NOTICE TO MEMBERS

Subject: Petition No 0008/2023 by Eduardo Martin Almeida (Spanish) on the Chirasosria hydroelectric power plant project in Spain and alleged infringement of Directive (EU) 2019/944 on common rules for the internal market for electricity

1. Summary of petition

The petition aims to stop the Spanish electricity system operator and transmission system operator (Red Eléctrica de España, REE) from building a reversible pumped-storage hydroelectric power plant in Gran Canaria. The petitioner considers that the construction, in addition to being contrary to the principles underlying the Green Deal, is in breach of Article 54 of Directive 2019/944 on common rules for the internal market for electricity, which prohibits transmission system operators from owning, developing, managing or operating energy storage facilities. The Spanish Government asked the Commission for a derogation from the application of this provision but – according to the petitioner – the works started before the Commission had issued its reply. The petitioner further considers that such a derogation, if granted, would leave REE with a monopoly on energy storage on the island, a situation which would be undesirable for consumers, and complains that the Spanish Government is promoting a costly hydroelectric project without having studied other less costly alternatives with a lesser impact on the limited territory and natural environment of the island of Gran Canaria. He points out that the project will impact 200 km\(^2\) out of the island’s total area of 1560 km\(^2\), and will affect five Natura sites. In particular, he notes that the area is home to a unique and endemic species of snail, which is in critical danger of extinction.

2. Admissibility

Declared admissible on 5 April 2023. Information requested from Commission under Rule 227(6).

3. Commission reply, received on 19 July 2023
The Commission’s observations

Compliance with Directive 2019/944

Article 54 of Directive (EU) 2019/944 on common rules for the internal market for electricity\(^1\) provide that transmission system operators must not own, develop, manage or operate energy storage facilities. However, there are a number of derogations to this rule, namely where the energy storage facilities are fully integrated network components and the regulatory authority has granted its approval, or where a number of conditions are fulfilled, in particular that other parties, following an open, transparent and non-discriminatory tendering procedure, have not been awarded a right to own, develop, manage or operate such facilities, or could not deliver those services at a reasonable cost and in a timely manner.

The aim of the above-mentioned provisions is to ensure that energy storage services are developed on a market-based and competitive way, to avoid cross-subsidisation between energy storage and the regulated functions of distribution or transmission, to ensure fair access to energy storage services for all market participants and to foster the effective and efficient use of energy storage facilities, which bring flexibility to the system and thus contribute to decarbonisation.

The Directive has full effect from 1 January 2021. Member States have to apply the above provisions, and compliance with them is ensured by the central role held by the national regulatory authority in any situation where a derogation pursuant Article 54(2) is granted. In those cases, pursuant Article 54(4), at regular intervals or at least every five years, the regulatory authority must perform a public consultation on the existing energy storage facilities in order to assess the potential availability and interest in investing in such facilities. If this shows that third parties are able to own, develop, operate or manage such facilities in a cost-effective manner, the system operator’s activities must be phased out.

On 23 November 2020 the Ministry for Ecological Transition and the Demographic of Spain submitted to the Commission an application for a derogation for Spain’s non-mainland territories pursuant to Article 66 of Directive (EU) 2019/944 and Article 64 of Regulation (EU) 2019/943\(^2\) on the internal market for electricity. The application included a request for a derogation from Article 54 of Directive (EU) 2019/944 and referred specifically to the Chira-Soria pumped-storage facility in Gran Canaria, and to future pumped-storage facilities owned by the system operator.

Following a public consultation on Spain’s application for a derogation and several rounds of questions and clarifications with the Spanish authorities, the Commission is currently assessing all relevant facts and aims to issue a decision before Q4 2023.

The Commission notes that for outermost regions like the Canary Islands, the derogations need to be subject to conditions aimed to ensure that they do not hamper the transition towards renewable energy. In the case of the Chira-Soria project, it seems that on the contrary, it is an

---


important project for stepping up efforts in the outermost region of the Canary Islands to
generate renewable energy and to achieve greater energy autonomy without having recourse to
fossil-fuels, and thus in line with the decarbonisation objectives for the electricity system. The
Commission takes note however of the concerns of the petitioner that granting a derogation
from Article 54 would leave REE with a monopoly on energy storage on the island, a situation
that according to the petitioner would be undesirable for consumers.

Environmental impact

The Environmental Impact Assessment (EIA) Directive\(^3\) applies to certain public and private
projects, defined in Annexes I and II thereto. Specifically, point 3 h) of Annex II refers to
“Installations for hydroelectric energy production”. For projects listed in Annex II, Member
States must determine whether an environmental impact assessment is necessary through a
case-by-case examination or through previously set thresholds or criteria. The Directive
provides for specific review procedures before a court of law or another independent and
impartial body to challenge the substantive or procedural legality of decisions, acts or omissions
subject to the public participation provisions of the Directive.

In the case of projects for which the obligation to carry out assessments of the effects on the
environment arises simultaneously from the EIA and/or sectoral legislation\(^4\), Member States
may provide for coordinated and/or joint procedures fulfilling the requirements of that Union
legislation, notably as regards the assessment of the likely effects of these projects on Natura
2000 sites in view of the site's conservation objectives; the need to avoid the deterioration of
natural habitats and the habitats of species as well as significant disturbance of the species for
which the areas have been designated; and the need to ensure a sustainable management of
groundwater and surface water consistent with the objective of achieving good quantitative and
qualitative water status. The Commission has issued guidance on this type of procedures\(^5\).

The competent authorities in the Member States are primary responsible to apply the above-
mentioned provisions.

The Commission notes that the provisions of the EIA Directive have been transposed into
Spanish law\(^6\). It follows that the Spanish legal order grants access to administrative and judicial
review procedures that any member of the public may use to challenge\(^7\) the legality of decisions,

---

of the effects of certain public and private projects on the environment Text with EEA relevance - OJ L 26,

of 30 November 2009 on the conservation of wild birds (Codified version) OJ L 20, 26.1.2010, p. 7–25; or

\(^5\) Commission guidance document on streamlining environmental assessments conducted under Article 2(3) of

\(^6\) Ley 27/2006, de 18 de julio, por la que se regulan los derechos de acceso a la información, de participación
de pública y de acceso a la justicia en materia de medio ambiente (incorpora las Directivas 2003/4/CE y

\(^7\) In accordance with the provisions of Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común
acts or omissions of public authorities that they consider to have infringed any of the rights granted by the Directive.

It appears that the project in question, aimed at increasing security of supply, energy system stability through the introduction of energy storage systems, improved system efficiency and increased integration of renewable energy in the island has been subject to a full environmental impact assessment procedure\(^8\) prior to the granting of the development consent.

**Conclusion**

As the final assessment on Spain’s application for a derogation is pending, the Commission cannot conclude whether there would be a breach of Articles 54 of Directive (EU) 2019/944/EU.

As regards the environmental concerns of the petitioner, in line with its strategic approach on its enforcement action\(^9\), the Commission considers that the redress mechanisms before the relevant national bodies available under the EIA Directive constitute the most adequate means for the petitioner to assert his claims in a satisfactory manner, should he consider that the relevant provisions of EU law are not being correctly applied in this case.

