

THIS IS WHAT THE FUTURE OF RENEWABLES LOOKS LIKE: NEW ROYAL DECREE-LAW 23/2020, OF 23 JUNE (I)

24 June 2020 saw the publication in the Official State Gazette (BOE) of the new Royal Decree-Law 23/2020 ("RDL 23/2020"), which sets some guidelines for the renewable energy sector in the coming years. We at Clifford Chance would like to outline what they are in a series of Client Briefings.

OBJECTIVES OF RDL 23/2020

RDL 23/2020, establishes milestones and deadlines with a view **avoiding speculation** on the use of permits for access and connection to the grid and gives notice of the creation of a **new system of auctions** that aims to provide stability for investors, facilitating the processing of projects that favour the **reactivation of the economy** following the crisis caused by the COVID-19 pandemic.

The subject-matter regulated in RDL 23/2020 can be divided into four main blocks: (i) measures for the orderly development and promotion of renewable energy; (ii) measures to promote new business models that favour energy transition; (iii) measures to promote energy efficiency; and (iv) measures aimed at ensuring balance and liquidity in the electricity system.

This text focuses on the first of the blocks, leaving the others for successive briefings that we will be circulating in the coming days.

MAIN NEW DEVELOPMENTS WITH REGARD TO RENEWABLE ENERGY

Article 1 of RDL 23/2020 regulates the conditions for maintaining access and connection to the electricity transport and distribution grids, depending on the technical viability and solidity of the projects, contingent on reaching successive administrative milestones that are necessary for the authorisation and execution of the same, with four groups of permits being distinguished.

- a) Those granted prior to the entry into force of the Electricity Sector Act (*Ley 24/2013, de 26 de diciembre, del Sector Eléctrico, "LSE"*) on 28 December 2013, whose expiry is governed by the terms of the eighth transitional provision of the LSE, and which in practice means that the permit expires unless the start-up certificate is obtained by 21 August 2020.
- b) Those granted between 28 December 2013 and 31 December 2017, which are subject the following milestones, starting from 25 June 2020:

Key points

- Existing projects will lose access and connection rights and guarantees unless they comply with the new implementation deadlines.
- New milestones are introduced for the validity of future access and connection permits.
- Moratorium: no new access and connection applications will be admitted until the future access and connection regime is implemented in regulatory terms.
- Hybridisation and repowering is facilitated subject to limits established.

- Application for prior administrative authorisation being presented and admitted ("**PAA**"): 3 months.
 - Obtaining a favourable environmental impact statement ("**EIS**"): 18 months.
 - Obtaining the PAA: 21 months.
 - Obtaining the administrative authorisation for execution ("**AAE**"): 24 months.
 - Obtaining the definitive administrative start-up certificate ("**ASC**"): 5 years.
- c) Those granted as of 1 January 2018 and until the entry into force of RDL 23/2020, which are subject to the following milestones, starting from 25 June 2020:
- PAA application submitted and accepted: 6 months.
 - Favourable EIS obtained: 22 months.
 - PAA obtained: 25 months.
 - AAE obtained: 28 months.
 - Definitive ASC obtained: 5 years.
- d) Those granted as of the entry into force of RDL 23/2020, which are subject to the following milestones, starting from the date the access permit is obtained:
- PAA application submitted and accepted: 6 months.
 - Favourable EIS obtained: 22 months.
 - PAA obtained: 25 months.
 - AAE obtained: 28 months.
 - Definitive ASC obtained: 5 years.

Any non-fulfilment will entail the **automatic expiry** of the access and connection permits, as well as the **immediate enforcement of the financial guarantees** provided for processing the application for access to the transport and distribution networks, although an exception is made in those cases in which, for reasons beyond the developer's control, a favourable EIA is not issued, in which case the guarantees will not be enforced.

Fulfilment of milestones will be confirmed by means of a writ from the body responsible for granting the authorisation, confirming that the application has been presented and admitted. If the installation is exempt from any of the procedures, this will have to be demonstrated in the form of a document issued by the competent body.

Moreover, the regulation of RDL 23/2020 contains additional milestones in its text that must be taken into account in order to preclude expiry of the access and communication permits or avoid the enforcement of the guarantees:

- a) First of all, holders of access permits will have a **maximum term of 6 months to apply for the connection permit** as of the entry into force of RDL 23/2020, except in those cases in which the access permit has not been obtained, in which case the term will run as of the date such permit is obtained. The failure to present the application within this term will entail the

automatic expiry of the corresponding access permit and enforcement of the guarantees provided.

In our opinion, this rule raises the doubt as to whether those access permits having lapsed in the past due to a failure to request connection within a term of six months as of then they were obtained (pursuant to articles 53.3 and 63.5 of RD 1955/2000) are reactivated and grant a new six-month term as of 25 June 2020 for requesting a new connection. Although it could be understood to mean this, according to the literal wording of the rule, this interpretation could cause conflicts with the holders of access permits obtained subsequently, meaning that it would not seem to be reasonable to apply it to those access permits when the six-month term for applying for the corresponding connection permit has expired without the application being made. Meanwhile, a doubt has also arisen regarding whether it is possible to reconcile this six-month term for applying for the connection permit with the term of three or six months established for applying for (and obtaining admission of), the PAA, particularly in the case of access permits granted after the entry into force of RDL 23/2020, the term of expiry of which starts to run as of when the access permit is obtained. According to article 53.1 LSE, it will not be possible to obtain PAA without first holding an access and connection permit, and this, in a normal administrative procedure, would mean that the application would not be admissible unless compliance with the requirements for granting the PAA is demonstrated, meaning that the two milestones cannot be reconciled. However, for processing the prior administrative authorisation, RD 1955/2000 only requires provision of the guarantees granted for access, meaning that the decision on admission does not require presentation of verification that the connection permit has been obtained.

