

Wind energy tariffs: the perspectives after the ECJ's decision of 19 December 2013

This client briefing addresses some of the questions raised by the recent preliminary ruling of the European Court of Justice following a request of the *Conseil d'Etat*. It may not be relied upon as legal advice.

Context

On 15 May 2012, the *Conseil d'Etat*, acting as the French highest administrative Court, requested the European Court of Justice (the "ECJ") to give a preliminary ruling on the question of whether the feed-in tariffs for onshore and offshore wind electricity set by the ministerial order of 17 November 2008 (the "2008 Order") constituted a State aid measure¹.

On 19 December 2013, the ECJ decided that the feed-in tariff scheme based on taxes levied by the State on consumers fell within the concept of aid granted by the State or through State resources².

It is now most likely that the *Conseil d'Etat* will cancel the 2008 Order. Indeed, as the 2008 Order

constitutes a State aid measure, it should have been notified previously to the European Commission under the State aid regime and should be considered as unlawful because of the failure to respect this legal requirement.

The future *Conseil d'Etat*'s decision and the way the French authorities and the European Commission will react in the next few months will be crucial for the wind industry in France and more generally for the feed-in tariff scheme.

Indeed, although the 2008 Order has remained in force after the *Conseil d'Etat*'s ruling in 2012, many wind farm projects have been put on hold since sponsors and lenders wanted to wait for the ECJ solution before moving forward³. It is true that the

adoption of a law in April 2013⁴ which brought some elements of

Key issues

- Context
- The French scheme of feed-in tariffs
- The reasons of the ECJ's decision
- The consequences of the ECJ's decision

simplification to the regulatory framework applicable to wind farms has been considered as an improvement by the industry.

is indeed one of the selection criteria and bidders are invited to propose the most competitive purchase tariffs. Consequently, if the 2008 Order was cancelled, there should be no direct consequences on such offshore wind farms.

⁴The law n° 2013-312 of 15 April 2013, referred to as "*Loi Brottes*", abolishes, among others, the minimum "five turbines" requirements and the wind development area (*Zone de Développement Eolien*), replaced by the Regional Wind Development Scheme. Derogation to the "*loi littoral*" is also included for the connection to the grid of off-shore wind farms.

¹ CE, 15 May 2012, *Association Vent de colère*, case n° 324852.

² ECJ, 19 December 2013, *Association Vent De Colère! Fédération nationale*, case C-262/12.

³ Please note that the 2008 Order is not applicable to the offshore wind farm projects which are granted by the French State through a tender process (the results of the first tender process were published in April 2012). In this case, the energy tariff

Nevertheless, significant uncertainty over wind energy tariffs in France has remained and is now heightened because of the ECJ's ruling; if the *Conseil d'Etat* cancelled the 2008 Order, wind energy producers would face a legal loophole concerning the fixing of their tariffs. Further, the producers would be exposed to State aid recovery issues.

The French authorities are in discussions with the European Commission and seem willing to reassure wind industry operators in relation to the legal framework of wind energy tariffs.

The French scheme of feed-in tariffs

It has been acknowledged for several years, both at European and national levels, that renewable energies offer a strong possibility to boost environmental protection as well as to contribute to economic development.

Going a step further *vis-à-vis* the former European approach, under which the production of renewable energy was already promoted but through non-compulsory objectives, the European directive of 23 April 2009 *on the promotion of the use of energy produced from renewable sources* has set out mandatory targets in terms of share of the gross final consumption of energy to be produced from renewable sources. In France, such target has been set at 23% for year 2020.

Currently, around 18.6% of the French net electricity production is generated from renewable sources⁵. Precisely 2.9 % of the 2013 French net electricity production is generated from wind sources, 0.8 % from photovoltaic sources and 13.8 % is produced from hydraulic sources⁶.

Given the low intrinsic profitability to date of renewable energy production, the development of such kind of production necessarily goes through State supported schemes (made easier by specific rules under State aid law⁷).

