

THIS IS WHAT THE FUTURE OF RENEWABLES LOOKS LIKE: NEW ROYAL DECREE-LAW 23/2020 (II): HYBRIDISATION, REPOWERING, STORAGE AND OTHER NEW DEVELOPMENTS

24 June 2020 saw the publication in the Official State Gazette (BOE) of the new Royal Decree-Law 23/2020 (the "RDL"), which sets some guidelines for the renewable energy sector in the coming years.

In our first client briefing on the RDL¹ we explained the main new developments of this text in relation to renewable energy, in particular, its impact on access and connection permits and the establishment of milestones for obtaining administrative permits. However, the RDL contains other new developments that will be of vital importance in the renewables sector in the coming years and that we have summarised below.

STIMULUS FOR HYBRIDISATION OF INSTALLATIONS

One of the main new developments of new the RDL is the stimulus for the hybridisation of installations, understood to mean the addition of energy from renewable sources to a generation installation or the incorporation of storage facilities.

Such installations **will be able to carry out hybridisation without losing existing access and connection permits**, using the same connection point, provided they do not: (i) increase capacity by more than 5%; or (ii) modify their geographical location by more than 10 km.

The hybridisation of existing installations, respecting the limits in (i) and (ii) mentioned above, would not be subject to obtaining new access and connection permits, merely an update of the existing ones. This update would not be affected by the moratorium contained in the first transitional provision of this RDL, which rules out the admission of applications for access and connection permits which are classed as new applications.

Key issues

- Existing installations can hybridise while maintaining access and connection permits.
- Capacity can be increased by up to 5% subject only to obtaining a new ASC, while maintaining granted access and connection permits.
- Generation installations can incorporate energy storage elements while maintaining access and connection permits.
- A system of auctions based on a long-term fixed energy price is established, subject to regulatory implementation by the Government.

¹ See our first client briefing on RD-L 23/2020 and its impact on renewable energy here: <https://www.cliffordchance.com/briefings/2020/06/this-is-what-the-future-of-renewables-looks-like--new-royal-decr.html>

REGULATION OF REPOWERING

In previous client briefings we analysed the impact of repowering in terms of administrative permits². The text of article 115 of Royal Decree 1955/2000, of 1 December ("**RD 1955/2000**") prior to the approval of the RDL, established that the "*construction, extension, modification and operation*" of electrical installations was subject to: (i) prior administrative authorisation ("**PAA**"), (ii) administrative authorisation for execution ("**AAE**"); and (iii) an administrative start-up certificate ("**ASC**"). According to this rule, it could be taken that repowering, involving a modification of the installation (whether or not capacity was increased) was subject to obtaining the three authorisations mentioned.

However, the RDL amends this rule, allowing the repowering of installations without the need to obtain some of the above authorisations, subject to certain limits. In particular, the RDL stipulates that:

- a) Modifications are exempt from new PAA (once the initial PAA has been obtained) when they do not exceed the installed capacity envisaged in the original project by more than 10%; and
- b) Modifications are exempt from new PAA and AAE (and only subject to new ASC) when considered "immaterial" because they do not increase installed capacity by more than 5%³. Moreover, these modifications do not prevent the installation being considered "the same" for the purposes of the access and connection permits applied for or granted, which means there would be no risk of a loss of the access and connection permits, the main barrier to entry in this sector.

In summary, these rules can be simplified as follows:

- Capacity increase of up to 5%:
 - Access and connection permits valid; only subject to an update⁴;
 - PAA valid; no update necessary.
 - AAE valid; no update necessary.
 - Need to obtain new ASC.
- Capacity increase of up to 10%:
 - Need to obtain new access and connection permits.
 - PAA valid; no update necessary
 - Need to obtain new AAE and ASC.

² See our client briefing on repowering here: <https://www.cliffordchance.com/briefings/2020/06/repowering-renewable-installations-regulatory-implications.html>

³ Note that RD-L 23/2020 expressly allows for the grant of administrative authorisations for an installed capacity in excess of the access capacity appearing on the access permit, which must be notified so that it can be recorded in the registry of the specific remuneration regime. The above notwithstanding, the access capacity will be the maximum active capacity that an electricity generation installation is permitted to feed in to the grid.

⁴ As such, only subject to the existence of available grid capacity but not affected by the moratorium contained in the first transitional provision of RDL 23/2020.

The above means that there is a tipping point in terms of increased flexibility for administrative permits as a result of the new rules with capacity increases of up to 5% only requiring to obtain a new ASC, maintaining the access and connection permits already granted (with the PAA and AAE already obtained remaining valid), even if this does not in itself guarantee the increase of access for the additional 5%, which will be contingent on the existence of available grid capacity for the power capacity increase requested.

In any event, the other limits imposed on the modifications would have to be respected if the installation is to continue to be considered the same for the purpose of access and connection permits: maintenance of technology (synchronous or asynchronous and belonging to the classification group envisaged in Royal Decree 413/2014, of 6 June⁵; and maintenance of the geographical location (which cannot be modified by more than 10km).

FAVOURING STORAGE

However, leaving aside the impact of repowering on access and connection permits, the fact is that the RDL opens the door for the existence of **installations with a higher authorised power capacity than their access capacity**. The above does not imply that more energy can be fed in to the grid than the access capacity granted, as the RDL expressly states that "*access capacity will be the maximum active power capacity at which an electricity generation installation is permitted to feed in to the grid*". Nevertheless, it does make it possible to improve utilisation of the resource by maximising the feed-in.

