

The Supreme Court finds the State, in its legislative capacity, liable for passing Royal Decree-Act 1/2012

Luis Gil Bueno

Partner, Administrative & Regulatory Law Practice Area, Gómez-Acebo & Pombo

The Judgment of the Supreme Court (Judicial Review Division, Fourth Chamber) of 20 April 2016 finds the State liable in its legislative capacity for passing Royal Decree-Act 1/2012, of 27 January, proceeding with the suspension of procedures for the pre-allocation of remuneration and the abolition of economic incentives for new facilities that produce electricity from renewable energy sources, cogeneration and waste (hereinafter, "**Royal Decree-Act 1/2012**").

The judgment determines the application for judicial review made by a developer of photovoltaic facilities upon the Cabinet's dismissal of the liability claim for losses caused by the entry into force of Royal Decree-Act 1/2012. The developer was affected by the suspension (which subsequently became a *de facto* cancellation) of the procedure for entry on the Register for the Pre-Allocation of Remuneration to Photovoltaic Facilities (abbrev. "**PREFO**"), registration that constituted an essential requirement to receive the regulated tariff under Royal Decree 1578/2008, of 26 September, concerning the remuneration for the production of electricity using solar photovoltaic technology open to facilities subsequent to the deadline for the remuneration under Royal Decree 661/2007, of 25 May, for such technology ("**Royal Decree 1578/2008**").

The judgment describes the procedure adopted by the legislature to create a remunerative legal framework for photovoltaic facilities, first through Royal Decree 661/2007, of 25 May, regulating electricity production under the so-called special regime ("**Royal Decree 661/2007**") and subsequently through Royal Decree 1578/2008, which "*created a solid expectation for facility*

owners that they would obtain entry on said Register (PREFO) and the consequent remuneration for their electricity" under the terms provided in Royal Decree 1578/2008.

The *raison d'être* of Royal Decree 1578/2008 was indeed to complement the earlier decree and accommodate those facilities that had not qualified for the previous regime on account of the deadline to qualify for the remuneration scheme under Royal Decree 661/2007, determined by Decision of the Sub-Ministry of Energy of 27 September 2007, having elapsed. The explanatory notes to Royal Decree 1578/2008 included among its objectives that of giving "*continuity and expectations to these investments*" in the photovoltaic industry.

In the words of the Supreme Court, "*the Royal Decree of 2008 constitutes an outward sign from the Government that we deem to be sufficiently conclusive as to reasonably induce interested parties to trust that, having met the stringent requirements set out in Schedule II (to Royal Decree 1578/2008), they would obtain entry of the facility on the pre-allocation Register, with the consequences inherent in such registration.*

Accordingly, the court of last resort concluded that "*the legislative change marked by Royal Decree-Act 1/2012 was unanticipated, breaching the principle of legitimate expectations*". Moreover, nothing presaged that "*the industry's regulatory risk could materialise in an abolition barely three and a half years from enactment*", precisely because the government, in passing Royal Decree 1578/2008 and approving other supplementary measures such

as the Renewable Energy Action Plans, induced the eventual beneficiaries of this 'premium' regime to undertake photovoltaic facility projects.

The quantum of damages should be calculated according to the "*actual losses caused to the appellant that are causally linked to that suspension of the registration procedure*". In short, it involves providing evidence of the expenses the developer incurred to complete registration with the PREFO, excepting from compensation any other item associated with "*ordinary business activity*" when not directly related to the application for registration.

To conclude, this ruling of the Supreme Court finds the State, in its legislative capacity, liable for passing Royal Decree Act 1/2012 because the legislative change brought by the same was "*unanticipated*" and breached "*the principle of legitimate expectations*" of investors. It will certainly be interesting to see the effect of this legal doctrine in the different areas where the conformity to international legality of Spain's profound reform of the legal and remuneration system in the production of electricity from renewable technologies, cogeneration and waste is being examined.

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