

client alert

ENERGY | FRANCE |

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FRENCH RENEWABLES SUPPORT SCHEME & CONTRACT FOR DIFFERENCE: OVERVIEW OF THE LATEST REGULATIONS

The French Government recently passed two pieces of regulation that add to the regulatory framework applicable to contracts for difference for renewable energy producers. This mechanism is now fully implemented and will progressively replace the former feed-in tariffs mechanism.

This Client Alert provides an overview of the general regulatory framework, with a focus on the wind power support scheme.

The French government has implemented a long-standing and favourable support scheme for renewable energy. It relied on two main mechanisms, based on (i) feed-in tariffs ("**FITs**"), paid over a fixed and long-term period by some electricity suppliers¹, and (ii) tendering processes, occasionally launched by the French State and which aimed at awarding long-term contracts with a fixed price².

Over the past few years, the FITs mechanism was challenged before French courts, mostly because of a breach of EU State aid rules. This challenge first dealt with the wind power support scheme³ but also more recently with the photovoltaic support scheme⁴. Although it was ruled that the FITs mechanism for wind farms constituted a State aid scheme, it was nonetheless regarded as compatible with the internal market⁵.

Simultaneously, following new guidelines from the European Commission⁶, Law no. 2015-992 of 17 August 2015 *on energy transition and green growth* was passed in order to integrate renewable energies into the market.

¹ The national electricity company EDF and the non-nationalized electricity distribution companies (*entreprises locales de distribution, ELDs*); Articles L. 314-1 et seq. of the French Energy Code.

² Articles L. 311-10 et seq. of the French Energy Code.

³ It was alleged that such FITs granted renewable energy developers an undue advantage and therefore breached EU States aid legislation. This challenge gave rise to several decisions of justice: CE, 15 May 2012, *Vent de Colère !*, No. 324852; ECJ, 19 December 2013, *Association Vent De Colère !*, C-262/12; CE, 28 May 2014, *Vent de Colère !*, No. 324852; CE, 15 April 2016, *Vent de Colère !*, No. 393721.

⁴ ECJ, 15 March 2017, *Ombrière le Bosc c./ Enedis*, C-515/16.

⁵ EC, 27 March 2014, State aid SA.36511 (2014/C) (ex 2013/NN), Support mechanism for renewable energies and caps on the CSPE.

⁶ EC, Guidelines on State aid for environmental protection and energy 2014-2020, (2014/C 200/01), § 12. The European Commission published these guidelines with a view to "strengthening the internal market, promoting more effectiveness in public spending (...), greater scrutiny on the incentive effect, on limiting the aid to the minimum necessary, and on avoiding the potential negative effects of the aid on competition and trade". The Commission required that, from 1 January 2016, beneficiaries of the support mechanism sell their electricity on the market and are subject to market obligations. All new aid schemes shall now be granted as a premium in addition to the market price whereby the generators sell their electricity directly on the market.

To this end, the French Energy Code sets forth a market-based premium regime (*complément de rémunération*) that is gradually to replace the FITs mechanism⁷. Two implementing decrees were published: Decree no. 2016-682 of 27 May 2016 on the power purchase obligation and the market-based premium, and Decree no. 2016-691 of 28 May 2016 defining lists and characteristics of plants that can benefit from support schemes.

These texts determined a general regulatory framework for contracts for difference (“CFDs”) in France.

OVERVIEW OF THE MARKET-BASED PREMIUM SCHEME

Under the new framework of market-based premium, the income of the producer relies on a price obtained on the market: electricity can be sold directly on EPEX SPOT or under a power purchase agreement (“PPA”) signed with any electricity supplier or any aggregator.

EDF is required to sign a CFD, which includes a market-based premium, with renewable energy producers using hydropower, domestic waste, biogas, geothermal, cogeneration and wind energy (*guichet ouvert* mechanism)⁸. For each power source, the right to benefit from the market-based premium scheme depends on the installed capacity and number of generators. Renewable energy projects that benefit from or benefited from FITs are not eligible to the market-based premium scheme⁹.

The premium paid to the producer includes¹⁰:

- an energy premium (*prime à l'énergie*), that corresponds to the difference between (i) a reference tariff calculated on the basis of the average financing and operation costs for an efficient and representative installation, and (ii) the average electricity and capacity market-based prices¹¹. The premium shall not exceed a “reasonable return on capital in comparison with the risks involved”¹² and shall be revised periodically so that the evolution of costs borne by installations are taken into account;
- a management premium (*prime de gestion*), that reflects the costs incurred by the producer to sell its production on energy and capacity markets.

Revenues from the sale of guarantees of capacity are withdrawn from these two premiums.

EDF shall make a proposal of CFD within three months of the submission of an application by the producer.

In order to provide certainty for investments made under the market-based premium, the administrative authority appoints a purchaser of last resort if the producer provides evidence that it is unable to sell its electricity directly or indirectly on the market¹³. In this case, the purchaser of last resort is obliged to sign a power purchase agreement related to the electricity produced by the installations falling within the market-based premium scheme. However, the price paid for the electricity cannot exceed 80% of the initial price due under the CFD.

