

client alert

ENERGY | FRANCE |

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THE FRENCH LAW ON ENERGY TRANSITION AND RENEWABLE ENERGY

After several readings in the two chambers of French parliament, the bill relating to the energy transition for green growth (hereinafter the "**Law on Energy Transition**") was adopted by the French Parliament on 22 July 2015. The text was deferred to and generally approved by the French Supreme Court (*Conseil constitutionnel*), in particular as regards the provisions relating to wind power and other renewable energies¹.

Law no. 2015-992 of 17 August 2015 was published in the Official Journal on 18 August 2015.

The Law on Energy Transition defines the new objectives of the national energy policy, including:

- On the one hand, to reduce greenhouse gas emissions and energy consumption.

The law aims to reduce greenhouse gas emissions by 40% in 2030 (as compared with 1990 levels), and to quarter greenhouse gas emissions between 1990 and 2050.

To reach these objectives, the law aims to reduce primary energy consumption of fossil energies by 30% in relation to the 2012 year of reference.

- On the other hand, to increase the percentage of renewable energies in the French energy mix.

The share of renewable energies in the final gross energy consumption will be increased to 23% in 2020 and 32% in 2030. Renewable energies will thus be widely in demand in the energy transition process, since they must represent 40% of electricity production in 2030.

For its part, the share of nuclear energy in electricity production should reduce to 50% by 2025.

The Law on Energy Transition also provides for the implementation of multiannual energy programming ("**MEP**"). This MEP sets out the objectives and priorities of public authorities in their management of various forms of energy. Consultations for the MEP's drafting will begin before 31 December 2015.

¹ Decision no. 2015-718 DC of 13 August 2015

As regards the second objective, the Law on Energy Transition includes two main sets of measures concerning renewable energy. It modifies the regime in favour of electricity generated from renewable sources (see chapter 1 of this newsletter) and provides for the application of new rules for the establishment of onshore wind turbines (see chapter 2 of this newsletter). Lastly, the Law on Energy Transition includes measures concerning hydroelectric concessions (see chapter 3 of this newsletter).

1. CHANGES TO THE REGIME IN FAVOUR OF ELECTRICITY GENERATED FROM RENEWABLE SOURCES

Application of Guidelines relating to state subsidies as regards energy and the environment

Guidelines concerning state aids on the protection of the environment and energy for the 2014-2020 period, adopted by the European Commission in June 2014 (the "**Guidelines**"), provide for new principles that apply to all mechanisms in support of renewable energies.

These principles are as follows:

- **From 1 January 2016**, support mechanisms for renewable energy will consist in the **payment of a supplementary remuneration** to reach a pre-determined price.

This obligation will only apply to power generating facilities whose installed capacity exceeds 500 kW, or 3 MW, or 3 production units for wind turbines.

- **From 1 January 2017**, **calls for tenders** are to be implemented.

This procedure only becomes compulsory for power generating facilities whose installed capacity exceeds 1 MW, or 6 MW or 6 production units for wind turbines.

Guaranteed purchase prices can thus be maintained for mechanisms that will be notified to the European Commission in future, for power stations with installed capacity below 500 kW. For wind turbines, the installed capacity must be below 3 MW or 3 production units in 2016, raised to 6 MW or 6 production units in 2017.

Specific case of the French onshore wind sector

The mechanism in favour of onshore wind energy will benefit from special treatment.

The European Commission has authorised member states to retain their pre-existing subsidy measures, which have already been notified to and approved by the Commission, for a period of 10 years at most.

In France, the decree of 17 June setting the purchase conditions for electricity generated by land-based wind facilities, based on electricity buy-back prices, was approved by the European Commission on 25 March 2014, before the entry into force of the Guidelines.

The decree can therefore remain in place without being affected by the deadlines of 1 January 2016 and 2017. Additionally, during the parliamentary debates on the Law on Energy Transition, the government indicated that no changes to this decree were currently under discussion.

Change to the support mechanism in favour of wind energy is nonetheless being considered before the end of the 10-year period, most likely from 2018 onwards.

From the purchasing contract to the supplementary remuneration contract

New supplementary remuneration mechanism

To date, the French energy code only provided for two systems in favour of renewable energy:

- A system known as an "**obligation to purchase**", whereby Electricité de France (hereinafter "EDF") purchases electricity from renewable sources at a pre-determined price above market price, set by ministerial order.
- A **call for tenders system**, organised by the State alongside the French Commission for Energy Regulation, in which operators offer a purchase price for the electricity they generate. If their offer is retained, they enter into a purchase contract with EDF based on the proposed price. This mechanism is not affected by the Law on Energy Transition.

Following on from the Guidelines, the Law on Energy Transition introduces a third mechanism, known as "supplementary remuneration" ("**Supplementary Remuneration**"), whose objective is to integrate into French law the market premium mechanism, which aims to replace the obligation to purchase mechanism for certain renewable energy sectors.

