

Impact of the announcement of a state of emergency on the energy sector

The scale of the health crisis caused by COVID-19¹ has forced the Spanish Government to **invoke a state of emergency by means of Royal Decree 463/2020 of 14 March declaring a state of emergency to manage the health-related crisis triggered by COVID-19**. The Decree was published in Official State Gazette number 67 of 14 March 2020.

Included under the Decree are a set of **measures to guarantee the supply of energy** across the entire Spanish territory and those which may have a **particular impact on companies** rendering services in the energy sector, most notably electricity and hydrocarbons.

State of emergency declaration established under the Spanish Constitution

The declaration of a state of emergency **is provided for under Article 116.2 of the Spanish Constitution** of 27 December 1978 and developed under **Constitutional Act 4/1981 of 1 June on states of alarm, emergency and siege**.

It is an **exceptional measure agreed by the Council of Ministers by means of a royal decree relating to the existence of extraordinary circumstances**² such as health crises triggered by an epidemic or widespread contagion, making it impossible to maintain normality. The measure can be put in place for a maximum of 15 days, albeit extensions may be granted if authorised by the Spanish Parliament.

¹ COVID-19 is the infectious disease caused by the recently discovered coronavirus, previously unknown before the outbreak began in Wuhan (China) in December 2019. Its impact in terms of the number of people affected, coupled with its simultaneous emergence in several countries, led the World Health Organisation to declare it a Public Health Emergency of International Concern on 30 January 2020. However, the rapid spread of the virus on a global scale meant that it was subsequently characterised as a pandemic on 11 March 2020.

² A state of emergency has only been declared twice in Spain's recent history, namely this current situation and the invoking by means of Royal Decree 1673/2010 of 4 December declaring a state of emergency for the restoration of the essential public service of air transport, passed on the back of the air traffic controllers' strike in late 2010.

The measures which enable the emergency to be declared, as well as its duration, **are restricted to the actions considered imperative to ensure a return to normal**, which in turn must be drawn up in specific reference to the circumstances at hand, in particular those found under Article 11 of Constitutional Act 4/1981³.

State of emergency declared by means of Royal Decree 463/2020 of 14 March 2020.

Royal Decree 463/2020 of 14 March declaring a state of emergency to manage the health-related crisis triggered by COVID-19 is underpinned by Articles 4.b) and d) of Constitutional Act 4/1981 of 1 June on states of alarm, emergency and siege in relation to health crises and the shortage of basic necessities. **The scope of application of said articles covers Spain's entire domestic territory.**

Pursuant to Article 3, a state of emergency will be put in place for **an initial 15 calendar days**, i.e. the maximum permitted under the Constitution, notwithstanding a **possible extension where approved by Parliament**. In the absence of a specific legal provision on the matter, approval shall be granted by way of simple majority.

The entry into force of the Royal Decree coincided with its publication, i.e. **just before midnight on Saturday 14 March 2020**, and by means of publication in the Official State Gazette.

Restrictions and limitations to movement and personal mobility

During the state of emergency period, **citizens may only use public roads** to carry out the following activities, as set out in Article 7:

- a) To purchase food items, pharmaceutical products and basic necessities.
 - b) To attend health centres, services and facilities.
 - c) **To travel to their place of work to perform work, professional or business activities.**
 - d) To return to their habitual place of residence.
 - e) To visit and care for the elderly, minors, dependants, persons with disabilities or those considered especially vulnerable.
 - f) To visit banks or insurers.
 - g) **Due to force majeure or critical situations.**
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- h) All other similar activities, which must be carried out individually unless accompanying persons with disabilities or for any other justified reason.

Citizens may travel in private vehicles on public roads to perform the permitted activities and to replenish their fuel supply at petrol stations and service stations. Nevertheless, **the Interior Minister may order the closure of roads** on public health, safety or traffic-related grounds.

No restrictions or limitations are expected to be imposed from an employment perspective and employers will not be forced to implement additional measures beyond a potentially-extensive application of the terms relating to keeping a **minimum distance between individuals of one metre.**

Against this backdrop, all employees working for energy suppliers are obliged to continue rendering services and are therefore not subject to any mobility restrictions. This does not prevent companies being able to adopt any measures they deem pertinent and which comply with health-related objectives, provided that they do not entail a decline in the respective supply.

