Royal Decree-law 23/2020 of 23 June approving energy-related and other measures to revitalise the economy: impact on the energy sector

The Spanish Government passed **Royal Decree-law 23/2020 of 23 June approving energy-related and other measures to revitalise the economy** ("**Royal Decree-law 23/2020**") at the Council of Ministers session held on 23 June 2020. This latest regulation was published the next day and came into force on **25 June**.

The **Preamble** reveals how **the impact of COVID-19** on the economy and the energy sector represents an **opportunity to ramp up the energy transition** to the extent that investments in renewables, energy efficiency and new generation processes help towards the **recovery of Spain's economy**. It also goes on to state the need for **driving through decarbonisation and sustainability plans as a response to the crisis**.

Royal Decree-law 23/2020 is split into **four Titles**:

a) Title I outlines the measures for the development and ramp-up of renewable energies, listing the criteria for the management of **access and connection** to the grid, as well as a **new auction mechanism** aimed at giving energy generated from renewable sources a less unpredictable and more stable framework.

b) Title II describes the **call for new business models** within the energy policy framework, in particular, **demand, storage and hybridisation.**

c) Title III tackles the theme of **energy efficiency**, prescribing a degree of flexibility for the National Energy Efficiency Fund (*Fondo Nacional de Eficiencia Energética*).

d) Title IV highlights the urgent **sector-based measures** to boost economic activity and employment following the COVID-19 pandemic.

Moreover, among other laws, Royal Decree-law 23/2020 also **amends** the **Spanish Electricity Sector Act 24/2013 of 26 December (the "Electricity Sector Act**") and **Royal Decree 1955/2000 of 1 December** regulating the transport, distribution, marketing, supply and authorisation procedures for power generation facilities ("**Royal Decree 1955/2000**") by introducing **key aspects affecting access and connection to the grid,** as well as other regulations which affect the activities and functioning of the electricity sector.[1]

Please find below details on the provisions which impact the energy sector, many of which in truth merit further analysis given the profound effect they are set to have.

[1] What's more, **it also partially transposes several EU Directives into the Spanish legal system.** In particular, it partially incorporates Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity in relation to storage and aggregation; Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources in relation to renewable energy communities; and Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency in relation to the extension of the validity of energy efficiency obligation schemes.

Justification for the moratorium on access permits and amendments to their regulation

According to the Preamble, **the extraordinary and urgent requirement** to pass this new Royal Decree-law in relation to access permits **is based on**:

*"A lack of **regulation in this area which makes it difficult to distinguish between** applications for **viable and definitive projects** and those which reflect more speculative behaviour in terms of grid access and connection procedures. Beyond the disproportionate figures released, there is also strong evidence of a **possible speculative element in many of the applications**, such as:*

- ***Projects that are still in their infancy** at the time of applying for access or official approval.*
- *An **increase in applications** over the last 16 months at an average rate of 30,000 MW per month.*
- *In the lion's share of cases, once the access permit has been obtained, **the permit holders have yet to apply for the connection permit**, which is often due to the lack of an actual project or the fact that the project remains very much in its early stages. Of the approximate 110,000 MW holding an access permit, over 60% are yet to obtain a connection permit".*

In line with the above, the Preamble also provides data on the number of permits granted in recent years and on the implementation of Spain's Integrated National Energy and Climate Change Plan, which is pending approval.

Please find below details on the regulation which directly affects access and connection permits.

