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Legal recommendations for supporting community energy in Spain



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Executive Summary

Spain must rethink the role of renewable energy and citizens in its energy system. Where Spain was once a leader in investment and innovation, it now risks becoming a backwater compared to its neighbours. Early support for renewable energy in Spain has led to a high penetration of renewable energy in the market, with figures for 2013 showing that renewable sources made up 15.4% of gross final energy consumption.¹ However, due to draconian measures by the Spanish Government, renewable energy growth is now almost at a halt and Spain risks missing its binding national target of meeting 20% of gross final energy demand from renewable sources by 2020 under Directive 2009/28/EC (the Renewable Energy Directive).²

If Spain wants to capitalise on renewable energy's potential to contribute to economic revitalisation and consumer benefit while playing a role towards meeting 2020 - and 2030 - climate and energy objectives, the Government must re-establish its credibility as a safe place for investment. Like much of the EU, in order to give consumers - both households and businesses - secure, sustainable, competitive and affordable energy, Spain needs to fundamentally transform its energy system. As a first step, Spain needs to acknowledge the potential of its citizens and communities to help drive further investment in renewable energy, and in creating markets for local green growth. This, however, requires a shift in how individual consumers are perceived as actors in the energy system.

Citizens and communities now have an active role to play as 'prosumers' - that is producers and managers of energy - as opposed to simply passive consumers. Citizens can invest in their own micro-generation and participate collectively in community projects. If allowed, they can also participate in other operational aspects of the energy system, including management of distribution grids, supply of green energy as a utility and provision of other energy services (e.g. through energy service companies, or ESCos). As a precondition for engagement, however, individuals and communities need to be appropriately incentivised and allowed compete on an equal playing field in the Spanish energy market.

What challenges does citizen participation in the energy system face in Spain?

1. Disincentives for self-production/consumption

In addition to doing away with feed-in tariff support for new renewable installations,³ a number of measures have been passed to disincentivise the production of renewable energy.⁴ Collectively, these measures have decimated financial incentives for installing new renewable energy capacity along with investor confidence in the industry as a whole. Furthermore, a proposed

¹ EU Commission, 2015 Renewable Energy Progress Report, Annex.

² Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ 2009 L14 p 16. See 2020 Keep in Track! (2014). EU Tracking Roadmap 2014, p 12. Available at http://www.keepontrack.eu/contents/publicationseutrackingroadmap/kot_eutrackingroadmap2014.pdf.

³ Royal Decree-Law 1/2012.

⁴ Royal Decree 1614/2010, Royal Decree 1565/2010, Royal Decree-Law 14/2010, Law 15/2012, Royal Decree-Law 2/2013, Royal Decree-Law 9/2013.

Royal Decree on Self-consumption⁵ has discouraged investment in installations for self-consumption (e.g. solar PV). Although the proposal has not yet been enacted into law, it arguably violates the legal principle of legal certainty and reasonable expectations and has prevented virtually any new investment in renewables, either from industry or individual citizens.⁶

2. No dedicated policy towards citizen participation in the energy system

While renewable energy in Spain experienced strong growth in the late 1990s and 2000s, it was done with little participation of citizens or communities. Nevertheless, this rate is increasing and currently at least for PV installations there are approximately 60,000 citizen investors. Without a supportive framework, this nascent sector will not be able to realise its full potential. Furthermore, if citizens continue to be ignored in the development of energy policy in Spain, tough decisions down the line regarding the energy transition could be more costly - economically and politically - due to lack of public acceptance.

3. A lack of competition due to ineffective unbundling of integrated energy companies

While the market for electricity has been liberalised for over a decade, there is still very little effective separation (unbundling) of energy utilities. These companies own distribution, but also produce and supply electricity through separate legal entities. Due to a lack of effective separation, particularly between distribution and other activities, distributors may try to make it difficult for new renewable energy installations to connect to the grid, especially installations that are not owned by them. This prevents community initiatives that want to decarbonise local energy systems from entering the energy sector.

Key Recommendations

It is with the above understanding that the following legislative and policy recommendations seek to promote community energy and energy citizenship.

1. **The proposed Royal Decree on Self-consumption should be withdrawn** as quickly as possible and replaced by a framework that contains provisions that provide modest and predictable yet flexible economic, financial and political support to energy installations for self-consumption. **The current norm that requires producers or consumers to pay the distribution operator for their installation/consumption point to the existing grid, and then give it away for free to the distributor, should be removed** as this represents an over-burdensome disincentive to production for self-consumption.

⁵ Proyecto de real decreto por el que se establece la regulación de las condiciones administrativas, técnicas y económicas de las modalidades de suministro de energía eléctrica con autoconsumo y de producción con autoconsumo. Available at <http://www.mineco.es/Documentos/proyecto-real-decreto-tramite-audiencia/20150601-RD-Autoconsumo.pdf>.

⁶ Indeed, only 22 MW of new PV was installed in Spain in 2014, compared to the UK and Germany, which installed 2,270 and 1,900 MW, respectively. See Europa Press (8 April 2015). Available at <http://www.europapress.es/economia/energia-00341/noticia-fotovoltaica-apenas-suma-22-mw-nuevos-2014-mayoria-autoconsumo-20150408140839.html>.

2. A new legislative proposal should be developed that provides an appropriate value/incentive for self-consumption, as an avoided cost of grid electricity via net metering. In addition, the national Government should cooperate with Autonomous Communities and municipalities to provide appropriate investment support for community installations in the form of special tax treatment (e.g. rebates for VAT and income tax liability on investment) and soft loan support (e.g. grants, low-interest loans).
3. A “Community Energy Strategy for Spain” should be developed with open participation from the public and community energy stakeholders. The Strategy should seek to define community energy and provide a framework for integrating community energy into law and policy from the national level down to the local level. The Strategy should list targeted areas where the Government will address particular barriers to community ownership and participation in the energy system. Specifically, the Strategy should aim to:
 - reduce administrative and market barriers for community projects (e.g. grid connections, ownership, and supply), and renewable energy projects in general;
 - enhance competition and provide an equal playing field for all market actors;
 - establish a cost-effective and sustainable long-term support regime that does not penalise self-production or export of renewable energy; and
 - enable local governments to lead by example and cooperate with citizen-led initiatives and other private renewable energy enterprises.
4. The national energy law should be reformed to require distribution grid owners to establish a designation process where the management of the grid that they own is tendered out to other entities. The designation process should be conducted in a transparent and competitive manner, according to considerations of efficiency and economic balance, as indicated by EU internal energy market legislation. In order to maintain competition, such tenders should not be permanent but undertaken periodically. This requirement should also be supplemented by either criteria that requires Distribution System Operators (DSOs) to take into account sustainability and climate when undertaking their duties under national legislation, or a legislative amendment to the national energy law creating an additional duty for DSOs to take into account sustainability and climate when carrying out their functions. Alternatively, the national energy law should be reformed to provide municipalities the right to establish and own new distribution lines in their territory into the transportation network.

