

## COMMISSION DECISION

of 12 June 2012

on State aid SA.21918 (C 17/07) (ex NN 17/07) implemented by France — Regulated electricity tariffs in France

(notified under document C(2012) 2559)

(Only the French text is authentic)

(Text with EEA relevance)

(2012/C 398/05)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof <sup>(1)</sup>,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above <sup>(2)</sup> and having regard to their comments,

Whereas:

## I. PROCEDURE

- (1) By letter dated 13 June 2007, the Commission notified France of its decision to initiate the formal investigation procedure laid down in Article 88(2) of the EC Treaty against 'regulated tariffs for the sale of electricity' (hereinafter referred to as 'standard tariffs') and 'regulated transitional market adjustment tariffs' (hereinafter referred to as 'return tariffs'), in each case with respect to their yellow and green components, as regards their application after 1 July 2004 to non-household customers other than small businesses. This procedure does not cover the rules and tariffs applicable to household customers and to small businesses ('blue' tariffs).
- (2) The Commission's decision to open the formal investigation procedure was published in the *Official Journal of the European Union* <sup>(3)</sup>. The Commission invited interested parties to submit their comments on the aid at issue.
- (3) The Commission received comments on this subject from interested parties. It forwarded them to France, allowing it the possibility to comment on them, and received its comments by letter dated 31 January 2008.

(4) Under its investigation of the measures at issue, the Commission examined Article 166 of Law No 2008-776 of 4 August 2008 <sup>(4)</sup>, which entered into force on 6 August 2008. This measure amended Article 30-1 of amended Law No 2004-803 of 9 August 2004 <sup>(5)</sup>, which introduced the return tariffs system.

(5) By letter dated 10 March 2009, the Commission notified France of its decision to extend the scope of the formal investigation procedure <sup>(6)</sup> to the return tariffs system as it resulted from the amendments introduced by Article 166 of Law No 2008-776. The Commission considered in fact that the green and yellow components of the return tariffs system, as amended by Article 166 of Law No 2008-776, still included State aid in favour of final non-household consumers other than small businesses, as was also the case before the amendment.

(6) France presented comments concerning the extension of the procedure on 16 April 2009, then responded to the comments by third parties on 21 October 2009.

(7) On 15 September 2009, the French Prime Minister informed the Commissioners responsible for competition and energy of the commitments that France was prepared to undertake under the present procedure. The Commissioners responsible replied by letter dated the same day.

(8) On 12 January 2012, the French Prime Minister notified the Commissioners responsible for competition and energy of the additional commitments that France was prepared to undertake under the present procedure. The Commissioners responsible replied by letter dated the same day.

## II. DETAILED DESCRIPTION OF THE AID

(9) This section describes the legislative and regulatory framework applicable to the two regulated tariffs systems covered by this procedure, the method by which they are financed and the trend in the tariffs in relation to market price references. Finally, this trend will be reinserted in the specific context of the French electricity market and the structural reforms implemented to make it more competitive.

<sup>(1)</sup> With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty, where appropriate. The TFEU has also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union', 'common market' by 'internal market' and 'Court of First Instance' by 'General Court'. The TFEU terminology is used in the present Decision.

<sup>(2)</sup> OJ C 164, 18.7.2007, p. 9 and OJ C 96, 25.4.2009, p. 18.

<sup>(3)</sup> OJ C 164, 18.7.2007, p. 9.

<sup>(4)</sup> JORF No 181, 5.8.2008, p. 12471.

<sup>(5)</sup> JORF No 185, 11.8.2004, p. 14256.

<sup>(6)</sup> OJ C 96, 25.4.2009, p. 18.

- (10) In the present Decision, the tariff measures covered by this procedure will be described in substance. As regards the details and publication references of the regulatory instruments governing them, reference is made to the decision to initiate the formal investigation procedure and the decision to extend this procedure.

*Legislative framework applicable to the regulated tariffs for the sale of electricity in France and eligibility of customers*

- (11) The operation of the electricity sector in France is regulated by Law No 2000-108 of 10 February 2000 on the modernisation and development of the public electricity service (*loi n° 2000-108 du 10 février 2000 relative à la modernisation et au développement du service public de l'électricité*)<sup>(1)</sup>.
- (12) In France, final electricity consumers can purchase their electricity through two main channels, the 'free market' and the 'regulated market'.
- (13) Until 1 July 2007, two categories of final consumers co-existed: 'eligible' customers and 'non-eligible' customers. The eligible customers are those benefiting from the right to conclude an electricity supply contract with a supplier of their choice at a freely established price. Pursuant to Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC<sup>(2)</sup>, all non-household customers<sup>(3)</sup> have been eligible since 1 July 2004 and all household customers — since 1 July 2007.
- (14) In France, every eligible customer, for each of its consumption sites, is free as to whether or not to exercise its right of eligibility, i.e. to claim its right to conclude a contract for the supply of electricity at a price freely established with a supplier of its choice, whether or not this supplier is an incumbent already operating in the French market before its liberalisation. The free market concerns the eligible customers that exercised their right of eligibility. On the free market, the final price paid for the electricity consumed includes a 'supply' component and a 'network' component. The 'supply' component, intended for the supplier, is the result of free negotiation between customer and supplier and corresponds to the supplier's costs of procurement and commercialisation, plus its profit margin. The 'network' component corresponds to the costs of electricity transmission and network use (charge for the use of the public electricity

networks (*Tarif d'Utilisation des Réseaux Publics d'Electricité*), hereinafter: 'TURPE'). The amount of the 'network' component is regulated by the State and is transferred to the operators of the electricity transmission and distribution networks.

- (15) The regulated market concerns the eligible customers that decided not to exercise their right of eligibility. On the regulated market, the final consumers benefit from a 'public electricity service'. The operation of this system and the conditions of access to the public electricity service are governed by Law No 2000-108 on the modernisation and development of the public electricity service, and especially by Articles 2, 4 and 22 thereof.
- (16) On the regulated market, the final consumers purchase their electricity from a supplier designated by the State at regulated prices, i.e. the standard tariffs referred to in recital 1. The State designates the suppliers responsible for electricity distribution under the public electricity service according to geographical areas under their control. For about 95 % of French territory, this is the enterprise Electricité de France (hereinafter referred to as 'EDF'). The other suppliers concerned are generally known as 'non-nationalised distributors' or 'local distribution companies'. EDF has its own electricity generation branch. The local distribution companies, for their part, usually procure their electricity from EDF, at prices which in turn are regulated, known as 'tariffs for the transfer of electricity to non-nationalised distributors'.

*Standard tariffs*

- (17) Article 66 of Programme Law No 2005-781 of 13 July 2005 establishing energy policy priorities (*loi n° 2005-781 du 13 juillet 2005 de programme fixant les orientations en matière de politique énergétique*)<sup>(4)</sup> assigned the right to each eligible customer to benefit from the supply of electricity at standard tariffs for all existing consumption sites for which this right had not been previously exercised by this customer or by another person.
- (18) This Article assigned the same right to eligible customers for their new consumption sites, provided that they were connected to the electricity distribution or transmission networks before 31 December 2007.
- (19) In 2007, the deadline for eligibility of the consumption sites newly connected to the distribution or transmission networks for a right to the supply of electricity at standard tariffs was extended until 1 July 2010. The obligation to supply electricity at the standard tariffs to customers benefiting from them is incumbent upon EDF and the local distribution companies, according to the geographical area in which the consumption site concerned is located.
- (20) Article 66 of Law No 2005-781 was subsequently amended. In the version resulting from the amendments made by Law No 2008-66 of 21 January 2008 on

<sup>(1)</sup> JORF No 35, 11.2.2000, p. 2143. This Law has been amended on several occasions, the last time by Law No 2007-290 of 5 March 2007 introducing the enforceable right to housing and laying down various measures in favour of social cohesion (*loi n° 2007-290 du 5 mars 2007 instituant le droit au logement opposable et portant diverses mesures en faveur de la cohésion sociale*) (JORF No 55, 6.3.2007, p. 4190).

<sup>(2)</sup> OJ L 176, 15.7.2003, p. 37, now replaced by Directive 2009/72/EC of the European Parliament and of the Council (OJ L 211, 14.8.2009, p. 55).

<sup>(3)</sup> Article 2(11) of Directive 2003/54/EC defines non-household customers as any natural or legal persons purchasing electricity which is not for their own household use. This definition includes producers and wholesale customers.

