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The consequences of the enforcement of competition rules

Since the Law of April 8, 1946, Electricité de France (“EDF”) - a state-owned company - has been enjoying a monopoly or quasi-monopoly over all activities in the electricity sector: production, transmission, distribution and supply.

This situation was not in line with the principle of free competition that governs the functioning of the European internal market and that was enacted as early as in 1957 by the Rome Treaty establishing the European Community. France, therefore, had no other choice but to remedy this situation to honor its international commitments.

The difficult liberalization of the French electricity market

The conditions for introducing competition in the French electricity supply market were enacted by a Law dated February 10, 2000, as amended^[1], that transposed three EU Directives^[2].

To simplify things, the liberalization process has been phased out. It first applied to the supply of electricity to the largest consumers (large industrial companies), Directive 96/92 having become of immediate application in February 1999. Since 2000, other large consumers, principally industrial sites, have also been given the possibility to choose their electricity supplier.

On July 1, 2004, all non-household consumers were granted access to the free market. The opening for competition was completed on July 1, 2007, date on which household consumers were granted the possibility to choose their electricity supplier.

Yet, this complete opening to competition did not entail the end of regulated tariffs. Indeed, two systems of prices continued to coexist: the liberalized electricity market where prices were freely determined on the one hand, and the regulated electricity market, reserved for EDF, where prices were fixed by the French

Government, on the other hand.

Consumer were given the choice between using their eligibility to select another supplier than EDF, i.e. stepping into the liberalized market, or sticking with their historical provider that applied regulated prices and had the possibility to propose commercial offers at non-regulated prices.

It had first been planned that consumers having selected a new provider on the liberalized market would not be able to switch back to regulated tariffs. Yet, because of the surge in the prices on the liberalized market, the French legislature offered consumers a number of possibilities to switch back to regulated tariffs.

Business consumers have, therefore, been given the possibility to switch back to the so-called TaRTAM (*Tarif Réglementé Transitoire d'Ajustement du Marché* or Transitory Regulated Market Adjustment Price), calculated on the basis of the regulated prices, plus a 10% to 23% overcharge. On the other hand, opting out of TarTAM tariffs to enter the liberalized market was final and definitive. TaRTAM tariffs were offered by any and all electricity operators.

The duration of the TaRTAM scheme, initially set up for two years, was extended on several occasions. It has been finally decided that it would be abolished upon the effective implementation of the new system provided for by the Law of December 7, 2010 for the reorganization of the electricity market, commonly referred to as the "NOME" Law.^[3]

Small household and non-household consumers have also been given the possibility to switch back to regulated tariffs in certain conditions, as per the provisions of the Law of January 21, 2008, as amended by the Law of June 7, 2010.

The conditions in which the French electricity market was liberalized did not entail free competition

European Union institutions are not satisfied with the changes brought forth by France because such changes failed to favor the emergence of free competition on the French electricity supply market. As an example, the European Commission considered that the regulated tariffs as well as the TaRTAM tariffs were likely to constitute state aids, TaRTAM notably being financed by a tax levied on all electricity consumers and a tax on electricity generated from nuclear and hydro power sources. Similarly, the European Commission considered that EDF had abused its dominant position on the market for electricity supply to large industrial consumers by concluding contracts which – due to their scope and nature – closed off access to this market for other potential suppliers and by restricting the resale by its customers of the electricity it supplied.

Several investigations were launched against France and EDF, some of which ended favorably because of the commitments proposed by EDF to effectively remedy the identified concerns. The adoption of the so-called NOME Law should help regularize the situation.

The NOME Law should remedy the anticompetitive concerns

The NOME law and its implementing decrees^[4] are supposed to complete the liberalization of the market for electricity production and supply. This Law shall come into force on July 1, 2011.

Concretely, EDF has a quasi-monopoly over the production of electricity. It owns low-cost production facilities.

This is the reason why the NOME Law requires EDF to sell a quarter of its nuclear power output to competitors at the so-called ARENH price (*Accès Régulé à l'Electricité Nucléaire Historique* or Regulated Access to Historic Nuclear Power), i.e. a price fixed by the Government, not by EDF.

After several debates between all concerned parties - the Commission for Energy Regulation ("CER") proposed a maximum price of 37 Euros per megawatt hour while EDF suggested 42 Euros per megawatt hour - the ARENH price was fixed at 40 Euros from July 1, 2011 to December 31, 2011, then at 42 Euros from January 1, 2012 to July 31, 2012. Thereafter, the ARENH price shall be fixed by the CER.

Regarding regulated tariffs, those applied to large and medium businesses (so-called yellow and green tariffs), shall be abolished on December 31, 2015. For small business consumers (with subscribed power level below 36 kVA), tariffs shall evolved, taking into account "the electricity transmission costs, the regulated electricity base-load access price, the price of the supply supplement assessed on the basis of the prices observed on the markets and marketing costs".

Retail tariffs (so-called blue tariffs) will continue to be fixed by the Government up to 2015 and by the CRE after that date.

The adoption of the NOME Law should lead the European Commission to waive some of the proceedings initiated against France. Yet, the infringement proceedings for non-transposition of EU Directives within the required time-line should continue.

[1] Law n°2000-108 of February 10, 2000 on the modernization and development of the public electricity service.

[2] Directives 96/92 of December 19, 1996; repealed by Directive 2003/54 of June 26, 2003, itself repealed by Directive 2009/72 of July 13, 2009 concerning common rules for the internal market in electricity.

[3] Law n°2010-1488 of December 7, 2010 on the new organisation of the electricity sector.

[4] Decree 2011-466 of April 28, 2011 fixing the conditions governing the Regulated Access to Historic Nuclear Power; Order of April 28, 2011 enacted pursuant to §II of Article 4.1 of the Law 2000-108 on the

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modernization and development of the public electricity service; Order of April 28, 2011 fixing the maximum global volume of electricity to be sold by EDF under the Regulated Access to Historic Nuclear Power scheme.

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