

## French on-shore wind farm market in 2017: New tariffs structure and other important updates

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### *Speed Read*

The French on-shore wind market, one of the most active renewable markets in Europe, will be subject of a new legal framework which aims to allow for a more market driven electricity system in France. Whilst the French government has recently announced its ambitious objectives for on-shore wind energy, with the objective announced in October 2016 to reach 22,000-26,000 MW in 2023 (from about 11,000 MW currently), the French wind market is undergoing structural modifications. Indeed, it will switch next year from the current 15-year long, 82€/MWh, feed-in tariff scheme to a premium system under which wind farms will sell their electricity directly in the market, receive premium payments under a 20-year premium contract, and (above six wind turbines) be required to go through a competitive bidding process. The details of this scheme – applicable to new projects – remains to be finalised in the coming weeks. Stakeholders (developers, investors, etc.) will need to adjust to this new scheme, which bears some similarities to the one implemented in Germany in 2014 (see page 2).

Other measures are being proposed to bolster on-shore wind energy. In particular, a simplification of the permitting scheme and a framework for repowering are expected in the course of 2017 (see page 5).

Regarding the 2008 feed-in tariffs, the legal challenge ended in 2014 and confirmed the validity of the Power Purchase Agreement (**PPAs**). However, in accordance with EU State aid regulations, around 700 PPA holders were required in October 2016 to pay a lump sum to the French State. There have been reports of clerical mistakes made in some of the tax notifications sent to PPA holders. This should be checked carefully (see page 6).

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# New tariffs structure in 2017

## ACCELERATED SWITCH TO THE NEW EU-COMPLIANT PREMIUM SYSTEM

### Background: New regulations on public support for renewable energy

New EU guidelines on State aid for environmental protection and energy entered into force on 1 July 2014. They aim to encourage better market integration of electricity from renewable sources and to maximize public spending efficiency. Beneficiaries must (i) sell their electricity directly in the market, (ii) be subject to market obligations, and (iii) go through a competitive bidding process.

Timeline	Requirement	Specific regime for wind energy
From 1 January 2016	(i) aid must be granted as a premium in addition to the market price; (ii) beneficiaries are subject to standard balancing responsibilities, and (iii) beneficiaries must have no incentives to generate electricity at loss-making prices	Applicable to all wind farms with a capacity of more than 3MW or 3 turbines
From 1 January 2017	Aid is granted after a competitive bidding process on the basis of clear, transparent and non-discriminatory criteria	Applicable to all wind farms with a capacity of more than 6MW or 6 turbines

In order to comply with these new regulations, the French Government modified its legal framework in 2015<sup>1</sup> and then adopted specific regulations, in particular decrees No. 2016-682 dated 27 May 2016 and No. 2016-691 dated 28 May 2016. As far as tariffs are concerned, this premium scheme sets out an *ex post* mechanism through which electricity is first sold on the market, with a variable premium (called “*complément de rémunération*”) paid to the PPA holder, ensuring a reasonable return on the invested capital.<sup>2</sup> This premium is established based *inter alia* on a formula which

includes a “reference tariff” set by ministerial order for each type of energy.<sup>3</sup>

This scheme is quite similar to the one implemented in Germany in 2014.<sup>4</sup> The so-called subsidised direct marketing (*geförderte Direktvermarktung*), which was only an alternative for the marketing of renewable energy under the previous German Renewable Energy Act 2012 (but which was in fact chosen by a large number of renewable energy producers), has become the norm for renewable energy in Germany under the German Renewable Energy Act 2014. Subsidised direct marketing means that the operator of the renewable energy plant sells its renewable energy on the market and, in addition to the sale proceeds, it receives a market premium from the grid operator.<sup>5,6</sup> Other EU Member States have adopted comparable schemes (UK, Portugal, etc.).

### EU pressure on French authorities to switch on-shore wind energy to the premium scheme

In the context of the prolonged legal challenge against the 2008 FiT (see below, p. 6), the French Government initially sought to extend the opportunity for new wind farms to benefit from a feed-in tariff scheme (possibly until 2018).