<sup>(4)</sup> JORF No 163, 14.7.2005, p. 11570.

regulated tariffs for electricity and natural gas (*loi n° 2008-66 du 21 janvier 2008 relative aux tarifs réglementés d'électricité et de gaz naturel*)<sup>(1)</sup>, it extends the right to the supply of electricity at standard tariffs:

- (a) to any final consumer for the consumption of a site for which the eligibility right was not exercised, either by this consumer or by another person;
  - (b) to any final domestic consumer (household), for the consumption of a site for which it had not itself exercised its eligibility right, on condition of applying before 1 July 2010;
  - (c) to any final domestic consumer for the consumption of a site for which it has exercised its eligibility right for more than six months, on condition of applying before 1 July 2010;
  - (d) to any final non-domestic consumer with subscribed capacity equal to or below 36 kilovolt amperes for the consumption of a site for which it has not exercised its eligibility right itself, on condition of applying before 1 July 2010.
- (21) The legislative and regulatory framework applicable provides that the standard tariffs are defined in accordance with categories based on the intrinsic characteristics of the supplies, depending on the costs of these supplies. In addition, the decisions relating to the standard tariffs are taken jointly by the Ministers for the Economy and for Energy, having consulted the Energy Regulatory Commission (Commission de régulation de l'énergie) (hereinafter referred to as 'the CRE'), based on the analysis of the technical costs and general accounts of the operators. The trend in standard tariffs is established each year and must reflect the variation in the electricity production cost, consisting of investment costs and operating costs for the installed production capacity and the transmission and distribution networks, as well as fuel costs. The electricity pricing system must reflect the costs of production and distribution of this energy to users.
- (22) The standard tariffs are integrated prices which include the price of the supply of electricity and all the costs of electricity transmission and network use. They are segmented by user categories into 'tariff options'. The tariff options depend on parameters such as the power for connection purposes, the duration of use or the peak cut-off option of the user. Some customers may be covered by several tariff options and must then choose between them.
- (23) The tariff options are combined in three large categories, known as 'blue', 'yellow' and 'green' tariffs. Between 2009 and 2011, the yellow tariffs and the green tariffs were applied to about 300 000 and 100 000 consumption sites, respectively.

— The blue tariffs apply to consumption sites with subscribed capacity equal to or less than 36

kilovolt amperes. These tariffs, which are not covered by the present procedure, correspond in general to household customers and to small sites of non-household customers.

- The yellow tariffs apply to consumption sites with subscribed power of between 36 and 250 kilovolt amperes. These tariffs correspond in general to medium-sized consumption sites of non-household customers.
- The green tariffs apply to consumption sites with subscribed power in excess of 250 kilovolt amperes, and which are connected either to a distribution network or directly to the transmission network. These tariffs correspond in general to large consumption sites of non-domestic customers<sup>(2)</sup>.

#### Introduction of return tariffs

- (24) Article 15(V) and Article 16 of Law No 2006-1537 of 7 December 2006 on the energy sector (*loi n° 2006-1537 du 7 décembre 2006 relative au secteur de l'énergie*)<sup>(3)</sup> changed this state of affairs by introducing the return tariffs system<sup>(4)</sup>. This system allows final consumers supplied by the free market to revert to a regulated price, under certain conditions.
- (25) In its original version, applicable between 2004 and 2008, the return tariff system allowed any final consumer supplied by the free market to ask its electricity supplier to replace the price clause of the supply contract by a 'return tariff' set by the State, for a period of two years from the application, with the other clauses of the supply contract remaining unchanged<sup>(5)</sup>. To benefit from the return tariff, a final consumer had to have made a written application for this to its supplier by 1 July 2007.
- (26) Furthermore, Article 30-1 of Law No 2004-803 provided that the return tariff 'shall apply automatically to contracts in progress from the date on which the application is made' and that 'it shall also apply to contracts concluded subsequently to the written application referred to in paragraph 1 of this Section I, including with another supplier'. Hence, if the supply contract of a final consumer which had applied to benefit from the return tariff expired during the two years following the

<sup>(2)</sup> The terms 'large sites', 'medium-sized sites' and 'small sites' correspond to the segmentation traditionally used by the CRE in its publications.

<sup>(3)</sup> JORF No 284, 8.12.2006, p. 18531.

<sup>(4)</sup> These measures inserted Articles 30-1 and 30-2 in Law No 2004-803 of 9 August 2004 on the public electricity and gas service and on the electricity and gas companies, which introduce and regulate the return tariffs system (*loi n° 2004-803 du 9 août 2004 relative au service public de l'électricité et du gaz et aux entreprises électriques et gazières*).

<sup>(5)</sup> Source: 'Note interprétative sur la mise en œuvre du tarif réglementé transitoire d'ajustement du marché' (Explanatory note on the implementation of the regulated transitional market adjustment tariff, Ministry of the Economy, Finance and Industry, available from: [http://www.industrie.gouv.fr/energie/electric/note-interpretative-tarif\\_retour.pdf](http://www.industrie.gouv.fr/energie/electric/note-interpretative-tarif_retour.pdf) (site visited on 9 February 2009).

<sup>(1)</sup> JORF No 18, 22.1.2008, p. 1122.

initial application, this consumer could apply to any electricity supplier agreeing to conclude a supply contract with it for this supplier to supply it at the return rate until the end of this two-year period.

(27) It resulted from the provisions governing the return tariffs system that:

(a) any final consumer that had not asked to benefit from the return tariffs system for a given consumption site before 1 July 2007 could no longer benefit from this system for the same site beyond 1 July 2007;

(b) no further final consumer at all could benefit from the return tariffs system beyond 1 July 2009.

(28) Like the standard tariffs, the return tariffs are integrated prices which include the price of the supply of electricity and all the costs of electricity transmission and use of the transmission and distribution networks. The return tariff may not exceed by more than 25 % the standard tariff applicable to a consumption site with the same characteristics.

(29) The levels of return tariffs are set by ministerial decree, by reference to the level of the standard tariff which would be applicable to a consumer with the same characteristics and which had not exercised its eligibility right. As a result, the return tariffs follow the trend in the standard tariffs. The Decree of 3 January 2007 setting the level of the regulated transitional market adjustment tariff (*arrêté du 3 janvier 2007 fixant le niveau du tarif réglementé transitoire d'ajustement du marché*)<sup>(1)</sup> establishes the following relative values:

— for the yellow tariff, 20 % more than the standard tariff,

— for the green tariff, 23 % more than the standard tariff.

#### *Compensation mechanism and financing of the return tariffs*

(30) Pursuant to Article 30-2 of Law No 2004-803, electricity suppliers which supply some of their customers at the return tariff following a request made by them and which establish that they are unable to generate or procure the quantities of electricity necessary to supply these customers at a price below the 'supply' component of the return tariff, benefit from compensation. This compensation covers the difference between, on the one hand, the production cost of the supplier in question or the price at which it procures electricity on the wholesale market, taken into account within the limit of a cap specific to it which is determined according to the rules provided for by ministerial decree, and, on the other hand, the income corresponding to the supplies in

question. Where appropriate, the production cost of a supplier is assessed taking into account the production cost of the 'affiliated companies' of this supplier established within national territory. The costs compensated are calculated on the basis of accounts kept by the suppliers according to rules laid down by the CRE. These accounts are audited at their expense and the CRE can have them verified by an independent body of its choice.

(31) The detailed rules governing the compensation system are laid down by Decree No 2007-689 of 4 May 2007 on the compensation of costs of the regulated transitional market adjustment tariff (*décret n° 2007-689 du 4 mai 2007 relatif à la compensation des charges du tarif réglementé transitoire d'ajustement du marché*)<sup>(2)</sup>. The cap mentioned in recital 30 is calculated by reference to the prices observed on the French wholesale market in order, according to the French authorities, to avoid speculative behaviour and abuses. To start with, the cap resulted from a mathematical formula laid down by Ministerial Decree of 4 May 2007. This formula defined the cap as a combination of mean prices observed on the principal French power exchange (Powernext) for annual, quarterly, monthly and daily futures, baseload and peakload<sup>(3)</sup>. It permitted only a marginal adaptation of the cap to the specific characteristics of each supplier concerned. It was amended by Ministerial Decree of 22 December 2008, which refined it so as to take better account in the calculation of the cap of the existence of differences in production costs depending on the consumption profile of the customers supplied at the return tariff.

(32) It results from Decree No 2007-689, as amended, that if a supplier, directly or via affiliated companies, has means of production at its disposal in France covering the entire consumption of its final customers and its production cost is below the French wholesale market prices, the costs eligible for compensation are defined by reference to these production costs and not in relation to the prices observed on the wholesale market. In addition, if these costs are below the 'supply' component of the return tariffs, the supplier in question does not receive any compensation. This is the case for EDF, which supplies the bulk of the electricity volumes delivered under the return tariffs system on the free market and which has significant nuclear and hydroelectric production capacities, the production costs of which are below the 'supply' component of the return tariffs.

(33) In so far as a supplier, directly or via affiliated companies, does not have means of production at its disposal in France covering the entire consumption of its final customers, the compensation paid to it is determined, within the limit of the cap referred to in recital 30, on the basis of the prices observed on the wholesale market, the quantities of electricity sold to final customers located in France, the production costs associated with the means of production which this supplier has at its disposal

<sup>(1)</sup> JORF No 4, 5.1.2007, p. 170.

<sup>(2)</sup> JORF No 105, 5.5.2007, p. 7952.

<sup>(3)</sup> The baseload futures correspond to a constant supply of electricity during a given period (one year, one quarter, one month, one day). The peakload futures correspond to electricity supplied between 8.00 and 20.00, apart from weekends.

directly or via affiliated companies in France, and the share in the quantities sold which was generated using these means of production.

