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BILL ON TAX MEASURES IN THE AREA OF THE ENVIRONMENT AND ENERGY SUSTAINABILITY

On 14 September 2012, the Council of Ministers approved, for submission to the Spanish Parliament, a Bill on Tax Measures for Energy Sustainability (the "Bill")[1]. Like other pieces of legislation approved in recent years in connection with the electricity sector, the Bill focuses on one of the most important problems currently facing the Spanish energy industry, namely, the tariff deficit, which by December 2011 stood at €24 billion.

The text of the Bill has been published in the Official Parliamentary Gazette on 28 September 2012. Note that the measures included in the Bill may still change as a result of the amendments that may be made as it passes through Parliament.

According to final provision five of the Bill, once the Bill reaches the statute books, it will come into force on 1 January 2013.

1. CONTEXT FOR THE APPROVAL OF THE BILL

The Spanish electricity system has suffered from a revenue shortfall in its regulated activities for more than a decade, due to the gap between (i) revenues from supply tariffs and tolls for access to the transmission or distribution grids, and (ii) the recognized costs associated with the various regulated activities and costs of the electricity system.

This gap between revenues and costs has given rise to a revenue shortfall in regulated activities known as the tariff deficit. Despite successive attempts at legislating to remedy and contain the tariff deficit, it has ceased to be a circumstantial by-product of the annual settlement of revenues and costs, and become a structural problem of the electricity system.

[1] The Bill was assessed and admitted for first reading by the Presiding Panel of the Lower Chamber of Parliament on 25 September 2012. The text of the Bill has still to be published in the Official Parliamentary Gazette.

In recognition of this problem, measures were introduced in Royal Decree-Law 6/2009, of 30 April 2009, to lay out the path towards the progressive sufficiency of access tolls to satisfy all of the costs associated with regulated activities so that, from 2013 onwards, no additional tariff deficit can arise. Royal Decree-Law 6/2009 also provided a mechanism to finance this deficit[2].

Since the publication of Royal Decree-Law 6/2009 various measures have been passed to remedy the deficit (in Royal Decree-Law 6/2010, of 9 April 2010, or Royal Decree-Law 14/2010, of 23 December 2010). Nevertheless these measures have yet to put a stop to the tariff deficit.

Faced with the entrenchment of the deficit problem, intensified by a fall in demand over recent years, the risk of breaching the deficit ceiling set for 2012, and the fast-approaching zero deficit target for 2013 and beyond, firstly, Royal Decree-Law 1/2012, of 27 January 2012, was approved (establishing the suspension of remuneration pre-allocation procedures and the elimination of economic incentives for new electricity generation facilities based on cogeneration, renewable energy sources and waste). As mentioned in the Preamble to Royal Decree-Law 1/2012, the Government identified the deficit as "*the main problem threatening the economic sustainability of the electricity system*" and announced its intention to adopt measures to remedy this. Accordingly, in Royal Decree-Law 1/2012, it sought to temporarily curtail the costs these incentives were bringing to the electricity system by taking away the financial incentives for electricity generation facilities under the special regime (using cogeneration, renewable energy sources and waste), and facilities using assimilated technologies and falling under the ordinary regime, and the remuneration pre-allocation procedure.

Subsequently, Royal Decree-Laws 13/2012 and 20/2012 were approved and introduced a new raft of urgent measures for containing the costs of some of the regulated activities and costs of the electricity system, with a view to reducing the temporary gaps for 2012, for both the electricity and gas sectors, to staying under the deficit ceiling set for 2012, and to achieving tariff sufficiency in 2013.

Due to the insufficiency of these measures for containing the tariff deficit, the Government has considered it necessary to unveil this new Bill, which includes new taxes the revenues from which will be used to cover certain costs of the electricity system.

According to Government estimates, these new tax measures in the electricity and gas sectors are expected to bring in approximately €2.9 billion in new revenues.

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[2] Royal Decree-Law 6/2009 determined that from 1 January 2013 onwards, access tolls will be sufficient to satisfy all of the costs associated with regulated activities, and provided rules on a transitional period until that date. It also determined that the deficit will be financed by transferring the related collection rights to a special purpose vehicle, the Electricity System Deficit Securitization Fund (or "FADE" by its Spanish acronym), which will issue the related securities in a competitive process on the financial market backed by a guarantee of the Spanish State.

On the financing of the tariff deficit, account should also be taken of Royal Decree-Law 6/2010, of 9 April 2010, on Measures to Boost the Economic Recovery and Employment.

