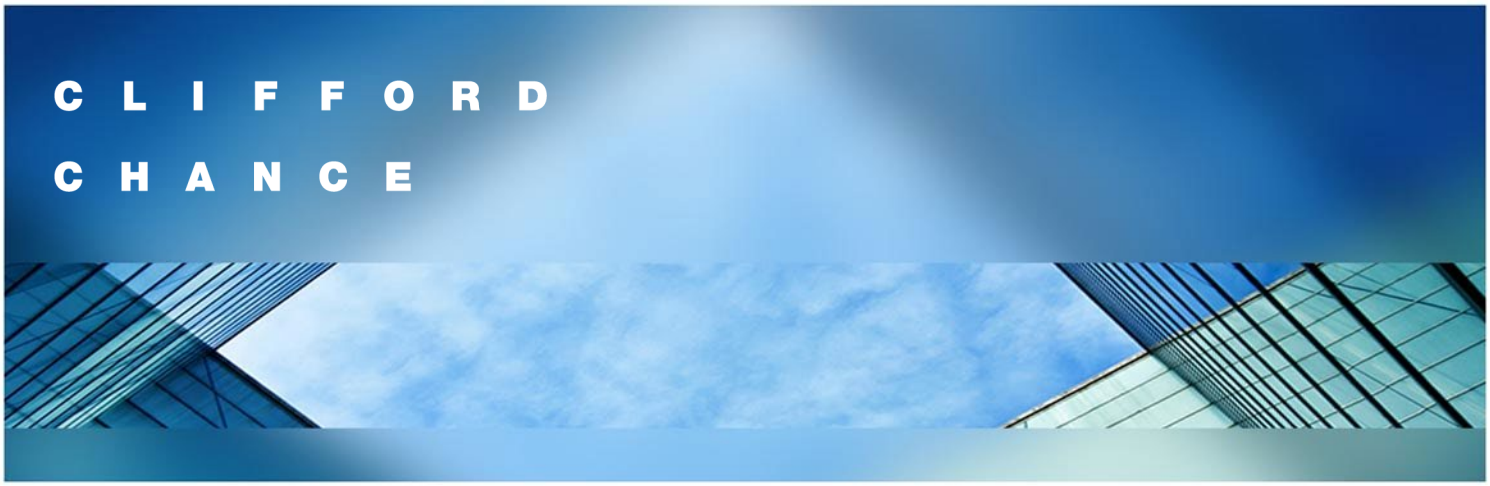

COUNTDOWN: THE DEADLINE IS FAST APPROACHING FOR THE EXPIRY OF A LARGE NUMBER OF RENEWABLE ENERGY PROJECTS' ACCESS AND CONNECTION RIGHTS

Renewable energy projects that are not operational by 31 March will lose all rights of access and connection to the electrical grid granted before 28 December 2013. The loss of these access and connection rights will trigger the enforcement of access guarantees, the loss of specific remuneration and the invalidation of any administrative authorisations granted, and will mean the application process will have to begin again from scratch, without priority access of any kind.

Key issues

- Enforcement of access guarantees
- Loss of specific remuneration
- Revocation of administrative authorisations already obtained
- Loss of initially-assigned capacity

The first issue to consider is whether the 31 March deadline is affected by the general suspension of time periods and deadlines established in additional provisions three and four of Spanish Royal Decree 463/2020, of 14 March, declaring a state of emergency to manage the health crisis caused by the Covid-19 virus ("**RD 463/2020**"). Our understanding is that the deadline is suspended until the end of the state of emergency, since administrative activity has been practically put on hold (additional provision three) and the deadline relates to the expiry of a right (additional provision four). Accordingly, once the state of emergency is lifted the time period will resume, with access and connection rights remaining valid for a further 18 days (the period of time between 14 March, when RD 463/2020 came into force and time limits and deadlines were suspended, and 31 March 2020, the deadline initially established when access and connection rights would expire). Of course, the situation would change if a rule having the force of law were approved that modified deadlines for expiry or established that time periods would resume under other conditions.

The expiry of access and connection rights is the only consequence established in transitional provision eight of Spanish Electricity Sector Act 24/2013 (*Ley del Sector Eléctrico*, the "**LSE**") for renewable energy projects that are not operational by 31 March 2020. However, there are certain other repercussions that arise not from that provision, but as inherent consequences of the expiry of access and connection rights.