The Supplementary Remuneration is an ex-post premium equal to the difference between the average sale price observed on the market and a target price set by decree for each renewable energy sector.

Energy generators who so desire can enter into an agreement with EDF that includes a supplementary remuneration clause, for a maximum period of 20 years. As concerns calls for tenders, the candidates will either enter into an energy purchasing contract or a Supplementary Remuneration contract.

A **consultative draft bill relating to the supplementary remuneration and purchase obligation** has recently been issued, which details the conditions of the mechanism. This bill, if adopted, will enter into force on 1 January 2016.

The calculation method and the level of supplementary remuneration will be set by regulation. The Law on Energy Transition only takes into account the representative operating expenses and investments of the sector, the costs of integrating the facility into the grid system, and the revenues generated by the facility. The draft bill sets more specific calculation methods, but still refers to the decrees in each sector for the precise level of Supplementary Remuneration.

The Supplementary Remuneration will be supplemented by a **management premium** that aims to compensate the costs of access to the electricity market for electricity generators. This premium, whose amount will be set by decree, will be included in the Supplementary Remuneration contract for its full term.

Sectors concerned by the Supplementary Remuneration mechanism

The list and characteristics of the power facilities that can benefit from the mechanism are not provided for in the law.

The draft bill, in consultation until 4 October 2015, restricts the application of the supplementary remuneration to the following generating facilities:

1. Facilities using hydraulic energy, with power lower than or equal to 1 MW;
2. Facilities that mainly use the energy generated by the heat treatment of household waste;

3. Facilities that mainly use biogas derived from methanisation or waste storage facilities;
4. Facilities that mainly use energy derived from geothermal heat;
5. Natural gas and electricity cogeneration and heat recovery facilities, with an installed capacity lower than or equal to 1 MW.

If the draft bill is adopted as is, the other types of electricity generation facilities, most particularly wind and solar facilities, will not be concerned by this mechanism for the time being. The decree indicates that the following can benefit from purchase obligation: (i) onshore wind farms and (ii) photovoltaic facilities whose power is lower than 100 kW. For the latter, the sale of electricity generated will be conducted as part of a call for tenders.

Additionally, ministerial orders provided for each sector and that cover remuneration conditions may defer the entry into force of the decree.

Long-term application of the supplementary remuneration

Application of the Supplementary Remuneration to the facilities concerned also depends on the progress of the projects:

- **For projects that have already entered into a purchase obligation contract**, the purchase price set will not be modified. Electricity generated by these power generation facilities will thus be purchased at the price indicated in the purchase contract for its full term.

In principle, these power generation facilities cannot receive any supplementary remuneration. Nonetheless, the draft decree provides for the possibility for electricity generators to terminate their purchase contract early in order to benefit from a Supplementary Remuneration contract, either for the remainder of the term initially provided for in the purchase obligation contract, or for the normal term of the Supplementary Remuneration contract, in particular on the condition of having implemented an investment programme.

- **For projects that have not yet entered into a purchase obligation contract**, and that belong to the categories of generation facilities subject to Supplementary Remuneration, the Law on Energy Transition provides that they will benefit from the purchase obligation mechanism **if the request is made prior to the entry into force of the regulatory texts** putting in place the supplementary remuneration mechanism, i.e. 1 January 2016.

Additionally, these electricity generators must also finish construction of those facilities for which they wish to continue to benefit from the former mechanism within the 18 months following the latter date, i.e. 1 July 2017. This deadline can be extended by ministerial decree if conditions pertaining to the construction of the power generation facilities justify it.

Last resort buyer mechanism in the event of market failure

The Law on Energy Transition also provides for a new last resort buyer mechanism. It is now possible for the state to designate, via a transparent procedure, a last resort buyer who must enter into a contract to buy the electricity produced by any power generator who so requests, and who can provide supporting documents as to its inability to sell the electricity generated.

This mechanism enables electricity generators to sell the electricity generated by their facility even if they have not managed to do so on the market. In this case, a last resort purchase contract replaces the supplementary remuneration contract.

The draft decree specifies that resorting to this mechanism will be possible in two cases: (i) if the electricity generator has not been able to enter into a contract with an aggregator², and (ii) in the event of aggregator failure.

The sale of electricity via the last resort purchase mechanism cannot, however, lead to a remuneration level exceeding 80% of the total remuneration that would have been received from the sale of said electricity on the market plus the payment of supplementary remuneration. Buyer management fees will also be deducted.

The contract entered into between the generator and the last resort buyer will have a three-month renewable term and will be established on a template approved by the minister in charge of energy matters.

Abolition of the certificate for eligibility to purchase obligation (“CEPO”)

Lastly, the draft decree organises the abolition of provisions in decree no. 2001-410 of 10 May 2001 relative to the CEPO. To date, this certificate enabled the state to monitor the number of facilities applying for purchase obligation.

EDF will now have to submit to authorities, on request, the information in its possession as regards purchase contract and supplementary remuneration requests, regardless of whether a contract has been entered into.