Lastly, it should be noted that the Government is preparing an additional package of measures for the structural reform of the electricity sector, including the amendment of Electricity Sector Law 54/1997, of 27 November 1997 ("**LSE**"). According to statements made by the Minister for Industry, Energy and Tourism, these measures, together with those included in the Bill and in previously approved legislation, will permit the consolidation of a "*clear, transparent and stable regulatory framework.*"[3]

2. DESCRIPTION OF THE MAIN MEASURES ESTABLISHED IN THE BILL

2.1 Measures established in the Bill

The Bill approved by the Council of Ministers includes, among other measures:

(i) new taxes:

- a tax on the value of electricity output,
- a tax on production of spent nuclear fuel and radioactive waste resulting from nuclear power generation,
- a tax on storage of spent nuclear fuel and radioactive waste at centralized facilities, and
- a charge ("*canon*") on the use of inland water for electricity production;

(ii) a modification of the rates of the excise tax established for natural gas and of the special tax on coal, while eliminating the exemptions for energy products used in electricity production and in the cogeneration of electricity and useful heat; and

[3] The reform of the LSE and of the regulatory framework for the electricity sector was announced by the Minister for Industry, Energy and Tourism in a speech to the Lower Chamber of the Spanish Parliament on 26 September 2012 (Official Report on Proceedings in the Lower Chamber of the Spanish Parliament, Plenary and Permanent Committee Sessions, 2012 (10th Parliament), no. 62).

In his speech, the Minister gave a general outline of the proposed energy industry reform and indicated that it could deal with a range of issues including the following: (i) the division of powers between central government and the autonomous community governments; (ii) the regulation of system connections and access; (iii) the unification of the concept of generation and convergence of facilities under the special and ordinary regimes; (iv) the deregulation of supply so as to reduce the cost of the "last resort" tariff (TUR); (v) new implementing legislation for renewable energy sources and energy efficiency; (vi) the presentation of a new concept of electricity wholesaling and supply; (vii) fresh proposals on electricity distribution and transmission and new remuneration for regulated activities; (viii) the redefinition of the items of which grid access tolls are comprised; and (ix) a new treatment of island and non-mainland electricity systems.

(iii) an amendment to the LSE, eliminating the right to be remunerated under the premium-based system for the sale of electricity attributable to the use of fossil fuels at generation facilities that use any non-consumable renewable energy as a primary energy source.

The revenues obtained from applying this Bill, once it becomes law, will be used to meet certain costs of the Spanish electricity system established in the LSE. Therefore, following the entry into force of the new Law, the remuneration for regulated activities and other costs of the electricity system will be paid not only out of access tolls, but also from items contained in the General State Budgets relating to the revenues raised by the new taxes and charge established by the Bill. It is also worth noting that the Bill contains an enabling provision for the General State Budget Law to modify the tax rates and tax prepayments provided for in the Bill.

The Bill establishes that, if the taxable events of the new taxes overlap with those taxed by the autonomous community governments and this leads to a decrease in their revenues, adequate compensation or coordination measures will be implemented in their favour.

Therefore, it will be necessary to have regard to the taxable events of the autonomous community taxes currently being levied on similar activities and to whether they overlap with the taxable events intended to be taxed by the Bill. Thus, the principal new feature of the tax on storage of spent nuclear fuel and radioactive waste at centralized facilities is that it is a central government tax, although autonomous community taxes on the same subject matter already exist.

The key features of the above-mentioned measures established in the Bill are described in the following sections.

2.2 Tax on the value of electricity output

Title I of the Bill establishes a direct, *in rem* tax on the value of electricity output, which is levied on the pursuit of the activities of production and feeding of power to the Spanish electricity system.

The payers of this tax will be the individuals and legal entities referred to in article 35.4[4] of General Taxation Law 58/2003, of 17 December 2003, ("**LGT**") who engage in the activities constituting the taxable event. This tax will apply throughout Spain, notwithstanding the tax regimes established by the economic accords respectively in force in the Basque Country and Navarra, and notwithstanding the provisions of international treaties and conventions.

[4] Article 35.4 LGT refers to undistributed estates, tenancies in common and other entities which, although lacking legal personality, constitute an economic unit or a separate set of assets capable of being taxed.

The taxable event is the production and feeding of electricity to the Spanish electricity system, measured in power plant busbars ("*barras de central*"), including the mainland electricity system and the island and non-mainland territories, whether at facilities under the ordinary or the special regime.

The tax base will consist of the total amount receivable by the taxpayer for the power output produced and measured in power plant busbars[5] on the electricity production market, for each facility during the tax period. The tax will become chargeable on the last day of the tax period, which will be the calendar year, unless the taxpayer has stopped producing electricity at the facility, in which case the tax period will end on the date on which production stopped.

In calculating the tax base, account will be taken of the remuneration provided for in all the remuneration systems resulting from the provisions of the Electricity Sector Law (market price, premiums, incentives and/or supplements, if any), in the tax period in question, as well as that provided for in the specific remuneration system for the activities of production and feeding of electricity to the electricity system in the island and non-mainland territories.

A single "ad valorem" tax rate (6%) is applied to the revenues obtained by each of the electricity production facilities.

