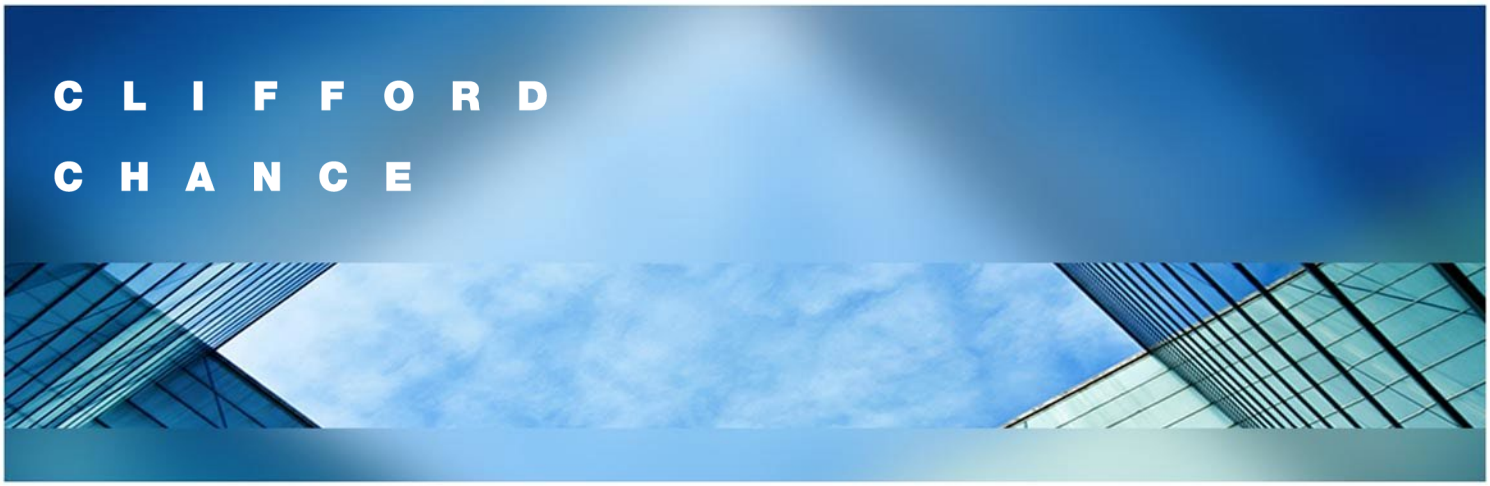

REPOWERING RENEWABLE INSTALLATIONS: REGULATORY IMPLICATIONS

The rapid technological advancements made in recent years have left many renewable installations in Spain prematurely obsolete, and so it is becoming more and more common to see decisions made to repower them. However, repowering can have an impact on administrative permits, the specific remuneration received, if any, and access and connection permits, which must be assessed in advance.

Key aspects

- What should be understood by "repowering"
- Impact of repowering in regulatory terms
- Conclusion

INTRODUCTION: WHAT SHOULD BE UNDERSTOOD BY "REPOWERING".

The repowering of renewable energy installations is often discussed in Spain in reference to increasing the capacity of such installations, after they have been in operation for a number of years, by replacing their technical equipment with newer, more efficient alternatives.

However, **repowering does not necessarily involve increasing capacity**. The only legal definition of this term is found in Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 ("**Directive 2018/2001**") on the promotion of the use of energy from renewable sources, the second article of which defines repowering as follows:

> *"renewing power plants that produce renewable energy, including the full or partial replacement of installations or operation systems and equipment for the purposes of replacing capacity or increasing the efficiency or capacity of the installation"*

Based on the above, repowering can – but does not necessarily – involve increasing the installation's existing capacity. In both scenarios, the Directive indicates that streamlined permit-granting procedures should be established, requiring that Member States facilitate the repowering of existing renewable energy plants by ensuring a simplified and swift permit-granting process.

That being said, Directive 2018/2001 has not yet been transposed into Spanish law and, as we will see below, it is uncertain whether the Directive's intent to facilitate repowering runs counter to the Spanish regulatory trend.

IMPACT OF REPOWERING IN REGULATORY TERMS

From a regulatory perspective, repowering an installation by modifying its technical characteristics can have a significant impact on: (a) the

administrative permits necessary for the repowering, (b) the specific remuneration obtained by the facility –if any- ; and (c) the validity of the permits to access and connect to the electricity transmission grid. We will analyse each of these impacts separately below:

- **Potential impact on administrative permits**

  Article 115 of Spanish Royal Decree 1955/2000, of 1 December, governing transmission, distribution, marketing and supply activities and the authorisation procedure for power plants ("**RD 1955/2000**") states that the "*construction, extension, modification and operation*" of electricity installations is subject to (i) administrative authorisation, (ii) approval of the execution plan, and (iii) start-up certificate. Based on this Article, we should bear in mind that repowering the installation through modifications (whether or not this involves increasing capacity) would be subject to mandatory reapplication for the three authorisations cited.

