

THE ENERGY
REGULATION
AND MARKETS
REVIEW

ELEVENTH EDITION

Editor
David L Schwartz

THE LAWREVIEWS

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PREFACE

In our 11th year of writing and publishing *The Energy Regulation and Markets Review*, the most pressing global concerns are inflation, supply chain concerns, the Ukraine war and continuing effects from the covid-19 pandemic. Accordingly, many of our contributing authors have emphasised concerns associated with the effects of these crises on infrastructure development, commodity purchases and energy demand. We have also seen industry and regional specific changes that have added uncertainties to global energy policies. For example, oil and gas prices have spiked sharply (offering a dramatic contrast to historically low prices just two years before). While pricing changes may be a boon for sellers and their exporting countries, that has created uncertainty for countries that are highly dependent upon oil and gas consumption and imports, particularly imports from Russia, which is now subject to certain embargoes following the initiation of trade sanctions earlier this year arising from Russia's invasion of Ukraine. Additionally, the United Kingdom continues to experience uncertainties resulting from its transition out of the European Union (a process known as Brexit), particularly regarding the future of its energy policies to reduce greenhouse gases and its coordination and cooperation with the European Union. The Biden administration has continued to reassure US allies and historical trading partners that it remains committed to the 2015 Paris Agreement, notwithstanding the Trump administration's previous withdrawal. And the memory of the 2011 Fukushima nuclear incident continues to affect energy policy in many countries. Finally, there are continued efforts to liberalise the energy sector globally.

I CLIMATE CHANGE DEVELOPMENTS

We continue to see significant carbon reduction efforts globally, including increased use of renewable resources and measures to improve energy efficiency and reduce demand.

In the United States, the Biden administration has continued to commit to the fight against climate change, despite the previous administration's support for fossil fuels. While coal and other aged fossil fuel plants continue to retire at an unprecedented rate (primarily because of the economics of those facilities), the Texas winter storm in February 2021 and recent dramatic increases in oil and gas prices have raised questions about whether renewable resources alone will be sufficient for long-term reliability. The US Federal Energy Regulatory Commission issued a report recommending reliability improvements to prevent rolling blackouts resulting from severe storms. Many states have continued to award procurements of thousands of megawatts of new offshore wind development projects on the east coast and, in May 2021, the US Bureau of Ocean Energy Management granted its first approval for the Vineyard Wind offshore project. The Federal Energy Regulatory Commission has continued

to struggle with whether and how to impose regulatory restrictions on the ability of states to subsidise renewable energy projects in light of their adverse impacts on competitive market prices.

Despite Brexit, the United Kingdom's renewable energy targets have continued to meet or exceed those of the European Union. France is seeking to double its wind and solar capacity and President Macron has announced a goal to close the remaining coal plants by 2022. France has recently updated its national policy priorities with respect to climate change to include low-carbon hydrogen resources as well as power plants equipped with pumped storage, and provided a new certification process for biogas. Italy had previously targeted a 28 per cent reliance on renewable energy by 2030 but is now working to reach the 32 per cent target adopted by the European Union, and has recently created a new Ministry of Ecological Transition to assist with the fight against climate change. To reduce reliance on Russian oil and gas, Belgium seeks to triple its offshore wind capacity to 5.8GW by 2030. Portugal is retiring coal generation and replacing it with renewable and hydrogen generation resources. Greece is decommissioning some of its old lignite plants and has begun implementation of a 'just transition' plan. Poland has been struggling to meet the EU renewable energy targets but has plans to develop significant offshore wind generation.

China continues to have ambitious renewable energy goals, aiming for an emissions peak by 2030, carbon neutrality by 2060 and a goal of 15 per cent of generation supplied by non-fossil fuel generation. There remains significant debate in Australia regarding the role of gas and coal in the energy landscape, which has led to a patchwork of national and state policies that point to continued uncertainty regarding Australia's commitment to carbon reduction. Malaysia continues its efforts to encourage greater entry into the renewable energy market and has goals to reach 31 per cent renewable generation by 2025 and 40 per cent by 2035, which reflects an increase in renewables of 15 per cent over previous targets.

The United Arab Emirates aims to reduce its carbon footprint by 70 per cent by relying on 50 per cent renewable energy by 2050, and recently launched an ambitious initiative to fund and supply clean electricity to almost 100 million people in Africa by 2035. In Brazil, hydroelectric resources constitute more than half of its installed generation capacity, and efforts continue to increase wind and solar generation as the cost of renewable generation has decreased.

II INFRASTRUCTURE DEVELOPMENT

The multiple crises so far this year (inflation, the war in Ukraine, supply chain issues and the continued covid-19 pandemic) have increased prices and slowed infrastructure development for many countries, particularly those in which a reliable energy supply remains the primary concern, regardless of fuel source. Even the United States is no exception, as controversy remains over the Dakota Access Pipeline, development and approvals for which have continued to stall, and the Biden administration revoked the Keystone XL Pipeline's presidential permit in January 2021, regardless of the recent dramatic increases in oil prices. The European Union has recognised the need to secure a diverse energy supply, particularly in view of Russia's invasion of Ukraine and the desire to reduce reliance on Russian oil and gas. Belgium is expected to increase investment not only in renewable generation but also in hydrogen and geothermal energy to combat reliance upon Russian oil and gas. Portugal is also seeking to expand the development of green hydrogen as an alternative fuel source, including development of the Sines project, which is intended to replace in part the capacity

lost following the retirement of coal generation. Furthermore, and unsurprisingly, Russia is expected to experience a significant downturn in foreign investment in its energy sector as a result of sanctions imposed by the United States, the European Union, the United Kingdom and many European states. Lebanon has developed a plan to reform its electricity sector to increase installed capacity so that electricity can be provided for up to 20 hours per day. Nigeria has only 12,000MW of installed generation capacity, which is insufficient to meet its needs, and is looking to the gas sector in the country to supply sufficient fuel to support additional generation resource development.