The tax will become chargeable on the last day of the tax period, which will be the calendar year, unless the taxpayer has stopped producing electricity at the facility, in which case the tax period will end on the date on which production stopped. As for how the tax is calculated and paid, the Bill provides that taxpayers must self-assess the tax and pay it over within the first twenty (20) calendar days of the December following the date on which the tax became chargeable, in accordance with the rules and on the forms established by the Minister for Finance and Public Authorities, i.e., the calculation and the payment must be made almost one year after the tax became chargeable. This time lag is probably due to the fact that, according to the Bill, the definitive measurements of output must be taken into account for these purposes.

Nevertheless, a system of four (4) prepayments is established, to be made between the 1st and 20th of May, September, November and the February following the period to which the calculation refers.

These prepayments will be calculated by applying a tax rate of 6% to the value of the electricity output (measured in power plant busbars) in the immediately preceding calendar quarter. For these purposes, the value of the output will consist of the total amount receivable by the taxpayer for the output (measured in power plant busbars) on the electricity production market, for each facility in that quarter. If the amount receivable by the taxpayer is not known when the tax is prepaid, a provisional amount must be determined in a reasoned manner.

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[5] The Bill defines power production measured in plant busbars as the energy measured at alternator terminals, net of ancillary consumption ("*consumos auxiliares*").

2.3 Taxes on production of spent nuclear fuel and radioactive waste resulting from nuclear power generation and on storage of spent nuclear fuel and radioactive waste at centralized facilities

Title II of the Bill regulates two new direct, *in rem* taxes: (i) a tax on production of spent nuclear fuel and radioactive waste resulting from nuclear power generation, and (ii) a tax on storage of spent nuclear fuel and radioactive waste at centralized facilities.

According to the information contained in the press release from the Ministry of Industry, Energy and Tourism after the unveiling of the Bill, the tax on storage of spent nuclear fuel and radioactive waste at centralized facilities will replace the taxes currently levied by the autonomous community governments on this matter, in order to make them uniform and to unify the taxable events taxed by various autonomous community governments.

As in the case of the tax on the value of electricity output, the taxpayers will be the individuals and legal entities referred to in article 35.4 LGT who engage in the activities constituting the taxable events. However, where the owners of nuclear facilities giving rise to the taxable event are not the same as the operators of those facilities, the owners will be jointly and severally liable with the operators for the related tax debt.

These taxes will apply throughout Spain, notwithstanding the tax regimes established by the economic accords respectively in force in the Basque Country and Navarra, and notwithstanding the provisions of international treaties and conventions.

The tax period of both taxes will be the calendar year, unless the taxpayer stops engaging in the activity in question at the facility, in which case it will end on the date on which the activity is deemed to stop. Both taxes will become chargeable on the last day of the tax period.

With regard to the calculation and payment of the two taxes, the Bill establishes that taxpayers will be required to self-assess the taxes and pay over the resulting amounts within the first twenty (20) calendar days following the date on which the taxes became chargeable, in accordance with the rules and on the forms established by the Minister for Finance and Public Authorities. A system of three (3) prepayments is also established, to be made within the first 20 calendar days of April, July and October, on the basis of the calculation of the tax for the tax period in progress. For these purposes, the amount of the prepayments will be determined by having regard to the value of the figures which determine the tax base on the calculation date.

2.3.1 Tax on production of spent nuclear fuel and radioactive waste resulting from nuclear power generation

The taxable event is the production of spent nuclear fuel and radioactive waste resulting from the generation of nuclear power.

The tax base, which will be determined for each facility where the activities constituting the taxable event are engaged in, and the tax rates applicable to each tax base will be the following:

Tax base	Tax rate
Number of kilograms of heavy metal contained in the spent nuclear fuel (defined as the nuclear fuel irradiated in, and permanently extracted from, the reactor) generated during the tax period	€2,190/kg
Number of cubic metres of medium- and low-level radioactive waste produced that have been (conditioned during the tax period for temporary on-site storage at the facility that generated it)	€6,000/m^3
Number of cubic metres of very low-level radioactive waste produced that have been (conditioned during the tax period for temporary on-site storage at the facility that generated it)	€1,000/m^3

2.3.2 Tax on storage of spent nuclear fuel and radioactive waste at centralized facilities

The taxable event is the storage of spent nuclear fuel and radioactive waste at a 'centralized facility', which is defined as a facility for storing such materials originating from several facilities. For these purposes, 'storage of spent nuclear fuel and radioactive waste at a centralized facility' is deemed to be any activity consisting of the temporary or definitive immobilisation of those materials, regardless of where or how it is done.

Nonetheless, the Bill establishes that the storage of radioactive waste from medical or scientific activities will be exempt from this tax, as will the storage of radioactive waste from exceptional incidents at industrial facilities not subject to nuclear regulations which are classified as such by the Spanish Nuclear Safety Council.