Practically, all member States of the European Union have adopted specific schemes aiming

to support the development of electricity produced from renewable energy sources⁸.

Among different kind of financial incentive schemes ("green certificates", premiums, investment grants, tax exemption...), feed-in tariffs are the most widely used⁹. It is also the main incentive tool used in France.

In France, the law of 10 February 2000 *on the modernisation and development of the public electricity service*, now largely codified in the French Energy Code¹⁰, introduced an obligation for EDF as well as for other "non-nationalised operators" to purchase electricity produced from renewable energy sources at favourable feed-in tariffs. Such purchase obligation applies notably to wind produced energy, whether such energy is produced by onshore windfarms or offshore wind farms (if located within the maritime public domain or within

⁵ 2013 French electrical statement (*Bilan électrique 2013*), Réseau de transport d'électricité. Electricity generated from nuclear sources remains highly dominant and accounts for 73.3% of French production.

⁶ 2013 French electrical statement (*Bilan électrique 2013*), Réseau de transport d'électricité.

⁷ Public measures supporting renewable energy production remain subject to State aid rules but they have enjoyed reasonably flexible guidelines allowing the European Commission to state in various cases that such measures can be deemed compatible with the common market (to summarise, State aids for environmental protection are compatible with the common market if, on the basis of a balancing test, they lead to increase environmental protection activities without adversely affecting trading conditions to an extent contrary to the common interest – for additional information, please refer to the 2008 Community guidelines on state aid for environmental protection).

⁸For a list of the various measures settled by the member States, see the Communication of the Commission to the European Parliament and the Council of 31 January 2011, COM(2011) 31 final, p. 10.

⁹ According to the above cited 2011 communication of the European Commission, 21 member States of the European Union settled feed-in tariff schemes.

¹⁰ Article L. 314-1 of the French Energy Code.

the French exclusive economic zone).

The tariffs set up by the 2008 Order are around 8.2 c€/kWh for onshore produced wind electricity in mainland France and Corsica (during the first 10 years, another tariff being possibly applicable for the next 5 years depending on the yearly duration of use) and around 13 c€/kWh for offshore produced wind electricity (during the first 10 years then decreasing, another tariff being possibly applicable for the next 10 years depending on the yearly duration of use).

As EDF and the "non-nationalised operators" bear the obligation to purchase, they are compensated through a complex mechanism, involving notably the *Caisse des dépôts et consignations* (CDC) and the Commission for the Regulation of Energy, both French public entities. Such compensation mechanism is being financed by the "contribution for the public service of electricity", a tax collected from electricity consumers.

The reasons of the ECJ's decision

A measure will constitute a "State aid" if four cumulative conditions are met: (i) there must be an intervention by the State or through State resources; (ii) that intervention must be liable to affect trade between Member States; (iii) it must confer an advantage on the recipient; and

(iv) it must distort or threaten to distort competition.

The *Conseil d'Etat* considered in its decision of May 2012 that the 2008 Order favours wind energy producers by granting them a tariff higher than its market value in a way which may affect trade between Member States and distort competition. This solution is consistent with the European Commission decisions on certain European incentive schemes.¹¹

The only State aid qualification criterion where the *Conseil d'Etat* considered the issue was not clear-cut related to the State resources criterion, such question being specifically the one brought by the *Conseil d'Etat* before the ECJ.

In its decision dated 19 December 2013, the ECJ replied that the offsetting mechanism of the additional costs imposed on EDF and the "non-nationalised operators" because of the obligation to purchase wind-generated electricity at a price higher than the market price, which is financed by all final consumers of electricity,

constitutes an intervention through State resources¹².

The ECJ's decision is based on the following:

- The new offset mechanism is attributable to the French State.
- The new offset mechanism constitutes an advantage granted through State resources.

The ECJ has pointed out that an advantage, although not involving the transfer of State resources, may be categorised as State aid if it is granted directly or indirectly through State resources. The concept of "intervention through State resources" is intended to cover, in addition to advantages granted directly by the State, also those granted through a public or private body appointed by that State to administer the aid.