III NUCLEAR POWER GENERATION

Ten years after the Fukushima disaster, there is a struggle between efforts to limit reliance upon nuclear energy and the emissions reductions and fuel diversity benefits nuclear power offers. Because of the Ukraine war and the need for fuel diversity, and the importance of nuclear power for fighting climate change, Belgium has extended the economic lifetime of two nuclear power plants until 2035. France had previously sought to eliminate nuclear generation by 2025 but has extended that date. South Korea has continued its efforts to phase out nuclear power (replacing nuclear plants with new renewable facilities over time). However, the United Arab Emirates' new 5,600MW Barakah nuclear power station is almost complete and one of its units is already operational. When all units are online, Barakah will supply 25 per cent of the emirates' electrical needs. Poland still intends to explore the development of up to six new nuclear power units in the future, with a target date for the first unit in 2033. In the United States, although the early retirement of certain nuclear plants has been driven by cost and power market considerations (rather than safety concerns), some states have passed legislation to subsidise nuclear energy to allow owners to continue to operate through zero emissions credit programmes, including Illinois, New York, New Jersey and Ohio.

IV LIBERALISATION OF THE ENERGY SECTOR

We have seen significant energy sector regulatory reforms in many countries. The European Union has sought to continue efforts to centralise the regulation of the EU energy sector, albeit without the full participation of the United Kingdom. Belgium, Portugal, Greece and France (among others) have each taken significant steps towards further liberalisation of the energy sector. Australia has opened access to transmission through regulatory reforms to ensure timely transmission investment and encourage market entry, and continues to engage in significant changes in the regulation of the energy market. Brazil has recently implemented net metering regulations and is now implementing distributed generation regulations. China has reduced subsidies for renewable energy and has implemented a market-price mechanism for pricing coal-based generation. The United Kingdom has continued to implement a competitive tender process for the development of offshore transmission. In the United States, while states have continued to subsidise renewable generation (particularly significant new subsidies for offshore wind development in the Northeast), the Federal Energy Regulatory

Commission has continued to struggle between deference to states in making procurement decisions and protections against adverse impacts on competition by implementing minimum offer price rules to combat buyer-side mitigation markets.

I would like to thank all the authors for their thoughtful consideration of the myriad interesting, yet challenging, issues that they have identified in their chapters in this 11th edition of *The Energy Regulation and Markets Review*.

David L Schwartz

Latham & Watkins LLP

Washington, DC

May 2022

FRANCE

*Fabrice Fages and Myria Saarinen*¹

I OVERVIEW

The energy market in France has undergone a progressive liberalisation as a result of the European plan to establish a unique energy market that would end national monopolies. This has naturally led to an important legislative and regulatory change, which was codified by Order No. 2011-504 of 9 May 2011, which created the legislative part of the French Energy Code. This Code sets out provisions relating to electricity, gas, renewable energy, hydropower, oil and both heating and cooling networks.

This chapter focuses mainly on electricity and gas markets since they are the markets that have been affected the most by these changes. It should be underlined, however, that the other sources of energy are also subject to specific regulation.

After the Second World War, to rebuild the infrastructure and the network, the French authorities decided to grant a state monopoly to Electricité de France (EDF) and Gaz de France (GDF, now Engie) with regard to the production, transportation and distribution of electricity and gas, respectively.² This situation remained substantially unchanged for half a century until France had to implement into its national law two Directives dated 1996 and 1998 adopted by the European Commission to promote an effective and efficient internal energy market, open to competition. These Directives were progressively transposed into French law as of 2000 and initiated the beginning of the liberalisation, although initially only large industrial consumers could benefit from this system.

Further opening of the energy market occurred several years later with the transposition into French law of new Directives dated 2003, which aimed to make this opening available to all professional consumers by 1 July 2004 and to all consumers, including residential customers, by 1 July 2007.³

Although significant progress had been made, the European Commission adopted the Third Energy Package to further liberalise the energy market, which included two new

1 Fabrice Fages and Myria Saarinen are partners at Latham & Watkins AARPI. This chapter was written with the assistance of Floriane Cruchet, an associate at the firm, and interns Anne-Romaine de Grandmaison and Guillaume Divet.

2 Law No. 46-628 of 8 April 1946 concerning the nationalisation of electricity and gas, repealed by Law No. 2004-803.

3 Law No. 2004-803 of 9 August 2004 concerning the electricity and gas public service and the electricity and gas companies; Law No. 2005-781 of 13 July 2005 setting out the guidelines for energy policy regarding professionals; Law No. 2006-1537 of 7 December 2006 related to the energy sector. These laws transpose (1) Directive 2003/54/EC of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, and (2) Directive 2003/55/EC of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC.

Directives⁴ replacing the former electricity and gas Directives. These were transposed into French law on 7 December 2010 by a new law commonly referred to as the NOME Law,⁵ which led to the removal of several obstacles to the development of competition in the French electricity market. Greater price liberalisation for industrial and residential customers has been achieved, notably by requiring EDF to sell a substantial part of its existing nuclear facilities to alternative suppliers at a regulated price, between January 2011 and 2025, to allow alternative suppliers to compete fairly with the historical supplier.

Finally, France launched an energy transition with the adoption of Law No. 2015-992 on 17 August 2015 (the Law on Energy Transition), establishing new rules supporting renewable energy production and setting out ambitious objectives, which were specified in multi-annual energy programming for the period 2016–2023.

II REGULATION

i The regulators

Compliance with the new energy market regulations is mainly controlled by the Energy Regulatory Commission (CRE), the sectoral regulator, which was created by the Law dated 10 February 2000.⁶ Its overall mission is to ‘contribute to the proper operation of the electricity and natural gas markets, to the benefit of final customers’.

The CRE is principally in charge of:

- a* powers of decision, approval or authorisation (system operators, contributions to the public electricity sector, etc.);
- b* dispute settlement and sanctions relative to access to the electricity and gas networks;
- c* powers of proposal (tariffs for the use of public electricity grids, contributions to public electricity services, etc.);
- d* information and investigative powers with stakeholders;
- e* advisory powers (tariffs, regulated access to incumbent nuclear electricity, etc.); and
- f* additional powers (processing of tenders for electricity generation, etc.).

