

RENEWABLE ENERGIES AND REGULATED TARIFFS IN THE LAW ON ENERGY AND CLIMATE

Law No. 2019-1147 of 8 November 2019 on energy and climate was published in France's Official Journal dated 9 November 2019.

It comes about in a context of increasing consideration for climate-related imperatives, and in particular with regard to the transposition of the "*Clean energy for all Europeans*" package. The new provisions, focusing on the implementation into French law of the Paris Agreement - that entered into force on 4 November 2016 - have been ruled compliant with the Constitution by the French Constitutional Council (*Conseil constitutionnel*), albeit subject to a reserve of interpretation.

The "energy-climate" bill, submitted to the National Assembly (*Assemblée Nationale*) on 30 April 2019, has been considerably supplemented by parliamentary work. The Law on climate and energy deals with a number of subjects:

- it significantly overhauls various goals of the national energy policy, notably inspired by guidance outlined during the setting up of the Multi-annual Energy Plan (*Programmation pluriannuelle de l'énergie*, in short PPE) (see below, **section 1**);
- the aforementioned objectives are formalised in climate-oriented provisions, specifically the shutting down of coal-fired power plants. Furthermore, obligations on energy efficiency in buildings are reinforced, as are measures fostering renewable energies (see below, **section 1**);
- the law also revamps the legal regime applicable to environmental evaluations. Specifically, the "environmental authority" becomes "*the authority in charge of the case-by-case assessment*" and any irregularities may, from here on in, be normalised in the course of proceedings;
- provisions to tackle energy-saving certificate fraud (*certificats d'économies d'énergies*, or CEE) are set out in the reform, with salient features including the speeding up of processes and the strengthening of controls. As a reminder, CEEs incentivise sector players to foster energy-saving measures;
- the Law transposes part of the "*Clean energy for all Europeans*" package. The remainder will be introduced into French Law within 3 to 12 months, by government ordinance;
- the law devotes a chapter to the reform of procedures before the Dispute Settlement and Sanctions Committee (**CoRDIS**) and the Commission for the Regulation of Energy (**CRE**) to "*reinforce the efficiency of the right to judicial remedy, of the rights of the defence and of the principle of a contradictory procedure*" and to enable the CRE to appear before French courts (Article 57);
- lastly, the law on climate and energy deals with regulated tariffs for gas and electricity, notably by putting an end to this mechanism for gas.

This law handles a number of current issues in the energy sector. For the remainder, the government is empowered to add to its provisions through forthcoming ordinances.

RENEWABLE ENERGIES AT THE HEART OF THE REFORM

Renewed goals for the energy policy

In its very first article, the Law on climate and energy sets new national objectives. Even though their legal force can be debated, those targets will surely nourish the French state's actions from now on.

The Law thus endorses "*the ecological and climatic emergency*" in Article L. 100-4 of the French Energy Code. Its main features include carbon neutrality by 2050, the division of greenhouse gas emissions by a factor of at least six, and the transition from a target of 30 to 40% reduction in the consumption of primary energy from fossil fuels by 2030 (the previous reference year was 2012). Furthermore, the goal of halving **the share of nuclear power** in the energy mix by 2025 has been delayed - as announced - to 2035, in order to ensure security of supply (Article 1).

Article L. 100-4 of the Energy Code is also supplemented to encourage the production of hydropower, promoting the setting up of offshore wind turbines and advancing the **development of hydrogen production**. The Law also inserts in Article L. 100-2 of the Energy Code a new objective of valorisation of biomass (Article 1).

The application of these renewed goals takes the form of a **five-year planning law** setting the energy policy objectives and priorities to take action and respond to the ecological and climatic emergency, under new Article L. 100-1 A of the Energy Code. It is also enhanced by the creation of a new institution, the High Council for Climate (*Haut Conseil pour le Climat*), an independent body attached to the Prime Minister (Article 10).

It is worth mentioning the announced end of coal-fired power plants (Article 12), already at the heart of the PPE and henceforth codified in Article L. 311-5-3 of the French Energy Code.

Indeed, from 1 January 2022, fossil fuel power plants emitting over 0.55 tonnes of carbon dioxide equivalent per megawatt-hour will be subject to the capping of their emissions. This spells the shutdown of the last four French coal-fired power plants. The economic consequences of this threshold on the companies' employees will be governed by a forthcoming regulation (Article 12).

In addition, a number of measures will be implemented to combat the use of energy-intensive buildings. For instance, an energy audit will have to be carried out on such buildings in addition to an energy diagnosis (Article 22).

The fostering of innovations for renewable energies

The Law on climate and energy contains provisions encouraging innovative projects, with two new sections on experimental contracts included in the French Energy Code. They provide for the conduct of calls for projects to grant operating licenses for electricity and biogas plants using renewable energies and innovative technologies (Article 33). It should be pointed out that the said projects are eligible to the purchase contract mechanism (*mécanisme du contrat d'achat*).

