

**Royal Decree-Law 23/2021, of 26 October,
which approves urgent measures for the
protection of consumers and the
introduction of transparency in the
wholesale and retail electricity and natural
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On 27 October 2021, Royal Decree-Law 23/2021, of 26 October, on urgent measures for the protection of consumers and the introduction of transparency in the wholesale and retail electricity and natural gas markets (hereinafter "**RDL 23/2021**") was published in the Official State Gazette (BOE). This RDL will enter into force on 28 October 2021.

Its approval has been justified based on the increase in market prices of raw materials, such as natural gas, as well as prices in the wholesale electricity market and of CO₂ emission rights, similarly to the Royal Decree-Law 17/2021, of 14 September, approving urgent measures to mitigate the impact of the increase in prices of natural gas in the retail gas and electricity markets (hereinafter "**RDL 17/2021**").

RDL 23/2021 states that in the first semester of 2021 the average price of natural gas was estimated at a value of 22.77 €/MWh when, by comparison, the price on 7 October had reached 177.84€/MWh, the maximum recorded price in recent history. The emission rights, as explained in this new regulation, have evolved from an average annual market price of 24,75 €/tCO₂ in 2020 and have peaked at 60 €/tCO₂. As addressed in this new law, the average closing price in September had reached 156.14 €/MWh, yet the average price for the past three years in the Iberian Electricity Market (MIBEL) had been 46.31 €/MWh

Therefore, due to this increase in costs over several months the Government has proceeded to approve its third Royal Decree-Law, which is also linked to RDL 17/2021 and Royal Decree-Law 12/2021, of 24 June, on the approval of urgent measures in the fields of energy taxation and energy generation, and on the management of the regulation tax and the water usage tariff (hereinafter, "**RDL 12/2021**").

To this end, and in an attempt to limit energy prices and alleviate the effects that unavoidably affect the economy as well as the energy transition process, certain measures have been introduced to modify those previously adopted by RDL 17/2021, introducing new regulations aiming to increase transparency in the energy markets, amending, once again, the Spanish Electricity Sector Act 24/2013 of 26 December (hereinafter, "**LSE**").

Measures amending RDL 17/2021 relating to the application of the mechanism for reducing energy subject to long term agreement

The first final provision of RDL 23/2021 introduces a new eighth additional provision in RDL 17/2021. The RDL outlines the scope of application of the mechanism designed to reduce excess payment in the electricity market, specifying which power generating facilities shall be excluded from applying said mechanism.

Thus, the following rules are established to exclude certain entities from the application of the reduction mechanism which aims, according to the Explanatory Memorandum, to reconcile the provisions contained in Articles 4¹ and 6² of RDL 17/2021, ensuring non-discriminatory treatment:

- (i) **Power generating facilities that are covered by a long-term agreement (Power Purchase Agreement- PPA) are excluded from the application of this new regulation if it had become effective prior to the entry in force of RDL 17/2021 (16 of September) and provided that its associated coverage price is fixed.**
- (ii) **Power generating facilities that are covered by a long-term agreement for a period equal to or greater than one year and whose coverage price is fixed are also excluded.**
- (iii) **In the event that the contract instrument incorporates a partial indexation, the equivalent amount of energy for the non-indexed section of the contract shall also be excluded.**

These long-term agreements may be related to the delivery as well as to financial settlement instruments over the period of validity of the mechanism.

RDL 23/2021 specifies that if the long-term agreement does not specify a particular power plant, the energy would be effectively covered by prorating the net selling position of the corresponding company or group between the available power³ facilities owned by the company.

Evidently, **we find ourselves with general provisions that try to cover a series of private contracts that possess variations and specific regulations**, which will lead to uncertainty regarding their enforcement.

¹ With the entry into force of this Royal Decree-Law, and until 31 March 2022, the payment for electricity production of facilities using technologies that do not emit greenhouse gases will be reduced by an amount proportional to the surplus obtained by these facilities as a result of adding the price of natural gas, by marginal emitting technologies, into the electricity prices on the wholesale market.

² The reduction will affect the output of the production facilities referred to in Article 5, regardless of the type of contract.

³ To obtain the available power from each facility, the potency of the product by the percentage of each technology available will be used as reference.

The aim is to try to affect only pool-indexed contracts, which implies a detailed examination of the clauses of each individual contract.

For this reason, RDL 23/2021 cites the documentation that must be provided to the system operator in order to **demonstrate the existence of a long-term agreement**:

- (i) **Liability statement**, following the model included in RDL 23/2021, Annex II, it must state the monthly amount of energy subject to the long-term agreement, as well as the price and delivery or settlement period for said negotiated energy and agreed on in fixed price contracts;
- (ii) **Proof of energy procurement from a third party**, either through a specific market or agency; and
- (iii) **Proof of the communication of the operations to the competent entity**.