The tax base, which will be determined for each facility where the activities constituting the taxable event are engaged in, and the tax rates applicable to each one will be the following:

Tax base	Tax rate
The difference between the weight of the heavy metal contained in the spent nuclear fuel stored at the end and at the beginning of the tax period	€70/Kg.
The difference between the volume of high level long-life radioactive waste, other than spent nuclear fuel, or medium-level long-life, stored at the end and at the beginning of the tax period, expressed in cubic meters	€30,000/m^3
The volume of medium-, low- or very low-level radioactive waste brought into the facility for storage during the tax period [6]	Medium- or low-level: €10,000/m^3
	Very low-level: €2,000/m^3

[6] For the centralized storage of this type of waste, the Bill establishes that the net tax base will be determined by applying to the tax base a reduction multiplier K calculated in a formula which has several components in order to take into account the treatment of such waste before its storage.

2.4 Amendment of Special and Excise Taxes Law 38/1992, of 28 December 1992

Title III of the Bill amends Special and Excise Taxes Law 38/1992, of 28 December 1992, establishing an excise tax rate for natural gas not used as fuel or used as fuel in stationary engines (€0.65 per gigajoule), which up to now had benefited from a rate of €0. Additionally, excise tax rates are introduced for diesel fuel (€29.15 per 1,000 litres) and fuel oil (€12.00 per 1,000 litres) used for the generation of electricity or the cogeneration of electricity and heat.

The exemptions from hydrocarbons excise tax for energy products included within the scope of the tax that are used in electricity generation and/or in the cogeneration of electricity and useful heat in combined cycle plants are eliminated at the same time.

Moreover, in the case of the special tax on coal, in order to offer a tax treatment akin to that given to the generation of electricity from natural gas, the special tax rate applicable to coal is increased from the current €0.15 per gigajoule to a proposed €0.65 per gigajoule; and the exemption for coal consumption if it is used for the generation of electricity and the cogeneration **of electricity and heat is also eliminated.**

2.5 Hydroelectric generation charge

Title VI of the Bill amends the Consolidated Water Law (approved by Legislative Royal Decree 1/2001, of 20 July 2001), to create a charge ("*canon*") on the use or harnessing of inland water for hydroelectric generation.

The charge will fall due when the hydroelectric concession is first granted and annually thereafter to maintain it, and will be payable in the appropriate amount and in the time periods indicated in the conditions of that concession or authorization. The parties liable to pay the charge will be concession-holders or their subrogees, if any. As for existing concessions, according to the Bill, the charge will apply to those already holding a hydroelectric concession when the Law enters into force. In this regard, the conditions of existing concessions must be brought into line with the new provisions.

The basis of the charge will be determined by the river basin authority and will be the economic value of the hydroelectric output produced by concession-holders as a result of using or harnessing publicly-owned water resources, measured in power plant busbars, in each annual tax period.

The annual rate levied will be 22% of the value of the basis of the charge.

Hydroelectric facilities operated directly by public authorities competent to manage publicly-owned water resources will be exempt from the payment of this charge.

Moreover, the charge will be reduced by 90%: (i) in the case of hydroelectric facilities with a capacity of 50 MW or less (electricity generation facilities under the special regime); (ii) electricity generation facilities using hydraulic pumping technology with a capacity of more than 50 MW; and (iii) in the case of types of production or facilities that must be encouraged for reasons of general energy policy, in such manner as may be determined by regulations.

The management and collection of the charge will fall to the competent river basin authority or to the central tax authorities, by virtue of an accord with the river basin authority; 2% of the charge collected will be deemed to be revenue of the river basin authority, while the remaining 98% will be paid to the Public Treasury by the authority collecting the charge, in order, to finance certain costs of the electricity system.

Lastly, the calculation of the charge will be subject to the provisions of article 115 of the Consolidated Water Law, which establishes the general rules on calculating all of the charges and levies provided for in Title VI of the Consolidated Water Law although the rules for their self-assessment are to be fleshed out by implementing legislation.

2.6 Remuneration for the sale of energy generated by using fossil fuels at generation facilities that use any non-consumable renewable energy as a primary energy source

Lastly, the Bill includes an amendment to the LSE affecting the remuneration system for certain electricity generation facilities under the special regime. Specifically, the Bill establishes that electricity attributable to the use of a fossil fuel at a generation facility that uses any non-consumable renewable energy as a primary energy source will, in no event, qualify for the premium-based remuneration system.

Accordingly, power generation facilities under the special regime, such as solar thermal plants, which are allowed to utilise equipment using fuel to maintain the temperature of the heat transfer fluid in order to compensate for a lack of solar irradiation that may affect the planned delivery of energy will not be remunerated under the premium-based system for the power fed to the grid that is generated from fossil fuel sources.