

# Highlight on solar energy tariffs in France

This briefing addresses some of the questions raised by a recent preliminary ruling of the European Court of Justice and the European Commission's decisions of 10 February 2017 in respect of solar energy tariffs.

The first months of 2017 have been an eventful quarter for solar energy tariffs. On 10 February 2017, the European Commission declared the compatibility of notified feed-in tariffs applicable to small-scale and large solar installations, from 2011 to 2020<sup>1</sup>. On 15 March 2017, the European Court of Justice (the "ECJ") ruled that the 2006 and 2010 feed-in tariffs fell within the concept of aid granted by the State or through State resources<sup>2</sup>.

Renewable energies, given their intrinsic lower profitability, mainly rely on State financial support – through feed-in tariffs and, since the Energy Transition Law of 17 August 2015, feed-in premiums – which raises some issues in respect of State aid regulations.

The wind energy industry was the first to be affected by such issues. Indeed, following a ECJ's preliminary ruling dated 19 December 2013, the wind

energy feed-in tariffs were qualified as State aid<sup>3</sup>. The French State eventually notified these feed-in tariffs, which were considered as compatible with the common market by the Commission on 27 March 2014. However, the French State had to send payment requests to producers to recover the interests in respect of the period of unlawfulness of such State aid, as required by the Conseil d'Etat in a ruling dated 15 April 2016<sup>4</sup>.

Now the wind has moved to the solar energy industry.

## Clarification of the legal qualification of solar energy tariffs as State aid

The ECJ's preliminary ruling and the European Commission's decisions have clarified that solar energy tariffs must be considered as State aid.

### ECJ's preliminary ruling

On 15 March 2017, following a request by the *Cour d'Appel de Versailles*, a French Court of Appeal, the ECJ decided that solar feed-in tariffs, as set by two ministerial orders

of 10 July 2006 and of 14 January 2010 (the "2006 Order" and "2010 Order") shall be deemed as an intervention by the State or through State resources. The ECJ left it to the *Cour d'Appel de Versailles* to assess whether the other criteria of State aid are met, but gave some guidance to the national courts in this regard, referring to its previous decision on the *Vent de Colère* case.

## Key issues

- Recent ECJ's preliminary ruling and European Commission's decisions have clarified the legal status of solar energy feed-in tariffs in respect of State aid regulations.
- The consequences of these decisions depend on the applicable tariffs (in particular whether they have been notified to the European Commission or not). They should be taken into account in the context of current and future transactions.

<sup>1</sup> European Commission, State aid decision, 2/10/2017, n° SA.40349 (2015/NN)

<sup>2</sup> ECJ, 15 March 2017, *Enedis SA vs. Axa Corporate Solutions SA, Ombrière Le Bosc SAS*, case C-515/16.

<sup>3</sup> ECJ, *Vent de Colère*, 19 December 2013, C-262/12; *Conseil d'Etat* 28 May 2014, *Vent de Colère*, n° 324852. Please see our briefing note of March 2014 "Wind energy tariffs: the perspectives after the ECJ's decision of 19 December 2013".

<sup>4</sup> *Conseil d'Etat*, 15 April 2016, n° 393721.

It is therefore very likely that the *Cour d'Appel de Versailles* shall rule that solar energy feed-in tariffs constitute State aid measures, especially having in mind two recent European Commission's decisions.

#### European Commission's decisions

On 10 February 2017, the European Commission approved the French solar energy feed-in tariffs which were notified in 2014 and 2015 by the French authorities<sup>5</sup>, dealing with:

- (i) small-scale solar installations of less than 100 kilowatts, installed on domestic or commercial roofs, for tariffs set out under ministerial order of 4 March 2011 (the "**2011 Order**"), applying from 2014 to 2020;
- (ii) large-scale installations between 100 and 250 kilowatts and above 250 kilowatts, awarded through tenders conducted between July 2011 and March 2013.

In these two decisions, the European Commission decided that these feed-in tariffs constitute State aid but considered that they are compatible with the common market.

#### A clarification which raises further questions

The legal characterization of solar energy tariffs as State aid is not surprising: considering these tariffs have been based on the same principles as wind energy tariffs, these decisions are consistent with previous rulings on wind energy tariffs.

It is now clear that solar energy tariffs constitute State aid. Without prejudice of their compatibility with the common market, they are illegal in so far as

they were not notified to the European Commission before being implemented.

However the consequences of this legal characterization on solar energy projects are yet to be assessed.

### Assessment of the consequences on the solar energy industry

In order to examine the consequences of the above mentioned decisions on the solar energy industry, it should be referred to the wind energy industry precedent.

