

RENEWABLE SUSPENSION IN SPAIN

THE SPANISH GOVERNMENT HAS PASSED A TEMPORARY SUSPENSION OF FINANCIAL INCENTIVES FOR NEW RENEWABLE ENERGY PROJECTS. BY **ANTONIO MORALES**, PARTNER, **LATHAM & WATKINS**.

The Spanish Government has passed Royal Decree-Law 1/2012 (hereinafter RDL 1/2012), dated January 27, which was published on January 28 2012 in the Spanish Official State Gazette (BOE), temporarily suspending pre-allocation registration as well as abolishing financial incentives for new energy production projects that use cogeneration, renewable energy sources and waste, as a consequence of the complex economic and financial situation Spain is undergoing at this moment.

The intention is to temporarily halt a reward system that involves a substantial cost for the electricity system, causing the tariff deficit, ie, differences between income from access tolls and regulated activity costs, to increase continuously. This measure does not jeopardise supply nor the renewable energy sources targets set forth by the European Union.

Background and purpose of RDL 1/2012

Special regime installations, which include renewable energy sources, are not subsidised by the General State Budget. Instead, they are included in electricity rates, causing the so-called tariff deficit. However, not only do renewable energy premiums generate tariff deficit, other items such as regulated tariff billing also generate tariff deficit. In fact, the special regime premiums cause only a third of the tariff deficit. In this context, the purpose of RDL 1/2012 is to limit the impact of renewable premiums in the tariff deficit, thus reducing costs.

Royal Decree 6/2009 dated April 30, attempted to limit the increase of the aforementioned tariff deficit. However, it was not enough, given that only one year later further steps needed to be taken by the Government. More specifically, a new Royal Decree Law 14/2010 was passed, aiming to reduce the tariff deficit in the electricity system.

While the Government is planning reform of the electricity industry to avoid tariff deficit, it has decided to suspend financial incentives on a temporary basis to build new energy projects. This situation has been brought about both by the global economic crisis and by financial difficulties in the electricity industry.

Measures taken to-date have not been effective in reducing this deficit, thereby making overall

sector development more difficult, and hindering the continuation of policies that promote electric power production using renewable energy sources. RDL 1/2012 will be part of a large group of other regulatory measures that will probably be passed in the future to change and improve the energy sector.

The Government is maintaining its commitment towards keeping renewable energy as an essential part of "Spain's energy mix". In 2011, a very high percentage of installed power was renewable, covering 33% of electricity demand and making Spain a leader in this type of energy. However, the current payment system is not sustainable, given the reduction in demand caused by the financial crisis. The Government noted that until the system is reformed and progress is made towards renewable of resources, the current payment system is suspended.

Affected installations

This measure will not affect either ongoing energy projects or those already registered with the Pre-Allocation Registry. Further, it will not jeopardise energy supply nor the achievement of the European Union's renewable energy targets. However, according to Article 2.1 of RDL 1/2012 the suspension will affect special regime projects, including wind, photovoltaic solar and thermoelectric solar that had not been registered under the Special Regime when the Royal Decree came into force, that means before January 28 2012.

Similarly, those projects under the Ordinary Regime that had not obtained administrative authorisation from the relevant Spanish Authority before RDL 1/2012 came into force, will be affected.



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Likewise, those projects that were not registered with the Pre-Allocation Registry to the date when RDL 1/2012 came into force may withdraw their registration applications, in which case any bank guarantee will be returned in full. In addition, the bank guarantee for those registered projects that, within two months from the date when RDL 1/2012 came into force, choose not to carry out the project will be returned.

RDL 1/2012 does not have retroactive effects. The principle of retroactivity establishes that a new regulation will not apply to those situations that have benefited from the previous regulations. In this particular case, this means that the provisions set forth by RDL 1/2012 will not affect ongoing energy projects' already authorised to receive financial incentives or those projects that have already been registered. Likewise, these measures will not affect those installations that have challenged the pre-allocation and an ongoing appeal is being resolved.

Temporary measure

Although the preamble of RDL 1/2012 refers to the fact that the purpose of RDL 1/2012 is to temporarily suspend a payment system that involves very high costs for the electricity industry, thereby causing the tariff deficit to continue increasing, it does not establish the duration of these temporary measures. In fact, the financial system is not really suspended, it is suppressed, which seems contrary to the temporary nature of the measure. Furthermore, the Pre-Allocation Registry itself is suspended, although the date such suspension takes effect is not specified. As it was mentioned before, the RDL 1/2012 does not have retroactive effect.

Notwithstanding the above, there are two facts that lead to the conclusion that the removal of premiums is, in fact, temporary. First, the Spanish Government has made certain commitments under Directive 2009/28 regarding the promotion of the use of energy produced using renewable sources. Sooner or later, such commitments will require the Government to implement a financial regime encouraging the establishment of the necessary installations to meet objectives regarding the promotion of the use of energy produced using renewable sources (which are far from being met).

Second, recognition of the right of the special regime installations to obtain a premium according to Article 30.4 of Law 54/1997 of the Electricity Sector (hereinafter LSE) must be considered. In view of the foregoing, it is highly unlikely that RDL 1/2012 has been passed in order to repeal or to permanently revoke the provisions set forth in LSE.

Therefore, according to the preamble of RDL 1/2012, these measures actually do have a temporary effect, which is linked to solving the tariff deficit problem. In fact, RDL 1/2012 sets forth that the Government may approve special

arrangements for particular installations. This is an opportunity to restore premiums whenever the Government considers it appropriate, although it appears that RDL 1/2012, rather than providing a financial system for all technologies, as did Royal Decree 661/2007, would be much more specific and focused on wind, photovoltaic and solar thermal.

Suppression of substantial change

RDL 1/2012, in its Sole Derogatory Disposition, revokes Articles 4.4 and 4 bis of Royal Decree 661/2007. In my opinion, the aim of this is to prevent special regime installations from obtaining higher premiums through minor modifications to their installations. This revocation means, from my point of view, that any change requires obtaining an administrative approval and would therefore create a new record of the service and losses of premiums. However, this revocation does not apply to those installations that have already obtained their official authorisation for substantive changes prior to January 28 2012.



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Possible disputes

The Government has chosen to pass a Royal Decree Law to adopt these measures. This prevents the text from being challenged before the courts. However, although the possibilities of reviewing the extent to which this text complies with legal requirements is limited, it is also true that those that have suffered damages as a result of these measures, may have the possibility to claim damages according to Article 139 of Law 30/1992 on Public Administrations' Legal System and Common Administrative Procedure.

It should be noted that, while RDL 1/2012 established the refund of the bank guarantee in its Sole Derogatory Disposition, there are a considerable number of installations under Article 30.4 of the LSE and Royal Decree Law 6/2009 (Paragraph 2 of Fifth Transitional Disposition) that had already initiated all necessary arrangements to obtain the Pre-Allocation before RDL 1/2012 became effective and these costs will not be repaid. Therefore, they may claim compensation. ■