1 Introduction: Setting the context

As of 2013, renewable energy sources made up 33% of Spain's gross final energy for electricity - one of the highest in the EU.⁷ Spain was able to achieve this success by establishing positive support for feeding renewable energy into the grid and putting in place a framework to encourage investment. Supportive laws and policies helped Spain achieve a leadership position in renewable energy development, and put it on track to meet its binding national target of achieving 20% of gross final energy consumption from renewable sources by 2020 under Directive 2009/28/EC (the Renewable Energy Directive).

Spain has suffered from the financial and economic crisis more than most Member States. In addition, the tariff deficit has forced the Government to face many tough questions over how to account for energy system costs and support renewable energy while sustainably maintaining the energy system long term. However, the extent to which the Spanish Government has scaled back support for - and in the worst case created the perception of penalising - renewable energy production has decimated confidence of the industry and investors. Furthermore, the tariff deficit has opened the public's eyes to the fact that despite liberalisation Spain's energy system remains largely controlled by five large companies, further damaging public trust. The above are compromising Spain's ability to take the additional necessary measures to meet its legally binding renewable energy and greenhouse gas (GHG) emissions targets for 2020.⁸

Nevertheless, as more Member States are acknowledging, renewable energy and energy efficiency represent opportunities for economic growth.⁹ As the costs of technologies continue to fall and national GHG commitments continue to rise, prospects for renewable energy development will continue to increase, as will the need for private investment in clean low carbon production and infrastructure. As the EU looks at how to drive implementation of the 2030 climate and energy targets that were agreed in October 2014 by the European Council,¹⁰ including an EU-level binding target of 40% GHG emissions reduction a 27% renewable energy target and a 27% indicative target for energy efficiency,¹¹ the Spanish Government must re-initiate investor confidence and public trust.

As a first step, the Spanish Government must acknowledge the role of citizens as active consumers and market participants in the energy transition. Indeed, stepping up the role of consumers in the energy system was agreed by the European Council as an objective in its

⁷ Eurostat (May 2014). "Renewable Energy Shares," EU Energy in Figures: Statistical Pocketbook 2014.

⁸ See European Environment Agency (2014). "Energy Support Measures and their impact on innovation in the renewable energy sector in Europe," EEA Technical Report, No 21/2014, p 46.

⁹ Indeed economic growth and industrial leadership, particularly in local manufacturing, was one of the original drivers that led Spain to support early development in the wind industry. See IRENA (2012). 30 Years of Policies for Wind Energy: Lessons from 12 Wind Energy Markets, p 115; and Lewis, J and Wiser R (2005). Fostering a Renewable Energy Technology Industry: An International Comparison of Wind Industry Policy Support Mechanisms (Earnest Orlando Lawrence Berkeley National Laboratory, November 2005), pp 13 and 19.

¹⁰ European Council, Conclusions on 2030 Climate and Energy Policy Framework (23 and 24 October 2014). SN 79/14.

¹¹ For energy efficiency, there is still scope to raise the target to 30% after the United Nations Framework Convention on Climate Change (UNFCCC) negotiations in Paris at the end of 2015.

October 2014 Conclusions, and the Commission envisions an Energy Union with “citizens at its core,” where they take ownership of the energy transition and participate actively in the market.¹²

1.1 What do we mean by ‘community energy’ and ‘energy citizenship’?

‘Community energy’ is a broad term that refers to citizen and local ownership and participation in renewable energy generation, distribution and energy efficiency. Community ownership and participation can take a number of different organisational forms, ranging from individual households to social enterprises, municipalities and partnerships between various actors.

Depending on the actors and goals, community energy can take on a number of different legal forms. In a previous report, “*Community Power: Model legal frameworks for citizen-owned renewable energy*”,¹³ ClientEarth’s research across four Member States shows that communities often come together to create a small or medium-size enterprise with a social or ‘community’ purpose. These socially-oriented enterprises often form as partnerships, co-operatives, community trusts or foundations, non-profit customer-owned enterprises, housing associations or municipal companies. Members/owners of these enterprises usually (but not exclusively) reside within the local area or region, and start with little or no expertise. Furthermore, they tend to situate projects within the local area. This is distinct from traditional renewable energy developers, which usually develop projects based on traditional corporate entities to realise profit opportunities.

1.2 The potential of community energy in Spain

Where community energy has been supported through appropriate laws and policies it is already playing an essential role in the uptake of renewable energy in a number of Member States. In Denmark and Germany, both of which are considered leaders in the energy transition, citizens and communities have been the driving force for long-term sustainable development and acceptance of such technologies.¹⁴ Community energy has also helped to build social capital, create local employment opportunities, create revenue to address community development needs and combat fuel poverty.¹⁵

¹² European Council, *supra* note 10; and EU Commission, Energy Union Package, Communication on a Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Policy, COM(2015) 80 final.

¹³ See Roberts, J et al (2014). “What do we mean by ‘community power’?” in *Community Power: Model legal frameworks for citizen-owned renewable energy*. (ClientEarth: London). Available at <http://www.clientearth.org/reports/community-power-report-250614.pdf>.

