



# **POLICY PAPER ON RETROSPECTIVE CHANGES TO RES LEGISLATIONS AND NATIONAL MORATORIA**

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## INTRODUCTION

This policy paper aims at presenting an overview of the retrospective changes (RSP) and various moratoria (MR) introduced or currently discussed in EU Member States and pointing at the negative effect they have or could have on the renewable energy sector. It will also propose some policy recommendations to ensure a cost-effective support to this industry and avoid detrimental changes in legislation.

Indeed, the European renewable energy sector has been suffering for a few years from abrupt retrospective changes introduced to legislations in several EU Member States harming the industry and shattering investors' confidence. These changes have the characteristic of impacting already existing investments.

The industry as a whole has been denouncing these national practices and has been supported by the European Commission and especially Energy Commissioner Günther Oettinger and Climate Commissioner Connie Hedegaard who formally condemned such practices.

### **What are retrospective and retroactive changes to support schemes?**

**Retrospective changes** are changes brought upon by laws - in this case - to renewable energy support schemes which, while taking effect only from the date of publication, change existing rights and obligations of RES producers and investors. A reduction of a current Feed-In-Tariff (FIT) level for already existing projects would be an example. Those changes apply to the future but change the status of already-made investments and therefore strongly affect what an economic operator, such as a renewable energy producer, may have legitimately expected in terms of return on benefits and seriously challenge the business case based on the agreement already concluded. This has led in several countries such as the Czech Republic and Spain to thousands of bankruptcies in the renewable energy sector.





European law offers some protection against these changes since Member States may have to justify the changes they are making. Those principles of European law directly apply to Member States when they are implementing European legislation, such as the Renewable Energy Directive 2009/29/EC.

**“Retroactive changes”** (as opposed to “retrospective changes”) is the expression widely used to designate these abrupt changes impacting past investment. However, from a legal perspective, retroactivity means that a law is applied to facts that have occurred before the publication of the law. Thus, a certain transaction has been completed before the new law was published and thus the legal consequences of the law applicable at the time of the transaction are invalidated. Therefore, the appropriate legal terminology to identify the changes renewables support schemes are facing is “retrospective changes”.

### **The impact of retrospective changes: Making RES target achievement more expensive**

As we are experiencing in several EU Member States, retrospective changes made to renewables law and policy can change the revenue streams expected by renewable producers which they based their investments on. As a consequence, investors and producers are unable to pay back their bank loans. This has led renewable energy projects to bankruptcy in the past, thereby further destroying the trust and investment climate in the sector. Introducing retrospective changes immediately increases risk premium for new projects. Investors become reluctant to invest in the sector, seeing renewable energy projects as a risky investment. In the same way, banks become more cautious before financing such projects, lend money at higher interest rates and therefore increase the cost of capital, making renewable energy projects “artificially” more expensive.





## **What is a moratorium?**

The term moratorium refers to the suspension of activity or an authorized period of delay. In the context of support to renewable energy, it means the suspension of support. Moratoria can be introduced by law or in fact, for definite or indefinite time. The Spanish law of January 2012 would be an example of a moratorium introduced by law. Not holding any new tenders in a tendering scheme would be de facto a moratorium. In France, a moratorium was introduced suspending and cancelling the application of all new renewables projects to a support scheme from a date even prior to the date of the publication of the moratorium, and thus with retrospective effect. However, even if not retrospective, the adoption of a moratorium entails major damage to the industry by abruptly stopping all support to the sector and leaving the industry without market and therefore leading to massive bankruptcy and job losses.

## **Which renewable energy technologies are concerned?**

The photovoltaic (PV) industry has suffered the most from retrospective changes due to the very quick, strong and unexpected decrease of the PV module price (60% decrease over just a few years). What is, in itself, good news (the decrease of PV module prices) has turned out to be a difficulty for the industry as national support schemes did not or not enough foresee regular or well-tuned price digressions, leading EU Member States to introduce retrospective changes. However, it is worth noting that all renewable energy technologies have been affected by similar retrospective changes and moratoria. Additionally, experience shows that even if a retrospective change has been introduced on one specific technology, investment confidence is damaged for all other RES technologies.