- (34) Furthermore, the costs of commercialisation associated with the supply at the return tariff, subtracted from the income associated with this supply, are also taken into account in the calculation of the compensation. Finally, the laws and regulations governing the compensation mechanism do not provide for a profit margin for the compensated suppliers.
- (35) The compensation is financed from the yield from two compulsory contributions:
- a portion from the ‘contribution to the public electricity service’, which is payable by all customers and was introduced by Article 5(l) of Law No 2000-108. This portion is limited to an amount of EUR 0,55 per MWh levied on the assessment basis of the contribution to the public electricity service<sup>(1)</sup>. It is also limited by the fact that under Law No 2000-108, it cannot cause the total amount of the contribution to the public electricity service to exceed that which was applicable on 9 December 2006, i.e. EUR 4,5 per MWh. The Finance Law for 2011 provides henceforth that the contribution to the public electricity service as proposed by the CRE applies, although subject to the limit of an increase of EUR 3 per MWh compared to the previous year,
  - a contribution payable by electricity generators operating installations with a total installed capacity exceeding 2 gigawatts. This contribution is based on their previous year’s nuclear or hydroelectric power generation. Initially limited to EUR 1,3 per MWh generated by the nuclear and hydroelectric plants with capacity exceeding 2 gigawatts, this contribution was capped at EUR 3 per MWh in 2008.
- (36) The Law provides that the yield from these two compulsory contributions is collected by the Deposit and Consignment Office. The amount of compensation to which each supplier concerned is entitled is calculated by the CRE on the basis of declarations made to it by these suppliers. The CRE forwards the result of these calculations to the Deposit and Consignment Office which makes the corresponding payments.
- (37) If the two compulsory contributions are insufficient to pay the total compensation for a given year, the shortfall to be collected is added to the amount of the charges to

be levied the following year. For instance, the charges to be covered in 2011 consist of the estimated charges for 2011 amounting to EUR 3,4 billion and the balance for 2009 amounting to EUR 1,4 billion, which comes to a total of EUR 4,8 billion. To be able to meet these charges in full, the contribution to the public electricity service should have amounted in 2011 to EUR 12,9 per MWh, of which EUR 9,3 per MWh to cover the charges for 2011 and EUR 3,6 per MWh to finance the balance for 2009. However, the contribution to the public electricity service was established in 2011 at EUR 7,5 per MWh, generating an estimated compensation deficit for EDF for 2011 of EUR 2 billion, to which is added that of 2010 estimated at EUR 1 billion.

*Amendments introduced by Article 166 of Law No 2008-776 of 4 August 2008 to modernise the economy (loi n° 2008-776 du 4 août 2008 de modernisation de l’économie)*

- (38) Article 166 of Law No 2008-776 amended Article 30-1 of Law No 2004-803, thereby enabling any final consumer with a consumption site already supplied with electricity under the return tariffs system to continue to benefit from return tariffs for this site until 30 June 2010, whereas originally the final consumer could benefit from them only for a two-year period ending no later than 30 June 2009.
- (39) Moreover, Article 166 of Law No 2008-776 enabled any final consumer to submit an application, up to 30 June 2010, whereas previously the applications to benefit from the return tariffs system could no longer be accepted after 1 July 2007.
- (40) On the other hand, it provided that a final consumer which had renounced the benefit of return tariffs for the supply of a site could no longer request to benefit from them again for the supply to this site.
- (41) Finally, it provided that no final consumer could benefit from the return tariffs system after 30 June 2010.

*Trend in regulated standard and return tariffs in relation to market prices*

- (42) Since 1 January 2004, the standard tariffs and, since 2006, the return tariffs have been revised annually by ministerial decrees. The structure of the tariff system, i.e. the set of tariff options and versions offered to the various final consumers depending on their power for connection purposes and their consumption profiles, has essentially remained unchanged since 2004. The various revisions of the level of standard and return tariffs have taken the form of an average increase defined specifically for each of the major categories of tariff options and then broken down for each tariff option and version.

<sup>(1)</sup> The contribution to the public electricity service also finances other costs, including the additional costs associated with the generation of electricity from renewable resources (42,4 %), the additional costs associated with the geographical averaging (35 %), the additional costs associated with cogeneration (21 %) and the ‘social’ tariffs (1,4 %) (CRE estimates for 2011).

Table 1

**Standard and return tariffs (EUR/MWh net of tax) from 1 January 2004 to 1 January 2012 <sup>(1)</sup>**

EUR/MWh	Standard tariff yellow	Standard tariff green	Return tariff yellow	Return tariff green
1 January 2004	68,5	51,3	Did not exist	Did not exist
15 August 2006	69,3	51,6	Did not exist	Did not exist
16 August 2007	70,3	52,4	84,4	64,7
15 August 2008	72,8	55,3	87,3	68
15 August 2009	76,3	58,1	91,6	71,5
15 August 2010	79,7	61,3	95,6	75,4
1 January 2012	82,9	63,5	No longer exists	No longer exists

(43) On the free market, the prices were more or less stable between EUR 30 and EUR 35 per MWh during 2004, then increased steadily in 2005 to reach over EUR 50 per MWh at the end of 2005. During 2006, prices fluctuated between EUR 50 and EUR 60 per MWh, with a mean of approximately EUR 55 per MWh. Until 7 December 2006, on the free market, prices movements were independent of the level of the standard tariffs, in so far as a final consumer supplied on the free market could not revert to the regulated market if the price it obtained on the free market was higher than the standard tariffs.

(44) According to the information supplied by the CRE <sup>(2)</sup>, it appears that the prices of futures on the wholesale market fluctuate far more than the return tariffs and were well above the 'supply' component of the green and yellow return tariffs during the first three quarters of 2008. The prices of the annual baseload contracts for 2009 amounted to EUR 85,6 per MWh at 30 September 2008. The price of annual peakload contracts for 2009, on the other hand, amounted to nearly EUR 120 per MWh at the same date. The French authorities pointed out that, during the first half of 2008, the prices of annual baseload contracts on Powernext rose from EUR 60 to EUR 80 per MWh, peaking at over EUR 90 per MWh.

(45) In 2009, electricity prices fell, as a consequence of the unfavourable economic climate and the fall in fossil fuel

<sup>(1)</sup> Tariffs based on the CRE opinions on the decrees concerning the selling price of electricity.

<sup>(2)</sup> See, for example, the CRE's *l'Observatoire des marchés de l'électricité et du gaz — troisième trimestre 2008*, p. 22, available at: [http://www.cre.fr/fr/marches/observatoire\\_des\\_marches](http://www.cre.fr/fr/marches/observatoire_des_marches)

prices. The CRE, in its report on the functioning of the market dated 21 December 2009 <sup>(3)</sup>, stated that the futures products had fallen by about 50 % since 2008. At 30 June 2009, the prices of the annual baseload contract for 2010, at less than EUR 60 per MWh, reverted to the valuation levels of early 2007. This trend is to be found in all the futures products, including the monthly and quarterly products.

(46) These market prices are supply prices, i.e. net of costs of transmission and network use. To be able to compare them to the tariffs, which are integrated prices, it is necessary to subtract from these tariffs the portion corresponding to the transmission and network use, to retain only the part corresponding to the supply of electricity. According to the Paris Chamber of Commerce and Industry, the costs of transmission and use of the electricity supplied represents between 30 % and over 50 % of the total electricity price depending on the subscribed capacity and the voltage <sup>(4)</sup>. The company POWEO for its part estimates the share of transmission costs at nearly 45 % of the tariff for a business customer <sup>(5)</sup>.

(47) In the light of the above and the decision to initiate the procedure, table 2 presents the trend in the value of the supply component of the standard and return tariffs, i.e. with the subtraction of the portion of the costs of transmission and network use from the total electricity price in the tariffs between January 2004 and January 2012. For the purposes of assessing the existence of a possible economic advantage for the beneficiaries of the tariffs in question, it is appropriate to compare the 'supply' component with the market prices available during the period as described in recitals 43 to 45; this comparison will be made in recitals 109 and 110.

Table 2

**Supply component of the standard and return tariffs (EUR/MWh net of tax) from 1 January 2004 to 1 January 2012 <sup>(6)</sup>**

EUR	'Supply' component of yellow tariff	'Supply' component of green tariff	'Supply' component of yellow return tariff	'Supply' component of green return tariff
1 January 2004	n.a.	n.a.	n.a.	n.a.
15 August 2006	37,1	33,8	n.a.	n.a.

<sup>(3)</sup> Available at: <http://www.cre.fr/documents/publications/rapports-thematiques/fonctionnement-des-marches-de-gros-de-l-electricite-et-du-gaz-naturel/consulter-le-rapport>

<sup>(4)</sup> <http://www.environnement.cci.fr/energie/electricite/reseau-transport-electricite.htm>

<sup>(5)</sup> Source: POWEO, cited by Company news. [http://www.companynewsgroup.com/imprimer.asp?co\\_id=111260](http://www.companynewsgroup.com/imprimer.asp?co_id=111260)

<sup>(6)</sup> Tariffs based on the CRE opinions on the decrees relating to the electricity selling price.