¹⁴ In Germany, approximately half of installed renewable capacity can be considered under community ownership. In Denmark, community ownership of wind turbines is higher than in any other country in the EU with 70-80% of wind turbines in the country under community ownership. See Agentur für Eneuerbare Energien (AEE) (2013). *Renewable Energy in the Hands of the People*. Available at <http://www.unendlich-viel-energie.de/media-library/charts-and-data>; and Kingsley, P (2012). “Windfarms: is Community Ownership the Way Ahead?” The Guardian (5 November 2012). Available at <http://www.theguardian.com/environment/2012/nov/05/windfarms-community-ownership>.

¹⁵ See e.g. Friends of the Earth Scotland (2014). *From Remote Island Grids to Urban Solar Co-operatives: Community Power Scotland* (FoE Scotland: Edinburgh), available at <http://www.foe-scotland.org.uk/sites/files/CommunityPower%202.pdf>; and REScoop 20-20-20 (2014). *Best Practices Report: Part II*, available at www.rescoop.eu; and EESC (2015). *The role of civil society in the implementation of the EU Renewable Energy Directive: An impact study across six Member States*. Available at <http://www.eesc.europa.eu/?i=portal.en.sdo-observatory-red>.

Community Energy has already contributed towards innovation and local green growth in Spain. *Som Energia*, *GoiEner*, *Zenzer*, *Enerplus* and *Nosa Enerxia* are just a few examples of citizens coming together to form co-operatives in order to supply their members with competitively priced renewable energy. This business model has proved that it can be replicated, which in a time of uncertainty for energy utilities, provides lessons for how suppliers will need to organise themselves in order to thrive in the future. *Viure de l'aire*, the first citizen-owned wind project, aims to demonstrate that renewable energy development can still produce a viable return on investment even without generous support schemes. Furthermore, *Ecooo*, a non-profit enterprise, has been very successful in facilitating citizen investment in collective photovoltaic (PV) installations, helping to instil climate and energy issues into the consciousness of the public. NGOs such as *Amigos de la Tierra* are also galvanising investment, with two PV projects that will be owned by citizens. In addition, public authorities in municipalities such as Rubí are taking a leading role and supporting local industry by providing support for local renewable energy development through their public procurement functions and their authority to grant special tax treatment for local development.

2 A legal framework to promote and support production of renewable energy for self-consumption

Due to decreasing costs it is more possible than ever for individual consumers to invest in their own renewable energy installations (e.g. PV). PV is already competitive even without generous support schemes such as feed-in tariffs - although in Spain due to administrative hurdles such projects experience considerable market barriers.¹⁶ Increased uptake of renewable energy by consumers can have multiple economic and system benefits including enhanced energy conservation by consumers, leveraging private investment, improving grid stability and enhancing competition.¹⁷ Legislative uncertainty, however (e.g. retroactive changes), prevents investment in such systems.

In order to allow citizens to play an active role in the energy transition and the achievement of climate goals, Spain must take steps towards re-establishing trust of investors. At the national level, this means getting rid of legislative proposals that prevent any growth of renewable energy uptake, such as the proposal for a Royal Decree on Self-consumption. This will need to be followed by political commitment by national and local authorities to reinstate cost-effective investment support to help citizens invest in renewable energy installations.

¹⁶ See Perez, D (2015). Photovoltaic Grid Parity Monitor, Third Edition, ECLAREON. Available at <http://www.unendlich-viel-energie.de/pv-is-already-competitive-against-retail-electricity-in-the-commercial-sector-of-major-european-markets>.

¹⁷ See SunEdison (2011). Enabling the European Consumer to Generate Power for Self-consumption, Available at [http://www.sunedison.es/docs/SunEdison_PV_Self-consumption_Study_high_resolution_\(13_Mb\).pdf](http://www.sunedison.es/docs/SunEdison_PV_Self-consumption_Study_high_resolution_(13_Mb).pdf).

2.1 Removing the proposal for a Royal Decree on Self-consumption

On 18 July 2013, the Spanish Government published a proposal for a Royal Decree on Self-consumption. This proposal was replaced on 6 June 2015 by a new proposal, which was submitted to public consultation for fifteen days. When the Government will finally adopt it, however, is uncertain as there are general elections in Spain in autumn 2015 and pre-electoral discussions have already started - which include the new proposal.

The proposal concerns different forms of self-consumption of electrical energy in Spain. It applies to:

1. consumers who constructed an installation of not more than 100 kW of electrical energy, destined for their own consumption; and
2. consumers who are connected to a production installation either through an internal grid or through a direct line, independently of the production capacity.

Under the proposal, if consumers want to be connected to the general grid, in view of their self-consumption they must request such a connection to the distributing company, even if they do not deliver energy to the distribution grid, and conclude a contract in this regard.

Consumers are then asked to pay for the connecting installation and to take a proportionate part of the maintenance costs of the grid (€49/MWh). The price of the electricity produced and supplied to the grid, and the price that the consumer takes from the grid, shall be negotiated between the distributing company and the consumer.

Whether consumers are connected to the grid or not, the procedural requirements for being authorised to self-consume are being made considerably more complicated than before, as consumers now need an authorisation for self-consuming; this authorisation is conditioned on several technical and procedural requirements.

The whole concept of this new proposal, as that of its predecessor, appears to be contrary to the declared objective of EU - and Spanish - policy to promote the use of energy from renewable sources and reduce dependency on fossil fuels. Under the proposal, consumers are discouraged from installing systems for self-consumption, as the installation and maintenance cost act as a significant deterrent. Making self-consuming consumers pay for the general grid costs is also counter-productive to uptake.

A possible way forward had been shown by the German Energy Installation Act (Energie-Einspeisungsgesetz). That Act provides that consumers are entitled to have their installation for self-consumption connected to the grid. The costs associated with connecting to the general grid have to be borne by the distributing company, not by the consumer. The Act guarantees a specific price for the electricity that the consumer supplies to the general grid, differentiated according to the source of the renewable energy (PV, wind, etc). The price is guaranteed for a specific time-span. When the consumer takes electricity from the general grid (which he thus

has not generated himself), they pay the general price for electricity, as any other consumer. Indeed other Member States such as Austria and the UK exempt residential solar from most permitting and licensing requirements (license to produce electricity), simply mandating a building permit or a simple notification of the installation's construction to the municipality.¹⁸ This legislation stimulates consumers to install PV or wind energy installations and thus reduce dependency on fossil fuel-generated electricity. It also contributes to reducing GHG emissions and allows individual consumers to participate in the general interest objective of moving towards a low carbon economy.

