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# Renewable Energy

The new regulatory landscape  
in France

January 2017

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# 1. Rapid growth of the renewable sector planned

French and EU law have set ambitious goals for the production of energy from renewable sources (RES).

Directive 2009/28/EC of the European Parliament and Council of 23 April 2009, on the promotion of the use of energy produced from renewable sources, set goals in this field for all EU countries.

France's law of 17 August 2015 concerning energy transition for green growth<sup>1</sup> (the LTE) implements this directive. By adopting this law, France confirmed its ambition to bring the share of RES to 23% of final gross energy consumption in 2020 and 32% by 2030.<sup>2</sup> Between now and then, it is intended to increase the share of electricity generated from renewable sources to 40% of the "electricity mix". In parallel, a goal has been set to reduce the nuclear sector's share in electricity production to 50% by 2025, proof of an imminent turning point and strong political will.

Alongside the LTE, the multiannual energy programme<sup>3</sup> (the PPE), set out the strategic direction for the French energy sector. After public consultation,<sup>4</sup> it was published by the government on 27 October 2016.<sup>5</sup> Ahead of its publication, an order of 24 April 2016—putting into application the multiannual investment programme (PPI)—inserted the development goals for RES into the PPE. These two documents, which appear to overlap each other,<sup>6</sup> flesh out the headline targets for increasing the share of renewable electric energy capacity to more than 50% (with the goal of reaching between 71 and 78 Gigawatt (GW) compared to around 45 GW today), and 50% of renewable heat in particular<sup>7</sup> by 2023.

Installed renewable electric energy capacity in France reached a level of 44.75 GW by 30 June 2016, accounting for almost 20% of the country's consumption.<sup>8</sup> Wind and solar photovoltaic (PV) sources represented one third of France's RES capacity in 2015. Hydroelectric energy is still the leading source of RES power.

To achieve the objectives set for RES, the LTE has planned many steps to facilitate the development of renewable energy installations and increase the diversity of RES used, by extending the goals to biomass, geothermal techniques (in France's overseas territories) and renewable heat and cooling.

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<sup>1</sup> Law No. 2015-992 of 17 August 2015 concerning the energy transition for green growth.

<sup>2</sup> Article 1 of the French law n° 2015-992 of the 15 August 2015 on the "Transition énergétique pour la croissance verte" (energy transition).

<sup>3</sup> In application of the article L. 141-1 of the French "Code de l'énergie".

<sup>4</sup> Consultation organized from 15 September to 15 October 2019 on the Ministry of the Environment website. 5307 comments were gathered during this consultation.

<sup>5</sup> Decree No. 2016-1442 of 27 October 2016.

<sup>6</sup> The adoption of the PPE is not considered to abrogate the order of 24 April 2016 concerning the application of the PPI that the PPE is designed to replace.

<sup>7</sup> Compared to 2014

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<sup>8</sup> Source: *Panorama de l'électricité renouvelable, L'électricité renouvelable en France au 30 juin 2016*, joint study by RTE, SER, ERDF and ADEeF.

## Installed and projected capacity (GW) of selected RES technologies<sup>9</sup>

Type of line	Installed capacity in 2015	Installed capacity planned for 2018	Installed capacity planned for 2023
Wind <sup>10</sup>	9.8	15.5	between 24.8 and 29
Photovoltaic	5.7	10.2	between 18.2 and 20.2
Hydroelectric	25.4	25.3	Between 25.8 and 26.05
RES total	43	52	71 to 78
Share of RES in French energy production	14.9%	23% (by 2020)	32%

### Sources:

- For 2015: RTE, Panorama of renewable electricity on 30 June 2015 and RES in France in 2015, Ministry of Ecology.
- For 2018 and 2023: Multiannual Energy Programme (Decree No. 2016-1442 of 27 October 2016 and the official summary released by the Ministry of Ecology).

<sup>9</sup> In addition to the technologies listed in the table, the PPE refers to others in smaller quantities, such as marine energy (100 MW), geothermal electricity (53 MW), wood energy (790-1.040 MW, methanization).

<sup>10</sup> Onshore wind and offshore wind combined.

## 2. Reform of the RES subsidy regime

The first support mechanism for RES, adopted in 2000<sup>11</sup>, was based on obliging electricity distributing entities (EDF or local distribution firms) to purchase electricity generated by RES producers at rates set by ministry rulings (or based on calls for tenders)—a feed-in tariff regime.

After the European Commission adopted its most recent state aid guidelines for the environment and energy<sup>12</sup> in 2014, France upgraded its legal regime when it adopted the LTE. The law and its implementing measures have led to a recasting of the RES support regime by establishing, in addition to the previous system based on an RES purchasing obligation, a new RES support mechanism: a feed-in premium. The goal is, of course, to bring RES closer to the market, by replacing feed-in tariffs little by little with mechanisms based on the sale of electricity generated in the market.

Henceforward, two supporting systems will coexist:

- **Guaranteed feed-in tariffs** which, in the new legal framework, will be available to a number of technologies that are not yet mature enough to be exposed directly to the electricity market and
- **Feed-in premiums.**

### 2.1 Technologies eligible for support

The energy code lists the types of energy to which aid can be granted, either by means of a power purchase agreement (PPA) under the feed-in tariff obligation or through a feed-in premium contract. These are:

- Installations recycling household or similar refuse or aimed at supplying a district heating network.

- Electricity-generating installations using RES, except for the technologies mentioned in the next bullet point or installations using high-energy efficiency techniques, such as cogeneration. A ministerial order limits the size of installations entitled to benefit from a feed-in tariff.
- Onshore or offshore wind farms and installations using marine energy, solar thermal energy or geothermal or hydrothermal energy.
- Windmills and watermills refurbished to generate electricity.
- Installations designed for energy recovery.
- In France's overseas departments, electric installations generating electricity from the biomass, including those using sugar cane.

### 2.2 Procedures for granting feed-in tariffs or premiums

Support (feed-in tariff or feed-in premium) is allocated in one of two ways: on demand or through a competitive process. The Commission's guidelines mean that small installations can be exempted from the competitive process which always generates costs for the operators involved. The competitive process is becoming the default method for the granting of aid; only small installations or technologies that are not yet mature (for instance marine technologies) can still avoid the obligation to compete for aid.

Decrees issued under articles L.314- 1 and 314-8 of the energy code have specified the list and the characteristics of the installations eligible for either feed-in tariff or feed-in premium support as of right or on demand, depending on the maturity of the technology in question:

- Accordingly, for the installations mentioned in point 2.3 below, producers are entitled to a feed-in tariff on demand.
- For those mentioned in point 2.4.2, producers are entitled to a feed-in premium on demand.

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<sup>11</sup> Law No. 2000-108 of 10 February 2000 concerning the public electricity service.

<sup>12</sup> Guidelines concerning State aid for the protection of the environment and energy for the 2014-2020 period (2014/C 200/01).

For installations that are eligible for support, but whose characteristics do not correspond to those entitling them to either form of support on demand, support is only available after a competitive process, under articles L. 311-10 and following of the energy code (regarding these procedures, see section 3 below). In this way, competitive allocation is becoming the rule and the feed-in tariff the exception. In this context, it is noteworthy that offshore wind farms are included among the technologies that cannot benefit from support without going through a competition.

### 2.3 Retention of the feed-in tariff system: installations eligible for support as of right

The system of support based on a feed-in tariff for electricity produced from RES has not been eliminated by the new legislation but has been modified so as to be consistent with relevant EU legislation.

Note that the following RES installations are still entitled to a feed-in tariff on demand:

- Hydroelectric energy and new installations for minimum flow rate turbine processes with installed power of up to 500 kW
- Onshore wind farms, except in Corsica
- PV devices on a building with installed peak power of up to 100 kW
- Biogas (methanization of non-hazardous waste, methanization of matter resulting from the treatment of waste water or derived from non-hazardous waste storage installations):
  - with installed power confirmed as less than 500 kW in mainland France
  - with installed power of less than or equal to 12 MW, installed in areas not interconnected with the mainland France grid;
- Floating wind farms selected by means of a call for tenders for projects in the territorial waters or exclusive economic zone of mainland France
- Wave driven or hydrokinetic energy installations selected by a call for tenders for

projects in the territorial waters or exclusive economic zone of mainland France

- Co-generation with installed power confirmed as less than 300 kW in continental France
- Coal bed methane for installed power of up to 12 MW
- Wind farms in areas particularly exposed to storm risks and incorporating a system of forecasting and smoothing out production.