Conditions to maintain access and connection to the electricity transmission and distribution networks

Royal Decree-law 23/2020 aims **to uphold the right of access to the grid for projects with a greater likelihood of coming to fruition.**

Article 1 outlines the **conditions to be met in order to retain the rights of access and connection to the grid**, based on the progress of each project and their viability from a technical perspective. Against this backdrop, several administrative requirements must be fulfilled for projects to be authorised and carried through, taking into account the term of the access permits.

a) Facilities holding permits granted prior to the entry into force of the Electricity Sector Act

As no administrative requirements are established, the Eighth Transitional Provision of the Electricity Sector Act applies, which stipulates that the permit will expire if any of the following circumstances are recognised:

a. A failure to have obtained an operating permit for the relevant facility within the longest of the following periods:

   i. Within two months from the lifting of the initial or extended state of emergency imposed under Royal Decree 463/2020 of 14 March

declaring a state of emergency to manage the health-related crisis triggered by COVID-19.[2]

ii. Five years from obtaining the access and connection permit for a point in the network.

b. Ceasing to discharge energy into the grid for a period exceeding three years for reasons attributable to the holder other than temporary closure.

b) Facilities holding permits granted after the entry into force of the Electricity Sector Act (28 December 2013) up to 31 December 2017

These facilities must provide evidence to the grid operator that the following administrative requirements have been met within the established periods, **beginning on 25 June 2020** (date on which Royal Decree-law 23/2020 entered into force):

1. Application for prior official approval submitted and approved: 3 months.
2. Obtaining a favourable environmental impact statement: 18 months.
3. Obtaining prior official approval: 21 months.
4. Obtaining a construction permit: 24 months.
5. Obtaining a definitive operating permit: 5 years.

c) Facilities holding permits granted after 1 January 2018 and up to the entry into force of Royal Decree-law 23/2020

These facilities must provide evidence to the grid operator that the following administrative requirements have been met within the established periods, **beginning on 25 June 2020** (date on which Royal Decree-law 23/2020 entered into force):

1. Application for prior official approval submitted and approved: 6 months.
2. Obtaining a favourable environmental impact statement: 22 months.
3. Obtaining prior official approval: 25 months.
4. Obtaining a construction permit: 28 months.
5. Obtaining a definitive operating permit: 5 years.

d) Facilities holding permits granted after the entry into force of Royal Decree-law 23/2020

These facilities must provide evidence to the grid operator that the following administrative requirements have been met within the established period, **beginning on the date on which the access permit was obtained**:

1. Application for prior official approval submitted and processed: 6 months.

[2] The Fifth Final Provision of Royal Decree-law 11/2020 of 1 April on urgent and supplementary social and economic measures in the fight against amended the Eighth Transitional Provision of the Electricity Sector Act by replacing the expiry term set for rights of access and connection obtained prior to 28 December 2013.

2. Obtaining a favourable environmental impact statement: 22 months.

3. Obtaining prior official approval: 25 months.

4. Obtaining a construction permit: 28 months.

5. Obtaining a definitive operating permit: 5 years.

There is also now the **obligation to apply for the connection permit within six months of obtaining the access permit**, calculated from 25 June 2020 (date on which Royal Decree-law 23/2020 entered into force) for those already holding an access permit. Alternatively, facilities which are yet to hold an access permit on said date will be given the same six-month period once the access permit is obtained.

The following will provide grounds for the **automatic expiry of the access permit**:

a) A failure to **submit the connection permit application** within the above-mentioned **six months**.

b) A failure to **provide evidence** to the grid operator that the **administrative requirements** listed above have been **fulfilled** correctly and on time. Alternatively, evidence must be provided to prove that the facility is exempt from one or more of those requirements.

Expiry will entitle the relevant authority (for issuing permits) to immediately enforce the **guarantees** provided for access to the transmission and distribution networks, except when the failed requirement relates to obtaining a favourable environmental impact statement for reasons not attributable to the developer.

Essentially, **a series of requirements are outlined which directly depend on obtaining each subsequent permit as opposed to applying for them**. Therefore, observing the deadlines set by the authorities for each procedure will determine whether the facility is developed and ultimately commissioned. We must also add that **enforcing the guarantee will hinge on the diligent conduct of the applicant** and **also the obligation imposed on the relevant authority to process** applications within the time frames set by law. In certain cases, a failure to meet these deadlines may result in the Spanish Government being held liable.