EUR	'Supply' component of yellow tariff	'Supply' component of green tariff	'Supply' component of yellow return tariff	'Supply' component of green return tariff
16 August 2007	38,2	34,7	52,1	46,9
15 August 2008	42,4	38,9	59	51,6
15 August 2009	43,7	41,1	62,5	54,5
15 August 2010	46,1	43,7	62	57,8
1 January 2012	46,1	44,3	No longer exists	No longer exists

#### *Specific situation of the French electricity market*

- (48) The French electricity market possesses specific characteristics within the Union. Only one undertaking, EDF, holds 87 % of the electricity generation capacity in mainland France, all sources together and especially nuclear and hydroelectric power<sup>(1)</sup>. Consequently, EDF (or, to a minimal extent, the local distribution companies) retains a market share in France which exceeds 85 % and remains predominant for all customer segments, whether private individuals, small and medium-sized enterprises or major customers. Hence, according to the CRE's market observatory for the third quarter of 2011, only 7 % of the sites (and 35 % of total consumption) are supplied at market conditions (18 % for large non-household sites, 15 % for small non-household sites and 5 % to 6 % for the other sites), with the remaining 93 % being supplied at the regulated tariffs. The vast majority of the sites benefiting from regulated tariffs are EDF customers.
- (49) In particular, EDF provides 100 % of nuclear power production, which, on a stable basis, accounts for over 75 % of the total electricity generated in France, on account of the number of its nuclear power stations. Moreover, EDF operates the main hydroelectric power concessions, whereas the development of new hydroelectric capacity comes up against natural limits. The nuclear power stations constructed before the liberalisation of the markets at Union level are very standardised (essentially the same technology for levels corresponding to the various installed capacities: 900 MW to 1 600 MW) — and therefore conducive to economies of scale in the field of maintenance, investment, training and staff allocation, etc. — and largely depreciated, with average production costs well below those of the other traditional technologies.
- (50) In fact, nuclear energy has a total cost structure characterised by the scale of the fixed costs (such as the depreciation of the power stations, costs of waste

processing and storage, costs of decommissioning) and by relatively low variable costs (mainly fuel). As illustration, the total costs of the electricity generated in Europe from natural gas (EUR 68 per MWe) and coal (EUR 61 per MWe) are 76 % and 59 % higher respectively than those of nuclear power (EUR 39 per MWe). In addition, the variable costs of fuel are even more decisive than the total costs for the price formation on the wholesale market based on the marginal cost of electricity. These variable costs represent on average 28 % of the total costs for coal-fired power stations, 70 % for gas-fired power stations and only 16 % for the nuclear fuel cycle<sup>(2)</sup>.

- (51) Therefore, as regards the French market, the CRE estimated in 2011 the price which would remunerate the long-term economic operating conditions of the installed nuclear capacity of EDF at between EUR 36 and EUR 39 per MWh, with the operating costs amounting to EUR 25 per MWh<sup>(3)</sup>. The fact that nuclear power is available with such a divergence in marginal costs gives EDF a very significant advantage in relation to a competitor producing electricity from thermal or renewable resources.
- (52) On account of the interconnection with the neighbouring Member States, the wholesale price of electricity in France is established at regional level (France/Germany/Benelux network). It is therefore largely determined, at a level higher than that of nuclear energy, by the operating cost of the gas-fired and coal-fired power stations, which gives a competitive advantage to nuclear energy in the form of a regular income in the price setting. No actual or potential competitor benefits from similar conditions and would be able, before several decades have passed, to equip itself with installed capacity at low cost representing a significant fraction of the installed capacity of EDF's nuclear and hydroelectric power stations.

#### *Exchange of correspondence between the Commission and the French authorities*

- (53) Given this situation, on 15 September 2009, the French Prime Minister, on the one hand, and the Competition and Energy Commissioners, on the other, exchanged correspondence concerning the principles for a plan to reform the French electricity market, providing in particular for:
- (a) the rapid abolition of the return tariffs and the more gradual abolition of the regulated tariffs for large and medium-sized enterprises, with the objective of abolition in full by 2015;

<sup>(1)</sup> Decision of the competition authority No 11/D-09 of 8 June 2011.

<sup>(2)</sup> See 'Coûts prévisionnels de production d'électricité', AEN-IEA, Edition 2010, median values with 5 % discounting.

<sup>(3)</sup> CRE opinion of 5 May 2011, p. 5.

(b) a system of 'regulated access to existing nuclear power' consisting of obliging EDF to sell at a regulated price, based on costs, part of its nuclear power production (in the order of 25 %, with a cap of 100 TWh) to its competitors on the electricity retail market in order to boost competition within this market. EDF's competitors would in this way be able to make offers at prices comparable to those which EDF can offer, which should allow effective competition and render it superfluous to maintain regulated tariffs.

#### *Reform of the French electricity market*

(54) In order to give substance to the commitments entered into by France, the French Government appointed a committee of experts, chaired by Mr Paul Champsaur, responsible for making proposals for the organisation of the electricity market. Its proposals laid the foundations for Law No 2010-1488 on the new organisation of the electricity market (*loi n° 2010-1488 portant nouvelle organisation du marché de l'électricité*), which was passed on 7 December 2010<sup>(1)</sup> and its implementing Decree No 2011-466 of 28 April 2011<sup>(2)</sup>.

(55) Law No 2010-1488 specifies that the return tariffs are to be abolished as of 1 July 2011, whereas the yellow and green standard tariffs are to be abolished in 2015. Law No 2010-1488 also amended Law No 2000-108 of 10 February 2000 on the modernisation and development of the public electricity service (*loi n° 2000-108 du 10 février 2000 relative à la modernisation et au développement du service public de l'électricité*) by including in it an Article 4-1 providing that as of 1 July 2011, for a period of 15 years, the alternative electricity suppliers are entitled to regulated access to existing nuclear power for a total volume not exceeding 100 TWh, i.e. about 25 % of the existing production of the nuclear power stations. The price of regulated access to existing nuclear power was fixed initially by the government after consulting the CRE. Article 4-1(VII) provides that in order to ensure fair remuneration for EDF, the price must be representative of the economic conditions of the electricity generation of its nuclear power stations over the duration of the mechanism. The price of regulated access to existing nuclear power must take account of the following factors:

(a) remuneration of the capital taking into account the nature of the activity;

(b) the operating costs;

(c) the investment costs for maintenance or necessary for the extension of the period of authorisation to operate;

(d) the estimated costs associated with long-term nuclear expenses.

(56) The price of regulated access to existing nuclear power was established by Decree of the Minister for Energy in May 2011 at EUR 40 per MWh from 1 July 2011, in order for a consumer benefiting from the return tariff at 30 June 2011 to be able subsequently to be proposed a market offer based on the (wholesale) access price at the same retail price level. By a separate Decree, the price of regulated access to existing nuclear power for 2012 was set at EUR 42 per MWh<sup>(3)</sup>. The government indicated that the price level adopted for 2011 resulted from the need to ensure continuity, at wholesale price level, with the return tariff. For 2012, the government justified the price level by proactively taking into account essential investments to reinforce the security of nuclear power stations following the Fukushima accident.

(57) From 8 December 2013, the price of regulated access to existing nuclear power will be established by the CRE. A Decree in Council of State is to specify the conditions under which the prices of access will be established by the CRE.

(58) The first period of delivery of regulated access to existing nuclear power started on 1 July 2011. Thirty-two suppliers signed a framework agreement with EDF and 61,3 TWh of regulated access to existing nuclear power were to be delivered between 1 July 2011 and 30 June 2012. For 2011, a volume of 84,4 % of regulated access to existing nuclear power is allocated to EDF's competitor suppliers. This volume represents the share of existing nuclear production in total consumption of final consumers in mainland France.

(59) In January 2012, a further exchange of correspondence between the French Prime Minister, on the one hand, and the Competition and Energy Commissioners, on the other, specified France's commitments on two additional points:

— the decisions taken after summer 2012 on the regulated tariffs will enable the gap between the sum of the costs and the regulated tariff to be narrowed compared to 2012 and then each year compared to the previous year,

— the price level for regulated access to existing nuclear power will not change until the decree establishing the method of calculating the price of regulated access to existing nuclear power enters into force, with the publication of the decree being scheduled for no later than 7 December 2013.

### **III. SUMMARY OF THE DOUBTS EXPRESSED BY THE COMMISSION IN ITS DECISIONS TO INITIATE AND EXTEND THE PROCEDURE**

(60) In its decisions to initiate then extend the investigation procedure, the Commission had considered that the

<sup>(1)</sup> JORF No 0284, 8 December 2010, p. 21467.

<sup>(2)</sup> JORF No 0100, 29 April 2011, p. 7472.

