

French wind: Cancellation of Wind Feed-in Tariff.

On 6 August 2008, the *Conseil d'État*, France's highest administrative court, cancelled a ministerial Order (*arrêté*) dated 10 July 2006 enacting the feed-in tariff applicable to wind farms due to a procedural irregularity. A new Order is due to be adopted shortly allowing new projects to benefit from the same feed-in tariff. In addition, the French Government stated that existing power purchase agreements will not be challenged. It therefore appears that this judicial victory by wind farm opponents should have, in practice, little or no impact on wind projects development.

1 Background

- In September 2006, a judicial challenge was filed by the association “*Vent de Colère*” against Ministerial Order (*arrêté*) dated 10 July 2006 enacting the feed-in tariff applicable to wind farms pursuant to Article 10 of the French electricity Act¹ (the “**2006 Order**”). This association applied for the suspension of the 2006 Order by way of injunctive relief. Such request was set aside on 3 October 2006 as the petitioner failed to show the urgency required for suspension. The *Conseil d'État* however ruled in favour of the association's challenge on the merits by cancelling the 2006 Order on 6 August 2008.

2 Court Decision

- The grounds for challenge were as follows: (i) the 2006 Order constituted State Aid within the meaning of Article 87 of the EU Treaty and as such should have been notified to the European Commission; (ii) the feed-in tariff enacted by the 2006 Order resulted in compensation exceeding costs incurred by wind farm operators, i.e., going beyond fair compensation authorised under EU legislation

¹ Law n° 2000-108 dated 10 February 2000.

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and levels permitted by paragraph 11 of Article 10 of the Electricity Act; (iii) the 2006 Order was signed by an official lacking power or authority; and (iv) the relevant Ministers failed to comply with their obligation to consult the *Conseil supérieur de l'énergie* (the “CSE”), a French consultative public body, prior to issuing the 2006 Order.

- The *Conseil d'État* ruled based on a single ground, i.e., that relating to the failure to consult the CSE, using the following reasoning: Law n° 2005-781 dated 13 July 2005 created the CSE, which must be consulted during the rulemaking process in the power and gas sector. Before that date, another public body, the *Conseil supérieur de l'électricité et du gaz* (the “CSEG”), was competent to give advice in that field. As a provisional measure, the CSEG remained competent as long as all of the members of the CSE were not appointed. As the 2006 Order was issued after the appointment of the CSE members, the *Conseil d'État* ruled that consultation of the CSEG in lieu of the CSE was irregular and cancelled the 2006 Order on that basis.
- Several stakeholders and professional associations with an interest in the continuing validity of the 2006 Order (the *Syndicat des énergies renouvelables*, the *association France énergie éolienne* and the *Fédération nationale des producteurs indépendants d'électricité*) joined in the proceedings and asked that cancellation of the 2006 Order should have no retroactive effect. The *Conseil d'État* ruled that there was no ground on which to “limit in time the effect of such cancellation”.²

3 Consequences of Court Decision

- This decision does not automatically result in the retroactive cancellation of power purchase agreements executed on the basis of the 2006 Order from the date of the court decision. A separate court would need to hear a dispute relating to a specific power purchase agreement and decide to cancel the relevant contract.
- In any event, in a press release dated 7 August 2008, the French Ministry of Ecology, Energy, Sustainable Development and Regional Planning (*ministère de l'Écologie, de l'Énergie, du Développement durable et de l'Aménagement du territoire* or “MEEDDAT”) stated that power purchase agreements signed with EDF on the basis of the 2006 Order “would not be challenged” and that “all necessary measures to confirm their validity would be adopted shortly”. The

² The *Conseil d'État* did not state the basis for such position. To our knowledge, pleadings filed by the Public Advocate (*Commissaire du Gouvernement*), which could have provided some clarifications in this respect, were not made public.

Ministry also announced that a new Order “*substantially based on the provisions of the Order dated 10 July 2006*” was in the process of being prepared with a view to allowing new projects to benefit from the same feed-in tariff provisions.³

- According to the *Syndicat des énergies renouvelables*⁴, the CSE approved on 2 September 2008 a draft Order adopting the same provision of the 2006 Order.
- In its current drafting, the draft Order applies to projects that have benefited from a *demande complète* (a request for execution of a power purchase agreement duly acknowledged by the relevant grid operator) prior to its coming into force. Accordingly, operators that have filed a *demande complète* on the basis of the 2006 Order should automatically benefit from the feed-in tariff under the new Order without the need to file a new *demande complète*.
- The new Order also expressly provides that it will be applicable to projects located in wind development zones, consistent with EDF’s practice in this respect, a point that was not dealt with in the 2006 Order.
- The new Order is expected to be published by the end of October at the latest, following consultation with the *Commission de régulation de l’énergie*, the French energy regulator.

³ See MEEDDAT press release (in French) dated 7 August 2008 on wind feed-in tariff: http://enr.fr/dossiers-presse/Communique_MEEDDAT_arrete_tarifaire_eolien_07.08.08.pdf.

⁴ A French renewables professional association of which Linklaters is a member.

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