However, regarding on-shore wind, it has to be noted that, after discussions with the EU Commission, the Government finally decided to shift to a feed-in premium system as of 1 January, 2017. The new regime is still under discussion but the Government already repealed the Order of 17 June 2014 that set up the FIT for on shore wind projects. A transitory regime has been put in place for 2016 (Order of December 13, 2016).

In theory, installations benefiting from feed-in tariff conditions are only entitled to benefit from a feed-in tariff contract once. However, there is an exception to this rule (article L. 314-2, D. 314-16, R. 314-19 and R 314-20 of the energy code) for the following installations, once the first feed-in tariff contract has reached its term:

- RES installations in zones not connected to the mainland French grid committed to carrying out a program of investment on the installation.
- RES installations in continental France and that are amortized, provided that the operating costs of a high-performance representative of the technology continue to be higher than its overall earnings, including the financial and fiscal aid for which it is eligible
- Electricity production installations principally fueled by biogas derived from non-hazardous waste storage installations located in mainland France, with installed power strictly below 500 kW.

## 2.4 The new feed-in premium system

### 2.4.1 Description of the mechanism

Since 1 January 2016, a new mechanism to support RES electricity production has been established: the feed-in premium. Little by little, it is intended to have it replace the “feed-in tariff” system for technologies that have reached maturity.

Introduced by the LTE and implemented by two decrees,<sup>13</sup> it consists of a premium paid to the producers of RES electricity, to top up the revenues they receive from the sale of their electricity directly on the market. This premium allows generators to sell renewable at electricity market prices, with any additional costs being compensated for by the feed-in premium.

This means that renewable electricity producers will in one sense be exposed directly to market signals while at the same time continuing to be protected by the compensation mechanism.

The feed-in premium is financed by the CSPE (a levy on French electricity consumers) and paid by EDF to eligible producers. It is covered by a contract between the producer and EDF.

#### 2.4.2 Installations eligible for feed-in premiums as of right

For installations identified in article D. 314-23 of the energy code, producers simply need to request feed-in premium to benefit from it. This applies to the following RES technologies:

- Hydroelectric energy and new installations for minimum flow rate turbine processes with installed power of less than or equal to 1 MW
- Energy given off by the thermal treatment of household or similar waste
- Biogas produced by the methanizing of materials generated by the processing of urban or industrial waste water with installed power of between 500 kW and 12 MW
- Biogas derived from non-hazardous waste storage installations with installed power of between 500 kW and 12 MW

- Energy extracted from geothermal reservoirs
- Co-generation with installed power of up to 1 MW
- Onshore windfarms

However, regarding the onshore windfarms, Government finally disclosed a new policy according to which small plants (fewer than six wind turbines) would be granted a feed-in premium on demand. Plants with more than six turbines would be eligible to a feed-in premium granted after a competitive process. The new system is still under discussion with the European Commission.

#### 2.4.3 Transition measures between the two systems

In theory, installations that benefit from or have benefited from feed-in tariffs are not eligible for the feed-in premium.

However, article L. 314-19 of the energy code creates an exception from this rule for:

- RES installations that have benefited from a feed-in tariff and that commit to the carrying out of an investment programme specified by order
- RES installations in mainland France and that are amortized, provided that the operating costs of a high-performance representative of the technology continue to be higher than its overall earnings, including the financial and fiscal aid for which it is eligible
- RES installations that have benefited from a feed-in tariff and wish to terminate it in favor of a feed-in premium contract for the remaining term of the feed-in tariff PPA.

#### 2.4.4 Calculation of feed-in premium

Articles R. 314-33 and following of the energy code make detailed provision for the operation of article L. 314-20 with regard to the calculation of feed-in premiums. Sectoral orders,<sup>14</sup> made after

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<sup>13</sup> Decree No. 2016-812 of 17 June 2016, for the application of article 65 of the Law No. 2015-992 of 17 August 2015 concerning energy transition for green growth and Decree No. 2016-565 of 10 May 2016, for the application of article 45 of the Law No. 2015-992 of 17 August 2015 concerning energy transition for green growth.

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<sup>14</sup> Order of 13 December 2016 *establishing the conditions of the feed-in premium for electricity generated by electricity generating installations using the mechanical energy of the wind*; Order of 13 December 2016 *defining the conditions of feed-in tariff purchase and feed-in premiums for electricity generated by*

consulting with the Commission for Energy Regulation, stipulate how they are to be calculated for each technology.

In very simple terms, the formula for calculating the feed-in premium is as follows:

$$\text{Premium} = \text{Reference purchase tariff} - \text{reference market price} - \text{Revenue from capacity guarantees} + \text{management premium}$$

The reference purchase tariff is equivalent to a feed-in tariff. It is calculated in such a way as to cover the average investment and operating costs of a high-performance installation which is representative and liable to “*procure reasonable payment of capital, in the light of the risks inherent in these activities.*” An order sets out the value for each technology.

The reference market price corresponds to the average of the prices on the French electricity market for a period (“time step”) to be specified for each technology by order.

The revenue from capacity guarantees corresponds to the revenue that the producers obtain under guarantees of security of supply given to suppliers when the latter are confronted by an electricity peak demand.

The management premium corresponds to the costs affecting renewable energy producers for gaining access to the wholesale electricity and capacity guarantee markets.

When the result of the calculation mentioned above is negative, that is, when the average sale price is higher than the average installation and operating costs, the generator is required to pay a premium to EDF. However, the amount of the premium a generator pays cannot exceed the total of the premiums it receives, since the feed-in premium is intended to support the development

of RES projects, not to represent an additional cost for generators. In this way, it is hoped that the potential drawbacks of a feed-in tariff system co-existing with negative market prices will be avoided.

#### 2.4.5 Buyer of last resort mechanism

A “buyer of last resort” mechanism has been established to make feed-in premium mechanism attractive to investors.

This mechanism guarantees that a designated operator, selected after a call for tenders’ procedure, will buy any electricity that producers have been unable to sell on the market themselves.

Any generator unlucky enough to be in this position enters into a PPA with the designated operator for a term not exceeding five years.

However, the electricity is sold at a lower price: less than 80% of the price that would have been generated from selling it directly on the market and payment of the feed-in premium.

The mechanism functions as a safety net, designed to make projects subject to the regime more financeable and enhance the creditworthiness of RES generators so as to reassure investors.

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*installations using hydroelectric energy from lakes, rivers and gravity-captured water;*

Order of 13 December 2016 *defining the paid premium conditions for electricity generated by installations primarily fueled by energy extracted from geothermal reservoirs, as referred to under point 5° of article D. 314-23 of the energy code;*

Order of 13 December 2016 *defining the purchasing conditions for electricity generated by installations primarily fueled by biogas produced by the methanisation of non-hazardous waste and raw vegetable material within mainland France, with installed power strictly less than 500 kW, as mentioned in point 4° of article D. 314-15 of the energy code.*

### 3. Competitive allocation procedures

Law No. 2000-108 of 10 February 2000 established a call for tenders' procedure for some electricity generating installations that enabled the Government itself to initiate the creation of RES installations in cases where either the technologies being used or the geographical distribution of projects does not conform to the goals set for renewable energy production. With this tool, the Government can guarantee country-wide balanced development of RES, or provide incentives for the development of innovative technologies.

With the adoption of the LTE, the legal framework for the call for tenders' procedure has been modified and completed, more especially to take account of the European Commission's state aid guidelines for environment and energy. The main change is the establishment of a new competitive dialogue procedure, running alongside the call for tenders' process, which is better suited to the development of technologies that are innovative or not yet quite mature.<sup>15</sup> Henceforth, it is no longer sufficient to refer to the call for tenders' procedure alone but to the "competitive allocation procedures," of which there are now two and which are defined in articles R.311-12 and following of the energy code.

The principles applicable to the competitive allocation procedures derive from those governing public procurement procedures: article L. 311-11 of the energy code stipulates that "the competitive allocation procedure mentioned in article L. 311-10 is to be carried out in compliance with the principles of transparency and equal treatment of applicants." Following the same approach, order No. 2016-1059 introduces applicant selection criteria. There are other criteria as well as price which can be applied in a non-discriminatory manner, provided they are linked with the purpose of the procedure concerned. These other criteria are a way of taking into consideration, in addition

to the criteria of transparency and equal treatment, criteria concerning the environmental and energy performance or the innovative character of the project. These criteria must be mentioned in the tender specification.