<sup>(3)</sup> Decrees published in JORF No 0117, 20 May 2011, p. 8792 and p. 8793.



green and yellow regulated standard tariffs and the return tariffs were attributable to the French State since they had been introduced and revised by laws or regulations adopted by it. These tariffs involved resources under the control of the State, whether these were EDF resources, under State control, or specific contributions under the control of an entity, the Deposit and Consignment Office, designated by the State.

- (61) Since the regulated tariffs conferred an economic advantage compared to the market prices in favour of businesses supplied with electricity at these tariffs and present in all economic sectors open to competition and trade between Member States, it appeared that the tariffs could be treated as aid schemes which may distort competition and affect trade between Member States within the meaning of Article 107(1) of the TFEU.
- (62) In these decisions, the Commission had also expressed doubts concerning the compatibility of the standard tariffs and return tariffs with the internal market.
- (63) It considered in particular that the derogations provided for in Article 107(2) of the TFEU did not seem to apply, as the aid is not granted to individual consumers, is not intended to make good the damage caused by natural disasters or exceptional occurrences and is not granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany.
- (64) The derogations provided for in Article 107(3)(a), (b) and (d) of the TFEU did not seem to be applicable either. In fact, in the absence of exceptional circumstances which did not appear to be met here, Article 107(3)(a) does not authorise operating aid. In addition, the aid is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State, or to promote culture and heritage conservation.
- (65) Article 107(3)(c) of the TFEU provides for the possibility to authorise aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The Commission noted that the aid in question could not be authorised in the light of the guidelines and frameworks explaining its application of the provisions of this Article.
- (66) The Commission had also expressed doubts as to whether these tariffs, applicable to medium-sized and large enterprises, can constitute compensation for supplying a service of general economic interest within the meaning of Article 106(2) of the TFEU.
- (67) In its decision to extend the procedure, the Commission had considered that the doubts expressed in the decision to initiate the procedure of 2007 concerning the compatibility with the internal market of the element of State aid initially included in the return tariffs

system also applied for the aid element contained in this return tariffs system as amended by Article 166 of Law No 2008-776.

#### IV. COMMENTS BY INTERESTED PARTIES

- (68) Several interested suppliers and customers notified the Commission of their comments.

##### *Suppliers*

- (69) POWEO, by letter dated 14 August 2007, states that it shares the Commission's view concerning the existence of State aid. Concerning the existence of an advantage, the enterprise confirms that the standard tariffs constitute an advantage in relation to the procurement conditions on the wholesale market, in relation to the return tariff and in relation to the commercial offers of EDF. The return tariffs constitute an advantage in relation to the procurement conditions on the wholesale market. Regarding selectivity, POWEO adds that exercising the right of eligibility to the market tariff is irreversible (the customer can no longer revert to the regulated tariff). In addition, the standard and return tariffs favour the enterprises consuming electricity to the detriment of other energy sources. By letter dated 25 June 2009, which is part of its comments on the decision to extend the procedure, POWEO supplied additional information on the way in which its price offers were structured.
- (70) ENEL, in a letter dated 21 September 2007, considers that the incumbents' tariffs are too low, that the return tariffs seriously disadvantage alternative operators. The enterprise adds that the new sites were entitled to the incumbents' tariffs despite the opinion of the French Council of State on the subject. By letter dated 27 May 2009, ENEL adds that the green and yellow regulated tariffs are lower than the market tariffs and have not followed the variations in the latter, stifling the development of any competition. In addition, the compensation provided for in favour of suppliers under the return tariff system is insufficient, increasing the advantage involved for customers. Finally, the return tariff does not allow suppliers to cover their production and commercialisation costs or to provide sufficient return on capital employed. It has prevented the development of competition in the French market.
- (71) Electrabel, by letter dated 19 September 2007, considers that the aid provides an advantage to certain electricity suppliers. The compensation paid to certain suppliers does not depend on the difference in turnover between the contract price and the return tariff, but is calculated according to the supplier's procurement costs. There is therefore no correlation between the loss of income suffered by the supplier and the compensation received, which is nevertheless supposed to cover this loss of earnings. Regarding the existence of a service of general economic interest allegedly to be performed by the customers which are the true beneficiaries of the return tariff, Electrabel considers that this is not proven. In its letter dated 26 June 2009, Electrabel adds that the return tariff leads to the drawing up of uniform offers by the electricity suppliers and prevents them from being

creative. Almost all the sites of Electrabel's customers have asked to benefit from the return tariff. The return tariff has led to alternative suppliers gradually being squeezed out in favour of EDF as, with equal tariffs, customers often prefer the latter. Electrabel considers that there is an advantage for electricity suppliers at the expense of other forms of energy, such as natural gas. As regards the return tariff, it is selective in so far as the possibility to benefit from it depends on the date of eligibility of the site, which in turn depends on the size of the site.

- (72) An enterprise having requested confidentiality considers that the regulated tariffs constitute State aid in favour of EDF, as the blue tariff is higher than the market tariff. As EDF benefits from a *de facto* monopoly for the application of these tariffs, it is placed in a privileged position. One of the subsidiaries of this enterprise was prevented from entering the French market on account of the return tariffs. Market entry was already difficult on account of the level of the wholesale tariffs and other costs (in particular the tariff for network access) for customers benefiting from green and yellow tariffs. The return tariff was creating a supplementary difficulty, on account of its level.

#### Customers

- (73) In its comments dated 13 August 2007, Uniden (Union des industries utilisatrices d'énergie) considers that the imperfect market operation makes regulated tariffs necessary. The transitional tariffs are not State resources as they allow alternative operators to have access to the nuclear and hydroelectric power which is not at their disposal whilst ensuring that the costs of the incumbent operators are covered. Selectivity cannot be demonstrated as the structure of the tariffs corresponds to that of the real costs per customer category.
- (74) On 28 May 2009, in its comments on the decision to extend the procedure, Uniden challenges the Commission's analysis concerning the selectivity of the tariffs, as it does not take into account the differences in costs of supply between the customer segments. The distinction between the application of the return tariff during the contract and signing a contract directly at the return tariff, although apparently logical, appears in reality to be flawed. In fact, the price is only one component of the overall economic value of a supply contract. Consumers also value the stability and transparency of the price they pay for their electricity supply. Contrary to the statements made in the decision to extend the procedure, the return tariff was imposed on consumers, whatever they requested. There are in fact concrete examples of unsatisfied demand for contracts extending beyond June 2010 and for consumers who were not necessarily requesting the application of the return tariff. Consequently, calculating a possible 'economic advantage' is unrealistic since the mechanism was imposed on consumers. It seems problematic, concerning the first period of application of the return tariff, to invoke selectivity since the mechanism was limited to consumers having requested it before 30 June 2007. All consumers in fact had six months in which to take a decision providing them with security and transparency of prices for two years. Likewise, not allowing toing and froing in the management of return tariffs is a commonsense measure, aimed solely at preventing arbitrage behaviour between the market price and the return tariff in so far as the seasonality of the return tariff is fixed in advance and that of the market is constantly changing.
- (75) Regarding the financing by State resources, consumers who have not benefited from the expected fall in the contribution to the public electricity service would therefore have benefited from State aid even though this contribution has financed the compensation for the return tariff. As regards the contribution by the hydroelectric or nuclear power generators, it should be noted that its level is very significantly lower than the difference between the price of electricity at the return tariff and the price of electricity at the green tariff or at the tariff provided for by the 'free' contracts freely granted by the generators. Uniden concludes that this contribution only in reality collects the 'excess profit' realised by these generators on account of the introduction of the return tariffs system.
- (76) The CLEEE (Comité de liaison des entreprises ayant exercé leur éligibilité) pointed out, by letter dated 16 August 2007, that the operation of the French electricity market was defective and that the prices practised on the free market did not reflect the production costs. The market price adopted as reference by the Commission was in its opinion distorted. The financing of the return tariff did not come from State resources but from consumers and producers who make a margin by selling at the return tariff. Since the return tariff is open to all, the CLEEE contests its selectivity. By letter dated 2 June 2009, the CLEEE adds that the return tariff did not constitute an advantage, as it merely limited the disadvantage suffered by the customers that have opted out of the regulated tariffs and could not revert to them. The CLEEE considers that the market price cannot be used as an indicator to establish the existence of an economic advantage, since it is the result of unsuitable or distorted market mechanisms. The CLEEE disagrees that the return tariff is selective as, in its opinion, it is open to all consumers that have exercised their right of eligibility and does not favour any site, any enterprise, any economic sector or any geographical area.
- (77) The CLEEE emphasises the structure and level of the return tariff and explains the essential difference between consumption profile and volume of consumption. The 'ribbon portions' of the return tariff are in its opinion more or less identical, contrary to the impression given by the information available to the Commission. The return tariff would not be of advantage to the very large electricity consumers to the detriment of the smaller consumers. The CLEEE disagrees that the return tariff should be considered as arising from State resources and that the condition of affecting trade has been established here, in particular because the Commission fails to establish that the return tariff is lower than the production costs or that the consumers benefiting from the return tariff purchase their electricity

more cheaply than their competitors in Europe which often still benefit from regulated tariffs. The CLEEE adds that the return tariff (assuming that it is State aid, which is not the case in its opinion) is compatible with the Treaty. In fact, Article 30-1 of the Law of 9 August 2004 on the public electricity and gas service and on electricity and gas companies (*loi du 9 août 2004 relative au service public de l'électricité et du gaz et aux entreprises électriques et gazières*) described the return tariff as a service of general economic interest imposed on the enterprises of the electricity sector. The CLEEE recalled how necessary this measure was to protect consumers who had exercised their right of eligibility and at the same time that it was proportionate and did affect trade excessively.

