

# Wind of uncertainty : towards another cancellation of wind energy tariffs?

This client briefing addresses some of the questions raised by a recent case ruled by 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 ministerial order of 2008 setting the feed-in tariffs for onshore and offshore wind electricity (the "2008 Order") constitutes a State aid measure<sup>1</sup>.

If the ECJ was to answer that the 2008 Order constitutes such a measure, the *Conseil d'Etat* would then have to cancel the 2008 Order. Indeed, as a State aid measure, the 2008 Order should have been notified previously to the European Commission under the State aid regime and would be unlawful because of the failure to respect this legal requirement.

After the cancellation of the previous 2006 order which the 2008 Order replaced<sup>2</sup>, this decision of the *Conseil*

*d'Etat* raises significant uncertainty over wind energy tariffs in France and could have important consequences for the wind energy industry in France<sup>3</sup>.

Given such a context, most of wind farms projects could be possibly put on hold (at least until the ECJ decision is published). Further, if the *Conseil d'Etat* was eventually to cancel the 2008 Order, wind energy producers would face a legal loophole concerning the fixing of their tariffs and would be further exposed to State aid recovery issues.

## 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 contributing to economic development.**

Going a step further *vis-à-vis* the former European approach, under which the production of renewable

## Key issues

- Context
- The French scheme of feed-in tariffs
- The reasons of the *Conseil d'Etat*'s ruling and the likely ECJ decision to come
- The consequences of the *Conseil d'Etat*'s ruling
- Which solutions now?

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.

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

<sup>2</sup> CE, 6 August 2008, *Association Vent de colère*, case n° 297723.

<sup>3</sup> Please note that the 2008 Order is not applicable to the 4 offshore wind farms which have been recently granted by the French State through a tender process. The energy tariff was indeed one of the selection criteria and bidders were invited to propose the most competitive purchase tariff. Consequently, in the case where the 2008 Order is nullified, there should be no direct consequences on such offshore wind farms. However, a risk remains that some applicants could be inspired by the current litigation being leaded against the 2008 Order to bring matters before the Courts.

Currently, around 13% of the French net electricity production is generated from renewable sources<sup>4</sup>. Precisely, 2,2 % of the 2011 French net electricity production is generated from wind sources, 0,3 % from photovoltaic sources and 9,3 % is produced from hydraulic sources<sup>5</sup>.

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 law<sup>6</sup>).

Practically, all member States of the European Union have adopted specific schemes aiming to support the development of electricity produced from renewable energy sources<sup>7</sup>.

Among different kind of financial incentive schemes ("green certificates", premiums, investment grants, tax exemption...), feed-in

tariffs are the most widely used<sup>8</sup> as well as the most efficient<sup>9</sup>. 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 Code, 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, lastly set by the 2008 Order. Such purchase obligation applies notably to wind produced energy, whether such energy is produced by onshore windfarms (whether the windfarm is not interconnected to the metropolitan network or whether it is located within a wind energy developing zone) and offshore wind farms (if located within the maritime public domain or within the French exclusive economic zone).

The tariffs set up by the 2008 Order are around 8,2 c€/kWh for onshore produced wind electricity (during the 10 first years, another tariff being possibly applicable for the next 5 years depending upon the yearly duration of use) and around 13 c€/kWh for offshore produced wind electricity (during the 10 first years then decreasing, another tariff being possibly applicable for the next 10 years depending upon 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* and the Energy Regulation Commission, 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 Conseil d'Etat's ruling and the likely ECJ ruling to come

**According to the Conseil d'Etat's decision, the 2008 Order could be characteristic of a State aid measure which should have been notified to the European Commission.**

In particular, the *Conseil d'Etat* considered that the 2008 Order favours wind energy producers by granting them a supported tariff in a way which may affect trade between Member States, both elements contributing to characterise a State aid measure. This solution is consistent with the European Commission decisions on certain European incentive schemes<sup>10</sup>.

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

<sup>4</sup> 2011 French electrical statement (*bilan électrique 2011*), Réseau de transport d'électricité. Electricity generated from nuclear sources remains highly dominant and accounts for 77% of all electricity.

<sup>5</sup> 2011 French electrical statement (*bilan électrique 2011*), Réseau de transport d'électricité.

<sup>6</sup> Public measures supporting renewable energy production remain subject to State aid rules but they enjoy reasonably flexible guidelines allowing the European Commission to state in various cases that such measures can be deemed compatible with the common market (please refer to the 2008 Community guidelines on state aid for environmental protection). Certain categories of aid can even benefit of the Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty.

<sup>7</sup> For a list of the various measures settled by the member States, see Communication of the Commission to the European Parliament and the Council of 31 January 2011, COM(2011) 31 final, p. 10.

<sup>8</sup> According to the above cited 2011 communication of the European Commission, 21 member States of the European Union settled feed-in tariffs schemes.