As regards the resources being State resources, the ECJ observed that the sums

¹¹ See for example the decision of the European Commission of 28 January 2009 on the Luxembourg compensation scheme and the decision of the European Commission of 24 April 2007 on the Slovenian support scheme.

¹² The ECJ has explained that its ruling must be distinguished from that in Case C 379/98, *PreussenElektra*, in which the ECJ held that an obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable sources at fixed minimum prices could not be regarded as an intervention through State resources where it does not lead to any direct or indirect transfer of State resources to the undertakings producing that type of electricity.

intended to offset the additional costs arising from the obligation to purchase imposed on the undertakings are collected from all final electricity consumers in France and entrusted to a public body, the CDC. Furthermore, the amount of the charge imposed on each final consumer of electricity is determined annually by ministerial order.

As the ECJ has previously held¹³, funds financed through compulsory charges imposed by national legislation, managed and apportioned in accordance with the provisions of that legislation, may be regarded as State resources.

As regards control by the CDC, the ECJ has pointed out that the CDC is acting as an intermediary in the management of the funds, centralising the sums collected in a special account before paying them out to the operators concerned. Further, the CDC is under an express mandate from the French State to provide administrative, financial and

accounting management services for the Commission for the Regulation of Energy.

Therefore, the sums managed by the CDC must be regarded as remaining under public control, and thus available to the French authorities.

The definitive categorisation of that measure as "State aid" should be pronounced by the *Conseil d'Etat*. However, given the above mentioned elements and consequences, it is now clear that the French authorities should have notified the 2008 Order to the European Commission, as several member States did with their own incentive schemes.

The French authorities' failure is even more regrettable when one considers that the 2008 Order would have been examined on the ground of the 2008 Community guidelines on State aid for environmental protection which, as mentioned above, appear to be relatively flexible.

For not having acted carefully, France is now facing a troubled situation.

The consequences of the ECJ's decision

The ECJ's decision that the criterion of the State resources is fulfilled will probably bring the *Conseil d'Etat* to rule that the feed-in tariff scheme for wind energy under the 2008 Order sets out a State aid measure. Indeed the *Conseil d'Etat* had considered in 2012 that the three other

criteria for the qualification of a State aid measure were met. Therefore the *Conseil d'Etat* will probably cancel the 2008 Order because the State aid measure is unlawful since it has not been previously notified to the European Commission¹⁴.

The *Conseil d'Etat* may specifically rule on the effects of its decision, in particular regarding the existing sale agreements.

It is true that, in principle, any cancelled administrative act is deemed to have never come into force. However, the French administrative judge may limit the temporal effects (in the future) of the cancellation of an administrative act if the consequences of a retroactive cancellation would be manifestly excessive regarding the public and private interests involved¹⁵.

Nevertheless, such a restriction seems unlikely in the present case since (i) the *Conseil d'Etat* had refused to limit the temporal effects of the cancellation (due to a procedural defect) of the previous applicable order on wind energy tariffs published on 10 July 2006¹⁶ (ii) the *rapporteur public*

¹³ The ECJ had previously ruled that the payment of a price surcharge imposed on electricity consumers and to be paid to their net operator constitutes a State resource transfer within the meaning of State aid law (ECJ, 17 July 2008, *Essent Netwerk Noord BV*, case C-206/06).

¹⁴ The prior notification of an aid is an obligation of the Member States imposed under Article 108 (3) of the Treaty on the Functioning of the European Union (TFEU).

¹⁵ CE, Assembly, 11 May 2004, *Association AC ! et autres*, case n° 255886.

¹⁶ CE, 6 August 2008, *Association Vent de*
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(the French equivalent before the *Conseil d'Etat* of a general advocate) concluded in 2012 that the 2008 Act should be cancelled with full effect and (iii) the ECJ has rejected France's request for the temporal effects (in the future) of its judgment to be limited.

The decision of the *Conseil d'Etat* is expected in the first half of 2014.