## Policy recommendations

1. Create and implement a predictable and stable legislative framework for renewables at national level
2. Respect as much as possible the commitments taken in the 2010 NREAP or notify changes to the Commission
3. Avoid retrospective changes, but provide for some flexibility in the renewable energy support scheme from the outset, e.g. digressive support, regular revisions, use transitional periods etc.
4. Include the renewable industry in discussions about changes to support schemes to find together alternative solutions to the problems identified



## STATE OF PLAY IN EU MEMBER STATES



**Retrospective changes**



**Retroactive changes**



**Moratorium**

### BELGIUM



In Wallonia, the Government has adopted a measure that retrospectively reduces the return obtained by prosumers in household PV installations. The Government had initially publicly announced that prosumers were to receive 7 green certificates/MWh at a minimum of 65€/ green certificate for 15 year. The Government, fearing that it could conduct to disproportioned return, decided to apply the “basis” legislation to guarantee a return of 7%. Their green certificates will only be delivered during 10 years instead of the planned 15 years. In addition, an annual fee will be retrospectively asked by the DSOs for PV-installations above 3 kW.





In Wallonia, more and more municipalities are adopting new wind turbine taxes on new and existing wind turbines (the taxes amount could go to 12500€ or even 17000€ per wind turbine per year).





In Wallonia, a new wind turbine noise limit could be set for wind farms already installed. This would lead new mandatory mitigations measures retrospectively impacting the wind farm productivity and profitability.



-  In Wallonia, a specific fee for green electricity producers (this also regards already installed capacity) has been introduced mid-2012 to cover the operational costs of the regulator. The total amount is fixed (~1,8M€) and has to be paid for the whole production, resulting in a fee of 0.54€ / MWh in 2012, 0.49€/MWh in 2013.
-  In Flanders, a grid connection tariff has been introduced for photovoltaic installations ranging from 44 to 69 €/ kW / year. The tariff will also have to be paid by already installed installations.

## BULGARIA

-  In July 2012, the State Energy and Water Regulatory (SEWRC) announced a 54% retrospective cut to the FiT for RES that would apply to existing installations. Three weeks later, it announced another change in the FiT only for PV, decreasing the tariff by an additional 39%. The SEWRC failed to justify this second unplanned change. Due to the inconsistency and unpredictability of tariff changes, banks refused to finance PV or RES investments. Reacting to the changes, the European Bank for Reconstruction and Development (EBRD) said they “do not contemplate any investments in renewables in Bulgaria, not this year, not next year, not until the framework is clearer.” The prices have been cut further as of July 2013, leaving some producers with “preferential” prices below the average selling price of electricity.
-  In September 2012, the SEWRC implemented grid access payments in the range of 5-40% for all renewable installations, commissioned after April 2010. The fee concerns mainly wind, solar and hydro technologies and the amount depends on a number of factors, including date of commissioning of the power plant. In addition to applying retrospectively, the new fee is discriminatory, as it affects RES only





and not conventional energies. As a consequence, numerous energy producers were brought to the verge of bankruptcy, not being able to reimburse their bank loans. The decision contradicts many national and European provisions and the European Commission started an official dialogue with the Bulgarian authorities and could possibly start an infringement procedure. In 2013, the Bulgarian Supreme Administrative Court revoked this Decision issued by SEWRC, yet only on a case-by-case basis that applied to 4 types of installation, leaving the grid access fee in force for the remaining 122 categories of RES producers. Further, at the end of September 2013, the Bulgarian Energy Holding (shareholding company with 100% state owned participation) submitted a statement to the National Assembly demanding for 30% additional levy on the energy produced by PV. The demand is to be discussed in the upcoming sessions of the parliament.



In May 2011 Bulgaria adopted a moratorium on new grid connected RES. RES grid connections were initially postponed until June 2013. By notification of the National Electricity Company (NEC) in July 2012, all RES projects with signed preliminary grid connection contracts were postponed again, and are to be connected only after 2016. This decision, by stopping the development of any new RES capacities for the next three years, is endangering the achievement of the Bulgarian 2020 binding national renewable energy target. Despite the suspension of grid connections, no grid connection fees (amounting to about 25 000 euro per installed MW) has been reimbursed to the investors.

→ The utter uncertainties in the economic decisions of the Government led many investors and companies operating in the RES sector to leave the country. Hundreds of qualified workers and trained managers were forced out Bulgaria.



## CZECH REPUBLIC



Due to a mismanagement by the Government of PV support scheme, leading to uncontrolled increase of the number of installations and important additional costs to electricity customers, the Czech Government introduced several legislative measures with retrospective effect in 2011: abolition of tax holidays, changes in depreciation, abolition of contribution on decentralized production, obligation to equip RES installations with facilities for remote power control, non-proportionate recycling fees for PV.

The largest impact has been the solar tax which decreased retrospectively the FiT by 26% and green bonus by 28% for a three-year period (2011-2013). The tax is applied to PV installations set up in 2009 and 2010.