However, the French renewables industry association (*Syndicat des énergies renouvelables*) informed members during the summer of 2016 that the EU Commission considers that a change (at the end of 2015) in the taxation of electricity consumption (CSPE) supporting *inter alia* the 2014 FiT<sup>7</sup> required a new notification under EU State aid regulations.<sup>8</sup>

French authorities (with active support from the SER and other renewables stakeholders) have been actively negotiating with the EU Commission since the summer 2016 to establish a new tariffs scheme compatible with

the 2014 EU guidelines (see above), while at the same time offering comfort as to the validity of PPAs under the 2014 FiT. The goal is that the EU Commission confirms the compatibility of the French scheme with EU State aid regulations.<sup>9</sup>

### **A transitional period for 2016 followed by a premium scheme to be finalised in the first quarter of 2017**

Negotiations are still on-going at the date of this update and the information contained in this section will need to be confirmed once the relevant regulations are issued.

The current situation is as follows:

- New wind farms will no longer be entitled to benefit from the current FiT scheme in the future (a);
- A transitional scheme has been set, under which wind farms will be subject to the premium scheme but with remuneration similar to the current FiT. This applies to projects filing an application before 31 December 2016 (b);
- A permanent scheme is expected to be set in the first quarter of 2017, with a premium price which remains to be defined (c).

#### **(a) Projects under development with a signed 2014 FiT PPA**

The [ministerial order](#) setting out the transitional scheme (dated 13 December 2016, the “**2016 Ministerial Order**”) provides *inter alia* that projects with a 2014 FiT PPA<sup>10</sup> will be entitled to continue benefitting from their PPA. However, these projects must comply with the deadlines for completion set by the Decree No 2016-691 dated 28 May 2016 (see next page).

The above-mentioned 2016 Ministerial Order also repeals the ministerial order setting the 2014 FiT:<sup>11</sup> Accordingly, EDF is no longer entitled to enter into new PPAs under the 2014 FiT.

#### **(b) The transitional scheme set by the 2016 Ministerial Order**

This scheme uses the premium system but will be tailored so that the remuneration is broadly similar to the current FiT (82€/MWh before indexation). The premium scheme means that wind farms will require a **dual structure for revenues**:

- The wind farm will sell its electricity directly in the market (e.g. EPEX spot market). It can do so directly, or through an intermediary called an “aggregator” (which typically manages and sells the electricity generated by several plants);
- A premium is paid by EDF under the premium contract. The premium contract has a 15-year term. It is calculated based (in particular) on a so-called “reference tariff” which is similar to the current 2014 FiT (82€/MWh, before indexation). It also includes a “management premium” (*prime de gestion*), which covers costs for the balance responsibilities/adjustment mechanisms and for the sale of the production on the electricity market (transaction costs, registration with Pownext, etc.). We understand it could be set at EUR2.8/MWh.

Financial models will need to be adapted to this new tariff scheme. The formula to calculate the premium also includes other important items, including a “reference market price” and a specific scheme for negative market prices.

#### **(c) The premium system in 2017**

##### *Tariffs structure for wind farms of up to 6 turbines*

This system will also feature the above-mentioned dual structure (contract with aggregator, premium contract with offtaker). However the conditions set for the premium contract are still being debated. In particular, the “reference tariff” will be different from, and more complex than, the tariff set by the 2016 Ministerial Order. The contemplated features include:

- A 20-year premium contract (compared to the current 15-year PPA);
- Two “reference tariffs” divided between (i) a tariff for a fixed number of GWh set at a level covering the invested capital and (ii) a tariffs set at a lower level until the term of the contract. In other words, the wind farm will receive a higher premium at the beginning of operations, and a lower (closer to market price) premium after the fixed number of GWh is

reached. Such scheme aims at avoiding excessive remuneration while providing sufficient support for wind farms with less favorable conditions (wind, etc.);

- The reference tariffs may be modified each year by the French energy regulator (CRE) to take into account improved competitiveness and falling costs over time.