Possibility of withdrawing access and connection permits without enforcing the financial guarantees

As has become the norm when amending the regulations on access and connection permits, Section two of Article 1.2 of Royal Decree-law 23/2020 prescribes the **possibility of withdrawing the access permits, which in turn will enable the reimbursement of the financial guarantees provided to process the application.**

In this instance, **the holders of an access permit or access and connection permits applied for or obtained after 27 December 2013 and before 25 June 2020 may withdraw** such permits or applications within **three months** from the entry into force of Royal Decree-law 23/2020.

Recognition of a consistent facility for the purpose of access and connection permits

Section 9 of Article 3 of Royal Decree-law 23/2020 incorporates a 14th Additional Provision into Royal Decree 1955/2000.

This amendment foresees issues addressed in **the draft royal decree on access and connection**, as well as in the Spanish Competition Authority's **Circular 4/2020 on access and connection** submitted to the Council of State in May.

In particular, said Provision sets out the **criteria for the recognition of a consistent facility for the purpose of access and connection permits**.

Specifically, **granted access and connection permits will only be valid for the facility for which they were obtained** and subject to **the facility maintaining sufficient features to be considered the same facility for which the permits were requested**.

In this regard, **Royal Decree 1955/2000 now has an Annex II listing the modifications** which if carried out would not be enough to sufficiently alter the facility for the purpose of the access and connection permits.

Said modifications under Annex II are as follows:

a) **Technology**: a change to the power generation technology used **will not be recognised**:

   a. when the facility's **synchronous and asynchronous features remain the same**;

   b. for facilities falling under the scope of application of Royal Decree 413/2014 of 6 June regulating the generation of electricity from renewable energy, co-generation and waste, the technology will not be considered modified **if the facility continues to belong to the same group foreseen in Article 2 of said Royal Decree.**

b) **Access capacity**: access capacity is considered maintained for the purpose of the permits **when coming in at less than the requested or granted capacity**. Access capacity will also not be considered modified when **increased up to a maximum of 5%** in relation to the requested or granted capacity.

c) **Geographic location**: the location **will not be considered changed** when the geometric centre of the initially-planned facility has not been offset by more than **10,000 metres**.

The **access or connection permits – or application – will need to be updated** where any of the modifications under Annex II are recognised. However, **under no circumstances will the date of application or granting be amended.**

Conversely, **modifications which lead to the consideration that the facility is no longer the same will trigger the requirement to submit a new access and connection application.**

This new regulation could lead to **disputes stemming from the use of criteria different** to those applied to date, given that existing rights may be **substantially varied** in certain cases.

Special features in the case of hybridisation and storage: regarding the validity of access and connection permits or their applications:

a) Adding energy storage elements at the facility **will not be considered a technology modification**

b) The implementation of hybridisation mechanisms **will not trigger the requirement to apply for a new permit** provided that the criteria set out in Annex II are met. In the case of hybridisation of commissioned facilities with a granted access permit, the condition

relating to the facility's technology will only apply to the existing generation modules or those foreseen in the access permit granted.

Moratorium on new access permit applications

In terms of **access and connection**, the **First Transitional Provision** is of particular note since it states that as of the entry into force of Royal Decree 23/2020 – 25 June 2020 – **the grid operators will not accept new access permit applications** from power generation facilities in respect of capacity existing at the time of said entry into force or capacity subsequently released as a result of withdrawal, expiry or any other unforeseen circumstance **until the Spanish Government and Spanish Competition Authority pass the royal decree and circular, respectively, which develop Article 33 of the Electricity Sector Act.**

Therefore, in view of the terms of Royal Decree-law 23/2020, **new access permits may be applied for from 25 September 2020** under the new regulation**.**[3]

The following types of applications are exempt from the foregoing: applications which at the time of the entry into force of this Royal Decree **have been submitted to the relevant authority for processing, with a receipt obtained for having paid the financial guarantees to process the access permit**; facilities used for **private consumption** connected to the distribution network; access to **consumers** of electricity and **permits** granted to ensure a smooth transition following the **closure of coal or thermonuclear power stations**[4].