The Government is currently discussing additional changes to the 2013 act that could retrospectively impact RES installations: existing project could undergo individual assessment to prove a 15 year payback time. Would the payback time be shorter, the Government would retrospectively reduce the support scheme duration from 20 years to 10 or 15 years.

## ESTONIA



The amendment to the Electricity Market Act, which entered into force on in July 2012, excludes the consumption of electricity and heat by the energy branch for electricity and heat production from the support mechanisms. Renewable CHP producers incur retrospective losses on average of 10% from the previous support levels.





A draft Electricity Market Act proposal 318 SE was sent by the Government to the Parliament. The proposal, which is currently still under discussion in the Parliament, foresees a change in the structure and level of existing support scheme. The changes would apply in a retrospective way and devalue producer's past investments. For instance, according to the initial draft proposal the payments for energy producers above 10 MW electrical capacities and for all the wind energy capacity would be reduced and capped.

⇒ Based on an analysis commissioned to SEB Enskilda, the estimated loss in revenues for the existing producers could be between 103 and 141 Million Euros.

In February 2013, the Economic Affairs committee of the Parliament of Estonia adopted additional measures to the draft which would retrospectively reduce renewable energy support including annual capacity triggered reduction in support for all renewable energy producers, which in essence means moratorium for new capacities. Currently the Government seeks the State aid permission from the European Commission for the scheme that includes retrospective measures. Once the permission would be granted, the Parliament is expected to adopt the draft proposal 318 SE including the retrospective measures.

## GREECE



In November 2012, the Greek Government decided to impose a levy on the supposedly “guaranteed” gross income of all operating RES projects in Greece. The decision was rushed through the Greek Parliament and hastily approved by a slim parliamentary majority in November 2012 as part of a package of fiscal austerity and economic reform measures. It aims at reducing the continuously growing



deficit of the Greek electricity market operator by unilaterally cutting the operator's payment obligations to the RES producers for three (2+1) years.

The levy ranges from 25% - 30% for operating PV systems >10 kW and 10% for wind farms, small hydro and biomass.

The imposition of the levy is a clear retrospective measure which affects all operating RES plants. In effect, it reduces a posteriori the "guaranteed" financial returns of the projects. Apart from its retrospective character, the measure is non-proportional and especially devastating for wind and small hydro projects, whose original FiTs and financial returns were, on average, much lower than their PV equivalents.



In August 2012, Greece stopped all authorization procedures for new PV projects as the number of applications exceeded the planned PV national target for 2020 from the National Renewable Energy Action Plan (NREAP). This decision affected over 7.5 GWp of PV projects.

→ These measures threaten the viability of many European companies based in Greece involved in the development, installation and operation of RES projects and drives away investments, wiping out any serious prospects for continued RES growth in a country with significant unexploited renewable energy potential.



## FINLAND



In Finland, the financial support for small hydro power had been based for many years on a premium FiT and on an energy investment fund. The production support, or at the beginning a tax refund, was mainly used by operating plants. The investment fund for new installations or significant refurbishments.

However, the new Finnish Government, elected in mid-2011, has step-wise stopped support for small hydro. The FIT was retrospectively abolished in 2012 for small hydro plants. The 15% investment support for new constructions containing a significant refurbishment is too small to be functional. The abolition of the FiT also applied retrospectively to existing and new bioelectricity plants under 300 kW and to wind power plants with a capacity below 1 MW.

## FRANCE



In December 2010, the French Government decided to suspend the purchase obligation which applies to photovoltaic installations above 3 kWp. PV projects which already had a grid connection authorization had 18 months to be grid connected and commissioned, or 9 months if the authorization had been accepted more than 9 months before the decree's publication. The moratorium ended in March 2011 with the publication of a new FiT decree, which applies to all PV systems up to 12 MWp.



A decree project on the FiT level has been under discussion since October 2012; it foresees a 20% decrease of the FiT applicable to all installations above 100 kWp, or without specific integration, or



ground mounted. This decrease will be applied to all projects which have asked for grid connection starting from 1 October 2012. This project will lead to a low FiT for specific installations, with a retrospective effect.

## ITALY

In less than two years, Italy has had three different incentive systems. These sudden and abrupt changes of legislation have generated many uncertainties among operators and, in some cases, limited access to credit. Many of those rules newly introduced by the Italian Government are affecting existing plants.



The July 2012 Decrees introduced a contribution of 0.05 cents € for each kWh of energy produced by RES sources to cover the cost for the Manager of Electricity Services (GSE) for management, monitoring and control activities. This measure is retrospective for all PV systems incentivized according to the 4 previous Conto Energia. It is an additional operational cost for the management of the systems (OPEX) that was not budgeted by investors.



