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Guide for the ENERGY sector during the COVID-19 health crisis

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1. INTRODUCTION

The rapid escalation of the COVID-19 health crisis has created an unprecedented situation that poses numerous legal challenges both at a national and international level.

Since the World Health Organization declared the COVID-19 outbreak a "Public Health Emergency of International Concern" on 30 January 2020, many countries, including Spain, have adopted measures that restrict the freedom of movement of their citizens and passed several pieces of legislation with the double aim of protecting their citizens and mitigating, where possible, the economic consequences of the pandemic.

In Spain, Royal Decree 463/2020 was approved declaring a state of emergency to manage the COVID-19 health crisis (the "**State of Emergency RD**"), which became enforceable the same day it was published (15 March 2020). On 17 March, Royal Decree-Law 8/2020 on urgent and exceptional measures to address the social and economic impact of COVID-19 ("**RDLaw 8/2020**") was approved. The State of Emergency RD was modified by Royal Decree 456/2020 of 17 March, and several ministerial orders have been adopted to deal with this exceptional situation.

It is undeniable that the social and economic impact of the measures adopted to control the expansion of the pandemic will be enormous and felt particularly hard in important economic sectors of the Spanish economy. This practical guide describes some of the legal implications that must be taken into account by operators in the ENERGY SECTOR in the current circumstances.

As the situation evolves over the following weeks, the Spanish Government will implement additional measures and an authorisation from the Congress to extend the state of emergency has been requested and granted. Therefore the state will extend till April, 11. To keep our clients informed of every development, we have prepared a compendium of all the measures adopted in Spain, which will be updated constantly (available at [link]).

2. THE STATE OF EMERGENCY RD

Pursuant to the State of Emergency RD and article 4(b) and (d) of Basic Law 4/1981 of 1 June regulating states of emergency, exception and siege (*Ley Orgánica 4/1981, de 1 de junio, de los estados de alarma, excepción y sitio*), a state of emergency was declared on 15 March 2020 to manage the COVID-19 health emergency.

During the state of emergency, the Government is the competent authority and, under the direction of the Prime Minister, the Ministers of Internal Affairs; Health; Defence and Transport, Mobility and Urban Affairs are delegated competent authorities. They have exceptional powers to issue orders, resolutions, rules and interpretation instructions to ensure that the necessary ordinary and extraordinary services are provided to protect people, assets and places. These measures can be implemented without following the normal administrative procedure but will be subject to judicial supervision. The state of emergency was initially declared for 15 calendar days and on 25 March the Government has been granted the Congress' authorisation to extend it until 11 April.

3. THE ENERGY SECTOR

(A) Guaranteeing the supply of electricity. The main measure adopted to deal with the health crisis is to guarantee the supply of (i) electricity, (ii) petroleum products, and (iii) natural gas. The competent authorities can adopt any measures that are necessary to guarantee supply.

Electricity supply. To guarantee the supply of electricity, in accordance with article 7 of Law 24/2013 of 26 December on the electricity sector ("**LSE**") the necessary measures will be adopted for a limited period if any of the following events occurs:

a) Actual risk to the supply of electricity.

b) Shortages in any primary energy sources.

c) Serious threat to the physical integrity or safety of individuals, equipment or facilities, or to the integrity of the electricity transmission or distribution grids. The autonomous regions affected by any such threats need to be informed of the adoption of measures before they are taken.

d) Significant reduction in the availability of generation, transmission or distribution facilities or in the quality of their supply.

The measures the Government can adopt to deal with these situations include the following:

a) Assuming direct control of the operation of generation, transmission or distribution facilities.

b) Imposing special obligations related to minimum stocks of primary energy sources for power generation.

c) Imposing limitations, temporary modifications or suspending the priority given to renewable energies, cogeneration and waste facilities pursuant to article 26 of the LSE.

d) Modifying general conditions on when electricity supplies to all or some consumers can be interrupted.

e) Imposing limitations, temporary modifications or suspending third-party access rights.

f) Limiting or allocating primary energy sources to electricity producers.

g) Any other measures recommended by international organisations (to which Spain belongs) or that derive from international treaties signed by Spain.

In these situations, the Government will determine the remuneration to be paid for the activities affected by the measures adopted, ensuring that costs are distributed fairly.

When the measures implemented relate to a single autonomous region, all decisions must be adopted with the collaboration of the regional government.

Petroleum products supply. To guarantee the supply of petroleum products, in accordance with article 49 of Law 34/1998 of 7 October on the hydrocarbon industry ("**LSH**") the following measures, among others, can be adopted:

(a) Limiting the maximum speeds on public roads.