- (78) SNC Paris Voltaire, by letter dated 20 July 2009, considers that the financing of the geographic area for the supply of electricity to territories that are not interconnected by means of the contribution to the public electricity service constitutes State aid.

#### V. COMMENTS BY FRANCE

- (79) In its comments on the decision to initiate the procedure, the French authorities contest the Commission's analysis.

##### *Comments on the standard tariffs*

- (80) As regards the existence of an advantage, France considers that:

- (a) any difference between the level of the standard tariffs and the prices observed on the power exchanges, and in particular Powernext, is clearly cyclical (between 1999 and 2004, the latter were lower than the regulated tariffs);
- (b) the reference to the prices of the power exchanges is not relevant, in so far as the bulk of the electricity purchased by enterprises is over the counter and the prices observed on Powernext are not justified by the economic fundamentals determining the reality of the transactions between buyers and producers of electricity.

- (81) In view of these two reasons, France concludes that the standard tariffs do not constitute an advantage for the enterprises which benefit from them.

- (82) Furthermore, the French authorities contest the selectivity of the standard tariffs and assert that it is logical and economically consistent that the standard tariffs do not have the same financial impact (in cash) for a large-scale consumer and a small-scale consumer of electricity and that the cost is not proportional to the volume consumed on account of the variety of the costs of the means of production. According to France, the regulation of the standard tariffs is a general price regulation measure applicable to all electricity-consuming enterprises which have not opted to exercise their eligibility right and to have access to the free market.

- (83) The French authorities contest the argument of use of public resources for two reasons:

- (a) the standard tariffs do not lead to the use of any budgetary resource or tax revenue and have not prevented EDF from recording positive results;
- (b) the standard tariffs, which reflect the electricity market fundamentals and the costs of the total production capacity of EDF, constitute the correct price level for the sale of electricity and cannot therefore be considered as lost earnings for EDF.

- (84) France adds that, as competition has not been jeopardised, cross-border trade cannot be affected.

##### *Comments on the return tariff*

- (85) France maintains that the return tariff does not constitute State aid.

- (86) According to France, the return tariff is constructed by merely increasing the standard tariffs, whilst retaining their entire structure. Since the concept of advantage in relation to the final customers which receive non-regulated offers is not relevant in the context of the standard tariffs, it is all the less so in the context of the return tariff. Likewise, the absence of exemption from charges for the final customers which are supplied at the standard tariffs necessarily implies a lack of exemption from charges for those supplied at the return tariff.

- (87) According to the French authorities, the regulation of the return tariff does indeed constitute a general price regulation measure applicable to all electricity-consuming enterprises.

- (88) The French authorities contest that there has been any financing at all via public resources. In fact, the imputability of the measure to the State, in the sense that the measure is imposed by a law, is not sufficient to prove the transfer of public resources. More specifically, the part of the compensation which is defrayed by the final consumers via the contribution to the public electricity service precludes the link with public resources. The French authorities therefore consider that the use of part of the revenue from the contribution to the public electricity service to fuel the compensation mechanism for suppliers benefiting from the return tariff could not be considered to imply a transfer of public resources. The other part of the compensation is financed by the contribution levied on the hydroelectric and nuclear power generators, whether public or private, with large-scale means of electricity-generating capacity (threshold of 2 000 MW) and characterised by low costs and largely depreciated. This contribution could not lead to considering that there is a direct or indirect transfer of public resources.

(89) France refers to the 'PreussenElektra AG' judgment handed down by the Court of Justice in Case C-379/98 (point 58) <sup>(1)</sup>: 'In that connection, the case-law of the Court of Justice shows that only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 92(1).' In this respect, it can be stated that there is no direct or indirect link between the mechanism (payment or transfer operations) and the public resources of the State, even through the intervention of the Deposit and Consignment Office. In fact, the role of the Deposit and Consignment Office is completely transparent. The Deposit and Consignment Office does not have the slightest competence at any time to determine the amount or the destination of the sums recovered and redistributed. These sums are recorded in a separate account and are kept totally separate from the resources which the Deposit and Consignment Office is competent to manage. The intervention of the Deposit and Consignment Office is a guarantee of simplicity and transparency in the exchanges between contributors and beneficiaries of compensation.

*Response to the comments of third parties*

(90) France presented its response to the comments of third parties on 31 January 2008. It recalls that the prices observed on the power exchanges cannot be taken as a reference. In fact, the price observed on the power exchanges in France reflects the cost of electricity generation in Germany, whether this electricity is delivered in France or not. In this respect, it points out that the volumes traded on the power exchanges are not all delivered: about 10 % of the volumes traded on the Powernext futures market are in fact delivered. France adds that the prices observed on the power exchanges do not reflect the price of current contracts of final consumers.

(91) France asserts that overcompensation is not possible under the compensation mechanism of the return tariff. It recalls that the mechanism was established following broad consultation of all the stakeholders, in the constant concern to limit as far as possible the spin-off benefits and opportunity effects, under the supervision of the CRE. It operates as follows: any supplier who delivers to a final customer at the return tariff is eligible for compensation. The compensation is calculated as the difference between its revenue at the return tariff (in EUR/MWh) and its procurement costs. The latter are however capped at a theoretical procurement cost determined by reference to the prices observed on the power exchanges (this is approximately a weighted mean of the various prices observed on the power exchanges). The cap on the procurement costs for a year N is not entirely known until the end of the same year N. It appears problematic to establish a strategy which can in fact allow overcompensation. Assuming an operator manages to devise such a strategy, this would be liable to sanctions by the CRE, the body responsible for the application of this mechanism.

(92) The French authorities consider that, if the Commission were to conclude that the standard tariffs and the return tariff constitute aid, which they contest, this should be considered to be compatible pursuant to Article 106(2) of the TFEU, read in conjunction with Article 3(2) of Directive 2003/54/EC. Likewise, according to the French authorities, these tariffs should be considered as aid compatible with the internal market on the basis of Article 107(3) of the TFEU, on the grounds that they correct market failure. In any case, the standard tariffs should be regarded as existing aid, as they predate the liberalisation of the electricity market. Finally, if the Commission were to refuse to regard the standard tariffs as existing aid, the French authorities consider that they would be justified in invoking the principles of legitimate expectations and legal certainty.

*Comments on the extension of the procedure*

(93) The French authorities abide by the analysis they presented in response to the decision to initiate the procedure. As regards the existence of an advantage, they indicate that even assuming that the prices observed on the power exchanges can be considered as a relevant reference, in contrast to during the period 2004-07, the market prices are at the same level as the return tariff in 2009.

(94) As regards selectivity, they point out that the return tariff aims to avoid arbitrage between a regulated system and market prices. The return tariff is in no way selective, it is a general measure: operators must take account of this in their choice of electricity supply offers. In this capacity, the French authorities recall that the Court of Justice considers that a State measure that benefits all enterprises located within national territory indiscriminately is not of a nature to constitute State aid. France adds that the various return tariffs set are based on objective, technical criteria which are for that matter the same as those used for the standard tariff.

(95) According to France, the concept of selectivity must be analysed in the light of all the conditions offered by the market to all enterprises. It is relevant and operational only if the mechanism analysed constitutes a decisive advantage in favour of a specific category of market participants, to the detriment of the other categories. This is not the case in point. If the other enterprises have not, in general, subscribed to the return tariff, it is because they were granted more advantageous procurement conditions at market price. In any case, they are not disadvantaged by the existence of this mechanism. Selectivity can be analysed only in the light of the nature of the enterprises concerned: each establishes its own strategy by taking maximum advantage of the possibilities available with regard to procurement cost, according to its own specific characteristics. It has to be noted that the return tariff was subscribed to by all categories of enterprises. Not a single one is excluded.

<sup>(1)</sup> Judgment of 13 March 2001 [2001] ECR I-02099.

