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European Commission Executive Vice-President  
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EC Executive Vice-President  
A Europe Fit for the Digital Age and Competition

**Ms Kadri Simson**  
European Commissioner  
Energy

20 June 2022

**Object: Draft law to reduce the remuneration of non-emitted CO2 in the electricity market**

Dear Executive Vice-Presidents,  
Dear Commissioner,

Following the letter sent to you on 8 June 2021, we are compelled to come back to you as the Spanish Government has relaunched the legislative procedure on the draft law for a new regulation on the electricity market that will reduce the revenues of non-CO2 emitting generation facilities installed before 2003<sup>1</sup> (the “CO2 Mechanism”).

The declared aim of the CO2 Mechanism is to contain, on a permanent basis, the impact of higher CO2 emission allowance prices on Spanish consumers, by clawing back “*excessive revenues*” that have allegedly been earned by certain non-CO2 emitting facilities.<sup>2</sup>

According to the economic analyses<sup>3</sup> that accompany the draft law, the CO2 Mechanism would have an economic impact of 1,600 million euro per year. In total, the measure would affect

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<sup>1</sup> Boletín Oficial de las Cortes Generales. Congreso de los Diputados August 30, 2021.

[https://www.congreso.es/public\\_oficiales/L14/CONG/BOCG/A/BOCG-14-A-65-1.PDF#page=1](https://www.congreso.es/public_oficiales/L14/CONG/BOCG/A/BOCG-14-A-65-1.PDF#page=1)

<sup>2</sup>The Preamble of the CO2 Bill is explicit: “*The recent evolution of the price of emission allowances on the European market [...] has fueled the debate about their effects on final electricity prices, especially in the current economic situation [...] the extra cost for electricity consumers derived from the aforementioned remuneration of the CO2 not emitted may place the economic recovery after the crisis at risk [...] These episodes of very high prices [...] end up being passed on to final consumers [...] The above reasons, the rationality in the formation of prices and the need for an equitable distribution of income between consumers and producers justify the need to act*”. Emphasis added.

<sup>3</sup> Assuming a 75 €/t price of CO2 emission allowances. Memoria del Análisis del Impacto Normativo [https://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura\\_14/spl\\_26/pdfs/2.pdf](https://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura_14/spl_26/pdfs/2.pdf)

around 85 TWh/year, which represents around 50% of non-emitting generation. As stated above, this is not a temporary measure. On the contrary, it will be imposed on a permanent basis.

As we described in the previous letter, the draft law **seriously undermines investment incentives for decarbonised electricity generation**. The measure reduces the commercial revenues of certain non-emitting companies, whilst the EU rules in place and the Emissions Trading System rules are precisely aimed at rewarding such companies for their low-carbon forms of generation and discouraging the use of carbon-intensive production methods.

Furthermore, the CO2 Mechanism goes against the latest Commission Communications on REPower EU, which says that **windfall profit measures should not affect the carbon price signal from the EU ETS**. Annex 2 of the Commission Communication COM (2022) 108 final says: *“long-term price trends resulting from structural market developments and the carbon price signal from the EU ETS should not be affected. This is so as not to interfere with long-term price signals that contribute to the coverage of fixed and investment costs, incentivizing investments in capacity needed for a decarbonised and reliable power system”*.

Setting aside the fact that this windfall profit measure is not admissible in essence as it goes against the ETS, its actual design is also contrary to the aforementioned Commission Communication as **it fails to exclude the energy sold under fixed-price contracts that are not profiting from the CO2 price**: *“the measure should not be retroactive and should only claw back a share of profits that were actually made. Thus, it needs to take into account that generators may have sold part of their production forward at a lower price... Energy which has not profited from higher electricity market prices because it was already sold forward should be exempted from claw back measures”*.

Likewise, the CO2 Mechanism is discriminatory, since it will only apply to non-emitting generation plants commissioned before October 2003. The Spanish Government’s thinking here is that plants commissioned after this date will have had a *“legitimate expectation”* about the CO2 price which they will have factored into their investment decisions. Quite apart from this highly questionable reasoning, this overlooks the huge investments the pre-2003 generation facilities have made since 2003 which will of course have factored into the CO2 price. This different treatment is discriminatory and creates a selective advantage in favour of plants commissioned after October 2003.

In addition, the CO2 Mechanism will jeopardise the aim of the Commission Communication on REPower EU COM (2022) 230 final, with regard reducing EU dependence on fossil fuels by fostering investments<sup>4</sup> in clean transition.

**Investments in wind, PV, storage, and other renewable sources over the next decades will require billions of Euros from the private sector.** These investments happen because companies believe that they can make a fair return on them. **This measure fundamentally harms that investment incentive and creates additional risk for investors.**

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<sup>4</sup> The Commission’s analysis indicates that REPowerEU entails additional investment of 210 billion euro between now and 2027, on top of what is needed to realise the objectives of the Fit for 55 proposals. Commission Communication on REPowerEU, COM(2022) 230 final, page 13.

It is important to note also that this permanent measure, originally proposed before the current crisis, **would now apply on top of other market intervention measures adopted recently by Spain**<sup>5</sup>, that are also meant to reduce the electricity price for consumers. The coexistence of these measures would structurally damage the badly needed non-emitting generation, whose costs are already raising on the back of various reasons market interventions. This would have the effect of favouring fossil-based power generation.

Bearing in mind that this CO2 Mechanism is foreseen to be adopted next July, we urge the Commission to enter in a dialogue with the Spanish Government and to express its concerns over a draft law that is contrary to the EU framework, including the various Commission Communications, that are aimed at incentivising the decarbonisation, by guaranteeing legal certainty and stability for investors.

We are at your disposal for any further clarification that you may need.

Yours faithfully,



Marina Serrano  
President of AELĒC



Kristian Ruby  
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Cc:

- Mr. Mauro Petriccione, Director General, DG CLIMA
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- Mr. Diederik Samsom, Head of Cabinet, Executive Vice-president Timmermans
- Mr. Kim Jørgensen, Head of Cabinet, Executive Vice-president Vestager
- Mr. Stefano Grassi, Head of Cabinet, Commissioner Simson

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<sup>5</sup> **Real Decreto-ley 17/2021**, de 14 de septiembre, de medidas urgentes para mitigar el impacto de la escalada de precios del gas natural en los mercados minoristas de gas y electricidad., amended by **Real Decreto-ley 23/2021**, de 26 de octubre, de medidas urgentes en materia de energía para la protección de los consumidores y la introducción de transparencia en los mercados mayorista y minorista de electricidad y gas natural and by **Real Decreto-ley 6/2022**, de 29 de marzo, por el que se adoptan medidas urgentes en el marco del Plan Nacional de respuesta a las consecuencias económicas y sociales de la guerra en Ucrania, as well as **Real Decreto-ley 10/2022**, de 13 de mayo, por el que se establece con carácter temporal un mecanismo de ajuste de costes de producción para la reducción del precio de la electricidad en el mercado mayorista.