⁷ Articles L. 314-18 et seq. of the French Energy Code.

⁸ Articles L. 314-18 and D. 314-23 of the French Energy Code.

⁹ Article L. 314-19 of the French Energy Code.

¹⁰ The calculation formula of the market-based premium is given in Article R. 314-33 of the French Energy Code.

¹¹ Article D. 314-33 of the French Energy Code.

¹² Article L. 314-20 of the French Energy Code.

¹³ Article L. 314-26 of the French Energy Code.

THE 2016 MARKET-BASED PREMIUMS

Ministerial Orders were issued at the end of 2016 covering several sources concerned by the market-based premium scheme: wind, geothermal, hydropower and cogeneration¹⁴.

As far as wind power is concerned, Ministerial Order of 13 December 2016 (“**2016 Wind Order**”) sets out the conditions under which operators of onshore wind projects can benefit from the market-based premium. Three types of producers are eligible:

- operators of installations for which a PPA was signed before 15 December 2016 and for which the application for the agreement was filed after 1 January 2016;
- operators of installations for which the application for the PPA was filed between 1 January and 31 December 2016, although no PPA has been signed;
- operators of new installations *i.e.* for which a complete application for a CFD was filed before 31 December 2016.

CFD duration under the 2016 Wind Order is 15 years. The reference tariff has been determined in order to target a remuneration of the electricity equivalent to the existing FITs, *i.e.* €82/MWh for the first ten years of the contract. For the last five years of the contract, the tariff decreases depending on the annual operating time¹⁵. In addition, the management premium is of €2.8/MWh.

2,500 applications were filed between 15 and 31 December 2016, 60% of which were filed by operators of new installations. However, 40% of the applications were incomplete and were therefore rejected. The reasons for rejection are in most cases the absence of a number of the establishment in the national register for companies and establishments (*SIRET*)¹⁶ and the lack of information regarding the type of generator. It should be noted that EDF has been unable in most cases to meet the three-month deadline for providing a CFD, given the number of applications.

THE 2017 ONSHORE WIND MARKET-BASED PREMIUM

A new Decree no. 2017-676 of 28 April 2017 modifies the current support scheme.

From a general point of view, it provides for stricter criteria in order to limit the right to benefit from the market-based premium through the *guichet ouvert* procedure. For instance, with respect to wind power, only wind farms with six generation units or fewer and with no generation unit of more than 3 MW are now fully eligible for the market-based premium¹⁷. For wind farms with seven generators and more, subsidies will only be granted after a competitive bidding process (*procédure de mise en concurrence*)¹⁸. Such a bidding process was launched on 5 May 2017¹⁹.

Decree no. 2017-676 also repeals the 2016 Wind Order three months after its publication, *i.e.* from 30 July 2017. Nevertheless, if a complete application is filed under the 2016 Wind Order before this date, the installation may still benefit from the conditions of the market-based premium defined by this Ministerial Order. Ongoing CFDs will also remain in force. The provisions of a new Ministerial Order of 6 May 2017 (the “**2017 Wind Order**”), together with Decree no. 2017-676, will apply to other installations.

¹⁴ Ministerial Orders dated 13 December 2016.

¹⁵ €82/MWh for 2,400 hours and less; €68/MWh for 2,800 hours; €28/MWh for 3,600 hours and more.

¹⁶ As required under Article R. 314-4 of the French Energy Code.

¹⁷ Article D. 314-23 of the French Energy Code.

¹⁸ Articles R. 311-13 et seq. of the energy code.

¹⁹ The deadline for submitting offers is 1 December 2017 (First period). The total installed capacity over the six periods is 3,000 MW.

According to this 2017 Wind Order, the CFD now lasts for 20 years. In addition, the reference tariff is calculated differently from the tariff set by the 2016 Wind Order and results in less profitable CFDs. A first reference tariff will apply to a quota of MWh. This tariff will depend on the rotor diameter and will range from €74/MWh for rotor diameters smaller than 80 meters, to €72/MWh for rotor diameters exceeding 100 meters. Beyond this quota, a second reference tariff set at a lower level of €40/MWh will apply. The management premium remains the same as the one set by 2016 Wind Order.

In order to benefit from the 2017 Wind Order, a new wind farm must be at least 1,500 m distant from any existing wind farm that filed a complete application for a PPA within the two previous years. The Minister for Energy may allow a smaller distance if the owners of the two wind farms are independent from each other.

The European Commission approved this scheme under EU State aid rules²⁰, and the new support scheme will therefore provide predictability and stability to renewable energy projects, which suffered previously from the various changes applied to the regulatory scheme.

²⁰ EC, 5 May 2017, "State aid: Commission endorses three French initiatives to produce more than 17 gigawatts in renewable energy", IP/17/1231.

CONTACTS

MICHEL GUENAIRE
guenaire@gide.com

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

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