The chosen applicants, designated after a competitive allocation process, will benefit from either a feed-in tariff for the electricity they generate, or a feed-in premium for their electricity.

#### 3.1 The call for tenders' procedure

The call for tenders' procedure is the competitive allocation process whereby the Minister of Energy chooses the most advantageous offer in economic terms, without negotiation, based on objective criteria previously notified to applicants. It has been modified by an Order.

The main changes made are the merging of the two procedures applied previously (ordinary procedure and accelerated procedure) and a reduction in the time between the decision to initiate the call for tenders' process and the designation of the chosen contractors.

##### 3.1.1 Generation of tender specification by Minister of Energy

Previously, the Minister for Energy and the Commission for Energy Regulation (**CRE**) shared responsibility for writing the tender specification: Initially the Minister defined the key features of the call for tender then the CRE had a six-month period to write the specification on this basis.

The rules are now simpler and will speed up the process. The specification is to be written by the Minister of the Economy then submitted to the CRE for approval, with just one month allocated to reach a decision. The resulting opinion is made public on the CRE website.

The specification must include a number of elements, in particular the geographical area concerned and the desired maximum power, a detailed description of the installations referred to and the conditions applicable to them, or an exhaustive list of the proposed evaluation criteria

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<sup>15</sup> Order No. 2016-1059 of 3 August 2016 on the production of electricity from renewable energy and decree No. 2016-1129 of 17 August 2016 on the competitive dialogue procedure for electricity production installations.

and their weighting or order of precedence. In relation to the criteria, it should be noted that article R. 311-13 of the energy code requires that quantitative criteria represent at least 50% of the total weighting.

### 3.1.2 Dematerialized procedure

After consulting the CRE, the Minister of Energy publishes notice of a call for tenders in the Official Journal of the European Union (OJEU). The Minister of Energy sends the specification of the call for tenders to the CRE, which then publishes it on its website on the first working day following the publication of the notice in the OJEU.

The CRE sets up an online application site. This site can be used for downloading the call for tenders' specification and for filing applications.

At the end of the procedure, the CRE publishes on its website the list of chosen applicants, a report containing a summary analysis of the bids, and, where applicable, any decision of the Minister of Energy not to take the procedure any further.

### 3.1.3 Timeframes

Applicants are given at least six months starting from the date of the publication of the notice in the OJEU to send in their applications. This timeframe is unchanged from the previous rules.

Starting from the closing date for the submission of the application files, the CRE has between 15 days and four months to examine the bids received and forward to the Minister of Energy:

- The list of compliant bids and non-compliant bids, with reasons given for the non-compliance; these lists are not public.
- The ranking of the bids with details of their scores and at the request of the Minister, a detailed report for each bid, justifying the scores obtained
- The list of projects it intends to choose
- A summary analysis of the bids
- If requested by the Minister, the bids themselves.

Note that previously, the CRE had two months as part of the accelerated procedure to examine the

files and that there was no set regulatory time frame for the regular procedure.

### 3.1.4 Choice of applicants

The Minister for Energy selects certain applicants and notifies all the others that their bids have been rejected.

After examination of the projects preselected by CRE, if the Minister's proposed choice is not compliant with the CRE's ranking, the Minister must first consult the Commission regarding his or her choice. The CRE has 15 days to provide its opinion, after which its opinion is considered as having been given. Please note that this is a non-binding opinion, and the Minister could go ahead with his own proposed choice.

## 3.2 Competitive dialogue

Decree No. 2016-1129 of 17 August 2016 concerning the competitive dialogue procedure for electricity producing installations has created a new competitive allocation procedure applicable where existing capacity and projects under construction do not meet the multi-annual energy programming goals. It is known as the "competitive dialogue".

This new competitive allocation procedure is modelled directly on the competitive dialogue procedure that forms part of the public contracts code. In the call for tenders' procedure, the Minister for Energy chooses the most economically advantageous offer, without negotiation, based on objective criteria previously notified to the applicants. With this new procedure, on the other hand, he must establish dialogue with any applicants who have previously been accepted for participation.

This new procedure has just been deployed by the Government in the context of the third offshore wind farm project call for tenders (installation of offshore wind farms off the coast of Dunkirk). The establishment of this new procedure has been motivated in particular by the difficulties encountered during the first two calls for tenders for offshore windfarms: lead time too short, lack of applicant visibility, significant restrictions imposed in advance on the technical options ... leading inexorably to an increase in the

prices that projects were seeking for their power. The dialogue procedure, by enabling discussion between the parties, should lead to a better allocation of the risks and so bring the prices down.

The competitive dialogue procedure involves several stages:

- Advertising: the Minister for Energy draws up a consultation document which is submitted to the CRE for its opinion, specifying the purpose of the procedure, the timetable, the requirements concerning the applicant's technical and financial capabilities and the supporting documents expected during the applicant selection phase, the methodology for assessing the technical and financial capabilities of the applicants, and the criteria for selecting the offers resulting from the competitive dialogue. When the CRE has issued its opinion, a public call for competitive tenders is published in the OJEU.
- Examination of technical and financial capabilities: the CRE examines the applications submitted to it on the basis of their technical and financial capability, drawing up a list of the applications it proposes for selection and those that are not selected, giving the reasons why.

The Minister for Energy designates the selected applicants and notifies all the others that their proposals have been rejected, giving the reasons why.

A draft specification is submitted to the preselected applicants.

- Dialogue: A dialogue phase is organized between the State and the preselected applicants to define the conditions to be fulfilled by the proposals.
- Submission of proposals: After the dialogue, the final specification is drawn up by the Minister of Energy and the applicants are requested to submit their proposals based on this document.
- Assessment of proposals by the CRE: In addition to the price, the scoring of proposals can take account of the technical value of the project, the environmental performance, energy efficiency, innovativeness of the project, security of supply, and also the profitability of the project and the existence of crowdfunding. However, quantitative criteria must represent at least 50% of the overall weighting.
- After the CRE has examined the proposals, the chosen contractors are appointed by the Minister of Energy.



## 4. Administrative simplification

### 4.1 Electricity generating licenses

The LTE has also amended the legal framework applicable to licenses to generate electricity as part of its efforts to simplify and clarify procedures.

The LTE has modified the criteria by which licenses are granted by bringing to the forefront the smooth running of the electricity market, the promotion of renewables and the fight against harmful climate change. On this point, the LTE has also arranged matters so that the license may restrict the maximum number of operating hours per year, if the installation emits greenhouse gases. The LTE has also created a single license for neighboring or interconnected installations using the same primary source of energy and operated by the same entity.

Decree No. 2016-687 of 27 May 2016 concerning authorization to operate electricity production installations, based on the LTE and article L. 311-6 of the energy code, completes the process of simplification started by the LTE by simplifying the licensing procedure, while still retaining its essential features.

#### 4.1.1 Installations deemed to be authorized

First of all, the decree covers the thresholds beyond which a license application must be made for electricity generating installations using RES and fossil fuels. Previously, these thresholds were 12 MW for solar, the use of non-fossil material of animal or vegetable origin, biogas, waste recovery and geothermal techniques, and 30 MW for wind power. These are raised to 50 MW.

In addition, installations using wave or hydrothermal or hydrokinetic energy which previously required a license are now deemed to be authorized as long as the installed power is less than or equal to 50 MW. With regard to installations using fossil fuels, the threshold has been raised by 4.5MW to 20 MW for natural gas and 10 MW for other fossil fuels (except coal).

Finally, certain hydro installations are exempt from the requirement to apply for a license (this applies to those not coming under the water law

and those producing electricity incidentally to other operations).

#### 4.1.2 Changes of operator

By application of L. 311-5-4 and R. 311-8 of the energy code, only a change in the operator running installations requiring a license needs to be authorized by an administrative decision. Otherwise, it appears that a change of operator does not require the prior approval of the regulator.

#### 4.1.3 Advertising measures

Some flexibility has been added regarding the requirement to publish license applications in the JORF (Official Journal of the French Republic) since it now applies only to installations with power exceeding 500 MW, and only requires the main characteristics to be published. The purpose of this limitation is to minimize risks of legal challenge, especially for modestly sized projects. Licenses continue to be published under the same terms as previously in the JORF.