The level and structure of the “management premium” will also need to be reviewed carefully given its potential impact on the financial structure.

#### ***Introduction of competitive tenders for wind farms with more than 6 turbines***

It is understood that competitive bidding processes will be introduced starting in 2017 for awarding the premium contracts. In line with the 2014 EU guidelines, these tender procedures are likely to be mandatory for all wind farms with a capacity of over 6 turbines, but would also be open to smaller wind farms.

The French Government is said to start designing the procedures during the first semester of 2017. The minister for the environment announced on 12 December 2016 that multiannual tender procedures would be launched shortly, with two rounds windows each for submitting bids.<sup>12</sup>

Such premium scheme – if confirmed – is very different from the current PPA scheme, and also differs from the German premium system. It requires all stakeholders to adapt quickly. Developers and regulators will need to demonstrate the bankability of the premium scheme to avoid a shortfall in investments and financing requirements. As far as investors/lenders are concerned, significant efforts will be required to design appropriate lending schemes and financial models.

#### **Deadline set for commissioning current projects**

In the context of the switch to the new premium scheme, French authorities imposed in the summer of 2016 that wind farms under development and entitled to benefit from the 2014 FiT must be completed at the latest:<sup>13</sup>

- Within three years of their “request for a PPA” (which under applicable regulations sets the FiT under the PPA); or
- No later than 30 November 2017, if the above-mentioned three-year delay expires sooner.

In practice, this deadline may be hard to meet for a number of wind farms, in particular when project development has been delayed by third-party challenges and/or delays in grid connection works. Such wind farms will then be entitled to benefit from the premium system (under specific conditions).

<sup>1</sup> Law No. 2015-995 dated 17 August 2015 on energy transition

<sup>2</sup> Article L. 314-20 of the French Energy Code

<sup>3</sup> Article R. 314-33 of the French Energy Code

<sup>4</sup> In 2014 Germany amended the Renewable Energy Act (*Erneuerbare Energien Gesetz* or EEG), in line with the EU guidelines on State aid for environmental protection and energy.

<sup>5</sup> For more details please see our [Bulletin](#) “Update – German Renewable Energy Act 2014”, March 2014.

<sup>6</sup> For more details please see our [Bulletin](#) “The German Renewable Energy Act 2017”, August 2016.

<sup>7</sup> The CSPE is paid by end-consumers in order to finance *inter alia* the costs borne by offtakers (including EDF) as a result of the FIT mechanism (approx. EUR5Bn annually for all renewables).

<sup>8</sup> Indeed, the EU Commission considers that such modification amounts to a substantial amendment of the FIT mechanism notified (and found compatible) in March 2014, thus requiring a new notification.

<sup>9</sup> The EU Commission has already published a [press release](#) on December 12th 2016 stating that the transitional scheme for 2016 is authorised.

<sup>10</sup> More specifically, Article 14 provides that wind farms for which (i) a complete request for PPA or (ii) a CODOA has been obtained before 1 January 2016 are entitled to keep benefitting from the electricity purchase conditions set out by the ministerial order dated 17 June 2014.

<sup>11</sup> Article 14 provides that the ministerial order dated 17 June 2014 is repealed without prejudice to its applicability to the PPAs already signed at the date of publication of the order in the Official Gazette (i.e. 14 December 2016).

<sup>12</sup> See [press release](#) dated 12 December 2016.

<sup>13</sup> Article 6, III. of Decree No. 2016-691 dated 28 May 2016. The decree further provides that completion of the wind farm is evidenced by the handover of the certificate mentioned by Article R. 314-7 of the French Energy Code, i.e. a certificate issued by an approved body.

