

## SPANISH PARLIAMENT APPROVES THE NEW FINANCIAL RATE OF RETURN OF FACILITIES FOR THE GENERATION OF ELECTRICITY FROM RENEWABLE ENERGY SOURCES AND COGENERATION, AND OTHER MEASURES IN RELATION TO THE CLOSURE OF COAL-FIRED AND NUCLEAR POWER PLANTS

Last Saturday, Royal Decree-law 17/2019, dated 22 November, was published in Spain's Official State Gazette. This Decree implements urgent measures to adapt remuneration parameters affecting the electric system and is in response to the process for the closure of thermal power plants ("**RDL 17/2019**").

RDL 17/2019 was approved in today's sitting of the Permanent Committee of the Spanish Parliament's Chamber of Deputies and its aim is essentially as follows:

- a) To establish, for the regulatory period beginning on 1 January 2020 and ending on 31 December 2025, the new reasonable rate of return for renewable energies and cogeneration facilities applying the specific remuneration regime (7.09%) and the new financial remuneration rate for generation activities in the electric systems of Spain's non-peninsula territories which apply the additional remuneration regime (5.58%).
- b) To maintain the reasonable rate of return deriving from Royal Decree-law 9/2013, of 12 July, which adopts urgent measures to ensure the financial stability of the electric system ("RDL 9/2013") for power plants prior to the entry into force thereof, which were entitled to apply a specific remuneration regime (7.398%), during two regulatory periods (2020-2031), provided that:
  - i. no court or arbitration claim is filed based on the modification of the special remuneration regime carried out subsequent to Royal Decree 661/2007, of 25 May ("RD 661/2007"), including claims deriving from the entry into force of RDL 9/2013 and from its implementing regulations, and that
  - ii. if any such claim has been filed in the past, the claimant expressly agrees to abandon it and waives the receipt of any indemnification or compensation to which it might be entitled, prior to 30 September 2020.
- c) To authorise the potential re-awarding of access to the grid or of the waters granted in concession which may become available following the closure of the coal-fired or nuclear power plants, in favour of projects which meet economic, social and environmental criteria.

### **1. Is it lawful in Spain to establish an asymmetrical regulation for those facilities which agree to not file any new claims, to abandon any existing claims, and to waive the receipt of the indemnification or compensation to which they may be entitled?**

This asymmetrical regulation is an incentive to eliminate disputes arising from the new remuneration regime applicable to facilities for the generation of electricity from renewable energy sources or from high-efficiency cogeneration, and it is not the first regulation in Spanish law to contain incentives to not file claims. In any event, it is true that this incentive may on many occasions lead to a misalignment of objectives between the past, present and future shareholders of projects affected by RDL 17/2019, since they do not all benefit from the same protection under international law on the protection of investments. The fundamental issue, in Spanish law, would be whether the ordinary rate of return (set at 7.09%) for those facilities which cannot or choose not to apply this asymmetrical regulation were considered unreasonable.

## **2. Is it more advantageous to maintain the previous rate of return of 7.398% for twelve years?**

In the current legal context, the promise to maintain the rate of return of 7.398% until the year 2031 is more advantageous, but it is important to note that this rate would be 'frozen' for twelve years. Therefore, if the new reasonable rate of return that is approved for the period 2026-2031 is higher than 7.398%, it will be detrimental to the facilities applying this regime, unless this rate is adjusted by law.

## **3. Which facilities are entitled to apply the special rate of 7.398%?**

Those facilities which were entitled to apply a specific remuneration regime prior to the entry into force of RDL 9/2013 can apply this rate, provided that:

- a) Their regulatory useful life permits them to continue to receive remuneration paid out of the electric system beginning in 2020;
- b) they do not file court or arbitration claims (either themselves, or their direct or indirect owners, nor any other person or entity whose entitlement derives from any of the latter) in relation to any changes to the remuneration regime subsequent to RD 661/2007 or, if they have filed a claim, they provide proof that the court or arbitration proceedings have concluded prior to the ruling stage and that they officially agree to abandon and not resume them, and that they waive the receipt of any indemnification or compensation acknowledged to them as a result of such proceedings, until 29 September 2020, and
- c) they do not officially make such waiver before the Directorate General for Energy Policy and Mines prior to 1 April 2020 (in which case, the waiver will be effective retroactively as from 1 January 2020).

## **4. What impact does this specific rate have on the possibility of challenging new changes to the remuneration regime approved in the future?**

The range of court and arbitration claims which would be incompatible with the application of this specific 7.398% rate is very broad, because it refers to any modifications of the special remuneration regime made subsequent to RD 661/2007, including those deriving from the entry into force of RDL 9/2013, and from their implementing regulations. It is an open list, which could potentially entail a penalty -with the loss of the spread between the 7.398% and the general rate of 7.09%- for any power plant (or its direct or indirect owners or third parties whose entitlement derives from the latter) filing a claim against any future changes to the remuneration regime.