(b) Limiting the circulation of any type of vehicle.

(c) Limiting the movement of ships and airplanes.

(d) Limiting the opening hours of facilities that sell petroleum products.

(e) Imposing minimum stock levels

(f) Imposing supply constraints and use restrictions on petroleum products for consumers

(g) Imposing obligations on hydrocarbon concession holders to only supply petroleum products for domestic consumption.

(h) Any other measures recommended by international organisations (to which Spain belongs) or that derive from international treaties signed by Spain.

Again, the Government will determine the remuneration to be paid for the activities affected by the measures adopted, ensuring that costs are distributed fairly.

Natural gas supply. Finally, to ensure the supply of natural gas, in accordance with article 101 LSH there are two possible situations: (i) emergency; and (ii) shortage or scarcity of natural gas supply or risk to the safety of people, facilities or the natural gas network. In emergency situations, those obligated to keep strategic reserves of natural gas can be permitted to use them. In situations of shortage or risk, the following measures, among others, can be adopted:

(a) Limiting or temporarily modifying the gas market.

(b) Imposing special or additional obligations of minimum safety stocks levels.

(c) Temporarily suspending or modifying the third-party access rights.

(d) Modifying general conditions on when natural gas supplies to all or some consumers can be interrupted.

(e) Requiring an administrative authorisation to sell natural gas on the international market.

(f) Any other measures recommended by international organisations (to which Spain belongs) or that derive from international treaties signed by Spain.

The Government will determine the remuneration to be paid for the activities affected by the measures adopted, ensuring that costs are distributed fairly.

In this context, article 4 of RDLaw 8/2020 establishes measures designed to guarantee that vulnerable customers do not lose their water and energy supplies, in the exercise of powers granted by RD 463/2020, which can be summarised as follows:

- *<u>Prohibition on suspending the supply of electricity, natural gas or water to vulnerable consumers</u>*

  Article 4.1 of RDLaw 8/2020 prohibits utility companies from suspending or interrupting the supply of electricity, natural gas and water to "*those consumers that are considered vulnerable or very vulnerable consumers, or consumers at risk of social exclusion*", during the term of one month from 18 March 2020.

  The concepts of vulnerable or very vulnerable consumers and consumers at risk of social exclusion are defined, generally for the electricity sector, in articles 3 and 4 of Royal Decree 897/2017 of 6 October on the status of vulnerable consumer, discounts (*bono social*) and other protection measures for domestic consumers ("**RD 897/2017**").

  In this way, RDLaw 8/2020 extends the concept of "vulnerable consumer", "very vulnerable consumer" and "consumer at risk of social exclusion" that initially applied only to domestic electricity consumers to include natural gas and domestic water supply consumers.

  The concept of vulnerable consumer defined in article 3 of RD 897/2017 refers to individuals to which the "Voluntary Price for Small Consumers" ("**VPSC**") tariff applies as regards their domestic energy supplies, and (i) whose income does not exceed specific multiples of the national indicator of earnings (IPREM, *Indicador Público de Renta de Efectos Múltiples*), based on the number of members in the consumer's household (see articles 3.1 and 3.2 b) of RD 817/2017); (ii) are officially recognised as members of a "large family" (*Título Familia Numerosa*) see articles 3.1 and 3.2 b) of RD 817/2017); or (iii) are pensioners in receipt of a social security retirement or temporary incapacity pensions for the minimum amount, and who do not have other sources of income that amount to more than EUR 500/year (see articles 3.1 and 3.2 c) of RD 817/2017).

  In the category of vulnerable consumers, RD 817/2017 includes a subcategory of "very vulnerable consumers", who are those who have even lower incomes.

  Finally, RD 817/2017 defines another subcategory, "consumers at risk of social exclusion". These are those who meet the applicable income thresholds and are recipients of social services provided by local or regional authorities pursuant to article 4 of RD 817/2017 –that is, their electricity bill is paid for by the corresponding authority and energy supplier.

- <u>*Automatic extension of the term of benefits for beneficiaries of the* bono social</u>

  Article 4.2 of RDL 4/2020 automatically extends the validity of the discounted electricity tariffs under the *bono social* until 15 September 2020 for all those beneficiaries whose bond is due to expire before that date pursuant to article 9.2 of RD 891/2017.

