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European Commission Executive Vice-President
European Green Deal

Ms. Margrethe Vestager
European Commission Executive Vice-President
A Europe Fit for the Digital Age and Competition

Ms. Kadri Simson
European Commissioner
Energy

24 September 2021

Object: Spanish Royal Decree 17/2021: a "gas charge" to non-emitting electricity generation

Dear Executive Vice-Presidents,
Dear Commissioner,

On September 15th, the Spanish Government adopted Royal Decree Law 17/2021 comprising a series of urgent measures to combat soaring energy bills. One of the measures introduces a charge on all non-emitting electricity generation, notably on renewable energy, to address the rise in the price of natural gas in European markets.

The Spanish Government justified this measure in an assumed increase in the profits of these technologies due to the rise in wholesale electricity prices, driven up by gas prices.

The measure does not take into account that 100% of baseload production (hydro, nuclear and renewable) for 2021 and more than 75% of that for 2022 has been already sold by these generators months ago at the then prevailing forward prices, which are much lower than the current spot market prices.

While the increase of wholesale gas prices has occurred across all Europe during the last months, this measure will jeopardize the goals of the Green Deal and Fit for 55 package, by breaking investors' confidence and rights, with a huge impact on the must-needed RES investment as well as undermining the functioning of EU's Internal Electricity Market and the EU Emission Trading System (ETS). There could be a contagion of this legal measure to other Member States, creating fractures in the internal energy market and in European energy policy.

This charge measure comes on top of the proposed ETS Windfall Charge currently in Parliament, which envisages another charge on non-emitting generators built before 2003, on the grounds that they do not have to pay ETS costs.

Legal certainty is crucial to trigger the much-needed RES investments. Against this principle, the Spanish Government has again adopted a legal act immediately binding and enforceable without any impact assessment, nor public consultation or debate in Parliament. Investors will be very reluctant to invest in new renewable capacity within a framework of such regulatory risks, even if it's a so-called temporary measure, since all inframarginal technologies without CO₂ emissions are affected and all kinds of contracts are impacted (including Power Purchase Agreements). The total cost for non-emitting generation is estimated to be around 2.6 billion euros in six months.

In addition, this retroactive measure is likely to infringe the Treaty requirements relating to investor protection.

The impact on the functioning of the EU electricity market will be profound. Market participants will be required to bid-in at prices unrelated to costs, introducing further distortive behaviour due to the way the charge is calculated, and incentivizing to limit generation from newly uncompetitive assets. Electricity companies that have invested in RES generation backed with long-term purchasing agreements will have to supply the electricity at a loss. As such, the charge is contrary to explicit requirements of Regulation (EU) 2019/943 on the internal market for electricity.

Furthermore, the net effect of the measure is fundamentally against ETS principles, in particular “polluter pays”, as it incentivises fossil generation, not subject to the measure (not least by eliminating the benefit for renewable generation that results from its zero-GHG nature).

We fully support the need to protect vulnerable citizens from peaks in energy prices and we firmly believe that the European regulation provides the framework for a different and legal range of solutions as other Member States have proven (reducing energy taxation, earmarked money from the State budget, to calculate the regulated tariffs, using forward markets, etc.).

In conclusion, this legislation creates massive distortions, uncertainty, and damages. We call on the European Commission to immediately start an in-depth analysis of both Royal Decree Law 17/2021 and proposed ETS Windfall Charge bill and engage with the Spanish government to come up with different solutions to the energy price peaks which are not distorting the market and are safeguarding investor confidence.

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