The possible cancellation of the 2008 Order may have important short- and mid-term consequences

Uncertainty over past and future wind energy tariffs.

If the 2008 Order is cancelled and deemed to have never come into force, feed-in tariffs established by that order would no longer be applicable.

In addition, the cancellation of the 2008 Order would unfortunately not bring back into force feed-in tariffs enacted by the 2006 order, which were previously applicable, as these were cancelled by the *Conseil d'Etat* in 2008.

Whether feed-in tariffs applicable prior to 2006, i.e. the tariffs enacted by the 2001 order, would again be in force is legally uncertain and it is not clear whether such tariffs would be sufficient for wind energy producers who had decided to invest on the basis of feed-in

tariffs established by the 2008 Order and furthermore, the 2001 order would not offer an appropriate legal basis in any hypothesis since in particular, established feed-in tariffs concerned only wind farms of 12 MW and below.

There are several examples of cancellation of tariff orders by the *Conseil d'Etat* such as the cancellation of gas tariff orders leading to revised invoices for the consumers.

As for the future, in theory, the obligation to purchase wind energy imposed on EDF and non-nationalised operators would remain into force. However, and save where specific contractual provisions could be relied on, performing this obligation would become almost impossible because of a major uncertainty in terms of applicable tariffs.

In order to secure the legal framework for the future and the past, French authorities have notified the feed-in tariff scheme for wind energy to the European Commission in October 2013¹⁷; the decision of the European Commission is expected in the first semester of 2014.

If the European Commission were to consider the actual scheme as

being compatible with the common market¹⁸, French authorities could cope with the 2008 Order cancellation. They would only have to re-enact provisions of the 2008 Order through a new order with retroactive effects as they did back in 2008 after the cancellation of the 2006 order that the 2008 Order replaced. Such action would secure purchase contracts which were concluded under the 2008 Order.

This new order would also replace the 2008 Order for the future and then allow the development of new wind farm projects in a secure legal framework. Both wind energy producers and the French State (who is bound by the mandatory targets of energy production from renewable sources imposed by the 2009 European directive) would take advantage of it.

However, it should be noticed that the French Authorities will only be able to take a new order setting the feed-in tariffs for wind energy after the mandatory consultation of the Supreme Council of Energy and the Commission for the Regulation of Energy.

¹⁸ Please note that the content of the notification to the European Commission by French authorities of the tariff scheme for wind energy has not yet been published. The consequences of the notification will depend on the exact scope of the decision of the European Commission.

¹⁷ Press release of the French Minister for Ecology, Sustainable Development and Energy issued on 20 December 2013.

Reimbursement obligation of wind energy producers.

The national authorities shall in principle order the recovery of an unlawful aid, i.e. an aid put into effect without previous notification to the European Commission.

Wind energy producers should then be compelled to refund feed-in tariffs they have benefited from, including interest payable from the date on which the unlawful aid was at their disposal until the date of its recovery¹⁹.

It should be noticed that, by way of exception to the reimbursement obligation principle, if the European Commission stated that the French feed-in tariff scheme for wind energy was compatible with the common market, the national authorities may decide not to order the recovery of the unlawful aid. In that case, the aid recipients, i.e. the wind electricity producers, would nevertheless have to pay interests in respect of the period of unlawfulness²⁰. The

purpose is to offset the undue advantage consisting in the non-payment of the interest which the recipients of the unlawful aid would have paid, if they had had to borrow the amount of the aid on the market pending the Commission's decision²¹.

In any case, the State would be exposed to liability actions triggered by wind energy producers who were aid recipients before the administrative courts²². Further, it is likely that several wind energy producers could be tempted to challenge the national decisions ordering them to refund the tariffs and, as the case may be, the European Commission's decision declaring the French feed-in tariff scheme incompatible with the common market.

(ECJ, Grand Chamber, 12 Feb. 2008, *CELIF*, C-199/06, P. 51 - 53).