New calculation of returns (Ro) during the state of emergency for facilities whose operating costs are pegged to fuel prices (co-generation, oil sludges and biomass)

The Fourth Additional Provision of Royal Decree-law 23/2020 sets out **supporting measures for facilities falling under the specific remuneration scheme** whose operating costs mainly depend on fuel prices. Said measures provide new criteria for calculating remuneration and a reduction in the number of minimum operating hours and the operating threshold applicable to standard facilities in 2020.

All current parameters will be used to calculate remuneration, with the **exception of electricity market prices and CO2 emission rights values**, both of which will be estimated for the state of emergency period, i.e. **from 14 March until 21 June 2020**.

Against this backdrop, the aforementioned **remuneration parameters need to be updated without leading to lower returns** than the remuneration established under Order TED/171/2020 of 24 February for standard facilities.

[3]The Eighth Final Provision stipulates that the Government and Competition Authority will pass as many regulatory provisions in the three months following the entry into force of the royal decree-law as necessary for development and commissioning within their remit under Article 33 of the Electricity Sector Act. While the Competition Authority's Circular 4/2020 on access and connection has been awaiting a report by the Council of State since May, the draft royal decree on access and connection is pending enactment.

[4] The 22nd Additional Provision of the Electricity Sector Act was drafted under section one of the Second Final Provision of Royal Decree-law 17/2019 of 22 November adopting urgent measures for the necessary adaptation of remuneration parameters which affect the electricity system and setting out the procedure for the ceasing of activity at thermal power stations. Said Provision enables the Ministry for Environmental Transition, following approval by the Government's Delegated Committee for Economic Affairs, to regulate the procedures and set the requirements for the full or partial awarding of access capacity at points in the network affected by such closures, taking all environmental and social benefits into account.

The **number of minimum operating hours and operating threshold applicable to standard facilities in 2020 have been cut in half** in comparison with the values indicated in Order TED/171/2020 of 24 February.

Auctions for power generation facilities using renewable energies

A **new remunerative framework** is established which will call competitive **auctions** in which **the variable for bidding will be the energy remuneration price**.

For such purpose, Article 14 of the Electricity Sector Act has been amended to include this new remunerative framework which **differs from those currently regulated and developed under Royal Decree 413/2014, namely competitive processes where electricity and installed capacity, or a combination of both**, are subject to bidding. As already mentioned, the variable at stake now will be the energy remuneration price.

Said scheme **will be cost-efficiency driven** and may therefore distinguish between different generation technologies based on their technical characteristics, size, manageability, location, maturity and others in accordance the procedure for the decarbonisation of the economy.

There is also the **possibility for small-scale facilities and demonstration projects to be excused** from said competitive process.

Streamlining of the authorisation process for electricity-based facilities

Several amendments have been introduced to Royal Decree 1955/2000 in a bid to **simplify and improve the processing of permits for the construction, extension, modification and operation of facilities for the generation, transmission and distribution of electricity:**

Specifically, Article 3 of Royal Decree 23/2020 addresses the following aspects:

a) **Exemption from obtaining prior official approval** in the case of modifications to facilities which already hold such authorisation and cumulatively fulfil a series of conditions.5

b) **Introduction of the concept of "non-substantial modifications"**, in which case only an operating permit will need to be obtained following evidence that the security conditions for the facilities and associated equipment have been fulfilled.6

[5] Conditions added to Article 115.2 of Royal Decree 1955/2000 of 1 December:
   a. Modifications are not to be subject to an ordinary environmental assessment.
   b. Following modification, the facility does not exceed the boundaries defined in the approved project or, where doing so, does not require a compulsory purchase order and has been authorised from a planning perspective.
   c. Following modification, the installed capacity does not exceed the capacity defined in the original project by more than 10%. In accordance with the 14th Additional Provision, the foregoing is understood without prejudice to the consequences which may stem from such increase in capacity in relation to the access and connection permits.
   d. Modifications do not entail a change in power generation technology.
   e. Modifications do not affect the security of the main facility and any ancillary facilities.
   f. There is no specific requirement for a declaration of public interest for the planned modifications to be carried out.
   g. Modifications do not affect other commissioned power generation facilities.