<sup>9</sup> Commission staff working document, *The support of electricity from renewable energy sources*, SEC (2008) 57, p. 3.

<sup>10</sup> See for example the decision of the European Commission of 28 January 2009 on the Luxembourg incentive scheme and the decision of the European Commission of 24 April 2007 on the Slovenian support scheme.

A pleasant surprise should never be excluded and the ECJ may finally conclude that the 2008 Order does not imply any State resources and consequently does not constitute a State aid measure.

However, the most significant elements tend to indicate that the ECJ should give a different ruling. Besides, it is noteworthy that the *rapporteur public* (the French equivalent before the *Conseil d'Etat* of a general advocate) concluded the 2008 Order constituted a State aid measure and should be cancelled.

In a 2001 case, known as "PreussenElektra", the ECJ ruled that statutory provisions of a Member State which, first, require private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, distribute the financial burden resulting from that obligation between those electricity supply undertakings and upstream private electricity network operators do not constitute State aid as such measures do not imply transfer of State resources<sup>11</sup>.

It is also true that the *Conseil d'Etat* expressly referred to the "PreussenElektra" ruling in a 2003 case, where a 2001 ministerial order setting the then applicable feed-in tariffs for wind electricity was challenged. The *Conseil d'Etat* then dismissed the applicants who claimed that this order should have been

notified to the Commission as being a State aid measure<sup>12</sup>.

However, it appears that the French incentive scheme is rather different from the one discussed in the "PreussenElektra" case and that the *Conseil d'Etat* was hardly in a position to confirm its 2003 ruling.

In particular, and contrary to the French scheme, no compensation scheme financed through a State enacted and controlled statutory deduction and collected upon electricity consumers existed in the regulation the ECJ examined in the "PreussenElektra" case.

And according to the European Commission's decisions on certain European incentive schemes, the existence of such State-controlled clearing mechanism identifies a State resource transfer within the meaning of State aid law<sup>13</sup>.

The ECJ also 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<sup>14</sup>.

Further, the *Conseil d'Etat* ruled in several occasions since 2006 that the "contribution for the public service of electricity" constitutes a tax, both under its initial<sup>15</sup> and current

scheme<sup>16</sup>. These repeated rulings hence made it clear that the *Conseil d'Etat* was in a delicate position to uphold its 2003 ruling whereby the "contribution for the public service of electricity" did not imply any State resources transfer<sup>17</sup>.

Consequently, it is rather clear that the "PreussenElektra" solution is not particularly relevant as regards the French situation and that a serious State aid issue exists, as confirmed by the recommendations to cancel the 2008 Order expressed by the *rapporteur public*.

Wind energy producers now have to wait for the ECJ's preliminary ruling but the most likely hypothesis is unfortunately that the European Court should rule that the 2008 Order implies a State resource transfer. The *Conseil d'Etat* would then be in a position where no other alternative exists but for the cancellation of the 2008 Order.

Given the above mentioned elements and consequences, it is now clear that the French authorities should have acted with greater care and 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 (i) the 2008 Order would

<sup>12</sup> CE, 21 May 2003, *UNIDEN*, case n° 237466.

<sup>13</sup> See the decision of the European Commission of 4 July 2006 on the Austrian Green Electricity Act ; see as well the decision of the European Commission of 24 April 2007 on the Slovenian support scheme ; see also the decision of the European Commission of 28 January 2009 on the Luxembourg compensation scheme.

<sup>14</sup> ECJ, 17 July 2008, *Essent Netwerk Noord BV*, case C-206/06.

<sup>15</sup> CE, 13 March 2006, *EURODIF S.A.*, cases n° 255333 and 263433. Contrary to the current scheme, where the "contribution for the public

service of electricity" is collected from electricity consumers, the "contribution for the public service of electricity" was initially collected from electricity producers, suppliers and distributors.

<sup>16</sup> CE, 13 March 2006, *RFF*, case n° 265582 ; CE, 30 March 2007, *RFF*, case n° 292776.

<sup>17</sup> Please note that the 2003 ruling was itself questionable regarding the differences existing between the French incentive scheme then existing and the incentive scheme the ECJ approved in the "PreussenElektra" case.

<sup>11</sup> ECJ, 13 March 2001, *PreussenElektra AG v Schlesweg AG*, Case C-379/98.

theoretically have been examined on the ground of the 2008 Community guidelines on State aid for environmental protection<sup>18</sup> which, as mentioned above, appear to be relatively flexible and (ii) the European Commission looks favourably upon feed-in tariffs scheme and even called French tariffs “reasonably high feed-in tariffs”<sup>19</sup> (the *Conseil d'Etat* also ruled in its recent decision that the average remuneration of locked-in equity in windfarm projects was not particularly overestimated)<sup>20</sup>.