  That being said, Article 53 of Electricity Sector Act 24/2013 (*Ley del Sector Eléctrico*, the "**LSE**") qualifies the above by allowing public administrations to establish that "*certain forms of immaterial modifications to installations … are not subject to prior administrative authorisations*". Under this premise, various Autonomous Regions have regulated which modifications can be considered "immaterial" and thus exempt from the requirement to obtain new authorisations, though such modifications must still be notified.

  This is the case of Catalonia, which, pursuant to Decree Law 16/2019, of 26 November, considers modifications to wind farms and solar plants immaterial when the meet the following requirements simultaneously:

  a) No change or a decrease in the number of wind turbines in the case of wind farms or of the surface occupied by a photovoltaic solar plant.

  b) No change or an increase of 10% or less in the total capacity of the wind farm or photovoltaic solar plant.

  c) Any proposed relocation of the farm's wind turbines must be within the same geographical area as initially envisaged, with a 500-metre tolerance limit, and must not exceed the targeted scope of the specific actions authorised, nor directly or indirectly affect, under any circumstances, any Natura 2000 protected areas.

  Therefore, any repowering involving (a) an increase in the number of wind turbines or surface area occupied by the photovoltaic plant, (b) a capacity increase of over 10%, or (c) a relocation of the wind turbines beyond the aforementioned limits would be subject to mandatory reapplication for (i) administrative authorisation, (ii) approval of the execution plan, and (iii) start-up certificate.

  In relation to the wind farms on its territory, the Autonomous Region of Aragon has established in Decree Act 2/2016, of 30 August, that modifications will be considered immaterial when they meet the following requirements simultaneously:

  a) The wind turbines remain within the area defined in the original project.

  b) There are no changes to the location of wind turbines that imply modifying the type of land considered in the original project or any

changes made involve moving wind turbines to emplacements with a reduced environmental impact.

c) A corridor is always kept free between the blade tips, at the level of the hub, equal to or greater than one and a half times the diameter of the rotor of the wind turbine with the largest blades.

d) The total capacity of the wind farm does not represent a variation of more than five per cent of the capacity defined in the original project.

e) The environmental conditions of the original project are respected in full.

Castilla y León, however, does not establish a distinction between material and immaterial modifications. Indeed, Decree 189/1997, of 26 September, states: "*Modifications to generation installations … will require prior administrative authorisation*." Consequently, any repowering Castilla y León, whether or not it involved increasing a wind farm's capacity, would be subject to mandatory reapplication for (i) administrative authorisation, (ii) approval of the execution plan, and (iii) start-up certificate.

As such, it will be necessary to take into account the specific regulations established by each Autonomous Region for each kind of facility in order to ascertain whether the repowering will involve obtaining new administrative permits.

- **Potential impact on specific remuneration received**

  While repowering is often undertaken at the end of an installation's useful life, this is not always the case. The rapid technological advancements made in recent years have left many installations prematurely obsolete, and so it is becoming more and more common to see decisions made to repower before its useful life has come to an end.

  In the case of facilities that receive specific remuneration under articles 14 LSE and 43 of Royal Decree 413/2014, of 6 June ("**RD 413/2014**") it is important to bear in mind that repowering before the end of an installation's regulatorily established useful life may affect the specific remuneration it receives.

  Indeed, the specific remuneration is awarded to installations on the basis of their technical characteristics at the date on which they apply for inclusion as operational in the registry of specific remuneration of power generation facilities (*Registro de régimen retributivo de instalaciones de producción de energía eléctrica*, "**ERIDE**"). Article 26 RD 413/2014 is careful to point out the potential impact of a modification of such characteristics on specific remuneration. Specifically, we must consider the following facts:

  a) The investments in repowering will not be entitled to remuneration.

  b) The installation's increased capacity will not be entitled to receive operating remuneration ("**Ro**").

  c) Where the modification entails a new standard installation code (*código IT*) that would modify the Ro:

  1. If the new Ro is lower than the Ro before the modification, the new Ro value will prevail.

2. If the new Ro is higher than the Ro before the modification, the Ro value will remain the same.

d) If installed capacity is reduced, the installation will only be entitled to receive investment remuneration ("**Ri**") for the installed capacity resulting from the modification.

To summarise, the specific remuneration initially awarded to an installation applies to its full useful life, unless its technical characteristics are changed. Consequently, any alteration of its technical characteristics may entail a corresponding change in specific remuneration. It is for this reason that any decision to repower an installation (whether or not its capacity is increased) before its useful life has ended should be preceded by a study of the impact that the repowering, constituting a modification of the technical characteristics of the installation, could have in terms of the specific remuneration awarded to it.

