

## RENEWABLE ENERGY IN TUNISIA

### IPP REGIME

The 2015 Tunisian solar plan set a target of 1755 MW for wind power, 1510 MW for grid-connected photovoltaic power and 450 MW for CSP by 2030<sup>1</sup>. These objectives will possibly be reviewed in the frame of the adoption of the national plan of electrical energy from renewable energy sources which should occur by the end of this year.

To date, without the RE projects in the process of being awarded and developed, according to the figures of the Ministry of Energy, Tunisia has 394 MW of installed capacity in RE, of which more than 316 MW developed directly by STEG and the rest in self-production. RE represents today 2.6% of the electricity production in Tunisia.

To boost the RE sector, Tunisia has provided it with a specific legal framework with Law No 2015-12 dated May 11<sup>th</sup>, 2015 *relating to the production of electricity from renewable energies*<sup>2</sup> and its implementing decree, Decree No 2016-1123 *setting the terms and conditions for the implementation of projects for the production and sale of electricity from renewable energies* dated August 24<sup>th</sup>, 2016 as amended by Decree No 2020-105 dated February 25<sup>th</sup>, 2020.

There are now three possible regimes for producing electricity in Tunisia from RE and selling it to STEG for the first two regimes or to a private or public customers for the third one:

- the power concession regime for projects exceeding 10 MW of installed capacity for solar photovoltaic, 30 MW for wind and 15 MW for biomass;
- the licence regime below these thresholds; and
- an original self-production scheme that resembles a sale to captive clients.

Since 2017, the Tunisian Government has relied heavily on concessions and the licence regime to get the private sector to contribute to the development of electricity production from RE.

Firstly, 1,000 MW of capacity, half in photovoltaic solar energy and half in wind power, were the subject of calls for tenders in 2018 and 2019 for the granting of concessions.

This was followed by 203 MW of solar photovoltaic capacity and 120 MW of wind power capacity which were licenced after three calls for projects in May 2017, May 2018 and July 2019. A new call for projects has just been launched for an additional 70 MW of photovoltaic solar power capacity.

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<sup>1</sup> [https://www.energiemines.gov.tn/fileadmin/user\\_upload/energies\\_renouvelables/PST\\_2015.pdf](https://www.energiemines.gov.tn/fileadmin/user_upload/energies_renouvelables/PST_2015.pdf)

<sup>2</sup> Hereafter the Law No 2015-12.

The power concession regime is not as regulated as the licence regime. The regime of self-production has recently been the subject of an interesting innovation, even if the conditions of its application should be relaxed if we really want to promote it.

## 1. THE POWER CONCESSION REGIME IN TUNISIA

There is nothing specific about the power concession relating to electricity production from renewable energy sources, as the Law No 2015-12 refers to the texts on the granting of power concessions<sup>3</sup>. The provisions relating to concessions contained in the Law No 2008-23 dated April 1<sup>st</sup>, 2008 as amended in 2019 will also apply insofar as they are not contrary to the specific text of electricity production concessions.

It is important to note that the Ministry of Energy proceeds by restricted invitation to tender preceded by a pre-selection phase for which it defines the terms and conditions for selecting the bidders. At the end of this call for tenders, the selected bidder signs a concession agreement with the Tunisian State and a PPA with STEG at the price per MWh for which it was selected.

The concession agreement will include terms defining *inter alia* the purpose of the concession, the characteristics of the power plant, the duration of the concession and the conditions for its extension, the conditions precedent, the timetable for the design and completion of the power plant, concessionaire's rights over the project site, the conditions for the commercial operation of the power plant, *force majeure* clauses, hardship clause, concessionaire's commitment during the operation phase, the property regime between returnable assets (*biens de retour*), the recovery assets (*biens de reprise*) and the owned assets (*biens propres*), termination clauses in the event of default of the grantor, forfeiture clauses in the event of default of the concessionaire, concession buyback clauses or the dispute resolution clause.

The concessionaire shall benefit from a right *in rem* on the returnable assets and said right shall be registered in a special register held by the State domain administration to allow the granting of security to its lenders<sup>4</sup>.

As for the PPA with STEG, its terms and conditions are provided in the tender documentation.

The conditions of the call for tenders and the selection and allocation process are carried out under the supervision of the Technical Commission for Private Production from Renewable Energies instituted by the Law No 2015-12 ("CTER") and of an Interdepartmental Commission for Independent Electricity Production ("Commission interdépartementale de la production indépendante d'électricité"). Finally, the concession agreement and related contracts must be approved by the Assembly of People's Representatives.

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<sup>3</sup> Decree No 96-1125 of 20 June 1996 *setting the conditions and procedures for granting electricity production concessions to private individuals*.

<sup>4</sup> Section 39 of Law No 2008-23

## 2. THE LICENCE REGIME

This procedure is more regulated than the previous one. The Tunisian legislator has specified by law and regulation both the procedure and the content of the PPA. The Ministry of Energy also endeavoured to specify in detail the stages of development of a project under this regime in a guide published on its website updated to May 2019<sup>5</sup>.