### 4.2 Elimination of the CODOA

Under the terms of article R314-7 of the energy code the entry into effect of a feed-in tariff or feed-in premium contract depends on the producer sending to the counterparty (EDF or another local distribution company (an “LDC”,) where applicable), a certificate confirming the conformity of its installation with the requirements of the orders mentioned in article R. 314-12 and the specifications set out in the contract. This removes and replaces the system of certificates of entitlement to a feed-in tariff<sup>16</sup> (CODOA) that producers have previously had to obtain from the prefecture in order to be able to enter into a feed-in tariff contract.

Until 1 January 2018, a transition phase has been established during which a simple process of self-

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<sup>16</sup> Abrogated by Decree number. 2015-1823 of 30 December 2015 concerning the codification of the regulatory part of the energy code.

certification by the generator replaces the conformity certificate.<sup>17</sup>

Accordingly, changing from an ex ante control mechanism—via “CODOA”—to an ex post control mechanism—via the conformity certificate—is part of the legislator’s aim of simplifying procedures and shortening timeframes for RES generators as better incentive for them to develop.

### 4.3 Single environmental authorization

The single environmental authorization combines a large number of fairly obscure authorization procedures previously governing environmental projects. The stated goal is to simplify administrative procedures so as to reduce the time taken to process authorization requests and to facilitate the implementing of projects.

The single environmental authorization reforms have taken place in successive steps: an initial three-year experimental phase governed by orders<sup>18</sup> applying to several regions and a second phase during which the experiment was generalized to the entire national territory, as a result of the “Macron law.”<sup>19</sup>

#### 4.3.1 Single environmental authorization – the trial phase

##### a. Scope of single environmental authorization

The single environmental authorization applies to:

- Installations subject to the environmental protection regime (**ICPEs**)
- Installations, structures, works and activities requiring authorization by virtue of the water law (**IOTAs**)

(i) For ICPEs, a single integrated procedure is implemented, leading to a single decision by the Departmental Prefect. It includes all the official

decisions that may be necessary to carry out the project under:

- The environment code: the ICPE authorization, the water law, [Natura 2000 evaluation] and any derogation from the rule against adverse impacts on protected species
- The forestry code: forest clearing authorization
- The energy code: licensing, approval of electricity transmission and distribution structures
- The planning code: building permits when issued by central government (wind turbines and methanization installations).

Furthermore, this single procedure is coordinated with the process of granting a building permit when it is not issued by central government (i.e. for all ICPE projects other than wind turbines and methanization installations)

(ii) For IOTAs, a single integrated procedure is used, leading to a single decision by the Departmental Prefect, and combining all the official decisions involving:

- The environment code: authorization under the water law, with respect to the legislation for national nature reserves and regulated sites and derogations from the rule against adverse impacts on protected species and habitats
- The forestry code: forest clearing authorization.

This single IOTA procedure is also coordinated with other related procedures: the issue of a domain authorization for the public river and sea domain, the building permit and the authorization to use water for human consumption.

##### b. Advantages of the single authorization

This single authorization process affords the following simplifications:

- A single process: henceforth, the applicant simply fills in a single form, deals with a single point of contact at the prefecture to obtain finally a single environmental authorization per project, including all the conditions and

<sup>17</sup> Article 7 of decree No. 2016-682 of 27 May 2016 *relating to the feed-in tariff and 2 feed-in premiums.*

<sup>18</sup> Order No. 2014-355 of 20 March 2014 on the trial of a single authorization for installations.

listed for environmental protection and order No. 2014-619 of 12 June 2014 *on the trial of a single authorization for installations, structures, works and activities requiring authorization by virtue of article L. 214-3 of the environment code.*

<sup>19</sup> Article 103 of the Law No. 2015-990 of 6 August 2015 for *economic growth, activity and equal chances.*

requirements imposed under the various regimes it covers.

- Shortened processing times: The set goal is to be able to process an application in 10 months versus 15 months for projects not benefiting from the single authorization.
- Unification of the timeframes and grounds for challenge: the decision can be brought before the administrative court by the requesting parties and third parties within two months of notification or publication.

#### 4.3.2 General rollout of the single environmental authorization

Starting on 1 January 2017, the single environmental authorization regime will be extended to the entire country. After a public consultation that concluded on 30 October 2016, the order covering this rollout is soon to be issued.<sup>20</sup>

Under the new system, ICPEs and IOTAs requiring authorization will go through the new environmental authorization process together with other projects requiring environmental assessment and that are not subject to an administrative authorization process liable to lead to measures to avoid, minimize or compensate for adverse impacts on environment.

The environmental authorization replaces the following authorizations, when they apply to the project:

- Special authorization for national nature reserves and nature reserves that are Government-listed in Corsica
- Special authorization for registered sites or those pending registration
- Exemption from measures protecting wild fauna and flora
- Non-opposition procedure for Natura 2000 sites

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<sup>20</sup> Because of a delay in adopting the order and its application decree, on 3 January the Government announced that the single environment authorization regime would enter into force on 1 March, with projects having the option to choose between the old and the new procedures until 30 June 2017.

- Approval or declaration for the use of genetically modified organisms
- Approval for waste treatment
- Authorization to operate an electricity production installation
- Approval of private electricity structures using public land
- Land clearance authorization
- For onshore wind turbines, various authorizations under defense national heritage and transport rules
- IOTA declaration, registration or declaration for ICPE.

Note that the environmental authorization is not equivalent to a building permit except in the case of onshore wind turbines. For any other project, the developer may choose when to apply for a planning authorization; however, it cannot be implemented before an environmental authorization has been issued.

#### 4.4 Maximum connection timeframes for all electricity distribution grids

The LTE establishes a maximum timeframe for connection to the electricity distribution grid for all renewable source electric installations. Article L342-3 of the energy code now stipulates that the connection time shall not exceed 18 months for installations with installed power exceeding 3 kV amperes. For installations with power not exceeding this threshold, the maximum time of two months starting from acceptance of the connection offer is unchanged.

The aforementioned 18-month deadline begins from the date on which the network operator receives the signed connection offer and does not include the time needed for commissioning the generating installation.<sup>21</sup>

In addition to the aim of simplifying procedures, this measure is designed to contribute to the growth of RES and consolidate the legal

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<sup>21</sup> Article D342-4-1 of the energy code.

framework for the connection of RES installations with installed power exceeding 3 kVA, for which there was previously no statutory deadline.

#### **4.5 Simplification of disputes**

One of the main problems for RES in France, along with the complexity of the administrative procedures, is the risk of the various authorizations obtained for a project being subject to legal challenge.

That is why various measures have been taken to simplify the rules regarding challenges, to improve

the efficiency with which the courts decide on such projects. Among other things, the following simplification measures are noteworthy:

- For the single environmental authorization: new legislation stipulates a single deadline for bringing a claim, regardless of which aspect of such an authorization is in dispute. The time is two months for the claimant or the operator and four months for third parties.
- For offshore windfarm installations, all claims concerning such installations are to be heard by the Nantes Administrative Court of Appeals.



## 5. Reforming the CSPE

### 5.1 Origin and development of the CSPE

The CSPE was established by a law of 3 January 2003. The purpose of this fiscal obligation, paid by every electricity consumer, is to compensate for the extra costs arising from public service obligations imposed on all public electricity network operators (EDF and local distribution firms). Essentially, these extra costs are those associated with the support schemes for RES installations and the obligation to buy RES electricity (cogeneration, solar, wind, hydro...) but also for the additional costs of producing and buying electricity in parts of the country not interconnected to the mainland, the financing of the “essential need tariff” system and the system established for the benefit of vulnerable consumers, the financing of the management expenses of Caisse des Dépôts et Consignations (CDC), and part of the budget for the National Energy Ombudsman and, finally, the financing of transitional capacity premium contracts and beginning in 2017, demand side response payments.

Largely as a result of the increase in the “renewable energy” aspect of the CSPE, which now represents more than 65% of its costs, the public service costs covered by the CSPE have increased enormously since it was first set up, growing from €1.4 billion in 2003 to €7 billion in 2016, and now representing 16% of the bill paid by a typical residential customer.<sup>22</sup> However, the CSPE did not operate through the State budget (it is collected by the CDC) and was therefore not under parliamentary control. Given both the overall burden imposed by the CSPE (exceeding that of the capital gains tax) and its impact on each consumer, the CSPE was heavily criticized, leading to its reform.