In any case, it should be kept in mind that Article 51.1 RD 413/2014 establishes that owners of installations entitled to specific remuneration, in addition to the necessary authorisations, must notify the Directorate General for Energy Policy and Mines of any modification of the characteristics that the installation had at the date of application for registration as operational with ERIDE, along with any changes in the fuel used with respect to that initially notified. This must be done within one month of the date of issue of the definitive operating permit, if required, or otherwise within one month of the date on which the modification is completed.

If this notification is not effected or contains false information, the installation will be removed from the ERIDE registry and, consequently, will lose its specific remuneration, pursuant to Article 49.1.f) RD 413/2014.

- **Potential impact on access and connection permits**

  Permits to access and connect to Spain's electricity transmission grid are associated with the installation's generation activity, insofar as they permit the feed in of the electricity produced. However, there is some regulatory uncertainty regarding the impact that repowering may have on these permits.

  Additional Provision Three of Royal Decree-Law 15/2018, dated 5 October, on urgent measures for energy transition and the protection of consumers (**"RDL 15/2018"**[1]) states that *a generation installation's access and connection permits will only be valid for the construction and operation of such installation. For that purpose, the criteria for an installation to be considered the same for the purpose of validating access and connection permits will be specified in the regulations.*

  Therefore, in view of the foregoing, **the validity of access and connection permits will depend, notwithstanding the repowering, on whether the installation can be considered to be "the same", which, as we have stated, is pending to be specified in the implementation of the regulation**.

[1] Note that RDL 15/2018 applies only to those renewable energy power plants were in the construction stage when RDL 15/2018 was approved on 5 October 2018.

Article 33.10 LSE[2] also states that the system for modifying the conditions for access and connection permits, including the connection points, will be specified in the future, but this has not yet occurred.

And this issue is crucial, because **the restriction of the capacity to access the grid is the main entry barrier to this market. Thus, if the installation's repowering entails that the installation ceases to be the same, then that installation will lose its access and connection permit**, and must begin a new access and connection process, facing tough competition from all other interested parties.

There is a plan in place to regulate access and connection which, on the occasion of the future renewal of access and connection permits about to expire because the installation has not become operational, considered the installation to be the same, provided there was no change in (i) generation technology, (ii) installed capacity by more than 5%, or (iii) (material change) in the installation's location.

The Spanish Markets and Competition Commission (CNMC), for its part, attempted to intervene in this regard with its first proposal for a Circular, published in June 2019 and establishing the methodology and conditions for accessing and connecting to the installations' electricity transmission and distribution grids. Annex IV thereof stated that the installation ceases to be the same and loses its current access and connection permits when: (i) its technology changes, (ii) the synchronous or asynchronous nature of the installation changes, (iii) its capacity increases in any way, or (iv) its location changes.

However, the current version of the draft Circular, sent to the Council of State on 6 May last, recognises that the authority for defining when an installation is the same, for the purposes of deciding whether or not it loses the access permit it holds, rests with the Government.

Therefore, the problem is that we still have no confirmation as to whether the repowering of an existing installation will entail a modification of its characteristics, leading to its not being considered legally the same installation and losing its previous access permits. In that case, given the high current demand for access, this would render any repowering project unviable.

In our opinion, the repowering should under no circumstances constitute grounds for an installation losing access permit, because article 16.6 of Directive 2018/2001 contains an imperative mandate for Member States to facilitate the repowering of existing renewable energy plants and ensure a simplified and swift permit-granting process, as mentioned earlier. Making an installation that opts to repower lose its access permit cannot be described as facilitating repowering. If there is no additional capacity for grid access, the extra capacity will not be able to be granted, but it can never determine the loss of the existing access rights.

In any event, the regulatory implementation approved by the Government, defining what is to be understood by the same installation in this regard, will affect all installations, regardless of technology and the Autonomous Region in which they are located.

[2] The validity of Article 33 is subject to the approval of the specification in the regulation, in the terms of Transitional Provision Eleven of the LSE.

CONCLUSION

The impact of the repowering of renewable energy installations in Spain will depend largely on: (i) the modification of the technical characteristics involved in the repowering; and (ii) whether the repowering represents an increase of grid feed-in capacity.

First of all, it will be necessary to take into account the specific regulations of each Autonomous Region for each kind of installation in order to ascertain whether the repowering will entail obtaining new administrative permits.

Moreover, in the event that the repowering takes place before the end of the regulated useful life of the installations, account will have to be taken of the potential impact on the specific remuneration, which will largely depend on whether the repowering involves a capacity increase.

Finally, we are awaiting the regulatory implementation which is to determine when a repowering means that the installation in question ceases to be the same one or not, for the purpose of maintaining the original access permit. Nonetheless, this regulatory implementation will have to respect the EU obligation to facilitate the repowering of renewable installations.

CLIFFORD CHANCE

CONTACTS

Jaime Almenar
Partner

T +34 91 590 4148
E jaime.almenar
@cliffordchance.com

Alba Sande
Associate

T +34 91 590 4184
E alba.sande
@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, Paseo de la Castellana 110, 28046 Madrid, Spain

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