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ENERGY

Changes in the processing of new renewable energy projects

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On 27 December, 2022, the Government approved Royal Decree-Law 20/2022, of 27 December, on measures in response to the economic and social consequences of the war in Ukraine. The measures approved mainly affect five main areas: (i) energy (ii) food (iii) transport (iv) gas-intensive industry (v) economic and financial stability (vi) social shield.

The Spanish Congress of Deputies approved the validation of this Royal Decree-Law by Resolution of 24 January 2023, published in the Official State Gazette No. 23 of 27 January.

In the field of energy, although many of the legislative amendments refer to tax matters, the measures related to the deployment of renewable energies and self-consumption stand out here. In particular, the moratorium on the processing of new projects and the regulation of the new procedure for determining the environmental impact of renewable energy projects.

Moratorium on the processing of new projects

There are currently almost two hundred and ninety nodes in the transmission grid that are reserved for access and connection tenders, under the provisions of Royal Decree 1183/2020, of 29 December, on access and connection to the electricity transmission and distribution networks. Article 18 of this Royal Decree empowers the head of the Ministry for Ecological Transition and the Demographic Challenge, following a report by the Government's Delegate Commission for Economic Affairs, to call access capacity tenders at a specific node of the transmission grid for new electricity generation facilities that use renewable primary energy sources, as well as for storage facilities. These capacity tenders will be carried out on the basis of the monthly reports to be submitted by the electricity system operator.

The Ministry for Ecological Transition and Demographic Challenge is currently finalising the processing of an Order that will call for tenders in some of the existing nodes. The current draft of the order envisaged a favourable score for those projects that put the facilities into service in the shortest possible time.

In view of the expectations generated by this order, and a potential uncontrolled flood of wind and photovoltaic projects, the Government has approved, through Royal Decree Law 20/2022, a moratorium for those projects that have already been submitted, that intend to evacuate at nodes in

competition, and that do not yet have access and connection permits.

In short, with this measure the government is trying to curb speculation in the sector in the initial stages of a renewable project, eliminating projects from developers who have no real technical or financial capacity.

Article 13 of the Royal Decree-Law establishes new rules for the organization of procedure in nodes subject to access capacity competition. Exceptionally, it is established that the procedure that developers have initiated before the competent body through any of the following procedure will be suspended for a period of 18 months from the entry into force of this Royal Decree Law, i.e. from the day of its publication on 28 December 2022:

i. Presentation of receipts accrediting that the financial guarantee has been deposited.

ii. Submission of applications for the administrative authorisations provided for in article 53 of Law 24/2013, of 26 December, on the Electricity Sector.

iii. Submission of requests to determine the scope of the environmental impact study, as an action prior to the initiation of the environmental assessment procedure according to article 34 of Law 21/2013, of 9 December, on environmental assessment.

iv. Submission of applications for the determination of environmental impact for renewable energy projects not located in the marine environment, under the provisions of Chapter III of Royal Decree-Law 6/2022, of 29 March, adopting urgent measures within the framework of the National Response Plan to the economic and social consequences of the war in Ukraine:

1. For wind and photovoltaic projects installed on land and occupying more than 100 hectares, which meet the following conditions:

a) Connection: Projects with overhead evacuation lines not included in group 3, section g) of Annex I of Law 21/2013, of 9 December, i.e. lines with a voltage of less than 220 kV and less than 15 kms in length.

b) Size:

1. Wind power projects with an installed capacity of 75 MW or less.

2. Photovoltaic solar energy projects with an installed capacity of 150 MW or less.

c) Location: Projects that, not being located in the marine environment or in areas that form part of the Natura 2000 Network, are located entirely in areas of low sensitivity according to the "Environmental zoning for the implementation of renewable energies", as per the tool prepared by the Ministry for Ecological Transition and the Demographic Challenge.

2. Projects subject to the simplified authorization procedure, under the competence of the General State Administration, which have obtained a favourable environmental impact assessment report and provided that their promoters request to avail themselves of these simplified

authorization procedure before 31 December 2024.

Article 13 also states that certain projects are not affected by this moratorium:

a) Those which have applied for an access and connection permit under the provisions of Article 8 of Royal Decree-Law 6/2022, of 29 March, as a result of the release of capacity at a node reserved for tendering for self-consumption.

b) Those which are hybridized and comply with the provisions of Article 27 of Royal Decree 1183/2020 of 29 December.

c) Those which respond to requests that have access and connection permissions.

d) Those which have submitted an application for access and connection permits to a network node pursuant to Article 7 of Royal Decree 1183/2020, of 23 December, prior to the decision that an access capacity tender will be held at that specific node, and provided that the application has not been rejected or rejected by the system operator.

Procedure for determining environmental impact

Article 6 of Royal Decree Law 6/2022 of 29 March established an environmental impact assessment procedure for renewable energy projects for a temporary period, in accordance with Article 4.2 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

Royal Decree-Law 20/2022 re-regulates this procedure in the same terms as provided for in Royal Decree-Law 6/2022, maintaining the validity of this environmental impact procedure for those projects for which an application for administrative authorisation is submitted in accordance with the provisions of article 53 of Law 24/2013, of 26 December, on the electricity sector, before 31 December 2024. However, environmental procedures that are being processed at the entry into force of this Royal Decree-Law will continue to be governed by the previous regulations.