Measures aimed at guaranteeing the supply of energy

The approved Royal Decree sets out very clear provisions from a health and pharmaceutical perspective to ensure **market supply** and the operation of production facilities as necessary to protect **public health**, stretching as far as **the temporary intervention and control of privately-owned industries, factories, health facilities and pharmaceutical establishments.**

However, the wording of the Royal Decree does not mention similar measures for the energy sector. The **consideration of the energy supply as a *service of general economic interest* (essential service or public service)** from a legal perspective determines the application of specific provisions, namely those referred to in the laws distinguishing between electricity and hydrocarbons.

Electricity supply

Pursuant to **Article 7 of the Spanish Electricity Sector Act 24/2013 of 26 December**, in the event of:

- a) **A real risk to the electricity supply.**

- b) **A shortage of supply** of one or several primary energy sources.
- c) Situations which could pose a **severe threat to the physical safety or security of citizens, equipment or facilities, or to the security of the electricity transmission or distribution networks** following notification to the governments of the affected regions.
- d) **Situations which cause a substantial reduction to the operation of production, transmission or distribution facilities or to the quality of supply indices** attributable to said facilities.

The following measures may be adopted:

- a) **Temporary restrictions or modifications in the electricity market** or to the dispatch of the energy produced in separate electricity systems.
- b) **Direct operation of production, transmission and distribution facilities.**
- c) Imposition of **special obligations relating to the emergency stock levels of primary sources** for electricity production.
- d) **Restrictions, temporary amendments or the suspension of the rights held by those producing electricity from renewable energy, cogeneration and waste.**
- e) Amendments to the general conditions of supply consistency either across the board or for specific consumer categories.
- f) **Restrictions, temporary amendments or the suspension of network access rights and guarantees held by third parties.**
- g) Restrictions or the allocation of primary energy supplies to electricity producers.
- h) Any other measures which may be recommended by international organisations of which Spain is a member or which are prescribed in application of agreements signed by Spain.

Consequently, the government has several options should the consistency of supply or quality of the supply suffer, all of which are set out in **regulations which have not been reproduced in the Decree** declaring the state of emergency.

The Electricity Sector Act also stipulates that **companies may be intervened when they fail to fulfil their obligations and therefore jeopardise the continuity and security of**

supply, for the purpose of ensuring such obligations are met. Grounds for intervention include insolvency and the improper management or a repeated and serious failure to maintain facilities.

Supply of hydrocarbons

In terms of ensuring the supply of petroleum and natural gas-based products, the Royal Decree refers to Articles 49 and 101 of the **Spanish Hydrocarbons Sector Act 32/1998 of 7 October**. Said articles prescribe the **possible adoption of measures** in times of supply shortage, including:

- a) Maximum speed restrictions on public roads.
- b) Restrictions on the use of certain vehicles.
- c) Restrictions on the use of vessels and aircraft.
- d) **Restrictions to the opening times of petrol stations.**
- e) **Subjecting minimum emergency stock levels to an intervention mechanism.**
- f) **Restrictions or the allocation of supplies to consumers of all types of petroleum-based products, as well as usage restrictions.**
- g) **Obliging the owners of hydrocarbon-based facilities to supply their products at national level.**
- h) Any other measures which may be recommended by international organisations of which Spain is a member or which are prescribed in application of agreements signed by Spain.

Where any of the above measures are adopted, the **remuneration scheme applicable to the affected activities will be determined under a Council of Ministers resolution, which in any event will ensure a balanced distribution of costs.**

In addition to the foregoing, in times of emergency the government is authorised to establish the **conditions under which strategic natural gas reserves may be used by those tasked with maintaining them.**

In turn, during **times of supply shortage or where the safety of citizens, equipment or facilities or the security of the network are under threat**, any or several of the following measures may be adopted alongside their determined scope, duration and exceptions:

- a) Temporarily restrict or modify the gas market.
- b) **Impose special obligations in terms of the minimum emergency stock levels of natural gas.**
- c) **Temporarily suspend or amend access rights.**
- d) **Amend the general conditions of supply consistency either across the board or for specific consumer categories.**
- e) **Refer the sale of natural gas for overseas consumption to government authorisation.**
- f) Any other measures which may be recommended by international organisations of which Spain is a member or which are prescribed in application of agreements signed by Spain.

Also, in these cases, the **remuneration scheme** applicable to the activities affected by the adopted measures will be determined, ensuring a balanced distribution of costs.

Thus, sector-based measures are also in place for hydrocarbons in order to guarantee supply, meaning that there was no requirement to develop them further in the Decree declaring the state of emergency.

Critical infrastructure

The providers of key services who manage critical infrastructure must adopt the necessary measures to ensure that said services remain in place. This includes companies and providers which although not considered critical, **must guarantee supply to the population** or the rendering of such key services.