Conversely, the provisions of the Proposal make the installation of self-consumption plants burdensome, economically risky and financially unattractive. It is a proposal to slow down and even to stop the construction and use of such installations, rather than promoting them. For small self-consumption installations, the energy that is delivered to the grid will not be paid for. For other installations of self-consumption, no price for such energy is fixed, preventing the owner of the installation from calculating his risk, providing great uncertainty. Instead, the Proposal goes into great detail of the price of the 'cargo variable', which the consumer shall have to pay for his connection to the grid.

The proposed Royal Decree on Self-consumption gives the impression of wanting to protect existing electricity producers, distributors and suppliers. By making the consumer pay for accessing the grid, the proposal neglects the fact that it is in the Spanish general interest to have as many self-consumption installations for renewable energy as possible. Spain is a country where PV is particularly profitable, and where wind farms have, at least in certain areas, equally a very important potential. Each construction of a micro-installation for self-consumption is therefore in the general Spanish interest. By discouraging consumers from contributing to the increase of Spanish energy production from renewable sources, the Proposal benefits the large energy market incumbents at the expense of the general interest.

It is indeed possible - although not a foregone conclusion - that increasing the number of self-consumption installations could reduce the market share of market incumbents that generate, distribute, and supply electricity in Spain. Nevertheless, in the medium and long term, it is desirable that the Spanish energy market becomes less dependent on imports of oil and gas and more competitive, not just for renewable energy but also independent distributed generators. Because of its unique geographical situation, Spain has the potential to be a world frontrunner in renewable energy, with all the positive consequences that this entails including innovative technologies, creation of jobs, strengthening the national economy, and citizen participation in the pursuance of national interests.

The global climate, the Spanish citizens, the Spanish economy, and the Spanish general interest will be best served if the proposed Royal Decree on Self-consumption is withdrawn as quickly as possible and replaced by a framework that contains provisions that give modest and predictable yet flexible economic, financial and political support for self-consumption installations that create a true incentive for citizen investment.

¹⁸ Sonvilla, et al (2013). "Initial Project Report," D4.13, PV Grid (July 2013), p 11. Available at <http://www.pvgrid.eu/results-and-publications.html>.

2.2 Providing investment support for self-consumption

To regain investment confidence, both national, Autonomous Community and municipal governments need to commit to developing a new framework to support installations for self-consumption. In the early stages of renewable energy development in Spain operational support through feed-in tariffs helped to incentivise investment. However, tax-based incentives and lending support are also cost-effective in providing a stable investment environment.

Local and regional authorities have the power to implement taxes. The national Government oversees this authority through national laws that govern local taxation and it may also provide, at national level, specific reductions or advantages for value added tax (VAT) for environmentally friendly activities. The Spanish Constitution also allows the Autonomous Communities to impose taxes in areas that are not reserved to the State or the municipalities.

Municipalities have authority to provide tax allowances on activities such as:

- Construction (construction, installations and works tax, or ICIO) – allows for a tax break of up to 95% for construction of solar energy installations/equipment
- Business tax – a tax break of up to 50% for taxpayers that produce or use renewable electricity, regardless of whether it is their main activity; and
- Real estate tax – tax breaks for entities and individuals for up to 50% on real estate where solar panels have been installed

It is up to the municipality to decide whether to allow for these tax incentives or not. In Calvià, the municipality has made efforts to become more independent and to pursue sustainable tourism. As a signatory to the Covenant of Mayors, an EU initiative that makes it eligible to receive financial, informational and other support, Calvià has enacted several measures to promote local renewable energy. In addition to committing to using solar PV to generate electricity for public buildings, within its urban plan the municipality enacted a special ordinance on taxes that are assessed relating to construction, installation and works. Under the ordinance, taxes applied to construction, installation and works to incorporate thermal or electrical solar installations for self-consumption are eligible for a 95% tax credit.

In other Member States, tax relief has also been used by national governments to promote investment in renewable energy by individual citizens. In the UK, for example, to encourage socially responsible investment that benefits the community, members of eligible social enterprises may be entitled to tax breaks under the Seed Enterprise Investment Scheme (SEIS) and the Enterprise Investment Scheme (EIS). Under these schemes, taxpayers may offset 50% or 30% respectively of their investment against their personal tax liability. In Denmark, where citizens invest in collective wind projects, if their annual income from such investments is less than DKK 7,000 (approximately €1,000), it is treated free of tax liability.

There are also examples of national governments providing publicly owned enterprises with tax incentives to invest in low carbon energy technologies. In Germany, the Kreditanstalt für

Wiederaufau (KfW) has in the past provided small grants for the installation of micro-generation systems on public buildings. The KfW has also provided loan support to extend existing district heating grids that use renewable sources of heat.¹⁹ In Denmark, municipalities, along with private individuals, self-employed professionals, small and medium-enterprises and non-profit organisations, are eligible for grants and subsidies to invest in renewable heat technologies.

In order to encourage investment back into the renewable energy sector, local municipalities, Autonomous Communities and the national Government should all play a role. This should include scoping for schemes that allow for specific reductions on income tax liabilities or VAT advantages, as well as soft loan measures. Each level of government should become active to attract investment from local citizens and small and medium enterprises. Combined with removing existing draft proposals to assess fees on self-consumption, investment support will help to build trust that the Spanish Government has lost from its industry and investment community. Furthermore, these measures should be combined with non-financial incentives (e.g. further simplification of administrative and permitting requirements).

2.3 Providing consumers with value for self-consumption

As PV becomes cost-competitive, there is less need to provide production from PV with operational support (e.g. feed-in tariffs for export of PV-generated electricity to the grid). Nevertheless, consumers should still be entitled to receive appropriate value for the environmental and grid operation benefits that self-consumption provides. Such value should be seen, for example, through savings on consumers' energy bills.