- (96) Regarding the existence and use of public resources, France points out, in response to point 77 of the decision to extend the procedure, that the private group GDF Suez, which has 3 000 MW of run-of-river hydroelectric power at its disposal at a competitive cost (approximately EUR 30 per MWh, charge included), is not compensated. Furthermore, EDF and GDF Suez, even though they do not have the same status, are nevertheless dealt with under exactly the same conditions regarding the financing of the return tariff mechanism. The French authorities therefore refute the fact that public resources were used on the grounds that EDF participates in the financing of the mechanism.
- (97) Regarding affecting trade and competition, the French authorities recall that it is for the Commission to provide evidence that competition is in fact affected by considering enterprises in precisely the same actual and legal situation. In any case, the return tariff does not change an old situation which allowed the enterprises located on the French market to derive benefit from the competitiveness of the French electricity generation system, which is essentially nuclear power.
- VI. ASSESSMENT OF THE MEASURES — EXISTENCE OF STATE AID**
- (98) Article 107(1) of the TFEU provides: ‘Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.’
- (99) State aid within the meaning of Article 107(1) of the TFEU exists where a measure confers an advantage on certain enterprises or the production of certain goods, this measure is selective, it is financed by State resources and it affects or threatens to affect competition and trade between Member States.
- (100) The Commission analysed the existence of a State aid element within the meaning of Article 107(1) of the TFEU in favour of non-household customers benefiting from one of the two tariff systems which are the subject of the present procedure. Moreover, as regards the standard tariffs, the Commission limited its investigation to the period starting on 1 July 2004, the date of the liberalisation of the electricity market. It is in fact on this date that all the non-household customers became eligible, pursuant to Directive 2003/54/EC. Previously, only a small minority of enterprises were eligible.
- (101) To be regarded as selective for the purposes of Article 107(1) of the TFEU, an aid measure must favour certain enterprises or the production of certain goods, which distinguishes it from general measures applicable to all sectors of the economy.
- (102) The Commission considers that the fact that the standard and return tariffs are in principle applicable to all electricity-consuming enterprises does not lead to the conclusion that these measures are of a general nature. In fact, to be termed as general, the measures in question must be applicable to all enterprises and not only to electricity-consuming enterprises, some of which may give precedence to this consumption compared to other enterprises which use other energy sources.
- (103) The tariff measures at issue are selective in that they favour electricity-consuming enterprises as compared to those which use fossil fuels, such as coal, oil and oil by-products or, to a certain extent, gas, irrespective of the fact that the prices of the latter are also regulated. Moreover, such tariff measures in fact favour the enterprises with larger electricity consumption in so far as the advantage they derive from them necessarily increases with the level of electricity consumption.
- (104) In addition, selectivity between electricity-consuming enterprises exists on account of the rules introduced, which define the categories of enterprises which may or may not benefit from the regulated tariffs. The irreversibility of exercising the right of eligibility between the market tariffs and the regulated tariffs, provided for by Article 66 of Law 2005-781 of 13 July 2005, contains an obvious element of selectivity: enterprises which have opted to switch to the market tariff may no longer benefit from the standard tariffs. In addition, the application of the criteria consisting of the dates on which the choice to exercise the right of eligibility had been made or those on which the applications to be supplied by a tariff system had been submitted has the additional effect of limiting the benefit from the tariffs to certain enterprises, by excluding others.
- (105) In the light of the above, the Commission concludes that the yellow and green standard tariffs and the return tariffs are selective for the purposes of Article 107(1) of the TFEU, in that they apply solely to electricity-consuming enterprises, even though they apply to a large number of enterprises operating in excess of 400 000 electricity consumption sites in France. In fact, neither the large number of beneficiary enterprises nor the diversity of the sectors to which these enterprises belong allows a State measure to be considered as a general measure.
- (106) It is at the stage of the assessment of the compatibility of the tariffs with the internal market and not at that of the assessment of their selectivity that it is appropriate to examine their application to very large parts of the economic sectors which have benefited from them and continue to do so.

#### Selectivity

- (101) To be regarded as selective for the purposes of Article 107(1) of the TFEU, an aid measure must favour certain enterprises or the production of certain goods, which distinguishes it from general measures applicable to all sectors of the economy.

#### Economic advantage

- (107) For the purposes of Article 107(1) of the TFEU, an advantage exists if a State measure allows an enterprise

not to bear expenses which normally it would have to bear in the absence of the measure. The supply of electricity at preferential conditions resulting from national legislation is liable to be covered by this Article, since the payment for procurement of electricity is clearly a current expense normally payable by an enterprise. It is therefore appropriate to analyse whether the measures at issue here lead to reducing this expense.

*Comparison with the reference of market prices*

- (108) The Commission analysed whether the standard and return tariffs allowed their beneficiaries to procure electricity at a more advantageous price than that which would prevail in their absence, i.e. market prices. As, for that matter, the Ministerial Decree of 22 December 2008 seems to confirm, the prices of electricity supplied on the free market to a large or medium-sized consumption site should, in the absence of the return tariff, correspond to a large extent to a combination of the prices of baseload and peakload futures observed on the wholesale market, this combination being linked to the consumption profile of the site in question.
- (109) The standard tariffs were the subject of regular adjustments from 2006, shown in table 1. Between January 2004 and January 2012, the yellow standard tariffs were increased by 21 % and the green tariffs by 23,8 %. These increases nevertheless did not enable it to be ensured that production costs were covered by the 'supply' component of the standard tariffs. In fact, it results from the comparison of the data in table 2 with the market prices described in recitals 43 to 45 that, since 2004, the 'supply' component of the yellow and green standard tariffs is systematically at least 25 % below the prices observed on the markets.
- (110) The yellow and green return tariffs rose by 13 % and 16 % respectively during the period between 2007 and 2011 when they were applied. For the green return tariffs, the examination of their estimated supply component compared to the market price references shows the existence of an advantage of at least 9 % in each year of the period examined. As regards the yellow return tariffs, comparison with the baseload supply contracts shows an annual advantage although it is not systematic. As a mean for the period, they were 13 % lower than the market prices. Furthermore, the yellow tariffs concern the medium-sized enterprises, which are likely to have higher consumption at peak times, which is underestimated by a comparison based on baseload contracts.
- (111) As a result, both systematically each year for the standard tariffs and the green return tariffs and on average for the yellow return tariffs during the period in which they were applied, the application of the tariffs at issue conferred an economic advantage on the beneficiary enterprises which they could not have obtained at market conditions.

*Assessment of the situation by the regulator (CRE) and the administrative court (Council of State)*

- (112) The results of the comparison with market prices which show the existence of an economic advantage are corroborated

by the opinion of the CRE on the draft decree of 10 August 2006 on electricity prices. In this opinion, the CRE indicated that the 'supply' component of the standard tariffs did not always reflect the reality of the supply costs and that, in particular, it was residual, or even negative, for certain customers benefiting from the green and yellow tariffs<sup>(1)</sup>.

- (113) Likewise, in its opinion of 23 July 2009 on the draft decree on regulated tariffs for the sale of electricity, the CRE indicates that failure to take into account the TURPE in the regulated tariffs for sales had up to that point automatically given rise to the appearance of tariff traps, i.e. situations in which the production component of a tariff, obtained by subtraction of the TURPE in force and the commercialisation costs from these integrated tariffs, is significantly lower than the production component allowing the production costs to be covered.
- (114) Hence, the CRE points out, in its opinion of 10 August 2009 on electricity tariffs, that with the tariffs in force since August 2008, 222 000 sites, some of which benefit from yellow or green tariffs, representing consumption of 2 200 GWh, are in a so-called 'deep' tariff trap, i.e. with an implicit 'supply' component below EUR 20 per MWh. For the summer consumption sites, which all benefit from yellow and green tariffs, 22 000 sites (consumption of 1 200 GWh) are in a deep tariff trap, of which 7 500 with a negative supply component.
- (115) The tariff adjustment of August 2009 enabled the deep tariff traps to be reduced by 82 % in terms of number of sites and volume, with 1 500 sites remaining in a deep trap. The tariff adjustment of August 2010 enabled deep traps to be nearly eliminated, since only 300 sites were still concerned.
- (116) The CRE calculations show the existence of a very significant competitive advantage for enterprises benefiting from peak cut-off or summer consumption tariffs. All the sites benefiting from yellow and green tariffs where the 'supply' component is below EUR 20 per MWh would obviously be unable to obtain an equivalent tariff under normal market conditions. This shows even more that the standard tariffs can constitute an advantage for a significant number of enterprises.
- (117) The Council of State, following the action for annulment of the Decree of 12 August 2008 on the price of electricity brought by POWEO, ruled, by decision of 1 July 2010, that the yellow and green tariffs resulting from

<sup>(1)</sup> Opinion of the Energy Regulatory Commission of 9 August 2006 on the draft decree on the selling price of electricity, Section 2.2, second paragraph, <http://www.cre.fr/imgAdmin/1161595981902.pdf>

the Decree of 13 August 2007 were insufficient to cover the full average costs of EDF and calls on the competent ministers to issue a new decree.

- (118) The French authorities, for their part, argue that any difference between the level of the regulated tariffs for the sale of electricity and the prices observed on the power exchanges, and in particular Powernext, was clearly cyclical. It emerges from the successive opinions of the CRE on regulated tariffs for the years following the initiation of the procedure by the Commission that this was not the case.
- (119) France adds that the reference to the prices of the power exchanges is not relevant, in so far as the bulk of the electricity purchases by enterprises are over-the-counter and the prices observed on Powernext are not justified by the economic fundamentals which determine the reality of the transactions between buyers and producers of electricity. The Commission considers, on the contrary, that the Powernext electricity prices serve as a basis for the suppliers drawing up market price offers.

