

MAIN EFFECTS OF ROYAL DECREES-LAWS 10/2020 AND 11/2020 ON FACILITIES FOR THE PRODUCTION OF ELECTRICITY FROM RENEWABLE ENERGY SOURCES

I. Introduction

The Official State Bulletin (“BOE”) of 29 March 2020 published Royal Decree-law 10/2020, of 29 March, regulating recoverable paid leave for employees who do not provide essential services in order to reduce the movement of the population in the context of the fight against COVID-19 (the “RDL 10/2020”).

Essentially, it is compulsory recoverable paid leave limited to the period between 30 March and 9 April inclusive, for all employees of public or private sector companies or entities which carry out activities that are considered to be non-essential according to the Annex to RDL 10/2020.

It is important to note that the aim of RDL 10/2020 is not to oblige companies and entities to close or to suspend their activities. In fact, it regulates the obligation to grant paid leave to employees who are not in the situations set out in both the articles of and the Annex to RDL 10/2020. However, the aforementioned compulsory leave will ultimately lead to a suspension of activities, unless the activities are considered essential or are related to essential activities.

In this regard, Order SND/307/2020, of 30 March, which establishes the interpretative criteria for the application of RDL 10/2020, of 29 March, and the model affidavit to facilitate any necessary journeys between an employee’s place of residence and their place of work, provides that employees who are not entitled to the recoverable paid leave established in RDL 10/2020 and those who are engaged in trade union or business representation activities will be entitled to have an affidavit issued by the company or employing entity recognising this circumstance, in accordance with the model set out in the Annex to the Order.

In this context, the activity of electricity generation is considered an essential activity, as set out in section one of the Annex to RDL 10/2020, in relation to articles 17 and 18 of Royal Decree 463/2020, of 14 March, which declared the state of alarm for the management of the

health crisis caused by COVID-19 (“RD 463/2020”). Therefore, it is important to highlight the main effects that RDL 10/2020 has on facilities that generate electricity from renewable energy sources.

II. Main effects of RDL 10/2020 on facilities for the production of electricity from renewable energy sources

Section one of the Annex to RDL 10/2010 excludes from its scope of application employees who carry out activities that must continue according to articles 10.1, 10.4, 14.4, 16, 17 and 18 of RD 463/2020. These activities include the supply of electricity, petroleum products and natural gas (article 17 of RD 463/2020), as well as the provision of essential services by critical operators (article 18 of RD 463/2020). Likewise, section two (b) of article 1 of RDL 10/2020 excludes from its scope of application those working in the divisions or on production lines in sectors described as essential in the Annex to RDL 10/2020.

In addition, article 5 of RDL 10/2020 also excludes those activities that are essential to maintain the production activities in the manufacturing industry that provide the supplies, equipment and materials needed to carry out the essential activities included in the Annex to RDL 10/2020 correctly.

Therefore, facilities that generate electricity from renewable energy sources do not fall within the scope of RDL 10/2020, since the supply of electricity is considered an essential activity for this purpose. Similarly, activities that form part of the division or production lines of the supply activity, or activities that are essential to maintain the production of supplies, equipment and materials relating to the supply of electricity, do not fall within the scope of application either.

Therefore, from a practical point of view, the following conclusions can be reached:

- (i) In relation to facilities that are in operation, the operation and maintenance (O&M) activities of electricity generation facilities should be considered as an integral part of the production activity and therefore an element of the essential electricity supply service that must continue.
- (ii) In relation to projects that are under development, the construction of electricity generation facilities is not considered an essential activity for the purposes of RDL 10/2020.

However, there are a number of situations in which it could be argued that construction work can continue.

- (a) **Immediacy of commissioning:** in those cases in which the construction of the

generation facility is close to completion and its commissioning is expected to take place in a short period of time, and especially while the state of alarm is in force, it could be argued that because it is close to being able to generate electricity, the facility, and therefore the tasks required to complete its commissioning, are essential.

- (b) **Security reasons:** in those cases where it is essential to carry out tasks that guarantee the safety of the project that is under construction and its elements, in application of article 4 of RDL 10/2020, which provides for the maintenance of what is known as the “*minimum essential activity*”.