The Dispute Settlement and Sanctions Committee (CoRDIS), which is an independent body of the CRE, acts in matters where the CRE has competence with regard to sanctions and settles disputes relating to the access and use of public electricity grids and natural gas networks.

In 2020, clarification was provided regarding the decision-making practice of the CoRDIS,⁷ which had mainly been established through case law over the past 10 years. It is now expressly provided that (1) the prosecution stage and the procedure before the CoRDIS are adversarial and that parties may be assisted by a counsel, (2) hearings are public, and (3) its decisions can be published, provided that secrets protected by the law, and personal data, are safeguarded.⁸ Further, an energy ombudsman has been put in place, whose role is to provide consumers with all necessary information concerning their rights, current legislation

4 Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC; Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

5 Law No. 2010-1488 of 7 December 2010 establishing a new organisation of the electricity market.

6 French Energy Code, Articles L131-1 to L135-16.

7 Ordinance No. 2020-8, 22 July 2020.

8 French Energy Code, Articles L133-7 and L134-4.

and the means of settlement available to them in the event of a dispute. In addition, the French Competition Authority (FCA) has the power to prevent and sanction anticompetitive practices in any economic sector, including electricity and gas. It must inform the CRE when seized of any matter that would fall under the CRE's jurisdiction. The FCA must also notify the CRE of any abuse of a dominant position or any anticompetitive practice in the gas or electricity sector.⁹

Finally, the Higher Energy Council is a body established by the Ministry of Energy and composed of several members, including Members of Parliament. Its main purpose is to advise on national energy policy. The Council is consulted on regulatory acts relative to that policy and on decisions relating to the electricity and gas markets.

ii Regulated activities

The energy market is composed of four main areas of activity: production (generation), transmission, distribution and supply (commercialisation). Under the regime that was in place until 2000, these four activities were carried out by EDF and GDF, which self-regulated the monopoly.

Greater strides have been taken towards liberalisation as production and supply are now open to competition. However, transmission and distribution are still public service activities supervised by the CRE. Where, to guarantee this public service mandate, a legal and financial separation between these activities has taken place,¹⁰ transmission is performed by GRT (gas) and RTE (electricity), and distribution is performed by GRDF (gas) and Enedis (electricity) or local distribution companies.¹¹

More generally, some activities, such as the exploitation of electricity production facilities, require an administrative authorisation when the installed power of the facility exceeds a certain threshold, with different thresholds applicable for different types of facilities. Decree No. 2016-687 of 27 May 2016, for example, provides that the installation of an electricity generating facility using renewable energy will require an administrative authorisation if its installed power exceeds 50MW.¹² The previous threshold ranged from 12MW to 30MW. The authorisation is issued by the Minister of Energy according to specific considerations such as security, energy efficiency, technical and economic capacities of the applicant.¹³ Similarly, gas exploration requires an administrative authorisation or a concession, which is granted subject to a public inquiry and a tender procedure.¹⁴

9 id., at Article L134-16.

10 Law No. 2004-803 of 9 August 2004 concerning the electricity and gas public service; the NOME Law.

11 Local distribution companies are defined by Article L111-54 of the French Energy Code.

12 French Energy Code, Article R311-1 et seq.

13 id., at Article L311-5.

14 French Mining Code, Articles L131-1, L132-3 and L132-4.

iii Ownership and market access restrictions

Although the French Energy Code does not provide for any restriction in relation to the acquisition of assets in the energy sector by foreign companies or individuals, it clearly states that the French state must hold at least 70 per cent of the capital and voting rights of EDF and one third of Engie¹⁵ (to protect the French national interest, the state may benefit from specific shares in the capital of Engie).¹⁶

iv Transfers of control and assignments

Any merger or any change in control over businesses in the energy sector, or any acquisition of utility assets, must be notified and supervised by the FCA if the following three cumulative conditions are met:¹⁷

- a worldwide aggregate turnover of all the parties to the concentration exceeds €150 million;
- b turnover in France of each or at least two parties concerned exceeds €50 million; and
- c the transaction does not meet the thresholds set by the EC Merger Regulation.¹⁸

The examination process by the FCA is twofold.

In Stage I (which takes up to 40 working days), the FCA has 25 working days to examine the transaction, starting from the date when a complete notification is received. When remedies are proposed to the FCA, this period is extended by up to 15 working days. At the end of this period, the FCA can clear the transaction, with or without remedies, or proceed to an in-depth investigation. In the absence of any decision, the transaction is tacitly cleared.

Stage II takes between 65 and 85 working days. If serious doubts remain as to the competitive effects of the transaction, the FCA proceeds with an in-depth investigation. During Stage II, if the transaction relates to a regulated area, the FCA may request a non-binding opinion from the relevant regulator (e.g., the CRE). At the end of Stage II, the FCA can either clear the transaction with or without remedies or prohibit the transaction. At this stage, the Ministry of the Economy has the ability to intervene and to take a position on the transaction for considerations of general interest, other than fair competition, that would compensate the harm to competition resulting from the transaction.

The FCA's authorisations for acquisitions may be subject to conditions.¹⁹

In addition, the French government issued Decree No. 2014-479 dated 14 May 2014, expanding the list of strategic sectors, including the energy sector, in which foreign investments

15 French Energy Code, Articles L111-67 and L111-68.

16 *id.*, at Article L111-69; Order No. 2014-948 of 20 August 2014, Article 31.