- b) In the case of the **hybridisation** of an installation with an access permit already granted, for the purposes of calculating compliance with administrative milestones:
- For the technology that has the initial access permit, the calculation of the terms will start as of the grant of the same.
 - For the new hybrid part not contemplated in the original access permit, the calculation date for the same will start as of the update of the access permit.
- c) Note also that in all cases (except for the permits obtained prior to 28 December 2013) there is the option for the holders of the permits to **relinquish** them within a term of three months as of the entry into force of the legislation, with the return of the financial guarantees provided.
- d) Moreover, the transitional provision introduces a **moratorium on new access permits** until the regulatory framework for access and connection has been implemented. Consequently, new applications for access capacity existing at the time of entry into force of RDL 23/2020 or that may be submitted subsequently as a result of expiries, relinquishments or any supervening circumstances, will not be accepted. However, an exception is made to this moratorium in the case of applications that, at the entry into force of RDL 23/2020, have provided and sent to the administration responsible for processing the authorisation the documentation confirming the provision of the financial guarantees.

The problem, following this moratorium, will be what criterion to use for all requests that are affected by the moratorium, as it is unclear whether

preference will be given to those made as of now, even if they cannot be processed, or those submitted as of approval of the implementing legislation.

Article 2 of RDL 23/2020 empowers the Government to establish an alternative compensatory framework to the specific remuneration regime, which will be based on the long-term recognition of a fixed price for the energy and will be granted through a competition mechanism. Consequently, we will have to wait for new legislation to be approved before we will know the specific characteristics of these new remuneration regimes and the projects that will be able to avail themselves of them. At present, the draft decree due to implement this auction regime is being processed.

Article 3 establishes the long-awaited (and needed) provisions regarding the impact of modifications to the installation (and, therefore, of repowering) on authorisations and access and connection permits, which will depend on the specific characteristics of the modification, as detailed below.

- a) Modifications subject to new AAEs but exempt from new PAAs are those that:
- are not subject to ordinary environmental assessments;
 - do not modify the layout, or do modify the layout but do not require mandatory expropriation and have obtained an urban planning compatibility certificate;
 - do not exceed the installed capacity envisaged in the original project by more than 10%;
 - do not require a new declaration of public interest ("**DPI**"); and
 - do not entail a change in technology or safety and do not affect other installations.
- b) Modifications considered "immaterial" and therefore subject to new ASCs but exempt from new PAAs and AAEs, are those that:
- do not alter the technical, safety or environmental characteristics of the installation;
 - do not require a new DPI; and
 - do not entail remuneration-related changes; as well as
 - modifications to feed-in infrastructure (lines and substations) that do not entail a change of route not agreed with the affected parties and maintain the characteristics of the original project.
- c) Modifications that entail the installation no longer being "the same" and **involve the loss of its access and connection permits** (and thus constitute the **limits applicable to repowering**) are those that:
- entail a change in technology, understood to mean (i) a change from synchronous to induction or vice versa, or (ii) a modification to their classification group under Royal Decree 413/2014, of 6 June;
 - increase grid feed-in capacity (access capacity) by more than 5%, or decrease capacity as a result of the division of the project;
 - modify the geographical location, understood to mean a change of over 10,000 m to the installation's geometric centre.

As a finishing touch to the regulations contained in Title I of RDL 23/2020 (first block of measures studied above), we must bear in mind that **final provision eight allows for its amendment by the Government by regulatory means**, except in the case of installations that had already applied for or obtained access or access and connection permits at the date of entry into force of RDL 23/2020. However, any regulatory amendments approved would not under any circumstances modify the milestones for obtaining the definitive ASC to which we refer above.

Titles II, III and IV of RDL 23/2020 envisage measures to foster new business models, promote energy efficiency and ensure balance and liquidity in the electrical system.

They also regulate essential issues for renewable energy, such as (i) hybridisation, allowing for the authorisation of installations with an installed capacity higher than the access and connection capacity granted; (ii) the empowering of the Ministry for Ecological Transition and the Demographic Challenge to use the electrical system's surplus income to cover the system's 2019 and 2020 costs; and (iii) in relation to installations using the specific remuneration regime whose operating costs are reliant on fuel prices, revising the value of the operational remuneration applicable during the state of emergency retroactively, as well as a reduction of 50% in the value of the minimum number of equivalent operational hours and the operational threshold applicable in 2020.

These issues will be analysed in later briefings.

CONCLUSION

The provisions of RDL 23/2020, published today in the BOE, will undoubtedly bring about change in the renewable energy industry.

Projects with access and connection permits granted years ago will have to make a special effort to meet demanding administrative milestones in order to avoid automatic expiry of their permits and enforcement of the related guarantees. At the same time, a door has been opened to new projects, which will have an easier time being authorised, due to increased capacity on the grid, simplified administrative procedures and new remuneration models, though not until an undetermined future date when the implementing access and connection regulations are approved.

Spain is set to have a fully renewable electrical system by 2050 and, with RDL 23/2020, is making a key first step and opening the door to strong domestic and international investment in the industry.

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