In this perspective, it is reasonable to assume that existing PPAs based on illegal feed-in tariffs will not be terminated (EDF has continued to abide by the terms of the PPAs signed under the wind energy illegal feed-in tariffs).

What is mainly at stake is whether solar energy producers will be subject to reimbursement obligations, and to what extent.

In this respect, one should bear in mind that the context is rather different than for the wind energy industry, considering in particular that so far there has been no fierce opposition comparable to the *Vent de Colère* legal actions<sup>6</sup>. The consequences of the State aid categorization will therefore probably depend on the stance which will be adopted by the French State and/or

the European Commission, more likely than third party legal actions.

These consequences are still uncertain and prospective. They depend on the applicable tariffs:

#### ■ Feed-in tariffs set out by the 2006 and 2010 Orders

These tariffs are in the most uncertain situation, since the Commission has not been notified.

In the worst-case scenario, the European Commission (on its own initiative, at the French State's request or at a third party's request) would consider these tariffs as not compatible with the common market, which would lead to the full reimbursement of the sums perceived above market prices by the concerned solar energy producers.

However, given that the European Commission has not initiated any action so far, despite the wind energy precedents which could have offered a strong occasion to do so, one may hope that it would not act until it is asked to by a third party (having in mind that no interested third party has, to the best of our knowledge, taken such a route so far).

In order to exclude such worst-case scenario, the French State could notify these feed-in tariffs to the European Commission. Nonetheless this could be a risky stance, considering that an economic and financial analysis could lead to consider these tariffs (which created a "speculative bubble") as not compatible.

The French State may therefore remain passive after the ECJ's

<sup>5</sup> European Commission, 10 February 2017, SA.40349 and SA.41528.

<sup>6</sup> It is worth noting in this regard that, in the case which led to the ECJ's preliminary ruling of 15 March 2017, the State aid argument was raised by ERDF's (now Enedis) insurance company in order to reduce the amount of the damages due by its client to a solar producer which was prevented from benefiting from higher tariffs because of excessive grid connection delays.

preliminary ruling, and, as a consequence, the solar energy industry may continue to live with this risk<sup>7</sup>.

■ **Feed-in tariffs implemented since 2011**

As mentioned above, the feed-in tariffs set out for small-scale solar projects installed under the 2011 Order and for large-scale solar projects through tenders conducted between 2011 and 2013 were considered compatible by the Commission on 10 February 2017.

These decisions allow to exclude the risk of reimbursement of the whole State aid cleared by the Commission's decision.

As a consequence, like wind energy producers, solar energy producers may only be requested to reimburse the interests they should have paid on the amount equal to the difference between the electricity market price and the feed-in tariff between the day they received such tariff and the date of the European Commission stating such tariff is compatible with the common market<sup>8</sup>.

It is reasonable to assume that this risk will only materialize if the French State is required to do so, either by the European Commission or by third parties, which, as mentioned above, does not seem the most likely scenario.

■ **Feed-in premiums under the Energy Transition Law regime**

As a reminder, following the *Guidelines on State aid for environmental protection and energy 2014-2020* issued by the European Commission on 28 June 2014, the Energy Transition has drastically modified the regulatory regime applicable to renewables including solar energy, organizing a transition (i) from "one stop shop" (*guichet unique*) to tenders and (ii) from feed-in tariffs (based on the power purchase obligation) to feed-in premiums (market-based).

Except small-scale solar installations of less than 100 kilowatts installed on domestic or commercial roofs (which benefit from feed-in tariffs set out by the 2011 Order), all solar energy projects shall now be subject to feed-in premiums determined after a tender process<sup>9</sup>.

They shall thus be considered as compatible with the common market, and the French State should be exempt from the obligation of prior notification provided that it complies with the criteria set out by Regulation No 651/2014 of 17 June 2014<sup>10</sup>.

Such consequences should be taken into account in the context of current and future transactions, and the actions undertaken by the various stakeholders (European Commission, French State, third parties) should be closely monitored.

<sup>7</sup> Please note that the European Commission can investigate these tariffs and ask for reimbursement until ten years after they have been effectively perceived (Art. 17 of Council regulation laying down detailed rules for the application of Article 108 of the TFEU).

<sup>8</sup> ECJ, 12 February 2008, *Centre d'exportation du livre français*, C-199/06.

<sup>9</sup> Such tenders are currently ongoing (for instance, for ground solar projects, a 500MW tender was completed in March, and a new process will be launched in May, followed by four more tenders of the same size held up until 2020). Please see <http://www.cre.fr/documents/appels-d-offres>.

<sup>10</sup> Commission regulation (EU) No 651/2014 of 17 June 2014 *declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty*.

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