

France's new Electricity Act: a barrier against the market and the European Union

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François Lévêque

In fall 2010, France passed a law to reform the organisation of electricity markets and prices. The new Electricity Act introduces numerous institutional and economic changes. In particular, it gives EDF's rivals access to a portion of the electricity generated by EDF's nuclear power plants. In other words, EDF's rivals in electricity supply to final consumers in France would be eligible to tap into electricity generated by EDF's nuclear power plants at an access tariff. The nuclear fleet, owned by the incumbent utility, is equated with an essential facility, access to which must be opened to downstream competition, which would otherwise only be able to develop on the margins.

To achieve this access, the Act introduces a cumbersome regulation of prices and volumes. The Act stipulates that the regulated tariff EDF's rivals will pay to EDF should include operating costs, plus investment, plus the provisional costs of dismantling the nuclear power plants and managing the waste, plus interest, taking into account the nature of the activity. This description of the principles and terms on which the access tariff is to be based is so vague that it is not possible to draw any precise conclusions about its initial level. It is supposed to be between €38 and €42 per MWh, according to the rapporteur of the bill to the National Assembly. That may appear to be a fairly small range. It should be borne in mind, however, that a difference of one euro per MWh for this price represents plus or minus €100 million in revenues for EDF. The French Energy Regulation Commission will also have to ensure that the suppliers entitled to the access tariff do not buy more than the volume they need to satisfy their customers in France. The first article of the Act stipulates that the nuclear electricity tariff is reserved for consumers located in France. To enforce that implicit destination clause (the permissibility of which is discussed below), the Energy Regulation Commission must regulate the volume subject to the tariff. It must

therefore calculate, then notify, the quantity to which each supplier is entitled based on its portfolio of customers and the estimated growth of that portfolio. In order to correct errors and avoid cheating, the Act provides for an adjustment mechanism, or penalty, in the form of a surcharge on top of the access tariff. Suppliers that are allocated volumes in excess of what their customers in France actually consume, will have to pay for every excess MWh received, an amount at least equal to the difference in value between the administered access tariff and the market price.

The paper examines whether this cumbersome regulation could achieve its purposes, namely the development of competition in electricity supply and the encouraging of efficient investments in base electricity generation. We show that the development of competition will be mostly limited to the segment of electricity supply to large consumers and that investment will be imbalanced and uncertain, because of a regulatory framework that will be barely more stable than now.

One cause of instability of the Act is the risk of incompatibility with European law. As we mentioned above the regulated tariff for nuclear electricity can only benefit consumers in mainland France. That territorial restriction goes against the construction of the domestic market wanted by European law on energy, and against market integration, one of the aims of European competition law.

A supplier that feels it has been underserved in access rights or an electricity-intensive firm that does not benefit from a comparable price to its main rival in France could lodge a complaint. In particular, the plaintiffs could claim an infringement of Article 35 or Article 101 of the Treaty on the Functioning of the European Union (TFEU). Article 35 prohibits quantitative restrictions on exports and all measures having equivalent effect. It refers to “all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade”. The plaintiff could argue here that the new Act creates a de facto clause that restricts exports and therefore infringes Article 35.

The plaintiff could also claim an infringement of competition law via Article 101 of the TFEU. Paragraph 1 of the article prohibits agreements which have as their object or effect the distortion of competition within the internal market, in particular through restrictions on resale. The success of such a claim is more uncertain, however. Theoretically, the article refers to agreements between undertakings that have willingly entered into a relationship and signed a binding contract. The contracts for the sale of electricity at the access tariff signed between the historic monopoly and alternative

suppliers are imposed on EDF. In addition, neither of the parties negotiates the tariff – which is set by the minister – or the volume – which is set by CRE.

In a nutshell, instead of having a long-term framework for investment, in the event of a complaint, operators will have to wait several years for clarification from a court ruling.

To sum up, regulated access to EDF's reactors was seen as the dream way to reconcile two contradictory political aims: continuing to enable domestic consumers to benefit from the cost advantage of nuclear power, and creating a competitive European energy market. In economic terms, these two principles are antagonistic, unless we believe in competition without a market and in regulation without loopholes. The new Electricity Act allows market mechanisms to play no more than a bit part. The market will only operate on the margins, supplying some electricity and resolving capacity guarantees. The core of the market, i.e., wholesale electricity generation, will be largely administered by the regulator and the government via mechanisms of an unwieldiness and complexity unprecedented in electricity sector regulation.

Contact
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francois.leveque@mines-paristech.fr
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