

Representation of facilities that produce electricity from renewable energy sources, cogeneration and waste under Spanish Royal Decree 413/2014

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Royal Decree 413/2014 retains the possibility of acting through a representative in the production market, the payment of tolls (connection charges) and the receipt of specific remuneration, while eliminating the possibility of combining direct and indirect methods of representation in the different fields of representation. The owners of renewable energy, cogeneration and waste-from-energy power plants that have been simultaneously using both methods of representation must pick one before 11 September 2014.

Art. 6(2) of the Spanish Electricity Sector Act 24/2013 of 26 December, allows any participant in the sector to act through a representative, whether acting on said participant's behalf (direct representation) or on the representative's own behalf (indirect representation), although in both cases for the account of the represented person (representee).

The above distinction has important practical effects given that the effects of a legal transaction, in the case of indirect representation, are directly attributed to the representative, without prejudice to the arrangement governing the relationship between the latter and the representee. Hence, in the indirect representation of a producer of electricity in the marketplace, payments for the sale of energy would be directly made to the representative – adding to said representative's assets – who would then be required (under the agreement entered into with the producer) to pay the representee the appropriate amount. In short, the producer does not have in this case a right to claim against the electricity system, but rather against his representative, with the claim risk that this may entail.

Until the entry into force of Royal Decree 413/2014 of 6 June regulating the production of electricity from renewable energy sources, cogeneration and waste (RD 413/2014), it was customary for

facilities producing electricity from renewable energy sources, cogeneration and waste to combine both types of representation: direct in respect of the representation before the Spanish Competition and Markets Authority (before, the Spanish Energy Regulator CNE) and indirect in respect of the representation in the production market, thereby eliminating counterparty risk in relation to premium remuneration (feed-in premium) amounts (liquidated by the CNMC).

However, art. 53(1) of Royal Decree 413/2014 has eliminated the possibility of simultaneously using both direct and indirect forms of representation, providing that in all cases the method of representation must be identical for the purpose of market operator and specific remuneration liquidations.

Transitory Provision 15 of RD 413/2014 grants all facilities that have been relying on different methods of representation before the market operator and the CNMC a time limit of three months from entry into force (i.e., until 11 September 2014) to choose one of the two methods.

RD 413/2014 does not spell out clearly the consequence of non-compliance with the above obligation within the 3-month period. One can assume that if both forms of representation are

maintained by the owner of the facility, such owner shall be regarded as unrepresented and thereon shall be represented by the regulated electricity supplier on its own behalf and for the account of another (indirect representation), with said supplier receiving an amount of up to € 5 per MWh assigned by way of representation.

The procedures (and requirements) that must be satisfied vary depending on which method of representation is favoured ¹:

a) Switching to an indirect method of representation before the CNMC [keeping an indirect representation before the Iberian Energy Market Operator (OMIE)]

- In the event of opting for indirect representation before the market and the CNMC, the contract entered into with the representative must be amended to reflect the new method of representation.
- If not envisaged in the power of attorney previously granted to the representative, a new power of attorney must be executed containing the new chosen method of representation.
- Additionally, in those cases where the receivables of the owner of the facility represented before the CNMC have been pledged, such pledge must be cancelled, replacing it with a pledge of receivables held against the representative (provided that such

receivables are not already pledged with this new scope).

b) Switching to a direct method of representation before the OMIE (keeping a direct representation before the CNMC)

Aside from the aforementioned adjustments (in respect of the representation agreement, the powers of attorney and the substitution of the pledge of receivables against the representative), the represented facility must acquire the status of market production participant, for which each of the facilities must meet the requirements of art. 4 of Royal Decree 2019/1997, of 26 December, organising and regulating the electricity production market (essentially, providing a guarantee to the System Operator), and sign with the OMIE the agreement of adherence to market rules.

It should be noted that acting through this method of representation involves a greater administrative burden (e.g., daily individual offers must be placed on the daily market and, where appropriate, the intraday market) which may increase the cost of representation services rendered to the facility

In short, in view of the consequences that presumably will arise from not choosing the method of representation before the deadline (11 September 2014), it is highly advisable that the owners of production facilities that have been simultaneously using both methods choose one.

¹ We outline the changes needed for the most common situation: direct representation before the CNMC and indirect before the market.

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