The procedure is carried out by the Ministry of Energy and the CTER<sup>6</sup> and is structured around five main phases.

### 2.1 The national plan for energy produced from RE

Firstly, the Ministry of Energy publishes an annual notice setting out the RE power needs<sup>7</sup>. In the coming months, this annual notice will be replaced by a national plan for energy produced from renewable energy sources, which will determine in particular the capacities reserved for the concession and those for the licence regime, taking into account the local grid. The plan will also determine the rate of industrial integration of the projects obliging the future candidates to foresee a production in Tunisia of components of their power plants. It is to be hoped that this constraint, which remains legitimate, will be measured for projects under the licence regime. Too strong constraints would in fact be in no way economically viable in the latter case, the developers would not be able to cumulate projects and therefore MW as long as the project for which they have had an agreement in principle is not operated<sup>8</sup>.

### 2.2 The call for projects and the preparation of the request for agreement in principle

Secondly, the Ministry launches a call for projects in which it gives developers a certain period to compile the file in order to request an agreement in principle.

In particular, the application file must specify the details of the project site and the developer's rights over it. Securing the site is critical and would require developments beyond the scope of this article. We will just stress on the fact that rural lands are rarely registered in Tunisia and often subject of joint ownership. The issue of the agricultural land, which constituted a real legal obstacle with the provisions of Law No. 83-87 dated November 11<sup>th</sup> 1983 *relating to the protection of agricultural land*, is now resolved with the reform that took place in May 2019. Indeed, the realisation of wind or solar projects no longer requires a change in the use of agricultural land, a procedure which required a decree issued on the proposal of the Minister of Agriculture<sup>9</sup>.

The Ministry also seems to require an environmental impact note, although this is not required by law.

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<sup>5</sup> <https://www.energiemines.gov.tn/fr/themes/energies-renouvelables/publications/>

<sup>6</sup> Section 35 et seq. of Law No 2015-16 and Section 29 of Decree No 2016-1123.

<sup>7</sup> Section 12 of Law No 2015-12 and 45 of Decree No 2016-1123.

<sup>8</sup> Section 16 of Decree No 2016-1123

<sup>9</sup> Section 8 of the Law No 2019-47 of 29th May 2019

Finally, the developer must obtain from STEG a preliminary study for the grid connection with the estimated costs of connection and possibly the costs of reinforcement which will be charged to the project leader<sup>10</sup>. STEG has set up a one-stop shop for this stage.

### 2.3 The agreement in principle issued by the Minister of Energy

CTER selects bids first by the proposed price per MWh until the entire available capacity is covered, and then on the basis of all the developers' technical and financial capacities. It then gives its recommendation to the Minister. The latter issues an agreement in principle to the successful developers at the end of this process and publishes the list on the ministry's website.

The agreement in principle is valid for two years for photovoltaic solar energy and three years for other energy sources, with the possibility of an additional period of up to one year<sup>11</sup>.

### 2.4 The contract for the sale of electricity exclusively to STEG

Immediately after obtaining the agreement in principle, the developer must sign a PPA with STEG under the terms defined by the order of the minister of Energy dated August 30<sup>th</sup>, 2018.

This contract is not subject to negotiation.

A first version had been approved by a ministry order dated February 9<sup>th</sup>, 2017 but gave rise to strong criticisms as to the vagueness of these terms, in particular concerning the non-delivered energy, the conditions of termination of the contract and the termination amounts payable to the project company, the terms of the change in law clause, the typology of cases of force majeure, to name but a few.

Some of these criticisms have been heard in this new version of the contract, which now provides for the calculation of the non-delivered energy, a clarified process for the dealing with the change in law event, a balance in the event of default by each party allowing the other party to terminate the contract, a termination amount in the event of STEG default covering at least the debt, and the terms of a direct agreement between lenders, the project company and STEG.

However, it is questionable whether the mechanism of suspending termination of the contract during the palliation and substitution periods within the meaning of the direct agreement can legally function with the immediate effects of termination in the PPA. One may also regret in particular the treatment of force majeure which does not give rise to any compensation even though it may result from "government restrictions" and the absence of precise calculation methods for the termination amounts in all cases.

The PPA will only come into force after the completion of conditions precedent such as the entry into force of the ministerial order granting the operating licence.

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<sup>10</sup> Section 15 of Decree No 2016-1123

<sup>11</sup> Section 17 and Section 27 of Decree No 2016-1123

## 2.5 Operating licence over 20 years

Once the developer is granted the agreement in principle and signs the PPA with STEG, it must set up a project company.

It will have to finalise and sign its contracts with manufacturers, suppliers and operators.

It will of course have to obtain the necessary permits and authorisations, such as the building permit, the notice of establishment on agricultural land if applicable, the authorisation from the civil aviation authority, the military authorisation if applicable for wind farms located near an air base or the authorisation for uprooting and clearing land.

