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**NEW ENERGY INDUSTRY LEGISLATION IN ROYAL DECREE-LAW 2/2013,  
OF FEBRUARY 1, 2013 ON URGENT MEASURES IN THE ELECTRICITY  
SYSTEM AND IN THE FINANCIAL INDUSTRY**

Royal Decree-Law 2/2013, of February 1, 2013, on urgent measures in the electricity system and in the financial industry was published in the Official State Gazette, and came into force, on February 2.

The new legislation contains new measures to correct the gaps between the costs of the electricity system and the revenues obtained from the regulated prices, which it does by making adjustments to certain costs of the electricity industry and amending Royal Decree 661/2007, of May 25, 2007, on the generation of electricity under the special regime (facilities using cogeneration, renewable energy sources and waste)<sup>1</sup>.

**1. CONTEXT FOR THE APPROVAL OF ROYAL DECREE-LAW 2/2013**

Royal Decree Law 2/2013 is one of a number of the measures adopted recently to deal with the continuous increase of the cost items of the electricity system which, as we mentioned above, has caused gaps to appear between those costs and the revenues generated by the regulated prices.

The measures adopted before the approval of Royal Decree-Law 2/2013 notably included the approval of various royal decree-laws (Royal Decree-Law 1/2012<sup>2</sup>, Royal Decree-Law 13/2012<sup>3</sup> and Royal Decree-Law 20/2012<sup>4</sup>), which set out a raft of urgent measures to

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<sup>1</sup> This newsletter only describes the changes the new royal decree-law makes to the electricity system, without entering into the provisions in Chapter II setting out financial amendments concerning the investment by insurers in securities or rights issued by the SAREB (Sociedad de Gestión de Activos Procedentes de la Reestructuración Bancaria).

<sup>2</sup> Royal Decree-Law 1/2012, of January 27, 2012, which approved the halting of remuneration pre-allocation procedures and the elimination of economic incentives for new electricity generation facilities based on cogeneration, renewable energy sources and waste.

<sup>3</sup> Royal Decree-Law 13/2012, of March 30, 2012, transposing directives concerning domestic electricity and gas markets and electronic communications, and adopting measures to remedy diversions for gaps between the costs and revenues of the electricity and gas industries.

contain the costs of some of the activities and the regulated costs of the electricity system, aimed at reducing the temporary gaps for 2012, for both the electricity and gas industries, at staying within the deficit ceiling set for 2012 and at achieving tariff sufficiency in 2013<sup>5</sup>. Later, Law 15/2012, of December 27, 2012 on tax measures for energy sustainability<sup>6</sup> was approved and came into force on January 1, 2013, containing new tax items bringing revenues that will be used to cover certain costs of the electricity system.

Despite the measures adopted to contain the tariff deficit, they have not managed to avoid the appearance of new variances in the estimated costs and revenues. This was pointed out by the National Energy Commission (“CNE”) in its Report 35/2012, of December 20, 2012 on the draft order establishing the access tolls from January 1, 2013 and the tariffs and premiums for facilities under the special regime (facilities using cogeneration, renewable energy sources and waste), which said that those variances were due, mainly, (i) to the greater cost for facilities under the special regime caused by a greater-than-expected increase in the number of operating hours and in the remunerative values because due to the fact that they are linked to Brent oil prices; and (ii) to a fall in revenues stemming from declining demand which, according to the report, is set to continue in 2013.

According to a press release published by the Ministry of Industry, Energy and Tourism, in relation to the approval of Royal Decree-Law 2/2013<sup>7</sup>, the government has estimated that the new measures will save between 600 and 800 million euros a year without increasing the access tolls paid by electricity customers.

## 2. ADJUSTMENTS TO CERTAIN ELECTRICITY INDUSTRY COSTS

Below is a summary of the main measures contained in Royal Decree-Law 2/2013 aimed at achieving a reduction of the costs of the electricity industry:

- a) Elimination of the premium set out in the electricity industry legislation for facilities under the special regime (facilities using cogeneration, renewable energy sources and waste) that sell the energy they generate on the market (article 2 of Royal Decree-Law 2/2013).

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<sup>4</sup> Royal Decree-Law 20/2012, of July 13, 2012 on measures to ensure budgetary stability and on encouraging competitiveness.