# Other important updates for 2017

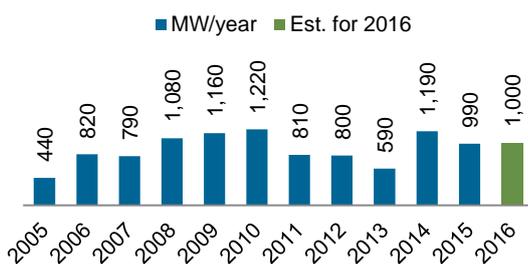
## AMBITIOUS OBJECTIVES, SIMPLIFIED PERMITTING AND REPOWERING

### Ambitious objectives have been set for the development of on-shore wind energy

The Law dated 17 August 2015 on energy transition provides<sup>14</sup> that the government shall establish (by decree) five-year periods (*programmation pluriannuelle de l'énergie*, or “PPE”) with objectives set for the development of energy in mainland France (including renewable energy). The first period ends in 2018 and the second period covers the 2018-2023 timeframe.

In October 2016, the French government confirmed ambitious objectives for on-shore wind energy, with a target of 15,000 MW in 2018, and 22,000-26,000 MW in 2023 (from about 11,000 MW currently).<sup>15</sup>

These objectives are ambitious as they require an additional approx 1,500-2,000 MW of new capacities to be commissioned each year over the next seven years – whereas new capacities have reached 1,000 MW/year on average for the last 10 years:



Source: French Ministry for the Environment<sup>16</sup>

On-shore wind energy currently generates 5% of French electricity and the current pipeline of projects under development is estimated at 7,700 MW.<sup>17</sup>

### A “unified environmental authorisation” is expected to be rolled out in 2017

A standard 6-turbine (2 MW/turbine) wind farm currently requires numerous permits and authorisations,

with projects spanning an average of 7-8 years from the initial studies to commissioning.<sup>18</sup>

In order to facilitate that process, French authorities have tested the so-called “unified environmental authorisation” in several regions since 2014.<sup>19</sup> In October 2016, a draft ordinance and a draft decree have been submitted for consultation, with the goal of broadening the scheme’s applicability to all other regions.<sup>20</sup>

In a nutshell, the unified environmental authorisation will contain several of the required permits and authorisations and will also exempt wind farms from the building permit requirement. The goal is that the authorisation is granted within a year from the application. The challenge period is shortened and clarified.<sup>21</sup>

### A legal framework for repowering is being considered

Repowering consists of the dismantling of a wind farm’s existing systems (including wind turbines)<sup>22</sup> and the construction of new wind power systems, with higher efficiency and (often) higher installed capacity.

There is currently no specific framework for repowering under French law and a lengthy process of obtaining new permits and authorisations may be required.

Accordingly, French authorities (with the support of stakeholders such as SER) are currently working on a framework aimed at facilitating that process, in the form of administrative guidelines. Developers would be subject to simplified obligations depending on the scale of the projected modifications (e.g. turbine height, number of turbines, etc.). Also, grid connection procedures would be simplified for repowering schemes.

The conditions under which these projects will be entitled to benefit from the premium scheme remain unclear at this stage.

The required regulations are expected to be issued in June 2017.

<sup>14</sup> Article 176.

<sup>15</sup> Decree No. 2016-1442 dated 27 October 2016.

<sup>16</sup> [http://www.developpement-durable.gouv.fr/IMG/pdf/Le\\_tableau\\_de\\_bord\\_eolien\\_T3.pdf](http://www.developpement-durable.gouv.fr/IMG/pdf/Le_tableau_de_bord_eolien_T3.pdf)

<sup>17</sup> *Ibid*: “Les projets d'éolien terrestre en file d'attente représentent, fin septembre 2016, une puissance totale de 7,7 GW. La puissance des

*projets avec une convention de raccordement signée, amenés à être raccordés dans les trimestres à venir, est en légère hausse, de 5,6 % entre fin juin et fin septembre 2016.*”

<sup>18</sup> <https://www.inforisque.info/actualite-du-risque/article.php?id=5142>

<sup>19</sup> Decree No. 2014-450 dated 2 May 2014

<sup>20</sup> <http://www.consultations-publiques.developpement-durable.gouv.fr/projets-d-ordonnance-et-de-decret-creant-l-a1532.html>

<sup>21</sup> [http://www.consultations-publiques.developpement-durable.gouv.fr/IMG/pdf/L\\_ORDONNANCE.pdf](http://www.consultations-publiques.developpement-durable.gouv.fr/IMG/pdf/L_ORDONNANCE.pdf)

<sup>22</sup> Operators are subject to specific dismantling and remediation obligations.