17 French Commercial Code, Articles L430-1 and L430-2.

18 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

19 See, e.g., the decision of the FCA dated 7 February 2012: the FCA made its authorisation of the acquisition of Enerest by Electricité de Strasbourg conditional on a number of commitments designed to resolve competition concerns, such as the commitment not to make offers for two energies that include at least one component at a regulated tariff. This commitment, the effectiveness of which is to be guaranteed by separating the sales teams responsible for electricity and gas at Electricité de Strasbourg, notably eliminates any risk of the company using its business of supplying energy at regulated tariffs as a tactic to win customers on the open market.

in France require the prior authorisation of the French Minister of the Economy.²⁰ The Pacte Law has strengthened the regulation of foreign direct investment in France.²¹ First, the Decree dated 31 December 2019 lowered the threshold triggering a review of an acquisition by a foreign investor of voting rights in a French target company, from 33 per cent to 25 per cent of voting rights.²² Second, the list of strategic sectors in which the government will be able to oppose a foreign takeover has been extended to include energy storage in the critical technologies mentioned in the new Article R151-3 of the French Monetary and Financial Code (which entered into force on 1 April 2020).²³ An order on foreign investments in France dated 10 September 2021 further extended the list of critical technologies to include ‘technologies involved in the production of renewable energy’.²⁴ Initially, the only energy activities covered by the foreign direct investments regulation were those guaranteeing integrity, security or continuity of the energy supply.²⁵

III TRANSMISSION/TRANSPORTATION AND DISTRIBUTION SERVICES

i Vertical integration and unbundling

Vertical integration is the process in which different aspects of the market are controlled by a common company or entity. Prior to the deregulation of the energy industry, French energy companies were largely vertically integrated, which created potential conflicts of interest and monopolies.

The European Commission issued Directives 2003/54/EC and 2003/55/EC principally to ensure efficient and non-discriminatory network access, to ensure free choice of suppliers by consumers and to encourage investment. This legislation was transposed into the French system by a Law dated 9 August 2004, which provided for a legal unbundling of regulated activities (distribution and transmission) from non-regulated activities (production and supply). After an inquiry launched in 2005 by the European Commission, however, serious shortcomings in the electricity and gas markets were identified, including an inadequate level of unbundling between network and supply interests deemed to have negative effects on the market and investment.²⁶ Consequently, under Directives 2009/72/EC and 2009/73/EC, priority was given to achieving effective unbundling of network and supply activities.

As has been explained, these Directives were transposed into French law so that the transmission and distribution system operators would be legally and fully unbundled companies. Accordingly, transmission and distribution system operators must be equipped

20 French Monetary Code, Article L151-3.

21 Law No. 2019-486 dated 22 May 2019, Articles 152 to 154.

22 Decree No. 2019-1590 dated 31 December 2019, Article 1.

23 Order dated 31 December 2019, Article 6.

24 Order dated 10 September 2021 relating to foreign investment in France, Article 4; Article R151-3 of the French Monetary and Financial Code, No. 9; Order dated 31 December 2019 relating to foreign investment in France as amended.

25 French Monetary Code, Article L151-3.

26 Final report from the European Commission relating to the inquiry pursuant to Article 17 of Regulation (EC) No. 1/2003 into European gas and electricity sectors, dated 10 January 2007.

with all the necessary human, technical, physical and financial resources to fulfil their obligations under French law and, in particular, they must own the assets necessary for their activity.

ii Transmission/transportation and distribution access

Non-discriminatory and fair access to transmission and distribution networks for gas and electricity are at the core of the free market approach.²⁷ Any discrimination, prevention of new participants from entering the market or restriction to fair competition in favour of the consumer is subject to sanctions issued by the CoRDIS.²⁸

Among the measures guaranteeing non-discriminatory and fair access, any refusal to enter into an agreement must be justified and notified to the applicant and to the CRE, specifying that any refusal is justified by objective, transparent and non-discriminatory reasons.²⁹ Furthermore, any transport or distribution system operator serving more than 100,000 clients must draw up a code of conduct to ensure compliance with the non-discrimination principle.³⁰

Finally, the CRE must publish an annual report concerning compliance with the code of conduct and a summary of its assessment of the independence of the transport or distribution system operators.³¹

iii Terminalling, processing and treatment

There are currently three natural gas terminals in France: Fos Tonkin and Fos Cavanou, both near Marseille, and Montoir-de-Bretagne, near Saint-Nazaire. Tariffs for the use of natural gas terminals, which are regulated, are set by the CRE.

The operation of storage facilities is subject to a concession.³² The storage of natural gas must ensure (1) the proper operation and balancing of systems connected to underground natural gas storage facilities, (2) the direct or indirect meeting of domestic clients' needs, and (3) compliance with public service obligations. Access to storage is guaranteed; the operators of underground storage facilities are free to negotiate the terms of their offers with their customers, with the latter being able to rely on objective, transparent and non-discriminatory criteria.³³

iv Rates

The aim of access tariffs to networks is to guarantee transparent and non-discriminatory access to public networks. These fees are calculated in a way that covers all costs supported by the system operators (costs arising from their public service duties, the research and development needed to increase the transmission capacity, and the grid connection).

27 French Energy Code, Article L111-91 et seq.

28 *id.*, at Article L134-25 et seq.

29 *id.*, at Article L111-93 (for electricity) and Article L111-102 et seq. (for gas).

30 *id.*, at Article L111-61.

31 *id.*, at Article L134-15.

32 French Mining Code, Articles L211-2 and L231-1.

33 French Energy Code, Articles L421-5 and L421-8.

The methodology used to establish access tariffs to the network is set up by the CRE. In addition to fixing the rates, the CRE grants appropriate incentives for transmission and distribution system operators in both the short and the long term to increase efficiency, to foster market integration and security of supply and to support related research activities.³⁴

v Security and technology restrictions

Security of electricity and gas supply is an essential public service obligation.³⁵ The Ministers of Energy and Economy must ensure the fulfilment of this public service mission mainly by EDF, GDF, RTE, GRT, Enedis, GRDF and local distribution companies. In the event of a serious energy shortage, the government may subject energy resources to control and allocation.³⁶ These measures mainly concern production, imports, exports, storage, acquisition and transportation. In the event of a serious energy market crisis, or a threat to the safety or security of the networks and of people, the Minister of Energy may take protective measures to grant or suspend licences for the operation of power generating facilities.³⁷ In times of war or serious international tension, the government may regulate or even suspend oil imports or exports completely.³⁸

In addition, to ensure energy autonomy, France has put in place a capacity market that entered into force on 1 January 2017. The aim of the capacity mechanism is to encourage demand management, especially during peak hours, via the purchase or sale of certificates depending on whether energy consumption needs are met.

