

Analysis of Royal Decree-Law 17/2022, of 20 September, adopting urgent measures in the field of energy, in the application of the remuneration system to cogeneration facilities and temporarily reducing the rate of Value Added Tax applicable to deliveries, imports and intra-Community acquisitions of certain fuels



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On 21 September 2022, Royal Decree-Law 17/2022 of 20 September was published in the Official State Gazette ("BOE"), adopting urgent measures in the field of energy, in the application of the remuneration system to cogeneration facilities and temporarily reducing the VAT rate applicable to deliveries, imports and intra-Community acquisitions of certain fuels (hereinafter, "[RD-Law 17/2022](#)"), which came into force on 22 September.

RD-Law 17/2022 approved a series of energy measures, some of which were long awaited in terms of project permitting. Among others, a measure has been adopted to enable cogeneration facilities to recover their operating costs - due to the price situation in the energy markets - through a new type of voluntary waiver of the specific remuneration scheme so that they can apply for inclusion in the adjustment mechanism; measures have also been introduced to promote the processing, commissioning, and evacuation of renewable energy. Another remarkable energy measure is the creation of an active demand response service. On the other hand, in the fiscal area, a reduction from 21% to 5% in the VAT tax rate on deliveries, imports and intra-Community acquisitions of certain fuels is established on an exceptional and transitory basis until 31 December 2022.

In this Alert we will summarize the main developments that have been approved.

Waiver of the specific remuneration regime for cogeneration plants for the purposes of applying the production cost adjustment mechanism

Electricity production facilities that include a cogeneration facility¹, located on the Spanish mainland, may waive the specific remuneration system so that the production cost adjustment mechanism to reduce the price of electricity (the "**Mechanism**") regulated in Royal Decree-Law 10/2022, of 13 May, which temporarily establishes a production cost adjustment mechanism to reduce the price of electricity on the wholesale market ("**RD-Law 10/2022**"), may be applied to them. The waiver may be submitted as long as the Mechanism is in force.

The period in which the waiver shall apply shall be the period between the first day of the month following the date of communication of the waiver to the competent body to make the settlements and the date of termination of the facility².

Once the waiver has been communicated, the market operator and the system operator may be asked to include the installation in the Mechanism.

During this period, the facilities will not receive the remuneration system, nor will they be required to comply with the energy efficiency conditions or fuel consumption limits. At the end of the period of application of the waiver, the facility will recover the right to receive the specific remuneration scheme.

Finally, the installations may also request that the Mechanism is no longer applied to them, and the market operator shall have two (2) business days to stop applying the Mechanism.

With this measure, cogeneration plants will be able to temporarily waive their regulated remuneration regime, so that they fall within the scope of application of the Mechanism and receive the compensation received by combined cycle plants.

Promoting the processing, commissioning, and evacuation of renewable energy generation

In order to promote the processing, commissioning and evacuation of renewable energy, RD-Law 17/2022 introduces a series of amendments to Royal Decree 1955/2000, of 1 December, which regulates the transmission, distribution, commercialization, supply and authorization procedures for electrical energy installations ("**RD 1955/2000**"). In this regard, the following amendments are introduced:

- ▶ Firstly, one of the requirements to obtain administrative authorization for construction ("**AAC**") without the need for a new prior administrative authorization ("**AAP**") in case of modifications to generation facilities that have already obtained AAP, is modified³. Thus, the requirement that the installed power, after the modifications, does not exceed by more than 10% the power defined in the original project, is amended so that the resulting installed power does not exceed by more than 15% the original one. This is without prejudice to the implications that this excess power may have for the purposes of access and connection permits.

- ▶ One of the requirements established regarding the consideration of non-substantial modifications is also modified⁴. Thus, for it to be understood that we are not dealing with a substantial modification, instead of requiring that there is no alteration of the basic technical characteristics of more than 5% of the installation's power, the percentage is raised to 10%.
- ▶ On the other hand, in connection with the hearing process of other Administrations, RD-Law 17/2022 introduces a period within which the CNMC must issue its mandatory report on authorizations for new facilities. Thus, the CNMC must issue the report within a period not exceeding 15 days from receipt of the application and it will be positive if it is not received after that period has elapsed. In addition, for renewable energy projects, the CNMC may issue a favorable report without carrying out a detailed analysis provided that 3 conditions are met: (i) the project belongs entirely to a developer that has obtained a favorable report from the CNMC for the authorization of other projects within a period of no more than 2 years for a size of no less than 50%, (ii) the power of its authorized projects has not increased by more than 300% over that period and (iii) its situation has not changed for the purposes of its legal capacity.
- ▶ Finally, as regards the conditions and approval of the execution project, the period is reduced from 30 to 15 days for the different administrations, organizations or public service companies affected to submit their technical conditions to the competent Administration as long as (i) the facility already has an AAP resolution, (ii) the processing of the AAC is carried out exclusively under the ordinary procedure contemplated in section 2 of chapter II of RD 1955/2000, (iii) the AAP does not require any of the procedures contemplated for a modification of the AAP and (iv) the declaration of public utility has not been jointly requested.

On the other hand, RD-law 17/2022 modifies RD 413/2014 in relation to the prior registration of electricity production facilities. In this sense, it admits that for the prior registration there may be discrepancies in the previous documents which will not be required to be modified. Specifically, it allows (i) a variation in access capacity of up to 5% with respect to that appearing in the access and connection permit granted, and (ii) a variation in installed capacity of up to 5% with respect to that appearing in the construction permit, provided that the issuance of a new construction permit is not necessary. However, discrepancies between these documents must be remedied before the final operational notification is obtained.