The Law on energy and climate also gives the CRE the power to grant dispensations as regards the conditions to access and use grids and facilities, thus encouraging the experimental setting up of innovative technologies and services (Article 61).

Significant developments in biogas

The law makes significant advancements for the biogas energy sector. It now requires natural gas suppliers, who supply over 10% of the national market, to conclude a biogas purchase obligation contract (*contrat d'obligation d'achat*) once a biogas producer so requests (Article 50). The same article complements the current system of guarantees of origin (*garantie d'origine*), stating that an organisation is now designated to maintain an electronic register for such guarantees.

Similarly with the mechanism in force for renewable electric energy, the article provides for the incompatibility between the guarantee of origin and the obligation to purchase. As a consequence, existing purchase obligation contracts in conflict with this principle shall be terminated.

Renewable energy communities

The law transposes the status of renewable energy communities (*communautés d'énergie renouvelable*) created by the "Clean energy for all Europeans" package in new Article L. 211-3-2 of the French Energy Code. A renewable energy community is an autonomous legal entity defined by (i) an "open and voluntary" participation, (ii) its shareholders and members (individuals, SMEs, local authorities and groups of local authorities) meet a criterion of geographic proximity, and (iii) its goal is to provide "environmental, economic or social benefits to its shareholders or members or the local territories in which it operates, rather than seeking profit".

Renewable energy communities' missions consist in the production, consumption, storage and sale, sharing of energy produced by community-owned facilities, and access to relevant markets. The methods to implement renewable energy communities will be specified in a regulation, but they already appear as an interesting innovation to boost the local consumption of energy, thus limiting costs for the development and use of the grid.

The adjustment to the self-consumption regime

Law No. 2019-1147 updates the current system for self-consumption. Indeed, Article L. 315-1 of the French Energy Code provides that a production facility can be owned and managed by a third party, under the supervision of the self-producer. In addition, the law makes it possible to authorise the implementation of a mechanism of collective self-consumption for residential buildings.

As part of the collective self-consumption scheme, the law enables tenants to reunite in the same managing legal person (*personne morale organisatrice*), that can be the social housing body itself. This possibility was not expressly provided for in the previous version of the Energy Code.

THE REGULATED TARIFFS REFORM

The renewed tariff for regulated access to historical nuclear power

The Law on climate and energy was particularly expected for its provisions on the regulated access to historical nuclear power (*accès régulé à l'électricité nucléaire historique*, or ARENH). It modifies the provisions on the mechanism to calculate additional price if the price cap for the rights granted to an energy supplier is exceeded. The maximum volume that EDF can offer annually to other suppliers rises from 100 TWh to 150 TWh.

Compliance of this provision was discussed before the Constitutional Council. The latter, in decision no. 2019-791 DC of 7 November 2019 approves the aforementioned system, albeit with a reserve of interpretation. According to the Council, Article 62 infringes EDF's entrepreneurial freedom but is justified by general interest as it is proportionate to "goals such as fostering competition on the electricity production market, supply to consumers and price stability". Furthermore, on transitional provisions, Ministers for energy and economy can set the price of electricity, pending the publication of the decree mentioned in Article L. 337-15 of the French Energy Code. Nevertheless, the Ministers must take into account the economic conditions of the production of electricity by nuclear power plants.

Regulated tariffs for electricity and gas

The Law on climate and energy also deals with regulated tariffs for electricity and gas. First and foremost, it organises the end of those tariffs for gas and sets up supporting measures to inform consumers that still benefit from such tariffs (Article 63). Thus, it complies with the decision of the Council of State (*Conseil d'Etat*) that ruled those tariffs violated EU law (CE, Ass. 19 July 2017, *ANODE*, req. No. 370321).

In addition, under Article L. 337-9 of the French Energy Code, Ministers for energy and economy will assess every five years the regulated tariffs mechanism for electricity.

On this matter, it should be recalled that the Constitutional Council, in its 16 May 2019 decision no. 2019-781, had rejected some provisions of the Law *on the development and transformation of businesses* (France's new *Loi Pacte*). The Law on energy and climate implements these rejected provisions to abide by EU law and ensure that regulated tariffs comply with the recent Council of State case law of 18 May 2018 that upheld them, but with adjustments to the current regime (req. no. 413688 and 414656).

As a conclusion, the Law on energy and climate will address numerous concerns of energy sector professionals. Nonetheless, the content of the forthcoming decrees and ordinances remains of vital importance to them. They will need to closely monitor the implementing provisions of the law that will come about in the near future, in particular as regards the transposition into French Law of the "Clean energy for all Europeans" package.

CONTACTS

MICHEL GUENAIRE
guenaire@gide.com

TIMOTHÉE DUFOUR
timothee.dufour@gide.com

EMMA GEORGE
emma.george@gide.com

PIERRE-ADRIEN LIENHARDT
pierre-adrien.lienhardt@gide.com

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