## Update on the 2008 FiT challenge

### TAX NOTIFICATION SENT TO ON-SHORE WIND FARMS BENEFITING FROM THE 2008 FEED-IN TARIFFS FOLLOWING STATE AID REGULATIONS BREACH

#### Background

The 15-year long, 82€/MWh, FiT established by the ministerial order dated 17 November 2008 (the **2008 FiT**) was cancelled by the *Conseil d'Etat* (France's top administrative Court) on 28 May 2014<sup>23</sup>, on the ground that French authorities had failed to notify the support scheme to the EU Commission under EU State aid regulations.

France reported the scheme to the EU Commission ahead of the *Conseil d'Etat's* ruling, and the EU Commission found it to be compatible with EU State aid regulations on 27 March 2014<sup>24</sup>. Accordingly, French authorities issued a ministerial order dated 17 June 2014, setting similar tariffs (the **2014 FiT**).<sup>25</sup>

#### Obligation for PPA holders to reimburse a fraction of the State aid to the French State

On 15 April 2016, the *Conseil d'Etat* ordered the French State to recover interests earned on the State aid illegally awarded under the 2008 FiT, within six months of the ruling<sup>26</sup>. This risk, which emanates from EU State aid regulations, had been anticipated by the market but it was not known if and when it would actually be enforced until the *Conseil d'Etat's* decision. This issue covers specifically:

- Wind farms operating under a PPA entered into on the basis of the 2008 FiT;
- Wind farms which have received payments from the offtaker (mainly, EDF) between their commissioning and 27 March 2014 (when the EU Commission found the 2008 FiT to be compatible with EU State aid regulations).

The amount to be paid corresponds to the interests which the generator would have paid if it had borrowed on the debt markets the sum that it received instead as part of the 2008 FiT. Such amounts of interest have been calculated in accordance with applicable EU regulations.<sup>27</sup>

French authorities have chosen to comply with this requirement and have set out the following reimbursement scheme:

- Relevant PPA holders (*circa* 700, i.e. the majority of wind farms under PPA in France) have received in the course of October 2016 a tax notification (*titre exécutoire*) from the French State, indicating the amount to be paid;

- Total amounts to be reimbursed are not known but have been estimated to be in the range of EUR50-60 million.

There have been reports of clerical mistakes made in some of the tax notifications sent to PPA holders. This should be checked carefully.

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<sup>23</sup> Case No. 324852

<sup>24</sup> EU Commission's decision in the case No. SA. 36511

<sup>25</sup> The 2014 FiT was also challenged by the *Vent de Colère* association but its claim was dismissed by the *Conseil d'Etat* on 9 March 2016 (case No. 384092).

<sup>26</sup> Case No. 393721

<sup>27</sup> Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty

## Key contacts

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The Paris Energy group is at the forefront of the renewable energy market, advising sponsors, developers, project companies and financiers across the renewable energy spectrum, with particular expertise in the wind (on-shore and off-shore) and solar sectors.

Our team has considerable experience of advising on all aspects of renewables projects including the permitting and planning procedures, construction and maintenance aspects, the financing, corporate and tax aspects, as well as the environmental economic instruments which are essential in making such projects viable. The combination of sector expertise, focused legal skills, the ability to keep up-to-date with the energy and utilities sector, which is one of the fastest moving marketplaces in the world, together with our global reach, gives our clients access to the best possible advice.

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