In relation to this article, the “*Interpretative note for the industrial sector regarding the application of Royal Decree-law 10/2020, of 29 of March, regulating recoverable paid leave for employees who do not provide essential services in order to reduce the movement of the population in the context of the fight against COVID-19*”, published by the Ministry of Industry, Trade and Tourism on 31 March 2020, states that “*this minimum maintenance of industrial activity must be understood to be especially prescribed for those industrial facilities for which a prolonged stoppage for several days would cause damage that would make it impossible or difficult to restart production or that would create a risk of accidents*”.

Therefore, it can be concluded that construction can continue in cases in which it is advisable that this activity is not halted due to the situation it is in (because damage may be caused that would make it impossible or difficult to restart production or that would create a risk of accidents).

All of the above will be applicable for the duration of the paid leave regulated in RDL 10/2020, that is, until 9 April 2020. After that date, any new measures adopted by the Government must be analysed in order to determine whether they involve amendments in relation to the suspension of activities produced as a result of granting the paid leave.

- (iii) In relation to the administrative processing of projects that are pending, the entry into force of RDL 10/2020 does not imply the adoption of additional measures in relation to administrative proceedings.

However, the suspension of administrative deadlines agreed “*ex lege*” in the Third Additional Provision of RD 463/2020, and the impact this may have on ongoing administrative proceedings in relation to renewable generation facilities, must be taken into account insofar as the aforementioned provision orders the suspension of all deadlines and terms.

Notwithstanding the above, it should be noted that this procedural suspension has the following exceptions: (i) the administrative body may agree, by means of a reasoned decision, to measures relating to the organisation and instruction of the proceedings, provided that they are aimed at avoiding serious damage to the rights and legitimate interests of the interested party in the proceedings and when the interested party gives its consent; (ii) the administrative body may agree, also by means of a reasoned decision, to continue the proceedings if the interested party expresses its agreement that the deadline should not be suspended; and (iii) the administrative body may agree¹ to continue proceedings that are directly related to the state of alarm or that are essential to the general interest or for the basic functioning of the services.

III. Expiration of access and connection permits

Royal Decree-law 11/2020 of 31 March, adopting additional urgent social and economic measures to deal with COVID-19 (“**RDL 11/2020**”), published in the Official State Bulletin on 1 April 2020, amends the deadline of 31 March 2020 established by the Eighth Transitional Provision of Law 24/2013, of 26 December, of the Electricity Sector (“**LSE**”) which had declared that permits for access and connection to the electricity grids granted before the entry into force of the LSE on 28 December 2013 would expire if the commissioning certificate for the generation facility associated with it had not been obtained before this deadline².

This means that, for permits that were due to expire on 31 March 2020, there is an additional period of validity of two months, starting from the end of the state of alarm.

To this end, section a) of the Eighth Transitional Provision of the LSE has been amended so the aforementioned permits will expire if, within two months of the end of the state of alarm, the commissioning certificate for the generation facility associated with the corresponding permits has not been obtained.

It specifies that, for the calculation of this two-month period, the suspension and resumption of the periods regulated in the Third and Fourth Additional Provisions of the aforementioned RD 463/2020 will not be applicable³.

¹ By means of a reasoned decision, but without the need to obtain the consent of the interested party.

² This deadline, however, had already been altered by the suspension of deadlines provided for in RD 463/2020.

³ However, this already results from RD 463/2020 itself, insofar as the suspension of administrative deadlines and the suspension of statutes of limitations and expiration periods provided for in the aforementioned Third and Fourth Additional Provisions are linked to the validity of the state of alarm, and the two-month period provided for the expiry of permits only commences once the state of alarm ends.

According to the explanatory memorandum of RDL 11/2020, the agreed extension intends to provide legal certainty both to the developers of electricity generation projects who hold these permits, “*on which depend investments that are essential for meeting the objectives of penetration of new renewable energies*”, and to the electricity grid operators responsible for granting these access and connection permits, so that the parties concerned have sufficient time to adapt to the new situation.

This Legal Briefing was prepared by Ana Cremades Leguina, Counsel of Pérez-Llorca’s Energy practice.

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