Net metering offers consumers the benefit of reduced energy bills against the wholesale price of electricity. Net metering allows consumers to use onsite PV to offset their consumption from the public grid and help save on electricity bills. Denmark uses net metering, which helped incentivise an increase from 17.5 MW of installed capacity in 2011 to 482 MW at the end of 2013. Instead of receiving feed-in payments, eligible installations were exempt from the national Public Service Obligation (PSO) tariff, which is a charge to every consumer based on their level of consumption. Solar installations up to 50 kW are eligible for complete exemption, but they must be connected to the grid, entered into a public register, installed at the place of consumption and owned by the consumer. In 2014, the Government replaced 'yearly' net metering with 'hourly' net metering, meaning that self-production offsets consumption costs only during hours in which they occur.

Due to the competitiveness of PV in Spain, such incentives for consumers would be appropriate. This would help to maintain grid stability into the future, encourage investment once again and get consumers involved in helping achieve energy efficiency and climate objectives. The Spanish Government should consider development of a net metering scheme as a way to support self-consumption from PV. Furthermore, the current norm that requires producers of renewable energy or consumers to pay the distribution operator for their installation/consumption

¹⁹ Hacrow Group Ltd (2008). "Appendix A – International Case Studies – Germany," in Review of Energy Efficiency and Microgeneration Support in Scotland. Prepared for the Scottish Government (March 2008).

point to the existing grid, and then give it away for free to the distributor, should be removed as this represents an over-burdensome disincentive to production for self-consumption.

3 A Community Energy Strategy for Spain

Aside from doing away with the most harmful measures that have been imposed on renewable energy, the Government must commit to supporting a transformation of Spain's energy system. To build public trust, the Government should first commit to supporting projects that benefit local communities and provide for active participation of local municipalities, community initiatives (e.g. co-operatives and other company structures) and individual consumers.

Support for renewable energy in Spain has led to a high penetration of renewable energy in the market. However, this did not translate into a high level of community or citizen ownership. Indeed, community-owned projects represent a small - albeit growing - minority of the total amount of renewable energy projects in Spain. Most projects, particularly in wind and solar, are owned by bigger companies.

It is possible to revive the renewable energy industry in a cost-effective way. An appropriate place to start would be to provide an explicit role for community energy in a comprehensive national level strategy for supporting renewable energy in the future. This initial step would be an economically prudent way to help reignite confidence and public trust in the renewables sector.

When production is owned by citizens the cost of supporting renewable energy can actually be less. This is evident when comparing the price of wind power in the UK and Germany. Even though wind turbines in the UK have a capacity factor that is about 50% more productive than those in Germany, the UK consumer still paid more in 2015 for supporting that technology.²⁰ This can be explained by two factors. First, feed-in tariffs in Germany are designed to reflect actual costs of solar and wind and to come down over time to avoid windfall profits. More importantly, however, a majority of wind and solar in Germany is owned by citizens and community initiatives, while most renewable energy in the UK is owned by big companies.²¹ This is important, because citizens and communities as a whole tend to require lower profit margins in order to make investment attractive, while larger companies usually have higher expectations.²² This has helped make renewable energy development more cost-effective in Germany compared to the UK, even though in principle the UK is more favourable for investment, at least in wind.

A “Community Energy Strategy for Spain” should define community energy to allow appropriate participation by local citizens and municipalities, and provide a framework for integrating community energy into energy law and policy from the national down to the local level. A strategy should also produce a list of targeted action areas where the Government could

²⁰ Morris, C (2015). “Why is wind in the UK so expensive?” *Energytransition.de* (29 April 2015), available at <http://energytransition.de/2015/04/why-is-uk-wind-power-so-expensive/>.

²¹ Agentur für Erneuerbare Energien (AEE) (2013). “Renewable Energy in the Hands of the People,” *Infographics*, available at <http://www.unendlich-viel-energie.de/media-library/charts-and-data.a>.

²² Morris, C (2015), *supra* note 20.

address particular barriers to community ownership and participation in the energy system (e.g. demand side management). A community energy strategy should be developed with open participation processes, including both the general public and community energy stakeholders.

3.1 A success story – the UK's Community Energy Strategy

A national community energy strategy is not a new idea. In January 2014, the UK Government released its own “Community Energy Strategy”.²³ The Strategy established a plan for creating a supportive environment for community energy and removing specific barriers to growth. The aim of the Strategy is to encourage community-owned renewable energy schemes so that every community that wants to form an energy group or take forward an energy project should be able to do so, regardless of background or location. The Strategy also has a goal to help existing community energy groups grow and inspire more to set up and expand.

The Strategy was developed by the UK’s *Department of Energy and Climate Change* (DECC), based on two extensive calls for evidence, which analysed the potential benefits of community energy to the UK’s system, as well as the main barriers to realising community projects. Before the calls for evidence were conducted, DECC established a *Community Energy Contact Group*, an informal advisory body composed of individuals from the community energy sector. The group was established to share views and help examine policies in order to assist the UK Government in ensuring that community energy can play a significant role in the energy transformation.

The Strategy covers many areas, including community ownership and participation in renewable energy production projects, barriers to community projects, heating, selling energy (supply), energy efficiency and reduced energy use, and energy poverty.

Importantly, one of the issues addressed in the Strategy has been the definition of ‘community energy’ in the UK. This is leading to the development of a shared understanding of what community energy means, providing an objective basis and an explicit scope for defining supportive policies. This exercise is important because it will help define who gets to benefit from support, naturally excluding certain actors. However, it will also ensure that support is not abused.

DECC also established a *Community Energy Unit* to coordinate and drive forward the Government’s activity in supporting the sector. The Community Energy Unit plays a key role in overseeing the Strategy’s implementation and provides a direct Government contact point for the sector. The Community Energy Contact Group also continues to actively input into the Strategy’s continued development and implementation.

Much of the Strategy provides guidance and policy support for helping community energy projects get off the ground. For instance, the Strategy encourages and provides advice for how community groups can partner with commercial developers and local authorities. The

²³ Department of Energy and Climate Change (DECC) (2014). *Community Energy Strategy: Full Report*. Available at <https://www.gov.uk/government/publications/community-energy-strategy>.