The aim of all these measures is to speed up the permitting process, commissioning, and evacuation of renewable generation facilities. The purpose is to facilitate permitting processing for cases in which modifications are made to the projects by consolidating certain administrative milestones, thus avoiding the administrative file having to be sent back so that the start-up of the project does not suffer delays.

Urgent measures to reduce VAT on deliveries, imports, and intra-Community acquisitions of certain fuels

With effect from 1 October 2022 and until 31 December 2022, on an exceptional and transitional basis, the rate of 5% (the minimum authorized by Community legislation) of VAT shall apply to the supply, import and intra-Community acquisitions of (i) natural gas and (ii) briquettes and pellets from biomass and wood for firewood.

The new uninterruptible mechanism

With effect from the entry into force of RD-Law 17/2022, a new uninterruptible mechanism (rapid demand response service) is created to allow large consumption industry to obtain remuneration for offering to stop consumption at times of high demand. This new uninterruptible mechanism is aimed at increasing the flexibility and security of the electricity system to cope with situations of shortages in the reserve balance to be raised by obtaining additional resources to those already available.

The competent authority may adapt, amend or, where necessary, repeal it.

The annual auction corresponding to the active demand response service is expected to be held imminently, as the service will be applicable as of 1 November 2022. All those demand units - traders and direct consumers in the market - with a supply greater than or equal to 1 MW connected to the Spanish peninsular electricity system may participate in the auction.

In this way, the assignment of the active demand response service shall be carried out through a closed envelope telematic auction procedure with marginal price assignment managed by REDEIA, as system operator, and said auction shall be held at least seven (7) working days prior to the start date of the service provision period.

Annex II of RD-Law 17/2022 regulates in detail the operation of this specific active demand response balancing service for the Spanish peninsular electricity system.

Destination of the surplus of the Electricity Sector in the 2021 financial year

Exceptionally, if at the close of the 2021 financial year a surplus of income from the electricity system is generated, all of this surplus will be used to cover temporary imbalances and transitory deviations between income and costs in the 2022 financial year.

Other additional measures in the field of energy

In addition to the above measures, RD-Law 17/2022 extends until 30 September 2022 the deadline for submitting addenda to the 2021 and 2022 investment plans and the 2023 investment plans.

Finally, the standard also establishes the admissible load levels in the transmission network. These levels may be modified by resolution of the Secretary of State for Energy.

Specifically, Annex I of RD-Law 17/2022 establishes the criteria for determining these levels in the lines and transformers of the electricity transmission grid in normal

operation. In order to carry out the procedure, the companies that own the power transmission facilities will determine the capacity of the lines and transformers they own, using the methodology of said Annex.

In addition, the calculation models used to determine transmission and transformation capacities must include, as a minimum, the aspects set out in Annex I of RD-Law 17/2022.

In any case, the companies owning transmission grid facilities shall send a report to the system operator every six months with the modifications made to the capacity values of their facilities.

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- 1 That is, the facilities belonging to group a.1 defined in article 2 of Royal Decree 413/2014, of 6 June, which regulates the activity of electricity production from renewable energy sources, cogeneration and waste ("**RD 413/2014**"), as well as those covered by the first transitional provision.
- 2 According to RD-Law 10/2022, the Mechanism will apply for 12 months from the date set in Order TED/517/2022 of 8 June (i.e. 14 June 2022). However, the RD-Law 10/2022 also establishes that in no case will the mechanism be applicable beyond 31 May 2023, so this date should be considered.
- 3 The original wording of article 115.2 of RD 1955/2000 is as follows: *2. Modifications to generation facilities that have obtained prior administrative authorisation may obtain administrative authorisation for construction without requiring a new prior administrative authorisation when all of the following conditions are met. a) The modifications are not subject to an ordinary environmental assessment in accordance with the provisions of article 7.1 of Law 21/2013, of 9 December, on environmental assessment. b) The land affected by the production facility following the modifications does not exceed the polygonal area defined in the authorised project or, if exceeded, does not require compulsory expropriation and has town planning compatibility. c) The installed power, following the modifications, does not exceed the power defined in the original project by more than fifteen percent. The foregoing shall be understood to be without prejudice to the implications that, if applicable, in accordance with the provisions of additional provision fourteen, this excess power may have for the purposes of access and connection permits. d) The modifications do not involve a change in generation technology. e) The modifications do not involve alterations to the safety of both the main installation and its auxiliary installations in service. f) No specific declaration of public utility is required to carry out the planned modifications. g) The modifications do not affect other electric power production installations in service.*
- 4 The original wording of article 115.3 of RD 1955/2000 is as follows: *For the purposes of the provisions of article 53.2 of Law 24/2013, of 26 December, are considered non-substantial modifications, and must only obtain the operating permit, after accreditation of compliance with the safety conditions of the facilities and associated equipment, those that meet the following characteristics: a) They are not within the scope of Law 21/2013, of 9 December, on environmental assessment. b) That they do not entail an alteration of the basic technical characteristics (power, transformation or transport capacity, etc.) of more than ten percent of the power of the facility. c) That they do not entail alterations to the safety of both the main facility and its auxiliary facilities in service. d) That no specific declaration of public utility is required to carry out the planned modifications. e) Modifications of lines that do not cause changes of easement on the route. f) Modifications of lines that, although causing changes of easement without modification of the route, have been carried out by mutual agreement with the affected parties, according to the provisions of article 151 of this Royal Decree. g) Modifications to lines that involve the replacement of supports or conductors due to deterioration or breakage, provided that the conditions of the original project are maintained. h) Modifications to the configuration of a substation, provided that there is no variation in the number of lanes or positions. i) In the case of transmission or distribution installations that do not involve changes in remuneration.*