²¹ The interest rate to be used for recovering State aid shall be calculated by adding to a base rate equal to the one-year money market rate (1 year-IBOR) a margin depending on the rating of the undertakings concerned and the collateral offered (100 basis points are to be added to the base rate for undertakings with satisfactory rating and collateral). The interest rate to be applied shall be the rate applicable on the date on which the unlawful aid was first put at the disposal of the beneficiary. Please refer to articles 9 to 11 of the Commission Regulation n° 794/2004 of 21 April 2004 and to the Commission Communication n° 2008/C 14/02 for further details.

²² See for example CAA Paris, 11 May 2009, *SA Baizet*, req. n° 07PA01777; CAA Paris, 25 May 2009, *SA Allemand Industries*, req. n° 07PA01787.

New uncertainty over the legal framework of renewable energy tariffs.

Currently, under the French Energy Code, EDF and other "non-nationalised operators" are obliged to purchase at favourable feed-in tariffs electricity produced from renewable sources, such as hydroelectricity, wind, solar panels, provided that certain conditions are met²³.

The level of remuneration of the producers depends on the type of renewable technology used and is fixed under specific orders that have not yet been notified to the European Commission.

In order to secure the legal framework, French authorities are now engaged into actions on the short and mid-term levels.

On the short-term, French authorities are seeking to secure the feed-in tariff scheme existing for renewable energies. As mentioned above, the existing feed-in tariffs for wind energy, set up by the 2008 Order, have been notified to the European Commission in October 2013.

Further, the other existing tariffs should remain into force in the

¹⁹ It would then become necessary to determine to which extent wind energy producers should be compensated for the electricity they effectively produced and sold prior to the 2008 Order nullification.

²⁰ The ECJ has ruled that: "*The national court is not bound to order the recovery of aid implemented contrary to [Article 107 (3) TFEU], where the Commission has adopted a final decision declaring that aid to be compatible with the common market, within the meaning of [Article 107 TFEU]. Applying European law, the national court must order the aid recipient to pay interest in respect of the period of unlawfulness.*"

²³ Producers must obtain an authorisation to operate an electricity production facility. In order to benefit from the feed-in tariff, they must also obtain a power purchase certificate which then allows them to enter into a purchase agreement with EDF or non-nationalised operators.

short or mid-term, possibly coexisting with other new measures. In this context, France should notify to the European Commission all the feed-in tariffs in 2014²⁴.

On the mid-term, following a national debate on energy transition, a process of simplification of the regulatory framework applicable to renewable energies is underway. A draft bill in relation to energy transition (setting out guidelines) will be published in the second quarter of 2014.

To this end, the French Government has launched public consultations, in particular:

- The white paper on the financing of environmental transition, which aims to modify the regulatory regime for investments (November 2013);
- The consultation relating to a new regulatory framework for the support scheme for renewable energies, which proposes the following options: (i) if retained, a new feed-in tariff scheme with new obligations for power

generators, or (ii) a move from a feed-in tariff model (FITs) to a feed-in premium model (FIPs), or (iii) green certificate schemes based on quotas (December 2013).

This consultation is in line with the public consultation that the European Commission has launched on 18 December 2013 on draft rules for state support in energy and environmental field, in order to replace the above-mentioned State aid Guidelines on Environmental Protection entered into force in 2008. The European Commission underlined that State aid for renewable energy "*should gradually move to more market friendly support in the form of market premiums or certificate schemes*"²⁵.

²⁴ French Minister for Ecology, Sustainable Development and Energy's closing address in a meeting of the French Electricity Association (*Union Française de l'Électricité*) on the topic "The energy challenges of France and Europe in 2050", 22 October 2013.

²⁵ The Ministers for Energy from the United Kingdom, France, Germany and Italy sent a letter on 14 March 2014 to Joaquín Almunia, the European Competition Commissioner, to express concerns that the current draft of the guidelines risks constraining the ability of Member States to determine their national energy policy. They underline, in particular, that the rules on the funding mechanism for renewable energy are too restrictive and ask for appropriate transitional arrangements.

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