUR 1 million or more but less than EUR 5 million.

Applications for prior administrative authorisation under the simplified procedure will be addressed to the head of the Directorate General for International Trade and Investment, who will decide on them following a report from the Board of Foreign Investment, applying *ex officio* the simplified procedure provided for in article 96 of Law 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations.

In addition, the government is empowered to establish by regulation the minimum threshold below which the system of prior administrative approval will not be applicable. In any case, until such time as this development takes place, RDL 11/2020 itself establishes the exemption from prior administrative authorisation for foreign direct investment operations amounting to less than 1 million euros.

Finally, RDL 11/2020 suppresses paragraph 6 of Article 7 bis of Law 19/2009, which allowed the government to lift the suspension by agreement of the Council of Ministers, so it will now be necessary for such lifting to be carried out by law or royal decree-law amending the aforementioned Article 7 bis.

## 4. Extension of the validity of permits for access and connection to the electricity grids

RDL 11/2020 finally establishes an extension of the validity of the permits for access and connection to the electricity grids granted before the entry into force of the LSE.

Thus, the eighth transitional provision of the LSE that established that these permits would expire if, prior to March 31, 2020, the commissioning for the generation facility associated with them had not been obtained is modified. Consequently, the aforementioned permits do not expire and their holders are granted an additional period of validity of two months, starting from the end of the state of alert.

The above measures would seek, in short, to ensure the proper functioning of a sector as relevant as the energy sector during the exceptional state of alarm in which Spain finds itself, as a result of the health crisis of COVID-19, which affects the rest of our jurisdictions in a similar way.

**This publication constitutes the individual opinion of Osborne Clarke. It is based on a particular interpretation of the existing laws. It should be used with caution since it is intended for information purposes only and should not be construed as legal advice.**

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