### 5.2 The new CSPE

The reform of the CSPE began with the corrective finance law for 2015 which budgeted the CSPE

“to ensure better control of charges and greater transparency for the use of revenues”<sup>23</sup> under it. This resulted in the CSPE being subsumed into a domestic tax on the final consumption of electricity (TIFCE), itself renamed as CSPE with a base modelled on that of the former CSPE so as to apply to all final consumption of electricity. The total levy was raised to the level planned for the CSPE in 2016.

Henceforth, the costs of public service obligations are incorporated into the State budget through a special account assigned to “energy transition” and a budgeted programme entitled “public energy service,” managed by the CDC.

The “*energy transition*” account covers expenses related to renewable energy support (electricity and gas) and to curtailment, and also refunds operators for shortfalls in compensation for their electricity public service costs accumulated up to 31 December 2015. It is funded not only from the new CSPE but also from part of the domestic tax on the consumption of energy products, the domestic tax on the consumption of coal, lignite and coke. In this way, the CSPE, which represented an ever-increasing burden on the final bill paid by electricity consumers will no longer be the sole source of financing for renewable energy support schemes, thanks to the input from hydrocarbons.

As far as the “public energy service” account is concerned, it supports the expenses related to tariff adjustment, support for cogeneration and social electricity and gas schemes (including the future “energy cheques” scheme and the budget of the energy ombudsman). It is financed from the general budget of the State.

### 5.3 Operation of the new CSPA de la nouvelle

Decree No. 2016-158 of 18 February 2016 concerning compensation for the costs of energy public service obligations (codified in articles R. 121-22 and following of the energy code) sets out

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<sup>22</sup> Legislative report on finance law draft for 2016: Ecology, sustainable development and mobility: energy.

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<sup>23</sup> General outline of reasons behind corrective finance bill for 2015.

the methodology for determining the costs that can be imputed to public service obligations imposed on companies in the electricity and gas sectors, the procedure for setting the amount of the expenses to be compensated in respect of each operator, and the means of paying compensation to the operators on whom these costs are levied.

The CDC continues to manage the specific accounts relative to the compensation for the costs of energy public service obligations. It collects payments from the State and makes payments to the operators.

The costs of energy public service obligations are clearly defined in articles R. 121-25 and following. In connection with costs connected with renewable energy support schemes:

- For the feed-in tariff mechanism, the calculation of the expenses differs marginally depending on whether the expenses are covered by EDF or by a local distribution company, in an area that is not interconnected, or not, but overall comes to the difference between the purchase price of electricity paid as part of a feed-in tariff arrangement and the market price of the electricity.

- As far as the feed-in premium mechanism is concerned, the expenses, for a given calendar year, correspond to the amounts paid as a feed-in premium by EDF to the producers entitled to the benefit of these contracts, reduced by any amounts due by producers to EDF in the event of the premium being negative.

It is up to the CRE to evaluate the total of the expenses imputable to energy public service obligations on the basis of the information contained in the declarations that operators are required to make every year. The CRE, before 31 December of the previous year, must notify each operator of the predicted total of the expenses imputable to such obligations to which it is subject in the following year. It makes a distinction between the total expenses included in the “energy transition” account and those of the “public energy service” account.

Compensation is paid each month by the CDC following an indication of the amounts submitted by the Minister of Energy.



## 6. Reform of the hydroelectric concessions system

The reform of the hydroelectric concessions system initiated by the LTE has been finalized by the adoption of Decree No. 2016-530 of 27 April 2016 *concerning hydroelectric energy concessions and approving the model of the specification applicable to these concessions*.

This reform was eagerly awaited because of the importance of hydroelectricity in France and the pressure being applied by the European Commission to open these concessions to competition.

Together with nuclear production, hydroelectricity is one of the two pillars of the French electricity mix: 70 TWh produced on average every year, that is 12% of electricity production; 25 GW installed power, and 20% of the installed power in the national territory; accordingly, it is one of the major links in security of supply for French consumers. Furthermore, hydroelectricity also represents more than 80% of RES electricity production and 20% of total renewable energy production so that it plays a decisive role in achieving the goals set by the PPI - 23% of renewable energy in the final energy consumption total between now and 2020. Accordingly, the management of the French hydroelectric sector plays a strategic role in France's energy policy.

At the same time, all the hydroelectric concessions granted on the basis of the law of 16 October 1919 concerning the use of energy were granted without a procedure involving competition, and for a very long term (usually 75 years) resulting in France being the target of complaints from the European Commission. In 2015, the Commission served notice on France under article 106 of the Treaty on the Functioning of the European Union (TFEU) pointing out that *“by virtue of article 106 of the TFEU the member states are required to ensure, in the case of public undertakings and undertakings to which they extend special or exclusive rights, that they do not enact or maintain in force any measure contrary the rules of the treaties and in particular the rules of competition.”*

Approximately 150 concessions out of the 400 will reach their term in 2023. The matter of their renewal is therefore attracting keen attention, because of the strategic challenge that hydroelectricity represents for France and also because it would appear the contract renewals should take place according to a competitive process that complies with relevant EU law.

New legislation is attempting to address these concerns in a positive way. On the one hand, concessions will be granted in compliance with the general rules on concessions, as derived from the order of 29 January 2016 concerning concession contracts, incorporating adjustments that allow for the specific nature of the activity in question. On the other hand, the Government and territorial communities will be able to have direct input into how are managed, since they will be expressly permitted to set up public-private companies to act as concessionaires of hydroelectric projects.

### 6.1 Competition procedures

The decision to begin a hydroelectric energy concession procedure may result from a decision by the competent administrative authority<sup>24</sup> to establish a concession in a new geographical sector or to renew a concession, or may result from a request made by any group of persons when it is in their interest.

The procedure begins with the publication of a notice in the OJEU, in the *Bulletin officiel des annonces des marchés publics* (official public market notice bulletin) or in a legal notices journal, and in a specialized publication relating to the economic sector concerned.

Article R. 521-8 stipulates the specific elements that must appear in the consultation documents (end of concession file, water regulation plans, summary plans for balanced and sustainable management of water resources...).

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<sup>24</sup> In theory, this is the Prefect of the Department where the works are located (article R. 521-1 of the energy code).

The consultation rules must contain various requirements including the conditions governing the duration of the concession, which may either be defined before the submission of bids or be an element in the evaluation of bids. The consultation rules must include an estimate of the cost of the admission fee. The bid assessment criteria must include “*optimizing the energy output of the flow or water and compliance with the balanced and sustainable management of the water resource taking account of its different uses and the economic and financial conditions for the State and the territorial communities.*”

The preferred bidder is then requested to submit the concession application within a timetable set by the administrative authority. Note that the administrative authority may decide that the second placed bidder is not finally rejected and may replace the preferred bidder if the latter is subsequently rejected or does not follow up its concession application.

Following the submission of the concession application, a public enquiry phase begins. Its conclusions may have an impact on the concession documents which are then updated, although this does not modify the results of the competitive tendering procedure.

At the end of the inquiry procedure, the concession is granted by a decision of the Prefecture.

## **6.2 Specificities of the procedure**

### **6.2.1 Provisions concerning the end and renewal of the concessions**

The decree organizes the termination and renewal of concessions in such a way as to guarantee that the operation of the service is uninterrupted.

Accordingly, it is up to the administrative authority, not more than three years before the expiry of the concession, either to decide on the definitive ending of the concession on its normal date of expiry, or to set up a new concession starting from this expiry date. The draft decision is the subject of public consultation. The decision to stop or continue operation is then published in the JORF Journal.

The provisions of the energy code pave the way for the administrative authority's decision by making it compulsory for:

- The concessionaire to supply to the administrative authority, within 15 months after a request of the administrative authority, and not more than five years before the normal due date of the concession, an end of concession file containing all the documents involving the concession, its history and description, and an assessment of the state of the equipment, buildings, works and development, the impact of the concession on the environment and the financial, economic and social impacts of its operation
- The concessionaire to carry out, within five years prior to the normal due date of the concession, at the expense of the State, any work deemed necessary by the Prefect for the preparation and development of its future operation, as envisioned by the Government and to the extent that it is preferable to perform them without waiting for the expiry of the concession
- The concessionaire to submit to the administrative authority, 18 months before the normal due date of the concession, a file including in particular a report certifying the sound operational and maintenance condition of the assets of the concession and the good progress made on any work planned for this purpose, through to the term of the concession; a draft protocol in which he describes all the measures it intends to take to guarantee the smooth termination of the concession and the handover to the Government of the assets and associated property of the concession with an updated version of the constituent parts of the concession end file.

