

# EFET

## European Federation of Energy Traders

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### GUIDANCE NOTES

#### EFET INDIVIDUAL POWER PURCHASE AGREEMENT FOR CORPORATES AND UTILITIES

#### FRENCH LAW

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STATUS: 18 May 2021

These Guidance Notes have been prepared in relation to the Individual Power Purchase Agreement for Corporates and Utilities (hereafter referred to as "CPPA"), issued by EFET on 26 June 2019. The Guidance Notes are intended to inform users of the CPPA where:

- (i) The CPPA is governed by French law; and/or
- (ii) The Facility (electricity generation plant of the Seller) and/or the electricity consumption unit of the Buyer are located in France and connected to the French power system; and/or
- (iii) Specific French market practices affect the use of the CPPA.

Comments are provided in the table below. They may be addressed in an *ad hoc* appendix or in the Election Sheet (in the Section specified as per the table).

The notes do not address compliance with EU regulatory requirements, e.g. under Regulation (EU) No. 1227/2011 (REMIT) or Directive 2014/65/EU (MIFID). Capitalised terms not defined herein have a meaning ascribed to them in the CPPA.

REFERENCE	COMMENT
<p><b>General remarks</b></p> <p><b>The Seller is considered as a supplier of electricity</b></p>	<p>In French law, the activity of purchasing electricity to sell it on <u>to an end customer (or the TSO for losses)</u>, is considered as supplying electricity.</p> <p>In this case, the supplier (“Seller”) must respect several obligations, of which the main obligations are listed below:</p> <ul style="list-style-type: none"> <li>- It must hold an authorisation issued by the State (article L. 333-1 of the French Energy Code).</li> <li>- It is liable for the domestic tax on final electricity consumption (article 266 <i>quinquies</i> C of the French Customs Code).</li> <li>- It is subject to several obligations in terms of informing the end customer, in particular regarding the origin of the electricity sold (article R. 333-10 and thereafter of the French Energy Code).</li> </ul> <p>These aspects should be taken into account if the Seller should be considered as an electricity supplier with regard to French law.</p>
<p><b>References to companies in charge of distributing electricity (voltage &lt; 50 kV) to that in charge of electricity transmission (voltage &gt; 50 kV)</b></p>	<p>In France, the company Enedis, subsidiary of EDF, runs the electricity distribution network over 95% of the territory, the remaining 5% is entrusted to semi-public structures (so-called “local distribution companies”). It is therefore likely that the relevant distributor for the CPPA perimeter will be Enedis.</p> <p>If the end customer is connected to the public electricity transmission network, the company RTE, owner and operator of the network, will be the contractual point of contact.</p>
<p><b>Balance Responsible Party (BRP)</b></p>	<p>In French law, in accordance with article L. 321-15 of the French Energy Code, each electricity producer and each consumer of electricity, connected to the public transmission or distribution networks, is responsible for the differences between the extraction of electricity and injection of electricity made by them.</p> <p>Each producer and each consumer may either define the terms and conditions by which these differences are financially attributed to one or the other by signing on to the standard BRP contract with the operator of the public transmission network (RTE), or enter into a contract for this purpose with a balance responsible entity which covers these differences.</p> <p>In the majority of cases in France, the producers and consumers enter into agreements with third-party balance responsible parties in order to ensure the management of their differences. Moreover, it is common for consumers to ask their usual supplier, directly, to perform this role of balance responsible party; this supplier is free to perform this task or to entrust it to a specialist operator.</p> <p>In these conditions, it is recommended that the parties specify if either of them has appointed, or will appoint, a third party to which their balancing responsibility is or will be delegated, in order to bear any differences between the injections into and extractions from the network.</p>