[6] The following modifications added to Article 115.3 of Royal Decree 1955/2000 of 1 December will be considered non-substantial:
   a. They do not fall under the scope of application of the Environmental Assessment Act 21/2013 of 9 December.
   b. They do not represent a change in basic technical characteristics (capacity, transformation or transmission capacity, etc.) exceeding 5% of the facility's capacity.
   c. They do not represent changes in the security of the main facility and any ancillary facilities.
   d. There is no requirement for a declaration of public interest for the planned modifications to be carried out.
   e. Modifications of lines do not lead to easement-related changes over their layout.

c) The **extension to several deadlines** for the submission of public information and information from the authorities.

d) The **incorporation** into Royal Decree 1955/2000 of a 14th Additional Provision which sets out the **criteria for recognising a consistent facility after modifications have been carried out** for the purpose of access and connection permits.

Measures to drive new business models

The measures calling for new business models under Title III of Royal Decree-law 23/2020 (Article 4) include the regulation of **new ways to form part of the electricity system** which were previously lacking sufficient governance. Namely, these are storage, hybridisation, aggregation and renewable energy communities:

a) **Storage**

A regulation has been introduced on storage facilities by virtue of which those owning such facilities – whether natural or legal persons – at which the ultimate use of the energy generated is deferred to post-generation or where electricity is converted into a form of energy that can be stored for its subsequent reconversion back into electricity **have now been added to the list of electricity system parties**.

Consumers and owners of storage facilities **will be able to earn income from being part of the services included within the energy generation market** pursuant to the regulated terms (amendment of Article 14.10 of the Electricity Sector Act).

In addition, a further section (12) has been added to Article 33 of the Electricity Sector Act which specifically introduces the **possibility of evacuating the electricity produced in hybrid generation facilities, incorporating storage facilities.**

The addition of energy storage elements to a facility **will not be considered a modification of technology or require application for a new permit.**[7]

b) **Hybridisation**

Article 4 of Royal Decree-law 23/2020 **expressly enables hybridisation** as access to the same point in the network for facilities using different generation technologies where possible from a technical standpoint.

Section 7 of said Article also **amends Article 53.1 of the Electricity Sector Act** by opening up to the possibility of enabling the authorisation of facilities with a greater installed capacity than the access and connection capacity granted, provided that the evacuation limits are respected.

f. Modifications of lines which, although causing easement-related changes without affecting the layout, have been implemented by way of agreement between the affected parties pursuant to Article 151 of this Royal Decree.
g. Modifications of lines which entail the replacement of supports or conductors due to deterioration or breakage, provided that the original project conditions are maintained.
h. Modifying the configuration of a substation, provided that there is no change in the number of streets or positions.
i. Transmission or distribution facilities where there are no remuneration-based changes.

[7] Article 3, Section 9, of Royal Decree-law 23/2020, which introduces a 14th Additional Provision and Annex (II) into Royal Decree 1955/2000 of 1 December regulating the transport, distribution, marketing, supply and authorisation procedures for power generation facilities and which provides the criteria for the recognition that a modified power generation facility is consistent for the purposes of the access and connection permits granted or applied for, sets forth a special provision in the case of storage.

The purpose of this provision is to lift the regulatory restriction which hindered the efficient design of facilities in order to maximise the use of renewable energy sources. Against this backdrop, and in terms of the authorisation regime, all references to generation facilities should be understood to mean both those owned by an energy producer and those owned by other parties to the electricity system. As such, the installation of more capacity than the amount that can be evacuated is permitted if done so by hybridising technologies or using the same technology.