On the normal end date of the concession contract, after a hearing of the parties before the administrative authority, and in the event of the renewal of the concession, with the input of the future concessionaire (if appointed), the concessionaire draws up a report establishing the state of the property of the concession.

## 6.2.2 Grouping

One of the main innovations of the reform is that it makes it possible to group together, within one concession, several concessions located in the same valley and forming “a chain of developments with hydraulic connections,”<sup>25</sup> before they are put up for tender. Grouping in this way could improve the future management of a series of connected hydroelectric structures.

This approach, known as the “barycenter method” consists in grouping together concessions before they are put up for tender in order to create a coherent group with a single end date. This date is obtained by taking a weighted average of the end dates of the various contracts based on the revenue that they generate.<sup>26</sup> In other words, it means shortening the term of the longer contracts and lengthening that of the shorter contracts for the same valley so that they all finish at the same date. If the concessions grouped together in this way are not all run by the same concessionaire, those whose contracts are shortened will be indemnified by those whose contracts are extended.

## 6.2.3 Admission fee

If a concession is renewed, the new concessionaire is required to pay an admission fee covering all the expenditure incurred by the administrative authority in renewing the concession, and in particular:<sup>27</sup>

- Refunding to the previous concessionaire the un-amortized share of any investment expenses incurred
- Where applicable, any indemnities paid by the administrative authority for a concession contract when the structures are included within the new concession
- Where applicable, any indemnities paid by the administrative authority for the purchase of recovered assets included in the new concession

- Any other expense incurred by the administrative authority in the course of the selection of the chosen concessionaire or processing its concession bid, in particular advisory and publication expenses.

The final amount of the admission fee is defined in the specification of the concession.

## 6.2.4 Public-private hydro company

In consideration of the challenges the hydroelectric system represents, the legislator has set up a tool so that hydroelectric concessions can be opened to competition while guaranteeing that the Government maintains reinforced and direct control of the management of these installations: the public-private hydro company.

This mechanism is inspired directly by the institutional public-private partnership as promoted by EU institutions.

For the Government, it means setting up a company with at least one economic operator as the shareholder operator and where applicable, with local communities at the project location, or any other public entity. The sole purpose of this company is to hold a hydroelectric concession contract.

The selection of the shareholder operator and the granting of the concession to a public-private hydroelectric venture takes place at the end of a single public call for tenders' procedure carried out by the Government. This procedure is set up according to the same rules and using the same selection criteria as the concession renewal procedure.

With respect to the advertising notice published to initiate the shareholder operator selection procedure, the Government must inform all the applicants of the main conditions it has defined for drawing up a concession contract with the public-private hydroelectric company, and in particular:

- The conditions of association of the Government, local communities or groupings of them and public partners in the company
- The draft articles of association of the proposed company, and all the elements designed to govern relations between the

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<sup>25</sup> Term defined in art. L. 521-60 of the Energy Code.

<sup>26</sup> Article L. 521-16-1, L. 521-16-2, R. 521-60 and following of the energy code.

<sup>27</sup> Articles L. 521-17 and R. 521-58 of the energy code.

shareholder operator and the public sector shareholders

- The main characteristics of the concession contract drawn up between the Government and the company and the related tender specification
- The conditions under which the company can draw up contracts contributing to the

execution of the concession, in particular contracts to be agreed with the shareholder operator or other members of its corporate group.

In their bids, the bidders must indicate the technical and financial capabilities that they will be bringing to the company, so that it can carry out its duties as concessionaire and the contracts that it will need to enter into to carry out its duties.



## 7. New legal framework for auto-consumption

Auto-consumption consists in the direct use of all or part of the energy produced on one's own site (house, business premises etc.) Sometimes referred to as being a “prosumer,” this is likely to be a growth area in the current context in which the costs of producing renewable electricity are decreasing while electricity prices are increasing. This is particularly true of PV technology because of its technical characteristics and readily available energy source.

Order No. 2016-1019 of 27 July 2016 concerning the auto-consumption of electricity realizes the Government's ambition of setting up a legal and regulatory framework that encourages auto-consumption of electricity. In October 2013, the Minister for Ecology, Sustainable Development and Energy initiated a wide-ranging review tasked with identifying and characterizing the technical challenges and the potential opportunities in terms of auto-consumption (and production to cover that auto-consumption). The study led to a report,<sup>28</sup> reflected in the LTE,<sup>29</sup> aimed at legislative reforms of the regime for the production of electricity from renewable sources.

Under the terms of article L. 351-1 of the energy code, auto-consumption occurs when a producer, referred to as an auto-producer, uses all or part of the energy generated by his installation himself.

A distinction is made between individual and collective auto-consumption:

- The former consists in satisfying the consumer's own energy needs by means of the installations installed by the consumer.
- The second envisages the possibility that a renewable energy production installation covers the joint needs of a set of consumers, such as office buildings or community housing. Article L. 315-2 of the energy code therefore stipulates that “*an auto-consumption operation is collective when the supply of*

*electricity is between one or several producers and one or several consumers linked together as a legal entity and whose output and injection points are on the same low voltage branch of the public distribution grid.”*

The reform is most beneficial to the second category because it allows auto-consumption to exceed the strict individual framework applicable during the past, so that community housing or office buildings can set up renewable energy systems—PV panels being the obvious example—meeting all or part of the joint consumption requirements at a lower cost. Furthermore, there is legislation defining the practical conditions concerning auto-consumption.

To set up a system like this, the operators of electricity production installations hoping to begin an auto-consumption operation must declare their equipment to the competent public electricity network operator before it is commissioned.<sup>30</sup> Installations commissioned before the publication of the order must be declared no later than 31 March 2017.

Auto-consumption consumers are guaranteed the right of access to the public transmission and distribution networks by the operators of these networks, by article L. 111-91 of the energy code. Furthermore, auto-consumption operations for installed power not exceeding 100 kW benefit from the setting of special tariffs for use by the public distribution networks (**TURPE**) fixed by the CRE.<sup>31</sup>

Therefore, it becomes possible to avoid the necessity of entering into a PPA with a third party for surplus electricity produced by small-scale auto-consumption installations.

The CRE had some reservations over this provision for “transfer by default, to the grid manager, free of charge, of any surplus energy”<sup>32</sup> but the legislator did not wish to revisit this point.

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<sup>28</sup> Report concerning auto-consumption and production of renewable energy. General department of energy and climate, National working group on auto-consumption of renewable energy, December 2014.

<sup>29</sup> Article 199 of the law No. 2015-992 of 17 August 2015 concerning energy transition for green growth.

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<sup>30</sup> Article L. 315-7 of the energy code.

<sup>31</sup> Article L. 315-3 of the energy code.

<sup>32</sup> Deliberation of the Energy Regulating Commission (13 July 2016), about the order bill relative to the auto-consumption of electricity.

## 8. Use of crowdfunding

The LTE has created a system of crowdfunding for renewable energy production projects. This new mechanism fits in with the legislator's wish to diversify sources of funding for RES projects and thereby contribute to achieving its stated renewable policy targets, while encouraging community ownership of renewable projects.

Although this method of funding appears to be something very new, it is already provided for under French law. For instance, law No. 2014-856 of 31 July 2014, concerning social enterprise<sup>33</sup> and order No. 2014-559 of 30 May 2014 concerning crowdfunding<sup>34</sup> had already put this funding method on a statutory footing. The LTE is expanding the range of crowdfunding by extending it to renewable energy products.

Article L. 314-28 of the energy code defines the conditions governing this “*crowdfunding*” system. Accordingly, companies limited by shares,<sup>35</sup> local semi-public companies (SEML) and co-operative societies coming under law No. 47-1775 of 10 September 1947, with articles of incorporation established to support a renewable energy production project, can propose “*to physical entities, in particular to inhabitants living near the location of the project, and to the territorial communities and groups of them in the area where they are located,*” either participation in the capital of the company (at the time of its incorporation or on an increase of capital), or participation in the funding of the renewable energy production project.

Choosing a company limited by shares as a vehicle for crowdfunding is connected to the legislator's desire to limit the liability of investors to the extent of their initial investments.