<p><b>Operational Performance</b></p>	<p>As regards “pay-as-produced” contracts, it is common in France to stipulate minimum quantities of volumes to be produced and purchased or minimum annual availability levels.</p> <p>As the CPPA may end up being a “pay-as-produced” contract, it could be appropriate to stipulate a minimum quantity of electricity to be produced and purchased or minimum annual availability levels.</p> <p>This detail could be added in Section C.</p> <p>Furthermore, we draw your attention to the following: under French law (article R. 314-59 of the French Energy Code) the period of electricity production for which guarantees of origin can be requested may not exceed one month.</p>
<p><b>Negative Price Periods</b></p>	<p>On the French market, the occurrence of negative market prices of electricity may affect the interests of the parties in the CPPA.</p> <p>Therefore, the parties could wish to adapt the CPPA to protect themselves from the effects of negative prices of electricity.</p>
<p><b>Comments in relation to specific provisions of the CPPA</b></p>	
<p><b>Part I Section B § 31.2(c) Courts and Arbitration</b></p>	<p>In French law, arbitration procedures are authorised if stipulated by the contract, in accordance with the provisions of article 1442 of the French Code of Civil Procedure.</p> <p>If the contract does not stipulate the terms and conditions in which the arbitration procedure should take place, it is organised in accordance with the terms and conditions stipulated in articles 1451 and thereafter of the French Code of Civil Procedure.</p> <p>It should be noted that arbitration is very often more expensive than court proceedings before the French courts.</p> <p>Where there is a choice between courts, it is common to choose the Commercial Court in Paris.</p>
<p><b>Part II §6 Definition of Metering Entity</b></p>	<p>In France, if the plant is connected to the public electricity distribution networks, the meter is installed by the electricity supplier, and it is owned by the latter. Indeed, these meters are part of the public electricity distribution network.</p> <p>However, this is not the case if the meter does not communicate with the public electricity distribution network and is only meant for a private network.</p>
<p><b>Part II § 15 Definition of Force Majeure</b></p>	<p>In French law, force majeure events are defined in article 1218 of the French Civil Code as external, unforeseeable and unavoidable events preventing the correct performance of the contractual obligations.</p> <p>The definition of Force Majeure events indicated in article 15§1 seems similar to that of French law.</p>
<p><b>Part II § 16 Change in Law</b></p>	<p>Hardship clause (“<i>imprévision</i>”) in article 16 of the CPPA stipulates that if a change in circumstances that was unforeseeable upon signature of the contract makes the performance of it excessively</p>

	<p>expensive for a party which had not agreed to take on the risk, the latter may claim a renegotiation of the contract with its co-contracting party. It continues to perform its obligations during the renegotiation period. In the case of refused renegotiations or failure in them, the parties may agree to terminate the agreement, or to refer their case to the court.</p> <p>In French law, article 1195 of the French Civil Code regarding hardship provides that <i>“If a change in circumstances unforeseeable at the time of conclusion of the contract makes performance excessively costly for a party who had not agreed to assume the risk, that party may request a renegotiation of the contract from the other party.”</i></p> <p>However, parties may provide for derogation from the provisions of article 1195 of the French Civil Code if they wish to do so.</p> <p>On the French market, the parties may wish to deal with issues related to evolutions in purchase prices or changes in environmental taxation.</p>
<p><b>Part II § 18 Term and Termination Rights</b></p>	<p>In French law, permanent undertakings are prohibited (article 1210 of the French Civil Code).</p> <p>As regards the end of the contract, two situations must be distinguished from each other:</p> <ul style="list-style-type: none"> <li>- When the contract is signed for an unlimited term, each party may put an end to it at any time, subject to respecting the contractual notice period or, otherwise, a reasonable notice period.</li> <li>- When the contract is signed for a fixed term, each party must perform it until its expiry.</li> </ul> <p>Thus, the lack of performance of a contract may entail its cancellation at the request of the wronged party (article 1217 of the French Civil Code).</p> <p>Moreover, under French law (articles L. 622-13 and L. 631-14 of the French Commercial Code) a clause providing for the termination of a contract solely because of insolvency proceedings is null and void.</p> <p>Despite the foregoing, French law leaves significant contractual freedom in terms of the cancellation clause.</p>
<p><b>Part II § 21 Limitation of Liability</b></p>	<p>In French law, in light of the general liability principle stipulated in article 1382 of the French Civil Code, any party causing a prejudice to another party is required to repair it, without any limit to the liability being stipulated.</p> <p>Thus, it may be appropriate to stipulate a limitation of liability adapted to the project and calculated in accordance with the insurance cover.</p>
<p><b>Part II § 22.4 Default Interest Rate</b></p>	<p>In French law, the legal late interest rate is low, currently less than 1% per year.</p> <p>In order to be protected from late payments, it may be appropriate to stipulate a higher rate, in the contract, than the legal rate in France.</p>
<p><b>Part II § 20.1 Maintenance of Insurance</b></p>	<p>In France, it may be common to ask for insurance cover for the power plant as from its construction stage, and not only as from the date of the electricity supply.</p>

	In this case, paragraph 20.1 should be amended.
<b>Part II § 21.2 Exclusion of Liability</b>	In French law, the debtor is only bound for the compensation that has been stipulated or which could be foreseen upon entering into the contract, unless the lack of performance is due to “gross negligence or willful misconduct” (article 1231-3 of the French Civil Code).
<b>Part II § 18.5(d) Long-Term Force Majeure</b>	<p>The CPPA sets at 12 months the period as from which an event is considered as a Long-Term Force Majeure event, authorising the enforced termination of the contract.</p> <p>This period exceeds practice on the French market and it may be appropriate to reduce it to 3 or 6 months depending on the projects in question.</p>