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Insights

REDUCTION OF PHOTOVOLTAIC FEED-IN TARIFFS: A POSSIBLE COMPENSATION FOR PRODUCERS?

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SUMMARY

The liability of the State for the damage suffered as a result of the tariff reduction decided by the legislator arises. The forthcoming adoption of implementing legislation should shed more light on the situation.

If the modification of a contract during its execution is in principle analysed on a contractual basis, it is different when it is not the fault of one of the parties but of the legislator. This is the case, in this instance, of the measure to reduce feed-in tariffs for photovoltaic energy recently adopted under the terms of the Finance Act for 2021.

1. The legal context.

As a reminder, the Finance Act for 2021 includes an article 225 which provides for the reduction of the tariff provided for in the energy purchase contracts concluded for photovoltaic and thermodynamic installations with a power greater than 250 kWp in application of the tariff decrees of 10 July 2006, 12 January 2010 or 31 August 2010. This reduction must ensure that "the total return on capital assets, resulting from the accumulation of all the income from the installation and the financial or tax assistance granted in respect thereof, does not exceed a reasonable return on capital, taking into account the risks inherent in its operation".

These purchase contracts, most of which are referred to as administrative contracts, are concluded between EDF or local distribution companies and energy producers.

If the reduction of tariffs had been decided by EDF, it would have been possible to analyse the classical tracks of contractual liability such as the unilateral power of modification of the Administration, which traditionally supposes the indemnification of the contracting party. This is not the case here. The modification of photovoltaic energy purchase contracts is here the result of the law, whose conformity with the Constitution has moreover been recognised by the Constitutional Council .

Although the implementing legislation has not yet been adopted and the effects of this measure cannot therefore be accurately assessed at this stage, the question of State liability and possible compensation for producers already arises because of this sudden change in legislation.

2. A possible indemnity action by the producers.

First of all, let us recall that EDF will have no other choice than to comply with the reduction measure, since it is obliged to apply the purchase tariffs fixed by ministerial decrees, as the Council of State recently specified. It would therefore not be conceivable to reproach EDF for applying the law.

The situation is quite different with regard to the responsibility of the State. According to case law, it is only for reasons of public order that the law may authorise the application of a new standard to contractual situations in force on the date of its entry into force. If the application of the new law causes damage to the contracting partner of the administration, the latter may seek compensation, since administrative case law has long accepted the possibility of the State's liability for the harmful consequences of a law.

This action will not be based on the contractual liability of the other party to the contract (EDF or the local distribution companies in our case) but on the extra-contractual liability of the State.

Examples of application are rare, but the conditions for the implementation of this indemnity action are relatively clear and two in number.

2.1 **In the first instance**, the judge verifies that the legislator did not intend to exclude any compensation for the damage that its implementation is likely to cause. In other words, if the hypothesis of compensation was ruled out ab initio when the law was adopted, the court cannot order the State to compensate the producers. It should be noted that this exclusion is assessed in concrete terms and cannot be deduced from the mere silence of the law on this point.

In the present case, the Finance Act for 2021 does not pronounce on a possible compensation and the legislator's intention to exclude any compensation was not expressly announced during the procedure for adopting the measure. A debate could therefore take place on this subject, even though some amendments which provided for compensation and/or indemnity mechanisms were rejected.

2.2 **Secondly**, the damage suffered by the applicant(s) must be "abnormal" and "special". This excludes from the outset compensation for harm that would be modest and/or suffered by all. In order to engage the State's responsibility, the harm resulting from the law must therefore be of particular importance and concern only a fraction of the population.

In this case, the situation of photovoltaic producers seems to meet these conditions. The criterion of speciality is hardly in doubt, as the reduction in feed-in tariffs is limited to photovoltaic power plants with a power greater than 250 kWp. The same applies to the abnormality criterion, insofar as this reform has the effect of upsetting the financial balance of these projects. In this respect, the "safeguard clause" mechanism resulting from the reform should not change the terms of the debate.

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