



JONES DAY
COMMENTARY

SPANISH GOVERNMENT MODIFIES THE REMUNERATION OF EXISTING RENEWABLE ENERGY PLANTS

Spanish Royal Decree Law 9/2013 of 12 July (“RDL 9/2013”) was published in the Official Gazette on 13 July, for the adoption of urgent measures to guarantee the financial stability of the country’s electricity system. RDL 9/2013 includes, among other things, a new remuneration framework for existing renewable energy projects. Set forth below is a preliminary analysis of this new framework.

AIM OF THE REFORM

As evidenced by the statement of motives for RDL 9/2013, the object of the reform is to reduce the electricity tariff deficit. This is intended to be accomplished by reducing the regulated costs of transmission, distribution, and renewable energy installations. This intent is made clear when RDL 9/2013 states that it approves a new legal and economic framework for the special regime, but expressly aimed at existing installations. The

objective is not, at least in the short to medium term, to establish a legal and economic regime for new renewable installations, but exclusively to modify regulations to the compensation system of existing installations.¹ To this end:

- The provisions that had regulated the special regime are repealed;
- Article 30.4 of Law 54/1997 on the Electricity Sector (“LSE”) is amended;
- The criteria applicable to the remuneration of existing installations are specified; and
- A transitory regime is established.

REPEAL OF THE PROVISIONS REGULATING THE SPECIAL REGIME

The Sole Repeal Disposition repeals the provisions that had previously regulated the special regime applicable to renewable projects: (i) Royal Decree 661/2007, regulating electrical energy production

¹ It is expected that new renewable energy plants will be governed by the new regime provided for in Article 30.4 of the LSE and additional norms, once the Spanish government approves the economic regime related to new projects.

under the special regime (“RD 661/2007”), (ii) Royal Decree 1578/2008, on the compensation of electrical energy production using photovoltaic solar technology (“RD 1578/2008”), and (iii) Article 4 and Section 2 of the Fifth Transitory Disposition of Royal Decree Law 6/2009, for the adoption of certain measures in the energy sector and the approval of the social bond (“RDL 6/2009”).

The provisions of RDL 6/2009 being repealed are those that created and regulated the preassignment mechanism. This mechanism was currently in suspension pursuant to provisions of Article 1.b) of Royal Decree Law 1/2012, which had suspended the compensation preassignment procedures and suppressed the economic incentives for new renewable, cogeneration, and waste-to-energy plants. Until a new regulatory framework is adopted to develop Article 30.4 of the LSE, the regulation of the current special regime under Spanish regulations is effectively repealed, except for a transitory regime, which is described below.

AMENDMENT OF ARTICLE 30.4 OF THE LSE

Article 1, Section 2 of RDL 9/2013 amends Article 30.4 of the LSE, which, in its prior drafting, established the criteria on which the compensation for special regimes were based. These calculation criteria took into account the investment costs for the purpose of achieving reasonable rates of return in relation to the cost of money in the capital markets. Based on these criteria, RD 661/2007 established the economic regime for renewable plants, as did RD 1578/2008 for those photovoltaic installations that did not benefit from the provisions of RD 661/2007.

Under the new wording of Article 30.4 of Law 54/1997, the receipt of additional compensation is not guaranteed, unlike the previous wording that indicated that the payment regime will be “complemented with the payment of a premium.” The new wording requires that the receipt of any compensation in addition to the payment received from the sale of energy at market prices will be conditioned on such price not

covering the investment costs. Therefore, it is established that the installations “*may* receive a specific payment.” Such specific payment should come from compensation for energy valued at the market price and supplemented by an additional payment only when such market price does not cover the investment costs of an efficient and well-managed company. As stated in the preamble to RDL 9/2013, an efficient and well-managed company is one that has the necessary means for development of its activity, the costs of which are those of an efficient company, considering the corresponding income and reasonable profit.

Under this criteria, the compensation shall consist, according to the technology, of:

- A compensation per unit of installed capacity to cover the investment costs of a typical installation that cannot be recovered from the sale of energy; and
- An operational compensation that covers the difference between the operating costs and the income for the participation in the market.

The payment will be calculated for a typical installation throughout its regulatory lifetime² and refer to the activity carried out by an efficient and well-managed company, taking into account (i) the standard income from the sale of energy at market production price, (ii) standard operating costs, and (iii) the standard value of the initial investment.

The specific compensation, which may be reviewed every six years, cannot exceed the minimum level necessary to cover the costs that permit competition with all other technologies, allowing a reasonable return that is referenced to the average performance in the secondary market of Spanish government bonds over a 10-year period, plus a margin.

Under Article One, Section Four of RDL 9/2013 adds a new Section 9 to Article 30 of Law 54/1997, creating a registry of specific compensation, in which all renewable installations must be registered as a prerequisite for the application of the aforementioned compensation system to such installation.

² The development of RDL 9/2013 will clarify if the reference to “regulatory lifetime” assumes that any payments received prior to the enactment of the RDL in excess of the reasonable return shall be deducted from future payments. This will thus guarantee that the installation has received a reasonable return during the regulatory lifetime of the plant, and not only from the enactment of the provision. If this is the case, an analysis of the legality of such retroactive application will likely be carried out by the Supreme Court.

COMPENSATION FOR THE EXISTING INSTALLATIONS

The first additional provision of RDL 9/2013 fixes the reasonable profitability of those installations that were entitled to receive premiums on the entry into force of Royal Decree Law 9/2013—which took place on July 14—as the average performance in the secondary market of the 10-year Spanish government bonds for the 10-year period prior to the effectiveness of RDL 9/2013, plus 300 basis points. However, an important clarification should be made.

The Second Final Provision of RDL 9/2013 makes clear that, once RD 661/2007 is repealed, these installations will be fully subject to the new economic regime established by Article 30.4 of the LSE and its development regulations. This means that specific compensation will be paid only to the extent that the market price does not cover the investment costs, calculated according to the parameters contained in Article 30.4 of the LSE. Such remuneration will be reviewable every six years.

TRANSITIONAL ARRANGEMENTS

As mentioned, the Second Final Provision of RDL 9/2013 determines that the existing installations are fully subject to the new economic regime established by Article 30.4 of the LSE and also, from the moment of its entry into force, as confirmed in its reading in conjunction with the Third Transitional Provision.

Under Section 1 of the Third Transitional Provision, the economic regime referred to in RD 661/2007, Royal Decree 1578/2008 and Royal Decree Law 6/2009 shall continue to be applicable until the approval of the regulatory development of RDL 9/2013, except for the complementary payment for efficiency and the reactive energy bonus. However, the settlements (“*liquidaciones*”) made pursuant to the aforementioned regime shall be deemed as payments on account, as described in Section 2, regularized in accordance with the parameters listed in Royal Decree-Law 9/2013 as from the adoption of its development regulations. Therefore, as from July 14, the compensation to be received by existing installations shall be as provided in RDL 9/2013.

LAWYER CONTACTS

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