Government also uses the Strategy to communicate the availability of specific funds to provide projects with start-up support (e.g. feasibility studies, obtaining necessary permits and other preliminary works) and sources of information to provide community groups with government and peer-to-peer advice.

Where short-term solutions to certain issues are not possible, for instance on addressing major barriers that concern key aspects of the energy market, the Strategy provides plans on how to move forward. The Strategy created a list of priority areas for further work between relevant government bodies and stakeholders in areas such as obtaining grid access; opportunities to become licensed suppliers; access to finance; addressing land use planning issues; and other regulatory barriers. In these areas, taskforces have been established, with industry stakeholders, NGOs, experts and government officials participating and contributing ideas on potential ways forward. Each taskforce has reported back to DECC, which is ultimately responsible for providing further political and legal direction on these issues. DECC has responded to most of these reports, either by proposing additional measures or deciding to continue to investigate the issue further.

With one year passed since the adoption of the Strategy, DECC recently released a “*Community Energy Strategy Update*”.²⁴ The Update has provided DECC the opportunity to communicate progress, announce new initiatives, and provide overall policy direction for addressing outstanding issues. In this sense, the Strategy is a living and evolving document designed to chart efforts and progress for developing the community energy sector in a transparent and accountable way to build trust and confidence.

3.2 Spain needs a new renewable energy strategy with an emphasis on community energy

While the concept of community energy exists in Spain, there has never been active support for it under the Government’s policy. However, it has been demonstrated that policies that support community energy contribute to a number of important goals including employment creation, local development of industry and generation of revenue to address community needs.²⁵ Furthermore, policies that support community energy tend to create more value, expecting less return on investment for individuals and recycling profits back into the local economy.²⁶ A renewed focus on sustainable renewable energy development, focusing on community energy, could help Spain rebound from the economic crisis.

Such a strategy could only be developed at national level. As the legislation on the production, transportation and distribution of energy comes under the competence of the national State, a regional strategy could not be successful. A regional strategy could, at best, deal with

²⁴ DECC (2015). *Community Energy Strategy Update: Creating the conditions for long-term growth*, available at <https://www.gov.uk/government/publications/community-energy-strategy-update>.

²⁵ See AEE (2010). “Value Creation for Local Communities through Renewable Energies,” Results of the study by the Institute for Ecological Economy Research (IÖW). Available at <http://www.unendlich-viel-energie.de/media-library/background-papers>.

²⁶ 4-6% for many cooperatives. See Wieg, A et al (2014). Energy Cooperatives: Citizens, communities an the local economy in good company, (DGRV: Berlin). Available at [https://www.dgrv.de/weben.nsf/272e312c8017e736c1256e31005cedff/46dfa793f78e8570c1257d46004ab223\\$FILE/Brochure.pdf](https://www.dgrv.de/weben.nsf/272e312c8017e736c1256e31005cedff/46dfa793f78e8570c1257d46004ab223$FILE/Brochure.pdf).

renewable energy installations that are totally independent from the grid - which means practically only solar installations on roofs.

Indeed, looking at the UK, most of the strategy was developed by the central Government, not at the level of Wales, Scotland, Northern Ireland or England. This is because aside from certain devolved powers (e.g. land use), energy policy remains the preserve of the UK Government. Thus, DECC was responsible for instituting working groups, organising consultations and collecting evidence. Nevertheless, the Strategy's elaboration was treated as development of general interest, and therefore local authorities also participated in its development and have taken an active role in its implementation.

In Spain, the *Ministry of Industry, Energy and Tourism* would be an ideal national Government body to initiate and coordinate the development of a Community Energy Strategy. It would also be advisable to use associations or other bodies that are able to work in the general Spanish interest to provide expert advice and input. Such bodies could help the Government prepare the first elements of a future strategy and go public with the idea, once the new Spanish Government is in place (early 2016). Where relevant, the Autonomous Communities and local governments should also be involved in the development of the Strategy and specific measures, as these bodies have a significant role in providing political leadership, as well as participating, both alone and in cooperation with private enterprises and citizen-led initiatives. Specific attention should also be given to the interests and the influence of the big Spanish multinationals of the energy sector, which may not be interested in seeing such a Strategy move forward.

It should be acknowledged that there are limitations to what the Strategy can do. It will not automatically fix many problems, and as a soft policy document it merely communicates to the public how the Government intends to go about addressing certain problems in the future. Nevertheless, the Strategy provides an explicit platform and a political space, allowing the community energy sector to engage with the Government, provide further evidence of their benefit for the energy system and consumers, and ultimately to obtain a more favourable law and policy environment. Furthermore, if the Strategy is updated in a transparent and participatory way, it can help inspire public trust and legitimacy.

Now is the ideal time to provide citizens and communities a stronger role in achieving national energy objectives. At EU level, the European Council has agreed to a binding EU target of at least 27% by 2030. Furthermore, under a new governance system, Member States will be expected to develop comprehensive and long-term "national plans for competitive, secure and sustainable energy" detailing their contributions towards the 2030 climate and energy targets and objectives, in order to deliver objectives of the Energy Union.

As Spain does not yet have a long-term strategy for its energy system, it will need to develop one over the next two to three years. We recommend that when the new Government steps into power after upcoming elections, it prioritise the development of a new long-term framework to support renewable energy as a central pillar of its future energy system. This framework should include a Strategy to help citizens and communities realise their potential participative role.

In particular, the strategy should focus on:

- Reducing administrative and market barriers for community projects (e.g. grid connections, ownership and supply), and renewable energy projects in general, aiming to enhance competition and provide an equal playing field for all market actors;
- Aiming to establish a cost-effective and sustainable long-term support regime that does not penalise self-production or export of renewable energy; and
- How local governments can lead by example and cooperate with citizen-led initiatives and other private renewable energy enterprises.

This will help to ensure a more equitable and democratic energy system that will help Spain achieve its climate goals. Providing a more supportive legislative environment for smaller new market entrants will also help to enhance competition in the energy sector, which will ultimately benefit consumers by providing them with more choice, better prices and services and opportunities to create jobs and stimulate local economic growth.

