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## Feed-In Tariffs for Wind Energy Set out by the French Government May Constitute Unlawful State Aid

In February 2009, a claim was filed before the highest French administrative court (*Conseil d'Etat*) by the association “*Vent de Colère*” seeking the annulment of a ministerial order dated 17 November 2008 enacting the feed-in tariffs applicable to onshore and offshore wind farms (the “**2008 Order**”). *Vent de Colère* notably claimed that the set feed-in tariffs constitute State aid as defined by EU law, which is unlawful because such a support scheme has not been duly notified to, and approved by the European Commission.

On 15 May 2012, the *Conseil d'Etat* decided to stay the proceedings and refer the matter for a preliminary ruling to the Court of Justice of the European Union (the “**CJEU**”).

On 19 December 2013, following the Advocate General Jääskinen’s opinion, the CJEU ruled that the financing mechanism put in place by the 2008 Order falls within the concept of aid granted by the State or through State resources.

### **Background**

The French electricity act dated 10 February 2000 obliges EDF and local distribution operators (“**LDOs**”) to purchase electricity produced from renewable sources by independent power generators at a preferential tariff, which is higher than the market price.

The preferential purchase tariffs are defined, for each type of renewable sources installations, by a specific ministerial order. The 2008 Order sets out the feed-in tariffs applicable for the purchase of electricity generated by onshore and offshore wind farms, which apply for a long period of time (PPAs entered into for onshore wind farms have a statutory term of 15 years, while those entered into for offshore wind farms have a statutory term of 20 years). For onshore wind farms, the tariff set out by the 2008 Order (and which is indexed over time) is EUR 0.082 /kWh for the first 10 years, while the tariff for offshore wind generation facilities is EUR 0.13/kWh for the first 10 years. The tariff then varies for the remaining 5 years, depending on the annual functioning duration of the facility between EUR 0.028/kWh and EUR 0.082/kWh for onshore wind farms and , between EUR 0.13/kWh and 0.03/kWh for offshore wind farms.

The purchasers of electricity benefit from a mechanism of compensation in full of the additional cost that is generated by complying with this purchase obligation. For EDF, the compensation corresponds to the difference between the purchase price of electricity pursuant to the relevant PPA and the electricity market prices, and, for LDOs, to the

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difference between the purchase price of electricity pursuant to the relevant PPA and the balanced average cost which would result from the purchase of the same quantity of electricity at the market price. This compensation is financed by electricity end-consumers, by the means of their contribution to the electricity public service (“*contribution au service public de l’électricité*” or “*CSPE*”). The CSPE, being in effect a tax, is due by all electricity end-consumers (individuals, either professionals or not, and companies) in proportion to the electricity they use. For 2014, the support to renewable energy by electricity end-consumers through CSPE amounts to EUR 3.72 billion.

## ***The CJEU’s decision***

The *Conseil d’Etat* asked the CJEU whether the obligation for EDF and LDOs to purchase electricity generated by wind-power installations at a price higher than the market price could be regarded as an intervention by the State or through State resources. The *Conseil d’Etat* has already considered that the other three cumulative conditions by which a measure constitutes “State aid” (i.e., intervention liable to affect trade between Member States, intervention conferring an advantage to the recipient, and intervention distorting or threatening to distort competition) were met in the 2008 Order.

By referring this matter to the CJEU, the *Conseil d’Etat* raises the question of the consequences of a change in the compensation mechanism. Indeed, under a previous system which was in place until 2003, additional costs arising from the purchase obligation were offset in full through a public service fund for the generation of electricity, which was funded by charges payable by the electricity producers, suppliers and distributors. On the basis of this previous system, in a decision dated 21 May 2003, the *Conseil d’Etat* took the view, applying a previous CJEU judgment, that the fact that the financial burden was shared amongst a certain number of companies, without any contribution from public resources, did not constitute State aid. The fact that the additional costs resulting from the purchase obligation are now offset by charges payable by the end-consumers raises serious difficulties in the *Conseil d’Etat*’s view.

The French Government pointed out before the CJEU that the obligation to purchase is neutral for the State budget, and that the appointment of the *Caisse des dépôts et consignations* as the entity in charge of the management of the funds collected from end-consumers arose from practical considerations relating to the number of companies subjected to a purchase obligation.

The Court did not follow the French Government’s position and considered that both criteria for qualifying the feed-in tariffs set out by the 2008 Order as State aid were met as (i) the offset mechanism was established by law and must therefore be regarded as attributable to the State and (ii) the funds managed by the *Caisse des dépôts*, which is a public body under State control, must be regarded as remaining under public control and therefore considered as State resources.