According to a consultation paper of the Italian TSO (Terna) in effect from August 2012, in case of emergency situations (for instance in the peak of PV production), plants connected to the medium voltage grid, especially non-programmable solar/wind systems up to 100 kW, will be disconnected. The lack of a clearly defined procedure created much confusion among operators. Additionally, the lack of compensation for the disruption and the lack of time limit for the application of the measure are creating a lot of uncertainty for investors.



## POLAND



The current support for RES-E is based on green certificates system. A new draft RES Act is expected but not yet known. The new vision presented support options for RES was published on 17<sup>th</sup> of September. According to the document, green certificates given to co-firing installations could be retrospectively decreased by 50%.

Additionally, the document suggests removing the inflation indexation mechanisms from the calculation of the substitution fee, resulting in retrospective lower initiatives for enterprises obliged to purchase of green power.

The price for the green power would be fixed through auction will not change for 15 years. Already exploited projects will have a right to continue the green certificate system or change for auctioning schemes. These projects will keep right for support but not longer than 15 years or to the end of 2021.

→ The final version of the new scheme is not yet under consultation with RES industry. Would the draft Act be presented, it would be discussed with all interested parties (chambers, associations and companies). For all is known that system should be transparent, easy and cheap in functioning and, what is the most important functioning.

## PORTUGAL



Despite the repeal of the moratorium through the publication of the Decree-Law 2015-B/2012, in October 2012, the RES-E sector is in fact



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currently facing a situation of moratorium with a decrease in the quotas for solar projects, a rejection of all new and standing by small hydropower projects, a postponement of biomass projects, and a new financial contribution requested to wind promoters. New legislation has been published in 2013 to define legal regimes, terms, conditions and criteria for the implementation of provisions relating to Decree-Law referred above. However, licensing procedure is practically blocked in Portugal since the defined provisions are not feasible, showing a lack of coherence with the national reality.

## SPAIN



In 2010, three laws introduced retrospective cuts on remuneration for PV, wind and CSP electricity (although part of them for wind and CSP had been previously agreed between the Government and the Spanish RES sector). These cuts included changes of the bonus-malus system for reactive power, a reduction of the remuneration period to 30 years in the case of PV, an annual limitation of production hours for wind, CSP and PV installations, a reduction of wind premiums by 35% for 2011/2012, and severe PV tariff cuts of up to 45%. For Concentrated Solar Power (CSP), all the plants were obliged to choose the fixed tariff option on the first operation year, implying an income reduction of 120 M€ for the sector.



A new fiscal measure has been applied to all types of energy sources used for electricity production in the form of a 7% flat rate tax on the gross revenues of electricity sales. This tax is applied retrospectively to already existing plants and is discriminatory against RES benefiting from the FiT who cannot pass it on to the consumers (the wind sector could - as long as they participated in the market until beginning of February 2013). On top of this measure, the part of the





electricity generated out of gas (max. 15% in the current regulation) for CSP plants was not subject to the FiT any longer. Legal actions will be pursued.



In February 2013, the Spanish Government, approved without notice a Royal Decree-Law that retrospectively abolishes one of the two remuneration options within the Spanish RES-E support scheme. RES producers can no longer choose the option of participating in the power market, receiving the hourly wholesale electricity market price with a green premium. For instance, this measure has an impact of 13% income reduction for CSP plants.

Furthermore, it retrospectively changes the indexation mechanism of the RES-E remuneration to the consumer price index (inflation) decoupling it from the real evolution of the energy costs with the result that the FiT for existing RES-E installations becomes a digressive one, which strongly negatively affects all RES-E producers, but even stronger for those highly exposed to inflation impacts like biomass installations.

Besides, it also abolishes the additional premium of up to 0.7 €/kWh for repowered wind farms which originally were put into operation before 2002.

The recent measures had a global impact of 37% income reduction in the CSP sector.



In mid-July 2013, the Spanish Government initiated the next and definitive rollback of the RES-E policy support by approving a new Royal Decree-Law (RDL) and presenting the draft of 7 Royal Decrees and several Ministerial Orders which amongst others will establish



complete new rules for the future of RES-E in Spain. The RDL established the principle of “reasonable rate of return” that should not be exceeded by RES investments. According to the defined parameters, the rate of return should reach around 7.5% before taxes, reduced to 5% or even lower after taxes. This return is clearly below other and more secure financial products. The new system is thought to apply for the whole regulatory lifetime of a RES-E installation, applying therefore retroactive ruling. Indeed existing plants which in the past have reached a rate of return higher than 7.5% (because more efficient or because they benefited from good entrepreneurship of their owners...) would see these higher returns subtracted from the financial support the plant is still to receive in the future. Indeed, the new legislation foresees to discount those past revenues from the amount what the plant operator can still get for the remaining regulatory useful life of the plant.