IV ENERGY MARKETS

i Development of energy markets

The sale of energy takes place on either the wholesale market or the retail market. The wholesale market is where electricity and gas are traded (bought and sold) before delivery in the network to final customers (individuals or companies), whereas the retail market concerns the final clients who may freely choose their suppliers (eligible customers).³⁹

The participants of the wholesale market are:

- a* producers who trade and sell their production;
- b* suppliers who trade and supply gas or electricity before selling gas or electricity to the final client; and
- c* brokers or traders who purchase gas or electricity for resale and thus favour market liquidity.

34 id., at Articles L341-3 (electricity), L452-2 and L452-3 (gas).

35 id., at Articles L121-1 (electricity) and L121-32 (gas).

36 id., at Article L143-1.

37 id., at Article L143-4.

38 id., at Article L143-7.

39 id., at Article L331-1.

As most of the activity in the wholesale gas and electricity markets takes place over the counter, through direct transactions or through intermediaries (brokers and trading platforms),⁴⁰ the opening of these markets to competition has led to the emergence of organised markets, namely trading platforms (such as EpeX Spot, France or EEX Power Derivatives France).

ii Energy market rules and regulation

Even if the supply of energy is open to competition, it is still subject to certain requirements and monitoring.

First, the sale of electricity or gas is subject to government approval. Indeed, suppliers willing to purchase electricity or gas to sell it to consumers need an administrative authorisation that is conditional on their technical, economic and financial capacities, and according to their project's compatibility with the obligation of security of supply.⁴¹

Second, each transaction performed on the French market that would involve the participation of a producer, broker or energy supplier must be monitored by the CRE, regardless of the trading method (two-way trades, with or without a broker or transactions on organised markets).⁴²

Third, free competition is limited with respect to pricing practices since, in certain circumstances, 'regulated tariffs' may be chosen on the electricity market by customers having contracted for less than 36kVA.⁴³ However, because of the European Commission's unhappiness, especially with the electricity retail market and the dominant position exercised by EDF, the NOME Law ended regulated tariffs for customers having contracted for more than 36kVA by 31 December 2015.⁴⁴ Furthermore, in the gas market, the suppression of gas-regulated tariffs for all non-domestic consumers entered into force on 1 January 2016.⁴⁵ The removal of these tariffs has induced more competition, with new participants entering the wholesale market, even though price differences remain small. As per a decision dated 19 July 2017, the Council of State declared that the gas-regulated tariffs were not in line with European Union law as they were a restriction on the existence of a competitive common gas market that failed to respect the conditions that would have made this restriction permissible under European Union law.⁴⁶ This decision has been taken into account by the legislature and the Law on Energy and Climate has been implemented to change the rules for gas-regulated tariffs. Since 20 November 2019, it has not been possible to subscribe for gas-regulated tariffs and all existing contracts were only valid until 1 December 2020 for non-domestic consumers and will be valid until 30 June 2023 for domestic consumers.⁴⁷

40 Energy Regulatory Commission (CRE), Electricity and gas market report, fourth quarter of 2011.

41 French Energy Code, Articles L333-1 (electricity), L443-1 and L443-2 (gas).

42 *id.*, at Article L131-3; see also 'Functioning of the wholesale electricity and natural gas markets 2021', CRE, at <https://www.cre.fr/en/Documents/Publications/Thematic-reports/the-functioning-of-the-wholesale-electricity-and-natural-gas-markets>.

43 *id.*, at Article L337-7.

44 French Energy Code (version applicable until 10 November 2019), Article L337-9.

45 *id.*, at Article L445-4 (version applicable until the entry into force of Law No. 2019-1147 dated 8 November 2019).

46 Council of State Decision dated 19 July 2017, No. 370321.

47 Law No. 2019-1147 dated 8 November 2019 relating to Energy and Climate, Article 63.

Finally, the Contribution to the Public Electricity Service, which has been funded since 2016 by the domestic consumption tax on electricity for end users, was created to compensate public service charges assigned mainly to EDF, such as support schemes for renewable energy or social electricity tariffs.

iii Contracts for sale of energy

The legal unbundling of the production and the distribution activities imposed by the energy market creates several inconveniences for consumers in that they have to deal with an increasing number of contractors, each of whose responsibilities are lessened.

To prevent this, the Law dated 7 December 2006 (subsequently augmented by the NOME Law) created a new section in the French Consumer Code titled 'electricity supply or natural gas contracts',⁴⁸ the provisions of which apply to contracts concluded by consumers and professionals for less than 36kVA (electricity) or less than 30,000kW (gas).

The energy supplier 'must give the client an opportunity to sign a single contract dealing with both the supply and the distribution of electricity or natural gas'.⁴⁹ This contract, which should last for at least one year, thus creates a tripartite relationship between the supplier, the distributor and the consumer, even though the supplier often remains the consumer's main interlocutor.

The supplier must mention several specific provisions in both the offer and the contract. Failure to do so is subject to sanctions.⁵⁰ The consumer can rescind the energy supply contract at any time if it plans to change supplier. Professionals are not entitled to ask the consumer for any costs other than those incurred by the rescission, provided that these costs were mentioned in the offer.⁵¹

Order No. 2021-237 transposing Directive (EU) 2019/944 of 5 June 2019 on common rules for the internal market for electricity modified both the French Energy Code and the French Consumer Code. The following are among the notable provisions of the Order: in relation to the supply of electricity, end customers must be notified by the supplier in the event of modification of the tariffs,⁵² and suppliers with more than 200,000 customers must offer their customers, upon request, dynamic pricing electricity contracts;⁵³ and the CRE is in charge of monitoring the impact and evolution of dynamic pricing electricity contracts, and assesses the risks that these offers could entail. The CRE shall also ensure that such offers do not lead to abusive practices.⁵⁴

iv Market developments

Developments have affected different areas of the market, particularly in relation to the cost of electricity (under the NOME Law) and on renewable energies (under the Law on Energy Transition). Moreover, the hydraulic concessions regime has been reformed, notably regarding the procedure applicable to the granting of concessions.