## ***Legal and practical consequences of the CJEU’s decision***

The *Conseil d’Etat* shall, within the next months, take a decision as to the annulment of the 2008 Order, on the basis of the CJEU’s decision.

It is most likely that the *Conseil d’Etat* will annul the 2008 Order.

The *Conseil d’Etat* is entitled to defer the date of the cancellation in order to preserve the PPAs which have been entered into on the basis of the feed-in tariffs set out by the 2008 Order, and could decide that the cancellation has no retroactive effects and shall only apply in the future. This may happen should it consider that the cancellation of the 2008 Order gives rise to manifestly excessive consequences.

However, this possibility of deferring the date of cancellation appears to be theoretical. Although the French government asked the CJEU to limit the effects of its decision in time, the CJEU rejected this request. The Court considered that none of the criteria for limiting the effects of the decision in time were fulfilled as (i) the French government could not have been unaware of the prohibition of putting an aid measure into effect or of the legal consequences of the failure to notify and, (ii) the financial consequences which might result for a Member State from a preliminary ruling have never justified limiting the temporal effect of such a ruling.

The French Energy Minister, Philippe Martin announced that the outcomes of the CJEU’s decision were being anticipated by the French State and that formal notification of a support scheme was filed with the European Commission in October 2013.

Despite assurances from the Energy Minister that all steps have been taken in order to avoid regulatory limbo, should the Commission subsequently declare the newly notified feed-in tariffs scheme compatible with EU law, this would not have the effect of regularising, retrospectively, measures implementing the 2008 Order, i.e. the PPAs entered into pursuant to the 2008 Order. This is because the 2008 Order was invalid as it had not been notified and therefore breaches EU law. In previous cases, the PPAs already entered into were not terminated as a result of the cancellation of the tariffs set out by ministerial order. However, this is not a straightforward solution and the electricity buyers received formal instructions from the Minister to pursue the payments provided for under the PPAs.

Besides the legal vacuum that an annulment of the 2008 Order would create, the *Conseil d'Etat's* decision could have four potential consequences:

*Firstly*, the repayment of the unlawful aid could be ordered by a court. Should the Commission, further to the assessment made on the basis of the support scheme notified in October 2013 by the French State, consider that the feed-in tariffs set out by ministerial order are compatible with the common market, the court would not have, pursuant to EU law, an obligation to impose full recovery of the aid granted on the basis of the 2008 Order, and would only be required to order the recipients of the unlawful aid to pay interest for the period of illegality.

*Secondly*, a third party could claim compensation for damage caused by the unlawful nature of the aid. Wind farm operators may notably therefore be exposed to claims from competitors on the grounds of unfair competition. While such claims are not common in France and it will be difficult to demonstrate the existence of damages given that all developers could have developed projects that benefitted from the feed-in tariffs, such claims cannot be excluded.

*Thirdly*, all the aids granted on the grounds of an obligation to purchase electricity generated by renewable sources pursuant ministerial orders setting out feed-in tariffs above the market price could also be considered as unlawful aids regardless of the sector concerned (e.g. hydroelectric power, solar energy, energy from biomass, etc...). It is therefore likely that claims are brought on this ground in respect of all the ministerial orders that have set out feed-in tariffs, thus creating uncertainty in respect of all the renewable projects developed in France over the last 14 years. Moreover, while it could have been considered that there would be no issue in respect of the tariffs guaranteed for renewable projects selected in the context of calls for tenders, the CJEU's decision also raises the issue of their qualification as State aid, given that the compensation mechanism put in place by the State is identical to the ones existing for feed-in tariffs set out by ministerial orders.

*Fourthly*, the view taken by the *Conseil d'Etat* that the compensation mechanism only raised serious difficulties with regard to EU law on State aid following the reform of the method of financing in 2003 could be challenged. Indeed, in the previous mechanism, the financial and accounting management of the public service fund for the generation of electricity was also taken care of by the *Caisse des dépôts et consignations* and could therefore be regarded as already having been under State control. Such interpretation has been supported by the Commission within the CJEU proceeding. This question has not been addressed by the Court given that it exceeded the scope of the preliminary ruling procedure. However, it cannot be ruled out that it will be used before French courts in order to challenge the granting of feed-in tariffs for wind energy pursuant to previous ministerial orders of 2001 and 2006 and the granting of feed-in tariffs for other types of renewable energy.

The CJEU's decision has already had a significant impact on public opinion, as it is reported that thousands of claims have been filed with the energy sector regulator by end-consumers requesting the reimbursement of the CSPE they have paid as a result of the wind energy feed-in tariffs mechanism.

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