ENFORCEMENT OF ACCESS GUARANTEES

The first and foremost consequence will be the enforcement of the financial guarantees provided to process the application for access to the grid (usually referred to as access guarantees), which were provided at EUR 10/kW (the amount required prior to the entry into force of the LSE).

Specifically, Articles 59 bis and 66 bis of Spanish Royal Decree 1955/2000, governing transmission, distribution, marketing, supply and authorisation procedures for power plants ("**RD 1955/2000**"), establish that access guarantees will be enforced in the event of "*non-compliance with the deadlines established in mandatory authorisations*".

The Directorate General for Energy Policy and Mines announced that it will enforce access guarantees automatically and will not authorise any extensions. Furthermore, it specified that for plants with access permits dated prior to 28 December 2013 but connection permits dated later, the date of the access permits will prevail in determining expiry.

LOSS OF SPECIFIC REMUNERATION

Many of the renewable energy projects that obtained access and connection rights before 28 December 2013 have the acknowledged right to receive specific incentivised remuneration, by virtue of which the Electrical System guarantees that reasonable remuneration will be obtained. To obtain this specific remuneration, plants must be registered at the specific remuneration system registry (*Registro de Régimen Retributivo Específico*, "**ERIDE**").

The expiry of access and connection rights entails the cancellation of registration at the ERIDE due to non-fulfilment of the registry requirements, which will be notified to the plant's owner by the Directorate General for Energy Policy and Mines. The cancellation of registration will, in turn, entail the loss of the right to obtain specific remuneration, pursuant to the provisions of Article 49 RD 1955/2000.

REVOCATION OF ADMINISTRATIVE AUTHORISATIONS ALREADY OBTAINED

Obtaining access and connection rights is a prerequisite for applying for, and thus obtaining, prior administrative authorisations, approval of construction plans and authorisations to operate, as expressly stated in Article 53 LSE.

The expiry of access and connection rights entails non-fulfilment of the requirements for obtaining and maintaining the plant's administrative authorisations, which must be applied for from scratch even if the technical specifications of the project have not changed.

The public body responsible for granting these administrative authorisations (the Directorate General for Energy Policy and Mines under the Ministry for Ecological Transition and Demographic Challenge for projects with a capacity of over 50 MW, and the equivalent body of the appropriate Autonomous Community for projects with a capacity of 50 MW or under) may resolve to revoke them upon the expiry of the related access and connection rights, pursuant to the provisions of Article 53 LSE.

LOSS OF INITIALLY-ASSIGNED CAPACITY

Once access and connection rights are obtained, a certain capacity is assigned to the project, based on its viability. While access and connection do

not entail a restriction on capacity as such, that capacity is "blocked off" or reserved for the project and cannot be assigned to third parties.

The expiry of access and connection rights frees up the capacity in the grid that had been assigned to the project holding those rights, allowing any interested third party to request that such capacity be assigned to a different project.

The system operator and, where necessary, the grid manager will be notified of the expiry of the access and connection rights and loss of assigned capacity, for the appropriate purposes, by the Directorate General for Energy Policy and Mines or the equivalent body of the Autonomous Community in question, pursuant to the provisions of Articles 59 bis and 66 bis RD 1955/2000.

In light of the fact that electricity transmission and distribution grids are currently at load capacity, we feel it is worth highlighting the difficulty that many of these projects would have in obtaining new access and connection rights at another point on the grid. Moreover, the fact of having previously been granted access and connection rights does not entail any priority access to newly freed-up capacity at another point on the grid after such rights have expired. Additional capacity would, in principle, be assigned to the first developer whose project met the technical requirements, with access and connection requests being processed on a strict first come, first served basis.

In short, although there are plans to expand the capacity of the electrical grid between 2021 and 2026, the fact of the matter is that projects with expired access and connection rights will not have any priority in the assignment of freed-up/expanded capacity.

Can any of these consequences be avoided by abandoning construction of the plant?

The deadlines established from the time access and connection rights are granted until the plant becomes operational (the deadline of 31 March 2020, which concerns us here) were initially set to avoid speculation involving projects whereby, once access and connection were obtained, the related capacity was "blocked off" (i.e. reserved) on the grid, depriving third parties of access and with the intention of reselling those projects, thereby delaying the generation of renewable energy and thwarting growth expectations in this sector. To avoid this situation, RD 1955/2000 establishes that guarantees will be enforced when, on 31 March 2020, those projects that had obtained access and connection rights prior to 28 December 2013 have not yet begun to operate their power plants.