The application for an operating licence will only be made when the power plant is completed after STEG has verified that it complies with the characteristics set out in the agreement in principle and the specifications for connection to the grid. If so, the project company and STEG execute a compliance certificate.

This application will be reviewed by CTER<sup>12</sup>.

The operating licence is granted by order of the Minister of Energy for a period of 20 years. This term can be extended for a further five years only.

At the end of the term of the operating licence, the project company must dismantle the installation unless it is transferred to STEG under conditions not defined<sup>13</sup>.

## 2.6 Approval of the Parliament ?

The Law provides that the agreement in principle as well as the PPA, the acceptance certificate and the operating licence will be submitted to a special committee of the Assembly of People Representatives<sup>14</sup>. Unlike in the concession regime, said provision does not specify that the submission is done for approval.

The ER guide published by the ministry does not mention this step<sup>15</sup>. Moreover, the submission to the special committee of the Assembly is not a condition precedent in the PPA approved by the minister order dated August 30<sup>th</sup>, 2018.

We tend to conclude that this step has no influence in the process of granting the operating licence, the transmitting of these documents being solely designed to enable the Parliament to follow the grant of operating licences in a sector considered as a strategic one.

## 3. THE ORIGINAL REGIME OF SELF-CONSUMPTION IN TUNISIA

Classically in Tunisia as elsewhere, self-consumption meant that the consumer produced his own energy. The producer and the consumer were therefore the same entity. Thus Section 9

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<sup>12</sup> Section 25 and 30 of Decree No 2016-1123

<sup>13</sup> Section 30, paragraph 1, of Law No 2015-12

<sup>14</sup> Art 12, alinéa 2 de la Loi n°2015-12

<sup>15</sup> [https://www.energiemines.gov.tn/fileadmin/docs-1/Guide\\_Detaill%C3%A9\\_Energie\\_Renouvelable\\_Tunisie.pdf](https://www.energiemines.gov.tn/fileadmin/docs-1/Guide_Detaill%C3%A9_Energie_Renouvelable_Tunisie.pdf)  
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of Law No 2015-12 in its initial version provided for the possibility for any local authority or public or private company to produce electricity from RE for self-consumption purposes with the right to transport the energy if necessary and sell the surplus to STEG.

This article was substantially amended by Law No 2019-47 of May 29<sup>th</sup>, 2019 to provide for a sales mechanism in this self-consumption process.

Thus, public authorities or public or private companies operating in the industrial, agricultural or service sectors can agree with a developer to set up a project company to sell energy exclusively to the self-producer. The latter, unless it is a public authority, must hold a stake in the capital of the project company without the latter necessarily being a majority<sup>16</sup> shareholder.

The developer, through the project company, will have the right to sell its production to its self-consumer customers, to transport the electricity via the STEG grid and to sell the surplus to the latter up to a limit of 30% of the production<sup>17</sup>.

However, this form of self-consumption is subject to restrictive limits:

- Customers eligible for this process must be connected to the medium or high voltage grid;
- Customers eligible for this process must subscribe a minimum capacity of 2 MW<sup>18</sup>.

Such a project requires a licence by order of the Minister of Energy after advice from the CTER<sup>19</sup>. The application is submitted to the Ministry, specifying in particular the identity of the developer and the self-consumer(s), the commitment of the latter to take all the energy produced by the developer, the power subscribed by the self-consumer(s), the consumption of the self-consumer(s) during the three years preceding the application and the forecast electricity consumption...

Licence will only be granted within the capacity limit reserved for self-production in the annual notice and the national plan for energy produced from RE, when it will be instituted.

This will be followed by the incorporation of the project company, the start of the works imperatively in the year of obtaining the licence and the completion of the power plant within two years for a solar power plant and three years for a wind farm.

On completion of the works, the project company must invite STEG to participate in the acceptance tests to jointly check that the installations comply with the technical specifications of the connection. The project company will then sign a contract for the power transmission and the purchase of the power surplus by STEG under the terms of the standard contract approved by order of the Minister of Energy on February 9<sup>th</sup>, 2017.

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<sup>16</sup> Decree No 2020-105 of 25 February 2020 inserting Section 10bis of Decree No 2016-1123

<sup>17</sup> Decree No 2020-105 of 25 February 2020 amending Section 8 of Decree No 2016-1123

<sup>18</sup> Order of 15 May 2020 *setting the minimum level of the individual subscribed power of the auto-consumer or auto-consumers opening the right to sell electricity produced from renewable energies*

<sup>19</sup> Section 10 of the Law No 2015-12

This Tunisian version of self-consumption is much closer to economic reality than the other self-consumption regimes we have practiced or studied so far. The Tunisian legislator has clearly understood that the development of solar or wind power plants was not the job of industrial or services companies wishing to find an alternative source of power. It thus spares operators the legal contortions that aim to interest the developer in the volume of electricity delivered by means of lease contracts and services contracts. It seems, however, that both the minimum subscription threshold and the cost of transmission are too high to give this mechanism the success it deserves.