4 Enabling local grid ownership/management

While the Spanish electricity market has been liberalised for over a decade and Spanish law requires ‘unbundling’ - or separation - of integrated energy companies, there is still very little effective separation between energy companies and the activities they perform. These companies own distribution, but also produce and supply electricity through separate legal entities. Due to the lack of effective unbundling of distribution and other activities, Distribution System Operators (DSOs) may try to make it difficult for new renewable energy installations to connect to the grid, especially ones that are not owned by them.

However, there is a growing desire by local communities and municipalities to prioritise connection of renewable energy installations, and oversee investment in infrastructure improvements to make sure they are capable of integrating decentralised renewable energy (e.g. more capacity, smarter grids, integrating efficiency, storage, etc) over the long term. As the owner/manager, the DSO is the main actor in making these important decisions. Due to the high cost of market entry and maintenance, grid ownership and management, which is mostly in the hands of the big five companies in Spain, is a natural monopoly, preventing any real competition in the geographical area in which the DSO operates.

There is a need increase competitive pressure on existing DSOs to prioritise grid management around the energy transition. In order to prioritise an energy system on renewable energy and energy efficiency, community initiatives such as co-operatives and municipalities should have more opportunities to compete for the responsibility to maintain and invest in this important infrastructure. As such, national energy legislation should be reformed to require distribution grid owners to designate an entity to undertake grid management through competitive tendering

procedures so that community and municipal enterprises can compete to manage and maintain distribution grids.

4.1 EU legislation on unbundling of distribution system operators (DSOs)

Under EU law, electricity distribution system operations are governed by Directive 2009/72 (IEM Directive on Electricity).²⁷ Under Article 24 of the IEM Directive on Electricity:

“Member States shall designate or require undertakings that own or are responsible for distribution systems to designate, for a period of time to be determined by the Member States having regard to considerations of efficiency and economic balance, one or more distribution operators.”

This means that Member States are under an obligation to ensure that the owner of the distribution system designates an operator to manage the grid for a specific period of time.

The Directive also establishes rules on unbundling of distribution from other aspects of vertically integrated undertakings. Where DSOs are part of a vertically integrated undertaking, they must be independent from the rest of the undertaking in terms of legal form (legal unbundling), organisation and decision making (functional unbundling) with regard to distribution and other activities.²⁸ A number of rules under the IEM Directive on Electricity seek to ensure this independence, both in terms of day-to-day operations and financial capabilities.²⁹ However, DSOs do not need to be separated by ownership from the rest of the undertaking.

Aside from these rules on unbundling, Member States are relatively free to establish their own rules on distribution grid ownership and management, as long as legal form ensures a sufficient level of independence by the DSO from other parts of the vertically integrated entity. There are different approaches that are influenced by national Constitutions and distribution of powers between national and lower levels of government, as well as national approaches towards organisation of the electricity sector. Nevertheless, as the IEM Directive on Electricity also sets out minimum rules Member States can supplement them with further measures to ensure the effectiveness of unbundling and promote competition in the energy sector.

4.2 Spain’s legal framework for ownership and management of grids

Spain has required unbundling since 1997, when transmission and distribution operators were required to be legally separated from the rest of supply and production activities, as well as for accountancy functions.³⁰ Ley 17/2007 added functional and informational unbundling requirements, which was then reinforced in 2010 along with reinforced powers of the *National*

²⁷ Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211, 14.8.2009, p 55 (IEM Directive on Electricity).

²⁸ IEM Directive on Electricity, Article 26(1) and (2).

²⁹ IEM Directive on Electricity, Article 26.

³⁰ Ley 54/1997, Article 14.

Energy Commission (CNE) to supervise and monitor compliance with national unbundling requirements. Unbundling requirements have been maintained in Ley 24/2013, Article 12.

In Spain, distribution system ownership and management is governed at national level, primarily by Ley 24/2013.³¹ For historic reasons, the companies that distribute electricity are owners of the grid. Article 38 of Ley 24/2013 declares that the distribution companies are the manager of the grid.³² There is no obligation to separate ownership and management. Article 38 provides that where more than one manager exist, the Autonomous Communities may make provisions to ensure coordination of the activities of the different managing companies, in the framework of their competences.

According to Article 38(2) of Ley 24/2013, ownership includes:

"... constitutive elements of the distribution grid all those parts of the grid which concern communication, protection, control, accessory services, ground, buildings and other auxiliary elements, whether electrical or not, which are necessary for the adequate functioning of the distribution grids, including the control centres in all their parts and elements which affect the distribution installations."

These expansive ownership rights are protected by the Constitution, which recognises a fundamental right to private property that also applies to the assets of energy companies - including infrastructure.

4.3 Legislation is needed to further separate distribution grid ownership from management

It is clear that liberalisation in Spain has not led to enhanced competition in the distribution of electricity, mainly because companies have been allowed to maintain both ownership and management of the grid as long as it is separated from other activities. Despite a legal requirement for DSOs to unbundle - or become legally and functionally separated - from supply and generation activities, the big five companies in Spain currently manage 96% of the overall distribution network in Spain.³³ Control over distribution has helped the big five maintain their dominant position, preventing competition and concrete steps towards a more sustainable, clean low carbon energy system in line with national and EU climate objectives.

There is a need to further separate ownership of distribution grids from the day-to-day management of the grid. This is because many energy companies, while legally unbundled on paper, are often still very much connected to their counterparts that generate and supply electricity. In practice, the grid operator is not independent but a part of the integrated entity. Although DSOs must be legally separated, Spanish law allows them to belong to a company or

³¹ Ley 24/2013 , de 26 de diciembre, de Sector Eléctrico. Available at www.boe.es/boe/dias/2013/12/27/pdfs/BOE-A-2013-13645.pdf.

³² Ley 24/2013, Article 38.