  In general terms, the *bono social* is a discount of between 25% and 40% on the VPSC. The "main electricity suppliers" (*comercializadores de referencia*) are obliged to apply the VPSC to vulnerable consumers. The *bono social* is financed by the parent companies of the electricity suppliers, or by the electricity suppliers themselves if they are not part of a group (see article 45.4 and 53.3.k) of the LSE and article 13 of RD 817/2017).

- *Suspension of the system for updating the regulated prices of bottled liquefied petroleum gas and the last-resort tariff for natural gas*

  To prevent increases in the prices or regulated tariffs for certain energy products, article 4.3 of RDL 8/2020 provides that, as from 18 March 2020, the following systems for updating regulated prices will not be applicable:

  (i) In relation to the system for the automatic calculation of maximum sale prices (*sistema de determinación automática de precios máximos de venta),* before tax, of bottled liquefied petroleum gases (*gases licuados del petróleo envasados*), the following measures have been taken:

    (a) For the next three bimesters, articles 3.5 and 6 of Order IET/389/2015 of 5 March updating the system for automatically determining the maximum sale prices, before tax, of bottled liquefied petroleum gases and modifying the system for automatically determining the tariffs, before tax, of the liquefied petroleum gases supplied by pipeline ("**Order IET/389/2015**"), are suspended.

    (b) During the suspension, the maximum prices will be those established in the resolution of 14 January 2020 of the General Directorate of Energy and Mining Policy, which published the maximum sale price, before tax, of bottled liquefied petroleum gas in bottles with a capacity of 8 kg or more and less than 20 kg.

  (ii) In relation to the "last resort natural gas tariff" (*tarifa de gas natural de último de recurso*), the following measures have been taken:

    (a) For the next two trimesters, article 10 and the sole additional provision of Order ITC/1660/2009 of 5 March on the methodology for calculating the last resort natural gas tariff ("**Order ITC/1660/2009**"), are suspended.

    (b) During the suspension, the maximum prices will be those established in the resolution of 23 December 2019 of the General Directorate of Energy and Mining Policy.

(B) Critical infrastructure. The State of Emergency RD mentions critical infrastructure, so the operators of the critical infrastructure listed in Law 8/2011 of 28 April should adopt measures to ensure they can continue to deliver the essential services provided by those infrastructures.

(C) Foreign investment. RDL 8/2020 (fourth final provision) modifies the regulation of foreign investments (Law 19/2003) by suspending the liberalisation of certain direct foreign investments in Spain. For these purposes, foreign investors are those resident outside the European Union and the European Free Trade Association. During the suspension, investments by foreign investors will require prior administrative authorisation. If the investments are made without authorisation, they will have no legal effects and constitute an infringement subject to sanctions up to the amount of the investment made.

The need for a prior administrative authorisation will stand until the Government states otherwise (as opposed to the general one-month term of most of the measures passed by RDLaw 8/2020).

The two types of foreign investments affected are:

(A) "Object" investments, which are investments in companies operating in the sectors listed in RDLaw 8/2020 that it considers affect public order, public health and public safety (e.g. energy, transport, water, health and defence); critical technologies (e.g. artificial intelligence, defence and biotechnology); the provision of basic supplies such as energy; activities with access to sensitive information (e.g. personal data); or mass media.

Operators in the energy sector could be affected by this measure because their infrastructure is considered critical and energy an essential service/good.

(B) "Subject" investments, which are those carried out by foreign investors, regardless of the sector in which the Spanish company affected operates. This includes investors controlled by foreign governments, those who already operate in sectors related to security, public order and health in other Member States, and those who have committed criminal or illegal activities in any other country.

In both types, an authorisation is required for those investments that will give the foreign investor more than 10% of the Spanish company's share capital, or "effective control or management" of the Spanish company.

The Government can extend the rules applicable to "object" investments to other sectors.

These provisions anticipate to some degree the transposition in Spain of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union and that will be enforceable from October 2020. It also limits the general principle of EU law on the liberalisation of foreign investment in the single market.

The new legal framework raises many questions, such as whether it applies to indirect investments (including EU companies controlled by foreign investors, be they institutional or not), what is understood as having effective management or control, and the situation of foreign investors that already have a shareholding of more than 10% and intend to increase it.

(D) Other ministerial orders. Order SND/260/2020 of 19 March suspends the demand-side interruption service for economic reasons owing to the COVID-19 outbreak. As such, as long as the state of emergency is in force, Red Eléctrica de España, S.A, as system operator, will not activate the demand-side interruption management service for the economic reasons referred to in article 8 of Order IET/2013/2013 of 31 October.

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