<sup>5</sup> Note that final provision number four of Royal Decree-Law 29/2012, of December 28, 2012, eliminated paragraph 1 of additional provision number twenty-one of Electricity Industry Law 54/1997, of November 27, 1997, which established that “*from January 1, 2013 the access tolls shall be sufficient to satisfy all the costs of the regulated activities without a deficit being able to appear beforehand (deficit “ex ante”)*”.

<sup>6</sup> The new legislation in Law 15/2012 was analyzed in our “*Energy Update 5-2012, Energy Industry Tax News*”, published by Garrigues in December 2012.

<sup>7</sup> Click here to see the press release: <http://www.minetur.gob.es/es-ES/GabinetePrensa/NotasPrensa/2013/Paginas/npmedidasenergia010213.aspx>

Under the remuneration regime envisaged in article 24.1 of Royal Decree 661/2007<sup>8</sup>, up until this new royal decree-law came into force, the owners of facilities under the special regime could choose either of the following options: (i) deliver the electricity to the system on the transmission or distribution grid, in exchange for a regulated tariff, which will be a single tariff for all programming periods (article 24.1 b) of Royal Decree 661/2007); or (ii) sell the electricity on the electricity generation market, in which case, the price will be that set on the pool or the price freely negotiated by the owner or the representative of the facility, with the addition, as applicable, of a premium (article 24.1 b) of Royal Decree 661/2007).

The coming into force of the new legislation brings with it the elimination of the premium envisaged to be added to the market price for the facilities that have elected the option under article 24.1.b) of Royal Decree 661/2007, and therefore the options for the sale of energy generated by the facilities under the special regime are now, to: (i) deliver the electricity to the system in exchange for a regulated tariff; or (ii) sell the electricity on the electricity generation market, in which case the remuneration for electric power will be exclusively the price obtained on the pool or that freely negotiated by the owner or the representative of the facility, with no additional premium.

Another element that has been eliminated is paragraph 3 of transitional provision number seven of Royal Decree 661/2007, on the repowering of wind farms having a definitive registration date earlier than December 31, 2001, which established that the Council of Ministers, following consultation with the autonomous communities, could determine for those facilities that fulfilled the requirements laid down in that transitional provision, the right to an additional premium amounting to up to 0.7 euro cents/kWh, specifically for each facility, to be received until December 31, 2017.

According to government estimates, these measures will save between 250 and 500 million depending on the market prices.

- b) Disappearance of the chance to elect the change of option envisaged in article 24.4 of Royal Decree 661/2007 for the facilities that sell the electricity they generate on the market (article 3 of Royal Decree-Law 2/2013).

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<sup>8</sup> According to article 24.1 of Royal Decree 661/2007:

*“1. To sell all or part of their net electricity generation, the owners of the facilities to which this Royal Decree applies, shall elect one of the following options:*

- a) To deliver the electricity to the system on the transmission or distribution grid, in exchange for a regulated tariff, which shall be a single tariff for all the programming periods, expressed in euro cents per kilowatt/hour.*
- b) To sell the electricity on the electricity generation market. In this case, the sale price for the electricity shall be the price obtained on the organized market or the price freely negotiated by the owner or the representative of the facility, with the addition, as applicable, of a premium in euro cents per kilowatt/hour.”*

The owners of facilities under the special regime that elect to sell the electricity they generate on the electricity generation market cannot later elect the change of option allowed by article 24.4 of Royal Decree 661/2007<sup>9</sup>.

- c) Measures affecting the remuneration regime for the electricity generation facilities that apply the special regime (facilities using cogeneration, renewable energy sources and waste), effective from January 1, 2013.

- (i) Replacement of the inflation adjustment index for the remuneration of the activities of the electricity industry (article 1 of Royal Decree-Law 2/2013).

Article 1 of the new royal decree-law replaces, effective from January 1, 2013, the Consumer Price Index (CPI) used in the methods to make adjustments for inflation to the remuneration, tariffs and premiums received by the users of the electricity system with the CPI at constant taxes, without non-elaborated food products or energy products.

The government estimates that this measure will save 337 million euros a year.

- (ii) Change of option for facilities under the special regime (facilities using cogeneration, renewable energy sources and waste) that have elected the option to sell on the market (single additional provision of Royal Decree-Law 2/2013).

The new royal decree-law contains a raft of measures affecting facilities under the special regime that have elected the option to sell on the market, effective from January 1, 2013. These changes are directly related to the elimination of chance to elect the change of option envisaged in article 24.4 of Royal Decree 661/2007 for facilities that sell the energy they generate on the market.