The documentation provided **will be sent by the System Operator (REE)** to the National Commission on Markets and Competition (hereinafter, "**CNMC**"), verifying that it complies with article 8.4⁴ of RDL 17/2021 for the estimation of any pending monthly instalments and in the definitive settlement made by the System Operator.

Once again, the verification of these contracts has been entrusted to a different body, rather than the Secretary of State for Energy. Therefore, the settlements foreseen under the new system created by RDL 17/2021 correspond to REE, which **could lead to uncertainty regarding the enforcement, claim method, opposition or challenge of settlements issued by the System Operator** (along with the information to be sent by the Market Operator (OMIE)).

⁴ The payments referred to in the previous section shall be considered payments on account of the settlement to be made by the system operator for each facility once the definitive data on production measurements at the power station busbars for the year are known.

Measures in the field of transparency, improvement of supervisory capacity, reinforcement of information and consumer protection in the electricity sector

Article 4 RDL 23/2021 introduces amendments to the LSE to ensure **greater transparency in the production market and to provide more information on the coverage available to producers in the market.**

In this regard, paragraph c) of article 26.3 has been modified, stating that energy producers **must send⁵ all information relating to electrical long-term agreement they have subscribed to, both material and financial, to the CNMC.**

As well as said information, **energy producers that are simultaneously marketing products, or who belong to a group engaged in commercialisation activities, must provide any sales transaction that they have entered into within the group or with third parties.**

Furthermore, any information regarding the **contracts arranged between the producer and companies within the group, or between these companies and the company responsible for said marketing activities,** must be sent.

In addition to the modified article, the provision also amends paragraph e) of article 44.1, relating to consumer rights. Consequently, regarding the amendment of contractual conditions, **there is now an obligation to notify all price reviews,** which must include a price comparison from before and after the review has taken place, and an estimate of the annual cost for the consumer, along with a comparison for the previous year.

In view of achieving greater transparency, paragraph l) of article 46.1 has also been amended, creating an **obligation for marketers to send the CNMC information relating to electrical long- term agreement, both material and financial, as well as all purchase transactions carried out with third parties or with companies within the same group.**

Finally, there is another obligation that has been introduced for marketers in paragraph u) of article 46.1, obliging them to **publish⁶ transparent, comparable, adequate, and up-to-date information on prices of all available offers, as well as any conditions related to contract termination.**

All the aforementioned measures **should provide the CNMC with sufficient information for the exercise of its powers,** including those relating to competition analysis in the sector, although synthesising this information would require the implementation of large-scale mechanisms and platforms.

⁵ To be submitted monthly, using the format and criteria established by the CNMC.

⁶ Enabling consumers to compare prices through the Energy Price Comparison website.

Measures for the promotion of transparency and supervision in the retail gas market

In the hydrocarbons sector, Article 5 of RDL 23/2021 amends Law 34/1998, of 7 October, on the Hydrocarbons Sector, in similar terms to the amendments made to the LSE.

A new section has been added to article 81.2 regarding the obligations of marketers. Specifically, **marketers will now be obliged to publish transparent, comparable, adequate, and updated information on the prices they offer consumers who have an annual consumption of less than 50,000 kWh**, as well as on the conditions relating to contract termination⁷.

In the case of time-limited engagements, both the offered price and the price resulting from the expiry of the established time limit must be published.

The prices offered must indicate the fixed rate (€/month) and the variable rate (€/kWh). For flat rates, the price must be specified regardless of the payment method. Furthermore, when the conditions of the tariff can be updated by an index, these must be made public.

This information **must be published on the same media outlet as the prices, as well as being sent to the CNMC** so that it can be made available to consumers⁸.

The provision also amends Article 57 bis. f), on consumer rights in relation to supply issues. It has created an obligation for marketers to include a price comparison in their price reviews, as well as an estimate of the annual cost for the consumer and its comparison with the previous year.

⁷ In offers that include penalties for termination of the contract, they must be legible, and the difference in font size must not exceed 10% of the rest of the text describing the offer.

⁸ As in the electricity sector, consumers are able to compare prices through the Energy Price Comparison website.

Other measures

RDL 23/2021 also includes additional measures aimed at protecting vulnerable consumers.

The first provision of the Royal Decree-Law states that, from the entry into force of RDL 23/021 and until 31 March 2022, the **discounts included in the Social Bond applicable to domestic electricity consumers** will be:

- (i) For vulnerable consumers, the discount will be up to 60%.
- (ii) For severely vulnerable consumers, the discount will be up to 70%.

Article 2 establishes an increase in the minimum amount of aid set out for the Social Thermal Bond, rising from 25 to 35 euros for the beneficiaries of this tax year (2021). In addition, the provision states that the aid foreseen for severely vulnerable consumers or those at risk of social exclusion will be 60% higher than the amounts allocated in their climate zone to a vulnerable consumer.

Lastly, and in relation to the Social Thermal Bond, article 3 of RDL 23/2021 has established an increase in the General State Budget for the year 2021 from €102.5 million to €202.5 million.

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