RD 1955/2000 also entitles the holder of the access and connection rights to abandon the construction of the plant. If this abandonment is due to impeding circumstances that were neither directly nor indirectly attributable to the interested party, the Directorate General for Energy Policy and Mines has the power to exempt enforcement of this guarantee.

Often the delay in start-up is linked to the backlog of the Administrations (especially regional and local administrations) in processing the administrative side of these projects on time. We understand that it is precisely in these cases where the non-enforcement of the guarantees would be the clearest outcome.

However, preventing the enforcement of the guarantee would be the only consequence deriving from the expiry of the access rights that abandoning the plant's construction could achieve. The project would inevitably be frustrated, entailing (i) the loss of specific remuneration, (ii) the invalidation of all administrative authorisations granted; and (iii) the loss of capacity, with no priority to be assigned it, once the grids' capacity has been expanded following the new 2021-2026 plan and notwithstanding the capacity that could be obtained after making a new request for access.

If it is the Administration's delays that have frustrated the project, is the developer that has to bear the consequences?

Spain's Ministry for Ecological Transition and Demographic Challenge has made it clear that it is not considering applying the new extension of the deadline slated to take effect on 31 March 2020. As a result, many projects for which access and connection rights were granted prior to 28 December 2013 will be frustrated on that date.

However, it is well known that many Administrations, especially regional ones, currently have a huge backlog in processing the administrative side of renewable energy projects on time. In many cases, this delay will be the main reason why projects fail to become operational by 31 March 2020. Thus, it seems logical in those cases where it has been the Administration that has failed to meet the deadlines established by law, that it should be the one to compensate developers for the damage caused.

Spanish law contains solid principles and case law arguments that state that in those cases where the expiry can be directly attributed to a delay by the Administration, the latter must bear the financial consequences that can be directly attributed to it. The possibility exists, in turn, to weigh the blame and share the liability when there are several reasons behind the damage caused.

Article 1902 of the Civil Code establishes the general principle under Spanish law regarding financial liability, whereby "*Any person who, as a result of an action or omission, causes damage to another by his fault or negligence shall be obliged to repair the damaged caused.*" On this basis, Article 32 of Spanish Act 40/2015, dated 1 October, on the legal regime governing the public sector, establishes the concept of the Liability of the Public Administration and, with it, the right held by individuals to be indemnified by the latter for all damage caused to their assets and rights, provided that such damage is the result of the normal or abnormal operation of public services and provided that the individual has no legal obligation to bear such damage.

It is therefore clear that if the financial damage suffered by the developers of the thwarted projects is directly attributable to the Public Administration, then the latter must be accountable for the damage that non-compliance with the deadlines established by law has caused.

The Administration responsible for the delay can be held liable, if its non-compliance makes it impossible for energy producers to meet their deadlines and therefore entails the enforcement of the guarantees, by considering bringing a financial liability claim.

On this basis, we understand that since it is obvious that many Administrations currently have a backlog in processing the administrative side of renewable energy projects by the deadline, it would not be preposterous for the Spanish

Courts to decide to attribute the financial losses to each party (the developer and the corresponding Administration) in proportion to the delay attributable to each of them. Consequently, the evidence stage would take on special importance, wherein the developer would need to prove (i) its compliance with the deadlines established by law (providing valid proof that it submitted the requests on time with the supporting documentation required and listing any access or connection conflicts identified, as the case may be, proving its diligence) and (ii) non-compliance with the deadlines established by law by the Administration (state or regional, as corresponds).

Thus, for those projects in which access and connection rights have been granted but the administrative side has not been processed to date, it would be difficult to attribute the damage to the Administration. However, for those projects developed in Autonomous Communities having a notorious backlog where it can be shown that efforts were made from the start to process the administrative side, obtain certain local and regional permits and that best endeavours were used to make the plant operational prior to 31 March 2020 (despite start-up not being achieved by that date), it will fall to the Courts to decide, case by case, on the apportionment of blame (and distribution of damages) considered to be the most fair.

In any event, given that the legal nature of the guarantee is that of a criminal clause, it would be possible to appeal the acts of enforcing the guarantee, seeking the full or partial cancellation of the enforcement (a reduction of the enforced amount) if there has been partial compliance and if non-compliance cannot be attributed to the interested party, but to the Administration or to an event of *force majeure*, as we can deduce from the Spanish Supreme Court's Judgment of 27 June 2012 (LA LEY 105843/2012).

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