A cooperative society, on the other hand, is “*a society founded by several people who join together voluntarily to fulfil their economic or social needs by a joint effort and setting up the*

*necessary means.*”<sup>36</sup> Accordingly, the members of a cooperative society are also the beneficiaries of the services it provides. It is probable that the cooperative society could become a joint interest cooperative society “*aimed at producing or supplying goods and services in the collective interest, having a function of social utility.*”<sup>37</sup>

Note that crowdfunding aims at two distinct categories of potential funders. First of all, inhabitants who are “neighbors” of the project. On this point, there are several outstanding questions in particular regarding the notion of the “proximity” to the project site. Second, territorial communities and groups of them: opening the capital of a commercial company to them meant creating an exception from the rule which had so far been maintained against their participation in this way, and so changing article L. 2253-1 of the general territorial community code.<sup>38</sup>

These crowdfunding or financing proposals can be made directly by the promoters of the project or by a social enterprise fund, by a company approved as a “socially useful solidarity company,” by crowdfunding advisers, through crowdfunding intermediaries or by investment service providers.

Article R. 314-71 of the energy code details the circumstances under which crowdfunding or financing offers are not to be treated as public offers governed by articles L. 411-1 and following of the monetary and financial code, so that private parties can be exempt from the obligation of drawing up an information prospectus coming under the general regulation of the Financial Markets Authority.

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<sup>33</sup> Article 95 provides for the possibility of crowdfunding for company founding projects.

<sup>34</sup> This order introduces provisions governing crowdfunding into the monetary and financial code.

<sup>35</sup> Governed by book II of the commercial code.

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<sup>36</sup> Art.1 of law No. 47-1775 mentioned above.

<sup>37</sup> Art.19 quinquies of law No. 47-1775 mentioned above.

<sup>38</sup> Henceforward, the CGCT allows communities and their groups to use “*crowdfunding of a limited company or a simplified joint-stock company having the social object of producing renewable energy by installations in their territory or territories located nearby and contributing to energy supply on their territory.*”

## 9. Capacity mechanism

In France, for several years now, there has been a substantial growth in peak electricity consumption, representing a risk during winter peak consumption periods, of upsetting the balance between electricity production and demand. To ensure secure supply of electricity to the French people and deal with this point, law No. 2010-1488 of 7 December 2010 concerning the new organization of the electricity market (known as the “NOME” law) has set up a capacity mechanism designed to encourage producers to create new electricity generation capacity and reward consumers who cut their electricity consumption during peak periods.

Decree No. 2012-1405 of 14 December 2012 concerning the contribution of suppliers to security of electricity supply and involving the creation of a capacity obligation mechanism in the electricity sector, followed by an order of 22 January 2015, sets the rules governing this mechanism. In addition, the RTE has made several changes to the system.

However, after the European Commission launched an in-depth investigation into the compatibility of the mechanism with the state aid rules in 2015, the implementation of the capacity mechanism was suspended. On 8 November 2016, the European Commission finally approved the capacity mechanism. During the investigation, the government agreed to change some of the measures provided for by the order of 22 January 2015. The Commission concluded that the revised mechanism improved security of electricity supply while maintaining competition. Following this decision, on 29 November 2016, the Minister for Energy approved a new order setting out the rules of the capacity mechanism, taking into consideration some of the changes requested by the European Commission. This mechanism will enter into force on 1 January 2017.

### 9.1 Description of the mechanism

The capacity mechanism, described in articles L. 335-1 and following of the energy code, requires that electricity suppliers guarantee security of

electricity supply for their customers, in particular during electricity peak demand periods.

To do this, suppliers are required to demonstrate their ability to meet demand at times of peak consumption by acquiring guaranteed commitments to generate or to curtail consumption (i.e. voluntary demand reduction).

Accordingly, the mechanism is based on two key groups:

- Suppliers, who are required to ensure that their capacity is sufficient, as calculated on the basis of the reference consumption of their customers and an additional safety margin
- Generators and demand side response operators, who agree with the transmission system operator (RTE) a level of availability that sets the total of the capacity guarantees they receive.

Capacity guarantees, allocated free of charge to generators or demand side response operators, are exchangeable and transferable. In this way, the mechanism goes hand-in-hand with the setting up of a capacity guarantee market, on which suppliers seeking capacity bid for guarantees and the electricity producers supply them (see point 9.5). An initial auction was held in September 2016.

### 9.2 Governance of the mechanism

RTE, the network operator, is responsible for the operational workings of the capacity mechanism: It proposes the rules of the capacity mechanism, forecasts peak demand and capacity requirements, ensuring the overall management of the mechanism, certifying the capacities of producers and demand side response operators, and calculating the capacity obligations of each supplier according to the consumption of its customers.

The CRE oversees and monitors the operation of the market.

### 9.3 Determination of supplier obligations

For each year of delivery, RTE determines supplier capacity obligations based on the reference power consumption of each supplier's customers.

The calculation of a supplier's reference power of consumption, and therefore its capacity obligation, depends on the following principles:

- Taking into consideration the consumption observed in the peak period during the year of delivery
- An adjustment for temperature-related variations in consumption and
- An adjustment in respect of demand reduction commitments (in the case of any customer who forms part of a demand side response unit).

### 9.4 Certification of operator installations

The capacity guarantees that suppliers must use to satisfy their obligations are based on RTE's certification of the availability and effectiveness of the underlying source of capacity.

Each generator or demand side response operator must therefore be contractually certified by RTE.

To get its certification, each capacity operator submits a certification request to the operator of the transmission or distribution network to which the capacity is connected, specifying among other things:

- The delivery year for which the capacity has to be certified
- The identity of the person in charge of the certified unit of which the capacity forms part: The **RPC** is the legal entity financially responsible for any deviations by the capacity operators within that unit. An operator can be its own RPC or contract with a third-party RPC. RPCs can pool together the capacities within their unit.
- Information needed for assessing the contribution of this capacity to reducing the risk of loss of load

- The means of activating and monitoring the capacity
- The predicted availability of capacity during the peak period.

The capacity operator makes a preliminary assessment of the volume of the capacity it will have available during the peak consumption periods for a given year of delivery. RTE then calculates the certified level, based on the data supplied.

The certification contract which is then drawn up with RTE (preceded, where applicable, by a contract with the relevant distribution network operator) defines the exact conditions under which the operator undertakes to keep its capacity available, the methods for checking that the capacity is provided and the certified capacity to be used for these purposes and the conditions on which and times at which capacity guarantees are to be issued to the operator.

### 9.5 Trading capacity guarantees and rebalancing

All capacity guarantees that are issued are entered in a register of capacity guarantees kept by RTE. Each supplier and each capacity operator has to open an account with RTE in the register. Vertically integrated players (EDF) are required to keep two accounts in the register, one for their generation activities and one for their supply business.

To transfer a capacity guarantee, the acquirer and the holder make a joint request to RTE. A capacity guarantee is transferred when RTE moves it from the previous holder's account to the acquirer's account.

The CRE is informed of all capacity guarantee transfers. At least once every year, it publishes statistical data on all the transactions and public offers to buy and sell capacity guarantees or related derivative products, and reports on the volumes and prices exchanged, paid or offered.

RTE is required to publish every year estimates of the total number of guarantees required to satisfy all suppliers' capacity obligations.

## 9.6 Rebalancing and financial settlement of differences

### 9.6.1 Rebalancing of capacity

RTE opens on its books a specific account called “fund for rebalancing supplier capacity.” This account tracks and centralizes the financial flows between the suppliers and RTE relating to the financial mechanism summarized below.

For each year of delivery, the following are defined:

- The deadline for the transfer of capacity guarantees beyond which capacity guarantee transfers are no longer possible.
- The deadline for recovery of capacity guarantees, by which each supplier must hold the total number of capacity guarantees corresponding to its obligation. This must be no later than two months after the transfer closing date.

Trading of capacity guarantees can take place throughout the period from certification through to the closing date for the transfer of capacity guarantees. RTE must notify each supplier of the total amount of its capacity obligation no later than 15 days before the closing date for the transfer of capacity guarantees.

Immediately after the closing date for the transfer of capacity guarantees, for each supplier, RTE calculates the difference between each supplier’s total capacity obligation and the total number of capacity guarantees appearing on the supplier account in the register of capacity guarantees.