Act 8/2011 of 28 April establishing **measures for the protection of critical infrastructure** lists the energy sector among the so-called strategic sectors (Annex I) and sets out a series of obligations and coordination mechanisms which **significantly reduce the likelihood of energy companies and their employees' activities being restricted.**

To the extent they are required to render such key services, **these companies and their employees must continue their activity**, with health-related measures being the only restrictions imposed.

Seizures and mandatory citizens' services

The Decree enables the authorities to temporarily seize all types of assets required to control the pandemic and, in particular, to provide critical and key security and operators' services. What's more, mandatory and essential citizens' services may be imposed in order to achieve the aims of the Royal Decree.

The above means that all public and private assets deemed necessary by the authorities are to be made available in the fight to control the virus. **Obligations may also be imposed on citizens who are not civil servants** to provide a specific service with a significant impact on the health and pharmaceutical sectors. However, such obligations must comply with the **principle of proportionality to the objective pursued** and may be subject to remuneration or compensation.

Against this backdrop, Article 120 of the Spanish Compulsory Purchase Order Act of 16 December 1954 **stipulates an entitlement to compensation when due to the consequences** of serious detriment to public order or safety, **epidemics**, floods or other catastrophes, the authorities are forced to adopt measures which involve the destruction, effective damage or **seizure of individuals' assets or rights without following the formal procedures** set out for the numerous forms of expropriation required under the Act.

In such cases, **the affected individual will be entitled to compensation** in accordance with the regulations on damage from the temporary occupation of properties and the fair value of personal property, **with the corresponding procedure to be initiated at the damaged party's request and pursuant to such regulations.**

Relevant authorities

For the purpose of a state of emergency, the government is appointed as the **relevant authority**, with the defence, interior, transport and health ministers recognised as such under the leadership of the President. **The measures affecting the supply of energy fall under the remit of the Ministry of Transport, Mobility and Urban Agenda.**

These authorities are able to issue any orders, resolutions, provisions and instructions deemed necessary under their specific remit to guarantee the rendering of all ordinary and extraordinary services designed to protect people, assets and locations. **No administrative procedures will need to be followed for the above to occur.**

All members of State **law enforcement authorities**, regional police forces and local authorities **will report directly to the Interior Minister**, who may also issue instructions on matters of private security.

As a means of preventing a breach of the restrictions in place, **officers may carry out checks on people, assets, vehicles, premises and establishments** as necessary to verify and, as the case may be, **put a stop to the rendering of suspended services and activities**.

This includes being able to issue order and bans, as well as suspending the activities or services being performed. However, the officers of each agency fall under a specific scope of application of the adopted measures and must observe them accordingly.

In addition, **citizens are imposed the duty of collaboration and must not obstruct the work of officers** while carrying out their duties.

Sanctions

A breach or failure to fulfil an order from the relevant authorities will be penalised as prescribed by law. **Where such acts are committed by civil servants**, the authorities **may suspend them** immediately. **Where committed by the authorities, the powers** granted to them to observe the measures agreed under the state of emergency **may be afforded to the government**.

All **breaches of the provisions, interpretations and orders issued by the relevant authorities will be penalised either before the courts or on an administrative basis pursuant to the applicable legislation** and its particular features.

We must bear in mind that **in terms of the energy sector**, under the specific provisions of the Electricity Sector Act and Hydrocarbons Act, not to mention the act protecting critical infrastructure, a breach of obligations would be **punished in accordance with the sanctions corresponding to the infringed regulation**.

Freezing of time frames

The Royal Decree freezes all procedural time frames across all jurisdictions, as well as administrative deadlines, expiry dates and the statute of limitations for the exercise of rights and demand to fulfil obligations. All of the above will resume when the

Royal Decree is no longer in force, which in principle will fall within **15 days** from approval if Parliament does not pass an extension.

Amendment of measures

The adopted measures may be amended by means of subsequent royal decrees which modify or extend them and which the government will have to present before Parliament.

Thus, **new measures may be adopted** over the next 15 days – prior to the extension of the state of emergency –, or indeed **amended**. Clearly, it is a question of adapting the Decree to the requirements needed to deal with the crisis that these extraordinary measures intend to overcome.

Challenge and compensation

All actions and provisions adopted by the public authorities in application of the Royal Decree **may be contested before the courts** in accordance with law, in which case any administrative deadlines would not be subject to suspension.

Moreover, those who **suffer damages or losses for conduct not attributed to them** as a consequence of the actions and provisions adopted during the state of emergency – whether directly, personally or to rights or assets – **will be entitled to compensation** as prescribed by law.