2. NEW RULES PERTAINING TO THE ESTABLISHMENT OF ONSHORE WIND TURBINES

Minimal distance between wind turbines and housing

In its version prior to the Law on Energy Transition, article L.553-1 of the French Environment Code (*Code de l'environnement*) provided that the delivery of the authorisation to operate (ICPE) a wind turbine be subject to respecting a minimal distance of 500 metres between the wind turbine and local housing.

The Law on Energy Transition made this 500-meter distance the minimal distance allowable between wind turbines and constructions for use as housing. The prefect will now take into account the impact study to assess the appropriate distance between turbine and housing, on a case by case basis.

It is therefore essential that this impact study be carried out sufficiently upstream of the project's definition.

Prior approval of councillors

For towns or public establishments for cooperation between local authorities (*établissements publics de coopération intercommunale*, "EPCI") having agreed upon local planning regulations (*plan local d'urbanisme*, "PLU"), the construction of wind turbines in areas "incompatible with the neighbouring inhabited areas" is subject to a vote by the EPCI deliberative body or by the council of the town in question.

² An aggregator is “a physical or moral person other than the electricity generator who is in charge of selling the electricity generated by the facilities on the electricity markets on behalf of the generator” (draft decree, article 3)

Thus, where a PLU is already in place, favourable vote by the town or EPCI shall be sought. In the event of an unfavourable vote, the project cannot be developed.

Participative funding

The Law on Energy Transition is innovative in that it develops participative funding possibilities for renewable energy projects.

Corporations set up to manage a renewable energy generation project can offer a share of their capital to third parties. Thus, people living in the area of the renewable energy project, as well as the local authorities and their consortia on the land on which the project is located, can take a stake in the capital at the time it is constituted or developed.

These corporations can also offer that these same individuals take part in the financing of the renewable energy generation project.

This possibility of taking a stake in the capital does not constitute a public offer. Additionally, participative funding is not compulsory for operators, as had at one point been considered.

Memorandum for councillors

Adding to article L. 2112-12 of the French General code for local authorities (*Code général des collectivités territoriales*), which provides that, for towns of over 3,500 inhabitants, a memorandum on affairs subject to approval by the town council should be issued, the Law on Energy Transition now provides that such a memorandum should be issued to members of the town council in towns with fewer than 3,500 inhabitants when such deliberations regard a registered environmental facility, such as wind turbines.

Connection timeframe

The Law on Energy Transition provides that the timeframe for connection to the main grid of renewable energy facilities whose power exceeds three kilovoltamperes cannot take longer than 18 months. Not respecting this timeframe could lead to damages being paid to operators, according to a scale set by decree.

Nevertheless, where a request is made by the grid system operator, the administrative authority may extend this connection timeframe, in particular with regard to the size of the facilities and their location in relation to the grid, or when the delay in connection is the result of circumstances outside of the grid system operator's control.

A decree will set the facility categories as well as the circumstances justifying the extension of the eighteen-month timeframe.

Generalisation of the single authorisation

Order no. 2014-355 of 20 March 2014 pertaining to the trial of a single authorisation as regards registered environmental facilities, tested, in certain regions (Champagne-Ardenne, Picardie and Nord-Pas-de-Calais), the implementation of a single prefectural decision, known as "single authorisation". Thus, for wind farm projects located in the trial areas, the authorisations relative to building permits, area clearing, protected species and legislation on classified facilities as regards the protection of the environment, will be delivered upon completion of a single procedure.

The Law on Energy Transition shall extend to all French regions the single authorisation procedure from the first day of the third month following its promulgation, i.e. 1 November 2015.

3. REDEFINITION OF THE HYDROELECTRIC CONCESSIONS REGIME

Changes to the hydroelectric concessions regime have been under discussion for several years now and have been finalised in the Law on Energy Transition.

Its three main points are:

- The possibility of **grouping, by decree, several concessions** using the barycentre method. When several concessions form a “connected hydraulic infrastructure chain”, the administrative authority can decide to group them together to optimise their management, while at the same time guaranteeing the upholding of a prior economic balance.

Where concessions are operated by several different agents, a common date for the termination of the concessions can be set, by shortening the term of the longest concessions and lengthening that of the shortest. Compensation is then paid by those agents whose contracts are lengthened to those whose contracts are shortened.

- **Modulation in the usage fee rate** paid by the agent to the contractor depending on the electricity sold by the former (i) to companies belonging to the same group, (ii) as a part of long-term electricity provision contracts, and (iii) to energy-intensive companies that invested in the concession and bore part of the risk of the operation.
- The possibility of creating **semi-public hydroelectric companies**, between the state, one or more economic operators, and local authorities, maybe even other legal persons under public law and the companies or bodies they own. These companies are established as private companies and aim to enter into and enforce hydroelectric concession contracts.

The selection of economic operators and the allocation of the concession to the company are subject to a single of a public competitive tendering procedure.

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