48 French Consumer Code, Articles L224-1 to L224-16.

49 id., at Article L224-8.

50 id., at Articles R242-6 to R242-15.

51 id., at Article L224-15.

52 French Consumer Code, Article L224-10; French Energy Code, Article L332-2.

53 French Energy Code, Article L332-7.

54 Order No. 2021-237 dated 3 March 2021, Article 36.

Finally, the implementation of legal frameworks for the self-consumption of electricity and for closed energy distribution systems, such as the one set up by Order No. 2016-1725 of 15 December 2016 subjecting the operation of these systems to the issuance of an administrative licence, might enhance the development of local energy markets in the future.

V RENEWABLE ENERGY AND CONSERVATION

i Development of renewable energy

In July 2007, the French government launched the Grenelle Environment Forum, a major national consultation that led to the emergence of priority targets in terms of controlling energy consumption and promoting renewable energies. This forum led to the enactment of two Grenelle Laws, on 3 August 2009 (Grenelle I) and 12 July 2010 (Grenelle II) respectively,⁵⁵ with the aim of promoting environmental objectives such as an increase in the share of renewable energy to at least 23 per cent of final energy consumption before 2020, in accordance with European Union Directive 2009/28/EC. In 2020, renewable energy accounted for a 19.1 per cent share of total final consumption.⁵⁶ These laws were codified in a separate section dedicated to renewable energy in the French Energy Code. The Law on Energy Transition and its several implementing decrees substantially modified the applicable legal framework on renewable energy.

Adopted on 8 November 2019, the Law on Energy and Climate⁵⁷ revised several objectives set out in the Law on Energy Transition, in particular to achieve carbon neutrality by 2050 in response to the climate emergency and to comply with the Paris Agreement. The Law focuses on four main areas: (1) the gradual phasing out of fossil fuels and the development of renewable energies, (2) tackling ‘thermal sieves’ (properties with the lowest energy performance ratings), (3) the introduction of new tools for the steering, governance and evaluation of climate policy, including the creation of the High Council on Climate, which is in charge of evaluating France’s climate strategy, and (4) regulation of the electricity and gas sector.

On 21 April 2020, two decrees were adopted to implement respectively new multi-annual energy programmes⁵⁸ and the national low-carbon strategy.⁵⁹ The multi-annual energy programmes aim at reducing final energy consumption by 7.5 per cent in 2023 and 16.5 per cent in 2028 compared with 2012, with the intent of significantly increasing the development of renewable energies by 2028.

Pursuant to Article 39 of the Law on Energy and Climate, which empowered the government to adopt the measures necessary to transpose the texts of the ‘Clean energy for all Europeans’ package, two Orders were adopted on 3 March 2021: Order No. 2021-235 transposing the sustainability aspect of bioenergy of Directive (EU) 2018/2001 of 11 December 2018 on the promotion of the use of energy from renewable sources (the

55 Law No. 2009-967 of 3 August 2009 relating to the implementation of the Grenelle Environment Forum; Law No. 2010-788 of 12 July 2010 relating to national commitment for the environment.

56 ‘Key figures for renewable energies’, 2021 edition, p. 15, at <https://www.statistiques.developpement-durable.gouv.fr/edition-numerique/chiffres-cles-energies-renouvelables-2021/pdf/chiffres-cles-des-energies-renouvelables-2021.pdf>.

57 Law No. 2019-1147 dated 8 November 2019 relating to Energy and Climate.

58 Decree No. 2020-456 dated 21 April 2020.

59 Decree No. 2020-457 dated 21 April 2020.

Renewable Energy Directive (the RED II Directive); and Order No. 2021-236 transposing other provisions of the RED II Directive and Directive (EU) 2019/944 of 5 June 2019 on common rules for the internal electricity market.

To enhance the development of renewable energies, public authorities can use two economic instruments: (1) the purchase obligation,⁶⁰ requiring EDF to buy electricity produced from renewable sources, for a regulated tariff over a long period, which can be changed and is slightly higher than the market price; and (2) the supplementary remuneration,⁶¹ which provides that EDF is obliged to enter into a contract for the purchase of electricity – the duration of which shall not exceed 20 years – with renewable energy producers, according to which an additional remuneration shall be paid to them.

The regime, eligibility for and articulation of these two schemes were later substantially reformed by three Decrees:

- a* Decree No. 2016-691 of 28 May 2016 defining the list and characteristics of the installations eligible to one or the other of the support mechanisms;
- b* Decree No. 2016-690 of 28 May 2016 setting out the terms and conditions of the assignment of the purchase obligation contract; and
- c* Decree No. 2016-682 of 27 May 2016 on the purchase obligation and on the supplementary remuneration.

ii Energy efficiency and conservation

To achieve a 20 per cent increase in energy efficiency, in accordance with the climate and energy package, the European Union adopted Directive 2012/27/EU on energy efficiency on 25 October 2012. It lays down rules designed to remove barriers in the energy market and to overcome market failures that impede efficiency in the supply and use of energy, and provides for the establishment of indicative national energy efficiency targets for 2020. These targets were recently revised as per the Law on Energy and Climate adopted in 2019 (see also Section VI.i).

The transposition of this Directive into French law led to the adoption of several measures intended to improve energy efficiency, such as:

- a* the creation of an obligation for companies to be subject to an energy audit every four years;⁶²
- b* the submission by France of a report on its efficiency energy target to the European Commission on 24 April 2014; and
- c* the establishment of a requirement for public purchasers to buy products and services and to buy or rent buildings that have a high energy efficiency.⁶³

Law No. 2017-1839, adopted on 30 December 2017, brought to a definite end the search and exploitation of hydrocarbons. The government's principal aim being the progressive phasing out of hydrocarbon production in the French territory by 2040, the Law provides that no new research permit for hydrocarbons will be granted by the government.