No later than 15 days after the transfer closing date, RTE notifies each supplier of its position and any corresponding sums required to be paid for the purposes of capacity rebalancing. For each supplier, the rebalancing payment is calculated as a lump sum, positive when the supplier owes such a payment and negative when it is entitled to one. The supplier rebalancing payment is based on the extent of the supplier’s shortfall or excess of guarantees and a unit price.

Supplier rebalancing occurs before the closing date for the recovery of capacity guarantees. Suppliers whose rebalancing payment is positive

pay the amount calculated by RTE into the fund for rebalancing supplier capacity.

Suppliers whose rebalancing payment is negative receive the amount calculated by RTE from the fund for rebalancing supplier capacity.

If there is a surplus left over in the fund for rebalancing supplier capacity, it is all redistributed to users of the transmission network by a reduction of the TURPE.

On the closing date for the recovery of capacity guarantees, the transmission system operator checks that each supplier has satisfied its capacity obligation. For each supplier, it notifies the CRE of any difference between:

- Its total capacity obligation less any rebalancing payment, divided by the amount of such rebalancing payment
- The total amount of guarantees it holds on the closing date for recovery of capacity guarantees, based on the information contained in the register of capacity guarantees.

If a supplier cannot demonstrate that it holds sufficient capacity guarantees to fulfil its obligations, and fails to justify its position having been required to do so, it is liable to pay a financial penalty imposed by the CRE. The penalty will be determined so that, in the medium term, it acts as an economic incentive to satisfy the obligations to the suppliers.

The amount of the penalties will be proportional to the severity of the shortcoming, the situation of the party concerned, the scope of the damage and the advantages resulting from it, but shall not exceed €120,000 per missing megawatt of certified capacity in a given year.

If a supplier fails to pay the financial penalty which imposed on it, the Minister for Energy may immediately suspend its license to purchase electricity for resale.

### 9.6.2 Payment for PRC deviations

RTE has opened in its books an account known as the “fund for settling deviations by RPCs.” This account tracks and centralizes the financial flows

between the RPCs and RTE according to the regime summarized below.

For each year of delivery, and each certified capacity, RTE calculates the effective capacity level in accordance with the rules of the capacity mechanism. For each certified unit, it determines the extent of any deviation by the RPC. This deviation is the difference between the accumulated effective capacity of the certified capacity related to the unit and the accumulated certified capacity of the certified capacity attached to the unit, where applicable, taking into consideration the certification contracts drawn up after rebalancing.

RTE notifies each RPC of:

- Its deviation
- Where applicable, the rebalancing volumes applied to certain certified units
- The financial adjustment.

The financial adjustment is positive if the RPC owes the amount. This settlement is payable when the effective capacity level is lower than the certified capacity level. A negative financial adjustment leads to a payment in favor of the RPC. Such a payment can also be made when the effective capacity of the RPC is higher than its certified capacity level.

RPCs with a positive financial adjustment pay the sums concerned into the fund for settling deviations by RPCs.

RPCs whose financial adjustment is negative receive the corresponding amount from the fund for settling deviations by RPCs. The sum of these payments cannot exceed, in a given delivery year, the aggregate of payments made for positive financial adjustments.

Any remaining balance on the fund for settling the deviations by RPCs is redistributed entirely to users of the transmission network, according to a methodology defined by the CRE.



## 10. Continuing difficulties related to state aid

### 10.1 Summary of previous episodes

Readers may recall that the organisation “Vent de Colère!” asked the State Council to cancel the order of 17 November 2008 (completed by that of 23 December 2008) governing the conditions for the purchase of electricity produced by installations using mechanical energy provided by wind. Considering whether this mechanism supporting the wind sector should be characterized as state aid, the Administrative Judge partially referred the matter to the Court of Justice of the European Union. In the light of the Court’s response,<sup>39</sup> the State Council, in its judgment of 28 May 2014,<sup>40</sup> ruled that fixing the price of electricity generated by wind turbines at a higher price than its market value did indeed represent state aid. Since this aid had not been notified in advance to the European Commission for its prior approval, as required by article 108 §3 of the Treaty for the Functioning of the European Union, it was to be considered as illegal, and the wind power tariff order was cancelled.<sup>41</sup>

However, the Government anticipated the characterization of the scheme as state aid, and without waiting for the ruling of the State Council, notified the European Commission of its wind power support regime, a regime that the European Commission, in a decision of 27 March 2014,<sup>42</sup> found to be compatible with EU rules.

When state aid that is illegal because of a failure to notify it in advance is subsequently declared compatible with the EU internal market, the beneficiaries are not required to pay back the aid. However, they are required to reimburse an amount equivalent to the interest they would have had to pay on the commercial banking market during the period when this aid was illegal.<sup>43</sup>

Applying these principles, the State Council’s judgment of 15 April 2016 informs the Government that it is obliged to require this reimbursement (see our client alert).

### 10.2 Ruling of 15 April 2016: Government obligation to recover interest on illegal aid

The State Council, responding once again to a case brought by Vent de Colère!, took the view that its decision of 28 May 2014 cancelling the wind tariff order would only be implemented after the Government had taken the necessary measures to ensure that each beneficiary of the aid paid the interest it would have paid had it borrowed the amount concerned on the market with interest calculated by a method determined by the European Commission.

The administrative Judge granted the Government a period of six months to implement its ruling, and therefore to recover the amounts in question, failing which it would be fined €10,000 per day of delay.

### 10.3 Sums to be paid back?

The Government needs to estimate the amount of the sums to be paid. As already mentioned, it is not a matter of requiring the paying back of all the aid, which has been judged to be compatible with the domestic market, but of paying an amount corresponding to the interest that the beneficiary would have been required to pay had the amount being borrowed on the market. There is a European regulation specifying the conditions for calculating this interest:<sup>44</sup> the rate of interest applicable to the recovery of the aid is an annual percentage defined by the Commission before the start of each calendar year, calculated by adding 100 basis points to the one-year money market rate.

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<sup>39</sup> CJEU judgement of 19 December 2013 in case C- 262/12, *Association Vent de Colère!*

<sup>40</sup> CE, 28 May 2014, *Association Vent de Colère!*, reg. No. 324852.

<sup>41</sup> Note that this illegality did not, however, taint the tax financing the aid, the renowned CSPE: CE, Sect. Notice, 22 July 2015, *Praxair*, No. 388853 and Dentons Client Alert of 31 July 2015.

<sup>42</sup> Decision C-348/78 27 March 2014.

<sup>43</sup> ECJ judgment of 12 February 2008 in case C-199/06 *CELF*; CE, 19 December 2008, *CELF*, req. No. 274923.

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<sup>44</sup> Regulation CE No. 794/2004 of the European Commission of 21 April 2004; see also Commission Communication *on revising the method for calculating the reference rates and their discounting* No. 2008/C 14/02.

This could result in a higher rate of interest than that prevailing on the commercial bank market. In France, on 1 January 2016, the applicable rate of interest for the recovery of aid was 1.12%.

The Government will be required to calculate this interest based on the aid granted by the Government, that is, the portion of the tariff exceeding the market price. To do this, the Government could refer, for instance, to the methodology for determining the market price to which the European Commission refers in its decision of March 2014 approving the aid, using a method based on prices on the EPEX SPOT day-ahead market and EEX Power Derivatives futures market.

This rate of interest will be calculated for a period extending from the date of payment of the aid to its declaration of compatibility on 27 March 2014, or more than five years for the first projects. This rate is calculated every year so that the companies that benefited from the aid may be required to pay a substantial final amount.

#### **10.4 Risk affecting PV?**

As the name of the claimant suggests, the Vent de Colère! saga is about wind energy. However, because the PV energy support system seems on its face to share the same defects, there has been room for doubt as to its legality since May 2014. However, these doubts are about to be resolved.

In the context of a dispute between a generator and the operator of the ERDF network, the Versailles Court of Appeals<sup>45</sup> has made a preliminary reference to the Court of Justice of the European Union to determine whether the PV energy support scheme resulting from the orders of 10 January 2006 and 12 January 2010 should be considered as state aid.

It is to be expected that it will be characterized as aid and that, since the scheme was not previously notified to the European Commission, the aid will once again be declared illegal, and the Government will be required to recover it.

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<sup>45</sup> Versailles Appeals Court ruling of 8 December 2015, *ERDF vs/ SAS Ombrière Le Brosc*, Juris Data No. 2015-030950.



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