## **5. What happens in the event of a breach of any of the conditions for applying the special rate of 7.398%?**

RDL 17/2019 establishes that the right to apply the reasonable rate of return of 7.398% would be entirely lost (resulting in the application of the ordinary rate of return of 7.09%) when court or arbitration proceedings have been or are brought in relation to the rate of return of these facilities, based on the modification of the special remuneration regime carried out subsequent to RD 661/2007. If any indemnification or compensation deriving from such court or arbitration claims were ultimately received, the revocation of this right would be produced with effects beginning on 1 October 2020, and therefore the application of the specific rate would be maintained for these facilities from 1 January to 30 September 2020.

RDL 17/2019 is worded in such a way that it leaves some serious doubts open to interpretation, such as what the effective date of the revocation of the special rate of 7.398% would be, if a new claim were filed after 1 October 2020.

## **6. Can a power plant be deprived of the right to apply the specific rate of 7.398% due to the fact that a shareholder has filed or is filing a claim, itself or through a third party, opposing the changes to the remuneration regime subsequent to RD 661/2007, pursuant to the international law on the protection of investments?**

The measure adopted in RDL 17/2019 is an attempt to undermine the enforceability of the compensation that can be ordered by international courts in cases in which Spain is sentenced in relation to changes to the special remuneration regime made subsequent to RD 661/2007. Those investors who were entitled to compensation as a result of the changes to the remuneration regime, pursuant to the international law on the protection of investments, may feel that this measure is designed to undermine their rights. In this regard, it could represent an attempt to eliminate the effects of the sentence imposed upon Spain for having violated the international law on the protection of investments and, therefore, it could not be considered to be in line with that same law, insofar as it would likewise entail a rejection of the treatment and protection afforded to investments made within the regulatory framework defined in RD 661/2007.

**7. Do the current owners of coal-fired and nuclear power plants hold a preferential right to reuse the capacity to which they have access, for new generation projects from renewable energy sources, or even to reutilise the waters currently granted to them in concession, for new projects following the plants' closure?**

No. RDL 17/2019 establishes that procedures are to be put in place for the reutilisation of both the rights to access the grid and the rights to use the water held by coal-fired and nuclear power plants, which become available following their closure, in favour of those projects which meet social, economic or environmental criteria. The plants' owners will be able to present projects which meet these requirements but hold no preferential right in terms of their awarding.

**8. Is it lawful for access to the grid to be granted according to social or environmental criteria?**

In our opinion it is not, because the granting of access to the grid should be in response to whether or not available capacity exists, pursuant to European Union law..

**9. When did RDL 17/2019 enter into force and why is it expected to give rise to new liquidations?**

RDL 17/2019 entered into force on Sunday, 24 November (the day after its publication in the Official State Gazette) and it was approved in today's sitting of the Spanish Parliament. A special meeting of the Permanent Committee of the Chamber of Deputies was called for this purpose.

In order for the specific remuneration established in RDL 17/2019 to be applied and liquidated, the Ministry of Ecological Transition must also approve the Order revising the remuneration parameters for the second regulatory period, which is to be approved before 31 December 2019. Given the circumstances, it does not seem likely to be approved by then, and so as a result, RDL 17/2019:

- a) extends the term for the Order to be approved until 29 February 2020; and
- b) establishes that until such Order is approved, the remuneration received during the first regulatory period continue to be liquidated, paid out of the remuneration which effectively corresponds to the plants during the second regulatory period. Once the Order is approved, the corresponding rights or obligations will be liquidated out of the following liquidation.

## CONTACTOS / CONTACTS

**Jaime Almenar**  
Socio / Partner

**T** +34 91 590 41 48  
**E** Jaime.Almenar  
@cliffordchance.com

**José Luis Zamorro**  
Socio / Partner

**T** +34 91 590 7547  
**E** JoseLuis.Zamarro  
@cliffordchance.com

**Ignacio Díaz**  
Socio / Partner

**T** +34 91 590 9441  
**E** Ignacio.Diaz  
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, Paseo de la Castellana 110,  
28046 Madrid, Spain

© Clifford Chance 2019

Clifford Chance, S.L.P.U.

Abu Dhabi • Amsterdam • Barcelona • Beijing •  
Brussels • Bucharest • Casablanca • Dubai •  
Düsseldorf • Frankfurt • Hong Kong • Istanbul •  
London • Luxembourg • Madrid • Milan •  
Moscow • Munich • Newcastle • New York •  
Paris • Perth • Prague • Rome • São Paulo •  
Seoul • Shanghai • Singapore • Sydney •  
Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement  
with Abuhimed Alsheikh Alhagbani Law Firm  
in Riyadh.

Clifford Chance has a best friends relationship  
with Redcliffe Partners in Ukraine.