Firstly, the power generated at the facilities that have elected the option to sell on the market between January 1, 2013 and the date of entry into force of the new royal decree-law will be settled by the CNE by reference to the energy generated in that period as if those facilities had elected the option to sell at tariff under letter a) of article 24.1 of Royal Decree 661/2007.

Moreover, those facilities which, on the date of entry into force of this new royal decree-law, were selling their energy under option b) of article 24.1 of Royal Decree 661/2007 will automatically be treated as if they had elected, effective from January 1, 2013, the option to sell at the regulated tariff under

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<sup>9</sup> According to that article:

*“The owners of the facilities to which this royal decree applies shall choose, for periods of not less than one year, the option for the sale of their energy that best suits them, which they shall notify to the distribution company and to the National Energy Commission, at least one month in advance, with respect to the date of the change of option. That date shall be the first day of the first month in which the change of option is going to be effective and shall be mentioned explicitly in the notification.”*

letter a) of that same article. However, the owners of those facilities can notify the Directorate-General of Energy Policy and Mines of their decision to remain under option b) (to sell at the market price without a premium) before February 15, 2013, although once they have made that notification they will not be able to elect the change of option set out in article 24.4 of Royal Decree 661/2007<sup>10</sup>. This provision will not apply to the facilities that are the successful bidders in the competitive bidding process for facilities using innovative solar thermoelectric technology.

Lastly, the new royal decree-law has rendered ineffective any notifications of a change of option for the sale of energy from the option to sell at the regulated tariff to the option to sell at the market price which may have been made but had not been implemented on the date of its entry into force.

- d) Remuneration of the facilities that are the successful bidders in the competitive bidding process for facilities using innovative solar thermoelectric technology.

The remuneration of facilities using innovative solar thermoelectric technology is set in the Decision of June 24, 2011, of the Energy Secretary of State, ruling on the competitive bidding process to obtain entitlement to an additional economic regime to the remuneration on the electricity generation market, for projects of electricity generation facilities using innovative solar thermoelectric technology, in the large facility category. This decision awarded to the facility belonging to Termosolar Alcázar, S.L. the right to receive an additional amount of remuneration to the remuneration received on the electricity generation market consisting of a premium and upper and lower limits, 15% lower than those envisaged for the 50MW solar thermoelectric facilities under Royal Decree 661/2007.

It is specified (in article 4) that the values for the premium and the applicable upper and lower limits will be calculated by reference to the values for 50 MW solar thermoelectric facilities published in Order IET/3586/2011, of December 30, 2011 establishing the access tolls from January 1, 2012 and the tariffs and premiums for the facilities under the special regime, reduced by the percentage specified in that decision, and adjusted for inflation as determined in article 44 of Royal Decree 661/2007<sup>11</sup>.

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<sup>10</sup> See footnote number 8.

<sup>11</sup> In relation to solar thermal energy facilities (group b.1.2 in article 2 of Royal Decree 661/2007), paragraph four of article 44.1 provides that:

*“The amounts of the tariffs, premiums, supplements and upper and lower limits of the market price per hour defined in this royal decree for category b) and subgroup a.1.3, shall be adjusted for inflation each year by reference to the increase in the CPI less the value established in additional provision number one of this royal decree.”*

In this respect, additional provision number one of Royal Decree 661/2007 provides that: *“The amount by which the CPI is to be reduced as referred to in this royal decree for the adjustment for inflation of some of the established values shall be by twenty-five basis points until December 31, 2012 and by fifty basis points thereafter.”*

### 3. NEXT STEPS AFTER APPROVAL OF ROYAL DECREE-LAW 2/2013

According to the press release published by the Ministry of Industry, Energy and Tourism, a preliminary bill has been passed to provide an extraordinary credit facility to the Ministry of Industry, Energy and Tourism to fund, if necessary, the premiums under the special regime for 2013 with a credit limit of €2,200 million. The press release says that *“the Preliminary Bill will be sent to the Council of State for information purposes and continue with its approval process at the Spanish Parliament before being included in the General State Budget Law for 2013.”*

Additionally, it should be noted that on February 1, 2013 the Energy Secretary of State forwarded to the CNE the *“Draft Order establishing the access tolls from January 1, 2013 and the tariffs and premiums for facilities under the special regime”* for the CNE to issue its compulsory report. The draft order sets out the applicable tariffs and premiums for facilities under the special regime which have been adjusted for 2013 using the CPI at constant taxes, without non-elaborated food products or energy products.

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