60 French Energy Code, Articles L314-1 to L314-13.

61 *id.*, at Articles L314-18 to L314-27.

62 *id.*, at Article L233-1.

63 *id.*, at Article R234-1.

iii Technological developments

Directive 2012/27/EU also includes several provisions relating to the development of smart grids and smart meters, the aim of which is to reduce bills by paying what has actually been consumed and by understanding consumption patterns better. The development of smart grids is based on the idea that it improves energy efficiency and better integrates renewable energy resources into the network.

The development of smart grids has also been decided, with a Decree dated 31 August 2010 providing that new connection points must be equipped with smart meters from 1 January 2012, and providing for a test run or pilot for equipment of this kind.

Following the government announcement that 35 million smart meters would be provided to electricity customers throughout the country by 2020, the deployment started in December 2015. According to Enedis, this goal was to be reached in 2021.

VI THE YEAR IN REVIEW

The year 2021 and the beginning of 2022 have been characterised by several developments in the energy sector.

i New climate law promoting development of renewable energies

Following the work of the Citizen's Climate Convention, Law No. 2021-1104 on combating climate change and strengthening resilience to its effects, also known as the Climate and Resilience Law, was officially published on 24 August 2022. A section of the Law is devoted to promoting renewable energies⁶⁴ at both national and local level.

At national level, the Law updates the list of 'national energy policy priorities for action' to be set by law every five years under Article 100-1 A of the Energy Code by including 'renewable and low-carbon hydrogen' in the list of renewable energy sources whose development is to be promoted by the national energy policy.⁶⁵ The development of hydroelectric capacity, as well as of power plants equipped with pumped storage stations, which are able to store energy, now also appears as an objective among the priorities for action⁶⁶ to ensure energy sovereignty, thus guaranteeing the safety of hydraulic installations and promoting electricity storage.⁶⁷ The Law eases the constraints on hydroelectric plant operators wishing to increase their installed capacity⁶⁸ and institutes a hydropower ombudsman on an experimental basis for a period of four years.⁶⁹ Moreover, a new biogas certification mechanism has also been implemented.⁷⁰

At local level, the act strengthens the legal framework for the self-consumption of electricity by providing that the energy ombudsman can be called upon to deal with disputes arising from the execution of contracts containing clauses relating to individual

64 Law No. 2021-1104 dated 22 August 2021 on combating climate change and strengthening resilience to its effects, Articles 82 to 102.

65 *id.*, at Article 87.

66 *id.*, at Article 89 III; French Energy Code, Article 100-1 A.

67 *id.*, at Article 89 I B; French Energy Code, Article 100-4.

68 *id.*, at Article 89 VI; French Energy Code, Article L311-1.

69 *id.*, at Article 89 IX C.

70 *id.*, at Article 95; French Energy Code, Article L446-31.

self-consumption operations.⁷¹ The roles of local communities in the implementation of the national energy policy is reinforced by the introduction of regional objectives for the development of renewable energies.⁷²

ii Administrative courts sanction the state for failure to implement national greenhouse gas emission reduction strategy

In 2021, French administrative courts issued decisions in two landmark environmental cases with a view to preventing future damage by ordering the state to take all necessary measures and to repair the damage caused by its failure to meet environmental goals.

First, on 1 July 2021, the Council of State issued a decision⁷³ in the *Commune de Grande-Synthe* case, ordering the Prime Minister to take all measures necessary, by the end of March 2022, to curb the rising curve of greenhouse gas emissions produced on the national territory, in compliance with the objectives set out in Article L100-4 of the Energy Code and Annex I of Regulation (EU) 2018/842 of 30 May 2018 (i.e., to cut greenhouse gas emissions by 37 per cent by 2030⁷⁴). While the administrative judges pointed out that the government had not met the environmental objectives that it had set itself, they acknowledged that the Council of State did not have the power to dictate the nature of the ‘necessary measures’ to be adopted by the government.

Second, on 3 February 2021,⁷⁵ in the ‘Case of the Century’ brought by four associations, including Greenpeace and Notre Affaire à Tous, the Paris Administrative Court acknowledged the existence of ecological damage due to the overrun of the country’s first carbon budget (2015–2018), finding the state partially liable for this damage, and it requested further investigations to determine appropriate measures to be imposed upon the state to redress the ecological damage. On 14 October 2021,⁷⁶ the same court ordered the French state to take all necessary measures, by 31 December 2022, to repair the damage caused by the overrun of the first carbon budget and to prevent the worsening of damage. After offsetting the subsequent reduction in emissions in 2020 against the 2015–2018 carbon budget overrun, the Court calculated the level of ecological damage to be compensated at 15Mt CO₂eq.

iii New legal and regulatory provisions concerning the Energy Savings Certificates scheme

Several new provisions have been passed regarding the Energy Savings Certificates scheme. This mechanism, created by Law No. 2005-781 of 13 July 2005 on energy policy guidelines, is a key instrument for controlling energy demand.⁷⁷ This system is based on a multi-annual obligation to make energy savings imposed by the state on certain energy producers and sellers.⁷⁸ At the end of each period, the obliged energy sellers must hold a certain volume of

71 *id.*, at Article 91 II; French Energy Code, Article L122-1.

72 *id.*, at Article 83 I; French Energy Code, Article L141-5-1.