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

### The consequences of the *Conseil d'Etat*'s ruling

**The *Conseil d'Etat*'s decision has one direct short-term and two possible medium-term consequences.**

The short-term consequence concerns wind farms projects and existing wind farms acquisition projects that have not yet reached financial and legal closing. It is most likely that sponsors and lenders will want to wait for the ECJ solution before moving forward and many projects will be put on hold.

Considering that it usually takes between one and a half to two years before the ECJ is in a position to give its preliminary ruling, this situation might generate negative outcomes for the wind farm industry.

The two possible medium-term consequences would be characterised if, as it is quite likely, the *Conseil d'Etat* was to cancel the 2008 Order in the hypothesis where the ECJ considered it to be a State aid measure. These consequences would be as follows:

1. 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 as both above-mentioned operators and wind energy producers would face a major uncertainty in terms of applicable tariffs.

Because of its cancellation, the 2008 Order would be deemed to have never come into force (which extends uncertainty to the past...) and, naturally, 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 are brought back to life is legally uncertain and it is not clear whether such tariffs would be sufficient for wind energy producers who had decided to invest based on feed-in tariffs established by the 2008 Order. Further, the 2001 order only established feed-in tariffs for wind farms of 12 MW and below and would not consequently offer an appropriate legal basis in any hypotheses

2. If the 2008 Order was to be assimilated to a non-notified State aid, another question may arise, namely whether the European Commission may require the French government to recover State resources irregularly transferred to wind energy producers through feed-in tariffs.

In such a situation, wind energy producers would be compelled to refund feed-in tariffs they had benefited from<sup>21</sup>.

Such situation would nonetheless be limited to the scenario where the European Commission would state that the French feed-in tariffs scheme is not compatible with the common market.

<sup>18</sup> The question even arises as whether the 2008 Order could have benefited of the Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty. It is not obvious however to answer positively and neither the *Conseil d'Etat* nor the French authorities seem to have considered the 2008 Order falls in the scope of the above mentioned Regulation.

<sup>19</sup> Commission staff working document, *The support of electricity from renewable energy sources*, SEC (2008) 57, p. 25 ; please note that the Commission document does not refer to the 2008 Order tariffs (not enacted at that time) but to tariffs set up by the prior order of 2006. Nonetheless, the Commission's remark is relevant as tariffs set up by the 2008 Order are almost the same than the ones enacted by the previous 2006 order.

<sup>20</sup> Please note however the French Energy Regulation Commission has a different opinion and indicated in an official advice released in the framework of the 2008 Order enactment process that, according to its calculations, the feed-in tariffs to be enacted by the said order leaded the wind energy producers to be overcompensated.

<sup>21</sup> 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.

## Which solutions?

**A relatively simple two-stage plan could possibly avoid most of the negative consequences described above.**

The first step would consist of quick and concerted action involving both the French State and the European Commission. French authorities should hence shortly notify a new order setting feed-in tariffs to the European Commission, which should review it and, hopefully, confirm it to be compatible with the common market as soon as possible<sup>22</sup>. This new order would replace the 2008 Order for the future.

This first step would then allow to keep developing 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.

The second step would be to prepare the necessary measures to be implemented in the situation where the 2008 Order is cancelled. The *Conseil d'Etat's* ruling offers the fundamental advantage to keep the 2008 Order in force (at least until the ECJ ruling is delivered) and French and European authorities should use this several months period to prepare

for the worst case scenario. Ideally, the European Commission should be requested to review the 2008 Order and, hopefully, would consider it as being compatible with the common market. In such a situation, French authorities could easily 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.

If this second step failed, especially in the case where the European Commission would consider the 2008 Order as being incompatible with the common market, the State would certainly be exposed to liability actions before the administrative courts<sup>23</sup>. Further, it is almost certain that several wind energy producers could be tempted to challenge the national decisions ordering them to refund the feed-in tariffs. The current wind of uncertainty would then become a wind of contentious cases.

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<sup>22</sup> French authorities would even be able to avoid notifying the new order to the European Commission if they are able to demonstrate the benefit of the Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty. However, and subject to an exhaustive analysis, such a possibility appears to be legally uncertain.

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<sup>23</sup> See for example CAA Paris, 11 May 2009, SA *Baizet*, req. n° 07PA01777.

## Clifford Chance contacts

To discuss any of the issues in this publication, please contact:



**David Pr  at**

Partner (Paris), Public law  
T +33 1 44 05 59 33  
E david.preat  
@cliffordchance.com



**Gauthier Martin**

Senior associate (Paris), Public law  
T +33 1 44 05 51 81  
E gauthier.martin  
@cliffordchance.com



**Amandine Delsaux**

Senior associate (Paris), Regulatory and environment  
T +33 1 44 05 51 03  
E amandine.delsaux  
@cliffordchance.com



**Laurent Schoenstein**

Partner (Paris), Corporate/M&A  
T +33 1 44 05 54 67  
E laurent.schoenstein  
@cliffordchance.com

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Clifford Chance, 9 Place Vend  me, CS 50018, 75038 Paris Cedex 01, France  
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