As a novelty, article 22 of Royal Decree Law 20/2022 establishes in an exhaustive manner, which projects are excluded from this environmental impact procedure, and instead will be subject to the environmental assessment procedure provided for in Law 21/2013, of 9 December on Environmental Assessment:

1º. Those located in areas that are part of the Natura 2000 Network.

2º. Those located in protected natural areas as defined in article 28 of Law 42/2007, of 13 December, on Natural Heritage and Biodiversity.

3º. Those located in the marine environment.

4º. The construction of overhead electrical power lines with a voltage equal to or greater than 220 kV and a length exceeding 15 km.

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DISPUTES

Legal actions for unfair competition

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Although unfair competition is in theory a cornerstone of the market, the truth is that in judicial practice it is not common to come across claims of this nature, and even less so with judgments declaring acts of unfair competition.

This is because the judges' premise is that the free market and free competition give a kind of presumption of innocence to the actions of all business people and professionals in the market, and convictions are only handed down when it is clearly established that a particular act has been unlawful and unfair.

However, it is always useful and interesting to review the acts of unfair competition provided for by law in order to know and assess the judicial options that market operators have when faced with an action by another operator that they consider to be unlawful in competition.

The Unfair Competition Act of 1991 establishes a general rule that acts carried out in the market contrary to good faith are unfair. However, the law goes on to specify a series of cases that are considered to be acts of unfair competition, which are as follows:

- Acts of deception.
- Acts of confusion.
- Misleading omissions.
- Aggressive practices.
- Acts of vilification.
- Acts of comparison.
- Imitation acts.
- Exploitation of the reputation of others.
- Breach of secrets.
- Inducement of contractual infringement.
- Violation of rules.
- Acts of discrimination.
- Selling at a loss.
- Unlawful advertising.

As we can see, some of these acts may overlap with other areas of law, such as the crime of fraud, the crime of violation of business secrets, the violation of patents or trademarks, or the violation of the right to honour. In these cases, it is advisable to bring joint legal action whenever possible.

In any case, the same law regulates different potential legal actions in case of an unfair act:

- Declaratory action for disloyalty.
- Action for cessation of the unfair conduct.
- Action to remove the effects of the unfair conduct.

- Action to rectify misleading, incorrect or false information.

- Action for damages.

- Action for unjust enrichment.

This is a wide range and consequently it is important to carefully analyse the action or actions to be brought, because the identification of the action must necessarily be made in the initial claim and cannot be modified afterwards.

With regard to these legal actions, it is worth noting that they have a singular limitation period, which is 1 year from when they could have been brought, and in any case 3 years from the end of the unfair conduct.

In conclusion, unfair competition actions are varied and complex, and when faced with a possible case of unfair competition, it is necessary to carefully analyse the available options in order to bring the most appropriate actions.

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COMMERCIAL

New extension of the suspension of the cause for dissolution due to asset imbalance

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The latest update of Law 3/2020, of 18 September, on procedural and organizational measures to deal with COVID-19 in the field of the Administration of Justice by virtue of Royal Decree-Law 20/2022, amends its article 13 to the effect of extending the suspension of the obligation to dissolve or rebalance the accounts of capital companies that are in legal grounds for dissolution under article 363.1(e) of the LSC, i.e. companies whose net assets are reduced to less than half of their share capital.

By virtue of the new regulation, the losses incurred during the financial years 2020 and 2021 will not be taken into account for the purposes of analyzing the potential existence of the aforementioned situation of dissolution due to asset imbalance until the close of the financial year beginning in 2024.

Furthermore, the rule clarifies that only losses incurred during the aforementioned financial years 2020 and 2021 will not be computed so that, having excluded them from the result of the financial years 2022, 2023 and 2024, if any of them result in a situation of equity imbalance *ex* article 363.1 (e) LSC, the duties of dissolution or rebalancing of the net assets established in articles 364 and following of the Capital Companies Act will be fully applicable.

Finally, the following express reference is noteworthy:

If, excluding the losses for the years 2020 and 2021 as described in the preceding paragraph, the ***result for the financial year 2022, 2023 or 2024 shows a*** *loss [...].*

Indeed, the express reference to the "*result of the financial year*" 2022, 2023 or 2024 seems to imply that the so-called "time zero", i.e. the time at which the two-month period available to the director for the purpose of convening the general meeting (Article 365 LSC) starts to run, will be at least the date of preparation of the annual accounts for the financial years 2022, 2023 and 2024. This would exclude the taking into consideration of losses detected during the course of the financial years 2022, 2023, 2024 by virtue of quarterly balance sheets or similar, which, in turn, would go against numerous rulings that establish that the aforementioned time starts from the moment the administrator becomes aware of the cause for dissolution (among others, STS of 23 October 2008 "RJ20086920").

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