



## ENERGY AND NATURAL RESOURCES

# RETROACTIVE REFUND OF STATE GRANTS FOR RENEWABLE ENERGY GENERATION WITH FEED-IN TARIFFS

Order no. 268-B/2016, of 13 October, issued by the Secretary of State for Energy entered into force on 14 October and is highly detrimental to those private investors who have benefited from state grants over the years.

This legislation imposes, with immediate effect, an obligation for power plants benefiting (or having benefited) from guaranteed remuneration for energy generated from renewable sources supplied to the public grid (known as «*feed-in-tariffs*») to refund to the Portuguese State part of amounts received to the extent they also benefited from other types of state grants (or incentives) to promote and develop projects to generate power from renewable energy, including cogeneration.

The reasoning behind this Order is that state grants should not have been received cumulatively with the guaranteed remuneration referred to above. As a result, the intention of the Portuguese State is that amounts received in excess should be paid back through the Last Resort Supplier («LRS»). This supposed excess is to take effect in the upcoming 2017 tariff period.

The need for this «offsetting» is based on the Government's aim to lower the electricity consumption bill and the tariff deficit of the National Electric System («NES») linked to the extra costs incurred by this sector, including the costs arising from tariff incentives to generators, with a view to achieving greater sustainability of the NES.

Nonetheless, several doubts arise from this Governmental Order, such as:

- Which (cumulative) state grants are covered?
- What is the legal basis behind the requests to refund the incentives?
- How far back will the Government go regarding cumulative incentives?
- Exactly how will the adjustment of the excess amounts be processed?
- When will the obligation to refund the amounts in excess (even if through offsetting) be due by generators?

The DGEG - Directorate General for Energy and Geology will have to (i) identify the excess amounts received by each power plant, and (ii) set down the amount in euros per MWh to be offset against the remuneration to be received from the LRS.

The DGEG has already started notifying power plants to (i) confirm the amount received *as from the granting of the production licence*, and (ii) provide extensive information and documentation, evidencing, inter alia, investment amounts and operating and maintenance costs, within 10 working days. If it is concluded that the **Governmental Order is illegal or unconstitutional**, the acts and administrative decisions performed/issued under or as a result of it may be challenged in court on the grounds of their illegality and unconstitutionality.

If any foreign entity owns rights over any of the renewable energy generation projects covered by the Order in question - directly or through any kind of equity stake - these foreign investors will be entitled to bring a legal action directly against the Portuguese State by means of **international investment protection arbitrations**. They will be able to do this under international law and regardless of the lawfulness or constitutionality of the Order under the Portuguese legal system, by claiming for compensation from the Portuguese State on the grounds of the negative impact of the Order on their investments.

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