This increase in the authorised capacity **could be implemented at the same time as the stimulus for hybridisation** to which we have already referred. In this way, it would be possible to increase the capacity of an existing wind farm, for example, with additional photovoltaic capacity, which would be subject to new PAA, AAE and ASC, but would not have to obtain new access and connection permits (as the installation would be considered the same provided the access capacity is maintained and its geographical location does not change by more than 10 km). Nonetheless, thanks to the hybridisation, the wind farm would be able to maximise feed-in to the grid for which it has access capacity, making it less dependent on just one natural resource and combining the two.

The RDL envisages the possibility of adding energy storage elements to the generation installations. As we have seen above, the incorporation of storage facilities is considered a form of hybridisation of new or existing installations.

As a **form of hybridisation**, the incorporation of storage facilities will not be interpreted as a modification of their technology, thus entailing:

- i. the possibility of **conserving access and connection permits** already granted;
- ii. **exemption from the moratorium** contained in the first transitional provision of the RDL which prevents the admission of new applications for access and connection permits (as the installation will not require new and specific access and connection and it will

⁵ It is expressly envisaged that the addition of energy storage elements will not imply modifying the technology.

be sufficient to update the existing permits pursuant to the terms of new additional provision 14 of RD 1955/2000).

NEW SYSTEM OF AUCTIONS

The RDL empowers the Government to implement a remuneration framework for renewable energy generation, although, unlike what occurs with other provisions regulating powers granted to the Government, no timeframe is set for the regulatory implementation.

However, it does indicate that the remuneration framework will be based on competitive procedures, in which the product to be auctioned will be the electrical energy, the installed capacity or a combination of the two, and the variable on the basis of which bids will be made will be the remuneration price of such energy, which will be recognised long-term (albeit without specifying the duration) and of a fixed nature.

Although article 2 of the RDL which regulates this new system alludes to the "additional" nature of the same in relation to the existing specific remuneration regime, it is logical to assume that such framework rather than additional will be alternative to the existing one. This is set out in the preamble to this text, by virtue of which "*the Government is empowered to establish another remuneration framework, **an alternative to the specific remuneration regime***" meaning that an installation will not be able to receive two forms of remuneration cumulatively.

We will have to wait for the regulatory implementation to analyse the specific parameters of the new auctions, the projects potentially or obligatorily affected and the rest of the implications of the system.

STABILITY OF THE ELECTRICAL SYSTEM

One of the objectives already announced in the preamble to the new the RDL is achieving stability for the electrical system. To that end, additional provision three of this text empowers the Minister for the Ecological Transition and the Demographic Challenge to use the surplus of income from the electrical system to cover system costs in 2019 and 2020.

The surplus will be applied first to covering temporary imbalances and, subsidiarily, to covering transitional cost-income deviations in 2019 and 2020.

However, the amounts, terms and timeframes for application are left for subsequent regulation which will have to be approved by an order from the Minister for the Ecological Transition and the Demographic Challenge following a resolution of the Government Delegate Committee for Economic Affairs.

It transpires that this is another of the new developments contained in the RDL in relation to which we will have to wait and see how the application of the surplus is implemented.

IMPACT OF COVID-19 ON RENEWABLE ENERGY INSTALLATIONS

The preamble of the RDL indicates that the objectives of these regulations include that of softening the financial blow of the global pandemic caused by COVID-19 in all sectors of production in the country.

With this aim, the fourth additional provision of the RDL contains a series of measures applicable to the installations operating under the specific remuneration regime whose operating costs depend largely on fuel prices, in order to guarantee their economic viability.

To that end, it is necessary to revise the operation remuneration value ("**Ro**") which will apply during the term of validity of the state of emergency. It is calculated using the values of the electricity market price and the CO2 emission rights price during the state of emergency. The Ro calculated in this way will never be lower than the Ro set by Order TED/171/2020, dated 24 February, for each standard installation.

Moreover, the figures corresponding to the minimum number of equivalent minimum operating hours and the operating threshold for 2020 are reduced by 50% in order to prevent these installations being deprived of the remuneration assigned to them due to having reduced their activity due to the state of emergency. Consequently, these provisions will be retroactive and will give rise to the corresponding reassessments.

R+D+I STIMULUS

The intention to increase flexibility for discharging administrative procedures is key for installations that may be classed as electrical installations whose object is technological research and development, with the Government being able to exempt them from the requirement to obtain PAA and ASC.

NATIONAL ENERGY EFFICIENCY FUND

Title II of the RDL creates a national system of energy efficiency obligations, which assigns an annual energy saving quota to certain parties nationally. Those obliged to pay the quotas, called "savings obligations" are the following:

- i. Gas and electricity marketing companies;
- ii. Wholesale oil product operators; and
- iii. Liquefied petroleum gas ("**LPG**") operators.

However, the second transitional provision of the RDL establishes a moratorium on compliance with this obligation until 28 February 2021, applicable to affected entities that hold SME status.

The savings obligations will be set annually by order of the Minister for the Ecological Transition and the Demographic Challenge and will be paid quarterly, becoming part of the National Energy Efficiency Fund.

Compliance with this obligation will be verified by presenting Energy Saving Certificates ("**ESC**").

CONCLUSION

The regulations contained in the RDL, in force since 25 June last, will undoubtedly involve far-reaching changes in the renewable energy sector.

the RDL contains a clear incentive for the repowering and hybridisation of existing facilities, including the introduction of storage systems, with a view to improving utilisation of the resource.

Increased flexibility for administrative procedures for the construction and operation of projects and the impending creation of a system of auctions is intended to help attract capital to a sector that had brought in a highly significant volume of investment with numerous projects being processed, developed and executed. Nonetheless, the moratorium introduced rejecting applications for new accesses and the aspects that are announced but pending implementation entail a degree of uncertainty that we hope can be dispelled in the short term so that the legislation can serve its stated purpose.

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