A further section (12) has been added to Article 33 of the Electricity Sector Act which specifically introduces the **possibility of evacuating the electricity produced in hybrid generation facilities, the same connection point and access capacity already granted**, provided that hybridisation is implemented by incorporating electricity generation modules which use renewable energies as their primary source[8].

c) **Independent aggregator**

Independent aggregators have been introduced as a new party to the electricity system for the purpose of **combining the demand from various consumers or generators for participation in different market segments**, thus injecting greater dynamism into the electricity market. This addition partially transposes Directive 2012/17 in relation to energy efficiency.

d) **Renewable energy communities**

Renewable energy communities, as defined under Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources in relation to renewable energy communities, have been added as a party to the electricity system to foster greater participation by local citizens and entities in community-based renewable energy projects.

As part of the call for new business models, Article 4 of Royal Decree-law 23/2020 sets out further measures in addition to those described above:

a) **Mobile electricity network facilities** to be implemented on a transitional basis for less than two years are exempt from having to obtain prior official approval, which is replaced by an **implementation permit** (amendment to Article 53.1 of the Electricity Sector Act).

b) The Spanish Government is authorised to regulate a special authorisation procedure for **facilities whose main purpose is RDI**, in which said facilities are exempt from the approval scheme prescribed under the amended Article 53.1 of the Electricity Act.

c) **Electric vehicle recharging stations (with a capacity of over 250 kW) are recognised under a declaration of public interest** (amendment to Article 54.2 of the Electricity Sector Act).

[8]Lastly, Article 3, Section 9, of Royal Decree-law 23/2020, which introduces a 14th Additional Provision and Annex (II) into Royal Decree 1955/2000 of 1 December regulating the transport, distribution, marketing, supply and authorisation procedures for power generation facilities and which provides the criteria for the recognition that a modified power generation facility is consistent for the purposes of the access and connection permits granted or applied for and therefore will not require application for a new permit, sets forth a special provision in the case of hybridisation. Thus, the implementation of hybridisation mechanisms will not trigger the requirement to apply for a new permit provided that the criteria set out in Annex II are met. Moreover, in the case of hybridisation of commissioned facilities with a granted access permit, the condition relating to the facility's technology will only apply to the existing generation modules or those foreseen in the access permit granted.

d) There is also the possibility of establishing regulatory sandboxes for the development of pilot projects aimed at promoting research and innovation within the electricity sector (new 23rd Additional Provision of the Electricity Sector Act).

Measures to boost energy efficiency

The measures to boost energy efficiency lie within an **amendment to Act 18/2014** of 15 October on the approval of urgent growth, competitiveness and efficiency measures. In particular, Article 5 of Royal Decree 23/2020 outlines the following measures:

a) The term of the national energy efficiency obligations system is extended until 31 December 2030.

b) **This regulatory change is aimed at improving the method of calculating the individual savings obligations** of the liable parties in order to provide the system with greater transparency and predictability in the fulfilment of its obligations, thus preventing the modification of sales from leading to a recalculation of the contributions of the gas and electricity supply companies, among others.

c) **While the term of the National Energy Efficiency Fund is extended until 2030,** the calculation of liable parties' individual savings obligations, the fulfilment of such obligations and energy saving certificates are also amended.

Regarding the obligations to **contribute** to said Fund, the Second Transitional Provision of Royal Decree-law 23/2020 prescribes a **moratorium on the fulfilment of such obligations** for liable parties recognised as **micro-companies or SMEs** in relation to any pending obligations up to **28 February 2021**.

Other measures

Surplus electricity system income may be used on an exceptional basis to preferentially cover temporary imbalances and transitional deviations between income and costs for the years 2019 and 2020 in order to **provide the electricity system with greater liquidity.** Essentially, **the surplus** generated from 2014 to 2018 and pending apportionment to make up the tariff deficit (fundamentally the Electricity Deficit Amortisation Fund, or FADE in Spanish) **can be used to offset the imbalances** arising from the tariff deficit generated in **2019** (pending final settlement in November 2020) and for that generated in **2020**.

The Institute for the Restructuring of Coal Mining and Alternative Development of Mining Regions has changed its name to the **Institute for Fair Transition** with the aim of: *"identifying and adopting measures to guarantee equal treatment to affected workers and territories".*