



The income reduction for electric producers in Royal Decree-Law 17/2021

What renewable energy assets are affected and other FAQ

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Faced with surging energy price due to the shock in the offer that is affecting natural gas markets, the Spanish Government has adopted certain temporary measures (from 16 September 2021 to 31 March 2022) that aim at reducing the electric bill for consumers, implemented by Royal Decree-Law 17/2021, of 14 September (**RDL 17/2021**).

Title III of the RDL 17/2021 provides for the so-called “mechanism for reducing the excess remuneration of the electricity market caused by the high price of natural gas in international markets” (the **Mechanism**). The Mechanism and, in particular, its scope of application, has raised a lot of questions and concerns to an extent that the Ministry for the Ecologic Transition and the Demographic Challenge has been compelled to clarify certain aspects related to the Mechanism and its application (the **Clarifications**).

Below we address some of the more frequent questions about this Mechanism which have arisen and which may be of interest for investors in general.

Q: Does the Mechanism apply to installations all around Spain?

A: No, the Mechanism only applies to installations located in the Spanish territory within the Iberian Peninsula (i.e. excluding the Canary and Balearic Islands, Ceuta and Melilla).

Q: Are there exemptions for smaller installations?

A: Yes, there are. Installations with a net power up to 10 MW are not subject to the Mechanism.

Q: Does the Mechanism apply to all renewable energy assets?

A: It depends. Article 5.2 of RDL 17/2021 excludes from the Mechanism all those installations that are entitled to receive any of the retribution schemes foreseen in article 14 of Law 24/2013¹. This includes installations entitled to any of both the specific remuneration regime (introduced by Royal Decree-Law 9/2013) and the new renewable energy regime (introduced by Royal Decree-Law 23/2020).

Q: What happens if a renewable energy asset is not entitled to any of the aforementioned remuneration schemes?

A: In principle, the Mechanism would apply to it. However, the Ministry has indicated in the Clarifications that the spirit of RDL 17/2021 is to reduce the income of installations that would be actually benefitting from the prices of natural gas and thus, that certain exceptions will apply. In particular, the Ministry stated that the reduction should not apply to energy already committed at a fixed price under contractual arrangements before the entry into force of RDL 17/2021 (i.e. 16 September 2021). This fact shall be evidenced by the producer following the procedure set out in the Clarifications.

However, according to the Clarifications, this exception does not apply to contractual arrangements entered into between one company (producer) and another company (supplier) where both entities belong to the same group. This clearly affects vertically integrated groups and companies.

Q: How should the existence of such a contractual arrangement be evidenced?

A: According to the Clarifications, evidence of the existence of prior contractual arrangements, as referred above, has to be provided to Red Eléctrica Española, as national operator of the Spanish electric system, which shall in turn send the information to the National Commission of Markets and Competition (CNMC).

Q: How is the reduction calculated?

A: Article 7 of RDL 17/2021 details this. In essence, it consists in a formula that takes into account: (i) the energy produced; (ii) the monthly average price of natural gas; (iii) a reduction parameter, which is initially set at 0.9; and (iv) a parameter that measures the internalisation of natural gas price in the electricity price. If the average price of natural gas in a given month is less than 20 €/MWh, there will be no reduction.

Q: Is the RDL 17/2021 “final”?

A: In principle, yes. A Royal Decree-Law has the same validity as a Law passed by the Spanish Parliament. However, a Royal Decree-Law needs to be validated by the Spanish Parliament within 30 days since it is enacted. The Spanish Parliament may decide to either (i) validate RDL 17/2021; (ii) reject RDL 17/2021; or (iii) validate RDL 17/2021 and decide that it shall be turned into a Bill and follow standard Parliament approval (and amendment, if the case may be).

It is difficult to know what will happen at the Spanish Parliament. However, it seems likely that RDL 17/2021 will be validated. Nonetheless, it is possible that the Parliament intends to amend RDL 17/2021 and, therefore, validates it and then approve it as a Bill.

Q: Could those affected by the RDL 17/2021 challenge it?

A: Within Spain, not directly, but affected individuals or entities may challenge the specific application of RDL 17/2021 (e.g. liquidations related to the reduction of income) before the ordinary courts. If the grounds for challenging include doubts on the compatibility of the Mechanism with EU regulations or the Spanish Constitution, a claimant may ask the relevant court to refer the case to the EU Court of Justice or the Spanish Constitutional Court. Recourse to investment arbitration is also available for foreign investors protected by the Energy Charter Treaty. However, it should be determined on a case by case basis whether or not the changes introduced by RDL 17/2021 may amount to a breach of this Treaty.

¹ Law 14/2013, of 26 December, on the Electric Sector.

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