³³ Aurora Urbina Rodríguez, M (2014). "Analysis of Distribution System Operator Unbundling," Official Master's Thesis in Electric Power Industry, Universidad Pontificia Comillas, pp. 38-39. Supervised by Trebolle, DT (Madrid, July 2014).

a group of companies that carry out incompatible activities.³⁴ The DSO is also allowed to keep the same registered offices, and even though the law requires separate branding many DSOs have maintained the same brands as their counterparts.³⁵ In Spain, according to a study, this has resulted in the owner of generation being in the same business group as the distribution company in the area in 81.98% of cases.³⁶

There is, however, a desire by communities to compete for the opportunity to manage infrastructure. Under Ley 52/1997 of Public Administrative Services, for instance, municipalities may constitute trade associations so that they can offer and provide grid services. As more local communities and public authorities aim to take concrete measures to address climate change and boost local economic growth, they should be enabled by the legal framework to establish a distribution company as an economic activity, and take more responsibility over local energy issues.

The Constitution states that, “a Parliamentary Act may reserve to the public sector the management of essential resources or services especially those of a monopolistic nature.”³⁷ Under Ley 24/2013, the supply of electricity is considered a ‘service of general economic interest’, but not one that is reserved for public administration.³⁸ However, essential services of a particularly monopolistic nature (i.e. considered to be natural monopolies) may be reserved for public administration. Public administration need not entail public ownership of assets, but instead ownership of the service itself. In overseeing this service, the government could then pass on management, for instance under a public contract.

If such a law were enacted for distribution, it would most likely constitute an expropriation of the distribution companies’ property. Such an expropriation is possible under Article 33 of the Spanish constitution, provided this is ‘necessary’. One could argue that it is necessary to further separate grid ownership and management in order to ensure long-term energy security and long-term functionality during the transition to a smarter, sustainable, more decentralised energy system. This is supported by Article 54(2) of Ley 24/2013, which states that:

*“Dicha declaración de utilidad pública se extiende a los efectos de la expropiación forzosa de instalaciones eléctricas y de sus emplazamientos cuando **por razones de eficiencia energética, tecnológicas, o medioambientales** sea oportuna su sustitución por nuevas instalaciones o la realización de modificaciones sustanciales en las mismas.”*

However, the Government would be required to provide affected distribution companies with compensation, which could potentially make a proposal to expropriate distribution grids throughout Spain impracticable.

³⁴ Ley 24/2013, Article 12(2).

³⁵ Aurora Urbina Rodríguez, M (2014), at p 40. See also RD 13, 2012.

³⁶ Pérez, D (2015). “Democratizar la red de distribución eléctrica,” in El Periódico de la Energía.com (7 Enero 2015), available at <http://elperiodicodelaenergia.com/democratizar-la-red-de-distribucion-electrica/>.

³⁷ 1978 Constitution of Spain Article 128 (2).

³⁸ Ley 24/2014, Article 2(2).

Alternatively, it may be possible to add provisions to Ley 24/2013 that require distribution companies to create a designation process where the management of the grid is tendered out to other entities. The designation process would need to be conducted in a transparent and competitive manner, according to considerations of efficiency and economic balance, which could be clarified by CNMC (*Comisión Nacional de los Mercados y La Competencia*). Under such a system, the grid owner would maintain ownership over the infrastructure. In order to maintain property ownership rights under the Constitution, the grid owner would be eligible to receive an appropriate fee in exchange for the successful tender to provide the management function. In essence, the winning tender would include a proposal to pay the owner an appropriate set fee, as an operation cost to the successful bidder.

It is advised that key questions of property rights and ownership be further looked into, particularly what level of compensation would prevent or minimise claims for compensation due to expropriation. Furthermore, proposals should ultimately be economically viable for entities bidding for management of the grid to provide a fee, etc. As national legislative change would be required, the issue would also require participation of the legislature and the Government.

Legislative reform could be supplemented by requirements for DSOs to take into account sustainability and climate when undertaking their duties. Under Article 40 of Ley 24/2013, DSOs have a duty to, *inter alia*, "maintain technical adequacy", and "be responsible for the construction, operation, maintenance and, where necessary, the development of its distribution network to ensure that the network has capacity to take in the long term reasonable demands for electricity distribution."³⁹ DSOs must carry out this duty according to criteria established by the Central Government. However, no such sustainability criteria have been established. However, DSOs must also carry out their functions according to applicable environmental regulations.⁴⁰

Criteria should be developed by the Spanish Government that require DSOs to take into account sustainability and climate when undertaking their duties under national legislation. Alternatively, Ley 24/2013 should be amended to creating an additional duty for DSOs to take into account sustainability and climate in the carrying out of their functions. Such a duty already exists in other Member States such as Denmark.⁴¹ Such amendments would have the effect of adding both sustainability criteria and competitiveness into the electricity sector.

Lastly, Ley 24/2013 could be amended to establish provisions for the construction of new distribution lines. This would avoid affecting property questions over distribution infrastructure. Under an amended legislative framework, municipalities could obtain the right to establish new distribution lines from the point of electricity production from renewable sources (wind farms, photovoltaic panels etc) in their territory into the transmission network (red de transporte de energía eléctrica), and to declare the municipalities the owner of such distribution lines. Under the legislation, several municipalities could be eligible to act jointly.

³⁹ Article 42(1)(a) and (b).

⁴⁰ Article 41(2), Ley 24/2013.

⁴¹ Act No 516 of 1 January 2010 on Electricity Supply, section 21.

In order to create such a legal framework, there is a need for additional provisions that:

1. oblige the transportation network to accept the access of that electricity to the transportation network, including the necessary construction work; and
2. ensure a guaranteed price for such energy.

It is another policy question, whether such a system should be extended to community energy projects. If such an option were considered, it should be reflected how the property question of the new distribution lines could be solved. Leaving the ownership of such lines in the hands of private persons might perpetuate the current situation by which there is a lack of competition. When municipalities become the owner of such lines, they should have an obligation to maintain the lines. The municipalities would also be able to sell the new distribution line to a distribution company, once the construction work is finished and access to the transport network ensured.

About the Community Power Project

These recommendations are a part of the Community Power project, a project in 12 European countries aiming to put people first at the heart of increased renewable energy. Check out the website of the project at www.communitypower.eu.

The partners in the Community Power project are:

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