73 Council of State, Decision No. 427301 dated 1 July 2021, “Commune de Grande Synthe”.

74 Decree No. 2020-457 dated 21 April 2020.

75 Paris Administrative Court, Decisions Nos. 1904967, 1904968, 1904972 and 1904976 dated 3 February 2021.

76 Paris Administrative Court, Decisions Nos. 1904967, 1904968, 1904972 and 190497 dated 14 October 2021.

77 French Energy Code, Articles L221-1 to L221-13.

78 *id.*, at Article L221-1.

certificates.⁷⁹ In cases of non-compliance, sellers are required to pay a penalty.⁸⁰ Energy sellers can obtain certificates by making direct energy savings, financing support programmes or purchasing certificates.⁸¹

The scheme's fifth period will run from 1 January 2022 to 31 December 2025.⁸² The level of energy savings for the period was set at 2,500TWh cumac, which is 17 per cent more than the level set for the previous period.⁸³

The Climate and Resilience Law requires persons who purchase Energy Savings Certificates to put in place risk management systems to detect fraudulent acquisitions by sellers.⁸⁴

iv Council of State reduces amount of first penalty imposed by the CoRDIS

On 18 June 2021,⁸⁵ the Council of State ruled on the first sanction decision handed down by the CoRDIS.⁸⁶ This decision, dated 11 June 2018, imposed a €3 million fine on Enedis for failure to comply with a dispute-resolution decision taken by the CoRDIS regarding a public electricity distribution network access contract.

In the course of its review, the Council of State found that only three of the 11 grievances initially sanctioned by the CoRDIS were in fact justified. Recalling the terms of Article L123-27 of the Energy Code, whereby the amount of the financial penalty to be imposed by the CoRDIS must be proportionate to the extent of the damage, the situation of the offender, the seriousness of the breach and the benefits derived from it, the Council of State reduced the amount of the penalty to €500,000.

v Government revises downwards historical feed-in tariffs of certain solar photovoltaic electricity purchase contracts

Article 225 of the Finance Act for 2021⁸⁷ provided for a reduction in the feed-in tariff for electricity produced by photovoltaic installations with a peak power of more than 250kW, for agreements entered into pursuant to the orders dated 10 July 2006, 12 January 2010 and 31 August 2010. These agreements were concluded pursuant to Article 10 of Law No. 2000-108,⁸⁸ which implemented a purchasing obligation scheme for electricity produced from renewable energy sources at regulated tariffs. The government considered that these tariffs needed to be reduced, as they did not take into account the sharp drop in the price of photovoltaic equipment.

Article 225 was upheld by the Constitutional Council, which ruled that it pursued a general interest objective.⁸⁹ The Constitutional Council also deemed that the infringement of the right to maintain legally formed agreements was proportionate because Article 225

79 id., at Article L221-2.

80 id., at Articles R222-1 and R222-2.

81 id., at Article L221-1-1.

82 id., at Article R221-1.

83 Ministry of the Ecological Transition, press release dated 28 April 2021, at <https://www.ecologie.gouv.fr/gouvernement-precise-niveaux-dobligation-des-certificats-deconomies-denergie-5eme-periode-afin>.

84 French Energy Code, Article L221-8.

85 Council of State, Decision No. 422616 dated 18 June 2021.

86 CoRDIS, Decision No. 0340-16 dated 11 June 2018.

87 Law No. 2020-1721 dated 29 December 2020.

88 These provisions are now codified at Articles L314-1 and L314-7 of the French Energy Code.

89 Constitutional Council, Decision No. 2020-813 DC dated 28 December 2020.

includes a safeguard clause that allows for adjustment of the level of the tariff reduction, its effective date or the term of the purchase agreement where the reduction would compromise the economic viability of the producer.

Decree No. 2021-1385 dated 27 October 2021 and an Order dated 26 October 2021 implement the tariff revision. The CRE will be responsible for investigating the implementation of the safeguard clauses⁹⁰ under the conditions set out in a decision dated 28 October 2021.⁹¹

vi Modification of the regulated access to historic nuclear electricity mechanism

The NOME Law created a system of regulated access to historic nuclear electricity (the ARENH system).⁹² This mechanism allows EDF to sell nuclear electricity to alternative suppliers to provide them with supply conditions equivalent to those of the incumbent operator within the theoretical limit of 150TWh per year until 2025. This system allows French consumers to benefit from lower electricity prices by taking advantage of the competitiveness of nuclear energy, even when contracting with alternative suppliers.

Until 2022, the volume granted to alternative suppliers was 100TWh per year. However, on 13 January 2022, the French government officially announced it would extend the ARENH system to support its social and economic policy in the face of soaring energy prices and to provide massive support for the purchasing power of all consumers.⁹³ The ARENH system has been amended by three ordinances⁹⁴ enabling an increase of 20TWh in the ARENH electricity volume available to alternative suppliers for 2022 (i.e., the total volume for 2022 is 120TWh rather than the initial 100TWh). These volumes can be delivered from 1 April to 31 December 2022.

These ordinances are currently being challenged before the Council of State.

VII CONCLUSIONS AND OUTLOOK

Since 2007, the liberalisation of the energy market and the energy transition continue together step by step. While historically France is strongly committed to a public energy service, a huge step towards liberalisation and energy transition has been achieved in the past few years, notably with the end of regulated tariffs and the adoption of the Law on Energy Transition, which aims to develop the role of renewable energy.

Furthermore, the implementation of President Emmanuel Macron's energy programme will have to be followed. Under this programme, Emmanuel Macron intends to close all coal-fired power plants by 2022, fix a bottom carbon price for the European Union, double the capacity of wind and solar energy production, and maintain both the prohibition against shale gas exploration and the objective of reducing the use of nuclear energy.

Finally, the amendment and the adoption by the European Parliament and the Council of the European Commission's Fourth Energy Package and its transposition and implementation by France will have to be closely monitored. Containing proposals for no fewer than four regulations and four directives, the Fourth Energy Package may well have an impact on France's regulation of its energy market.

90 Decree No. 2021-1385 dated 27 October 2021, Article 7.

91 CRE, Decision No. 2021-324 dated 28 October 2021.

92 Codified by Order No. 2011-504 of 9 May 2011.

93 Government press release No. 1890 dated 13 January 2022.

94 Decree No. 2022-342 dated 11 March 2022 and two ministerial orders dated 11 March 2022.

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