Additionally, the Spanish Government adopted a moratorium already in January 2012. This sudden stop to FiT programs unlimited in time led to loss of investors' confidence in the sector and the bankruptcy of many companies and massive employment destruction (according to a Deloitte study, some 36,400 jobs have been destroyed between 2008 and 2011 and around 21,800 were created in the CSP sector, leading to a net loss of 15,000 jobs).

→ Being retrospective and retroactive, these measures are causing not only a strong loss of confidence in the legal security of the Spanish RES-E promotion regime, but also resulted in numerous lawsuits at national, European and international level. Affected investors asked for the respect of their legitimate expectations regarding their investments. Furthermore, the measures resulted in thousands of projects going bankrupt and clearly endanger the fulfillment of





Spain's 2020 RES, as recently highlighted in a new report presented by the European Commission<sup>1</sup>.

## UNITED KINGDOM

The United Kingdom has not experienced any retrospective changes or any cases of moratorium. However, discussions on potential retrospective changes to the FIT or the quality scheme for Heat and Power (CHPQA) have come close in the past and therefore the UK renewable energy industry fully supports the policy recommendations in this document.

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<sup>1</sup> Ecofys et al. (2013) "Renewable energy progress and biofuels sustainability" (ENER/C1/463-2011-Lot2), [http://ec.europa.eu/energy/renewables/reports/doc/2013\\_renewable\\_energy\\_progress.pdf](http://ec.europa.eu/energy/renewables/reports/doc/2013_renewable_energy_progress.pdf)  
The report concluded that Spain would end up with only 12.6 - 17.1% of RES in 2020 depending on the scenario assumptions used and thereby clearly failing to reach its 20% minimum target as set by Renewables Directive 2009/28/EC.



## POLICY RECOMMENDATIONS AND GOOD EXAMPLES

### 1. **Create and implement a predictable and stable legislative framework for renewables at national level**

The renewable energy industry has long been calling for predictable and stable policies as this is the only way to ensure investment security. Governments should therefore introduce and maintain more stability and reliability to their policies if the sector is to continue investing and growing in a sustainable way and create green growth and new jobs.

### 2.

#### **Respect the commitments taken in the NREAP as much as possible or notify changes to the Commission**

Member States have submitted their National Renewable Energy Action Plans (NREAPs) to the European Commission in 2010. Those plans are binding and cannot be changed by Member States without proper justification. Those plans can be adapted due to changes in the national context. However, any changes that impact the way Member States plan to reach their 2020 RES targets should be notified to the European Commission.

### 3.

#### **Avoid retrospective changes but provide for some flexibility in the renewable energy support schemes**

One of the main principles in policy making should be to avoid retrospective changes all together. As shown in this paper, they destroy investment security and increase the cost of capital thus leading to an artificially higher cost of renewable energy technologies and therefore making the transition towards green energy more expensive

However, the renewable energy sector has proven to be a very dynamic sector, with fast learning curve and effects of scale leading to rapid price decrease of the technologies. Many Member States have not taken these rapid changes into consideration in the design of their support schemes, leading sometimes to overcompensation and investment bubbles that then



lead to retrospective changes to legislations. To avoid this situation, some flexibility clauses should be integrated to the design of support schemes, from the outset, e.g. digressive support, regular revisions, use transitional periods etc.

In this context, the German FiT offers a good example of a transparent and sustainable policy which provides long-term investment security. One of its strengths - together with guaranteed payments and technology specific support - is the digression of FIT rates. This design element has led to a flexible policy that can quickly adapt to the rapid technological advances of renewable energy, thus triggering a reduction in the total costs of the policy and stimulating innovation.

## 4.

### **Include the renewable industry in discussions about changes to support schemes to find together alternative solutions to the problems identified.**

Too many Member States introduce retrospective changes without seeking prior discussion with the RES industry. Member States that involve the RES sector in the legislative process have a much better result often leading to sound compromise solutions.

For instance, Portugal is referred to as a positive example of achieving a way to reform the support mechanisms and a good cooperation between the Government and the industry. As the Government has to reduce electricity costs to payback its tariff deficit by 2020, intense negotiations during more than one year took place with the wind industry, leading to a voluntary agreement formally signed in March 2013, with an adhesion of 100% of the eligible power.