*Indications resulting from the choice of customers in the market*

- (120) The fact that a vast majority of eligible customers have chosen to retain the standard tariffs or to benefit from the green and yellow return tariffs is significant. Thus, at 30 June 2011, the date of the abolition of the return tariff, the CRE pointed out that, out of a total of 4 907 000 non-household sites, 4 202 000 obtain supplies at the standard tariffs and 7 220 at the return tariff. In terms of annualised consumption, the standard tariffs represented 161 TWh (i.e. 54,6 % of the consumption of the non-household sites) and the return tariff 75 TWh (25,4 %). Therefore, four years after the opening of the entire market to competition, the market share of offers under free tariffs amounted to only 20 %.
- (121) This analysis is confirmed by the figures provided by the alternative operators which communicated their comments. Electrabel indicated that 90,4 % of its customers that were previously supplied at the market tariff had chosen to benefit from the return tariff. According to Electrabel, over the entire period of application of the return tariff, the customer's advantage amounts on average to EUR 11 per MWh. POWEO points out that in 2007, it suffered a loss of EUR 33 to EUR 34 per MWh on average for a customer benefiting from the yellow tariff and of EUR 26,6 per MWh on average for a customer benefiting from the green tariff, taking account of its procurement and commercial costs.
- (122) In the light of the above, the Commission concludes that an economic advantage exists for the customer categories benefiting from standard tariffs and green and yellow return tariffs.

**Imputability to the State, involving State resources**

- (123) For the purposes of the application of Article 107(1) of the TFEU, it is appropriate to establish whether the

measures at issue involve State resources in favour of the beneficiaries, these being in particular resources of public undertakings, pursuant to the decisions taken or attributable to the State.

- (124) In the present case, the imputability to the State is obvious, since both the standard tariffs and the return tariffs mechanisms are implemented by laws and regulations passed by the French State. In addition, the level of the tariffs is set by ministerial decree for each of the tariff categories. The decisions are therefore State decisions which are out of the control of the enterprises responsible for executing them.

*Concerning the standard tariffs*

- (125) The standard tariffs are financed by resources of EDF and the local distribution companies, which sell electricity to their customers at a price below the price which would result from the free functioning of the market. It is appropriate to analyse whether their resources can be considered as State resources.
- (126) The State holds the vast majority of the capital of EDF. At 31 December 2010, it held an 84,48 % stake. EDF is therefore under State control. It is a public enterprise and its resources are therefore State resources. When a consumer benefiting from the tariff is supplied by EDF, the statutory and regulatory decisions of the State require EDF to supply electricity at a price which is below that which would apply on the market, therefore involving EDF resources under public control.
- (127) The uncontested facts set out in the decision to initiate the procedure indicate that there are 168 local distribution companies. One hundred forty-four of them take the form of governmental corporations or semi-public companies. The governmental corporations are public undertakings fully controlled by the local authorities (for example, the municipalities). The semi-public companies are public limited companies, with the majority of their capital held by the public authorities, and their resources are therefore State resources. These local distribution companies are therefore under the direct control of the State. One of the local distribution companies is an EPIC (public institution of industrial and commercial nature). The EPICs are public undertakings which are entirely State-owned and their resources are therefore State resources.
- (128) Other local distribution companies, such as Electricité de Strasbourg, are public limited companies, in which EDF and/or municipal authorities hold a majority stake. These companies are therefore also under State control.
- (129) Finally, a small minority of the local distribution companies (20 out of 168) are structured as cooperatives or agricultural cooperatives supplying electricity, regarding which it is more difficult to determine whether the State exercises control.

- (130) In view of the fact that EDF itself distributes the vast majority (about 95 %) of the total volume of electricity covered by the standard tariffs and that a very large majority of the other distributors are themselves under State control, the Commission considers that it can be concluded that the sums concerned represent, at least almost entirely, State resources.
- (131) The local distribution companies usually buy from EDF the electricity they distribute at the standard tariffs, by a system which is itself State-regulated, known as the system of 'tariffs for the transfer of electricity to non-nationalised distributors'. Through this system, EDF is subject to the obligation to supply to the local distribution companies the quantity of electricity they need to meet their supply obligations under the standard tariffs system, at a price enabling them to sell the electricity at the standard tariff without loss. It is therefore through EDF resources that the tariffs they offer are financed. The Commission considers that, in the end, all the resources involved in the standard tariffs system originate from public undertakings.
- (132) The Commission does not share the French authorities' opinion that the return tariffs do not lead to the use of any budgetary resource or tax revenue and did not prevent EDF from recording positive results, or that the standard and return tariffs (based directly on the standard tariffs), which reflect the fundamentals of the electricity market and the costs of EDF's installed capacity, constitute the correct level for the selling price of electricity and cannot therefore be considered as lost earnings for EDF. It is obvious that, without standard tariffs, the prices that EDF would apply to customers benefiting from these tariffs would tend to approach the higher prices observed on the markets since 2004, so the lost earnings for EDF and for the local distribution companies represent lost earnings for the French State or the controlling public authorities.
- (133) The standard tariffs are therefore financed by State resources and are attributable to the State.

*Concerning the return tariffs*

- (134) The return tariffs are financed by the revenue from two contributions imposed by the State, as described in recitals 35 and 36.
- (135) According to the consistent practice of the Commission<sup>(1)</sup>, which follows the case-law of the Court of Justice in this respect<sup>(2)</sup>, the revenue from this type of contributions constitutes State resources where the following three cumulative conditions are met:

- (a) the contributions must be imposed by the State; this is the case here since the two contributions are imposed by Law No 2000-108;
- (b) the revenue from the contributions must be paid to a body designated by the State; in this case this is the Deposit and Consignment Office;
- (c) the revenue from the contributions must be used in favour of certain enterprises, according to the rules established by the State; this too is the case since the revenue from the contributions is used pursuant to Law No 2000-108, so that in the end the user categories defined by the State benefit from it, to the extent also defined by it.

- (136) After the *PreussenElektra* case-law, cited by the French authorities, in its decision-making practice concerning electricity tariffs, the Commission has come to examine the existence of contributions at the amounts determined by the State and imposed by it, financing the introduction of these tariffs. Depending on the existence of a public control body through which the funds flow, the Commission reached the conclusion that in certain cases State resources existed within the meaning of Article 107(1) of the TFEU<sup>(3)</sup> or, on the contrary, that such resources did not exist on the grounds in particular that the sums in question did not flow through any fund created or managed by the State<sup>(4)</sup>.
- (137) In the present case, the Commission, in the light of its past practice, considers on the contrary that the mechanism by which the return tariffs operate, for which the rules are established by the State, is closely linked to the use of public resources. The contribution to the public electricity service can be assimilated in principle to a tax established by the State transferred via the Deposit and Consignment Office, a public operator, under the control of the regulator.
- (138) The return tariffs are therefore financed by State resources.

*Affecting competition and trade between Member States*

- (139) The standard and return tariffs constitute aid schemes, applicable to all economic sectors in France, on the sole condition that are electricity consumers. Thousands of enterprises benefiting from these tariffs in the industrial and services sectors in France operate in markets which are fully open to competition within the

<sup>(1)</sup> See, for example, the Commission decision in State aid Case N 161/04 — Stranded costs in Portugal (OJ C 250, 8.10.2005, p. 9) or, more recently, the Commission decision in Case C 24/09 (ex N 446/08), State aid to energy-intensive businesses, Austrian Green Electricity Act (OJ L 235, 10.9.2011, p. 42).

<sup>(2)</sup> Court of Justice judgments of 2 July 1974 in Case 173/73 *Italy v Commission* [1974] ECR 709 and 22 March 1977 in Case 78/76, *Steinike v Federal Republic of Germany* [1977] ECR 595.

<sup>(3)</sup> Commission decisions of 15 January 2002 No N 826/01, Ireland — Alternative Energy Requirements I to IV and No N 553/01, Renewable Energy (OJ C 59, 6.3.2002).

<sup>(4)</sup> Decision of 27 February 2002 in Case N 661/99, United Kingdom — Competitive Transition Charge (OJ C 45, 19.2.2002). The additional cost arising from the obligation to purchase electricity generated from renewable resources was financed by a contribution called the 'Competitive Transition Charge' paid by consumers in proportion to their consumption and of an amount set by the public regulator at the level of the additional cost considered, without any public body designated to manage the funds (OJ C 113, 14.5.2002).



internal market and which are not the subject of exclusive rights or restrictions to trade between Member States.

- (140) As already emphasised in its decisions to initiate and extend the investigation procedure, the Commission considers that the impact of the systems in question on competition and trade between Member States is obvious since the economic activities engaged in by the customers benefiting from the standard and return tariffs are open to trade between Member States.

#### *Conclusion on the existence of State aid*

- (141) The Commission concludes that the yellow and green standard tariffs and the yellow and green return tariffs constitute State aid within the meaning of Article 107(1) of the TFEU to the economic operators benefiting from it.

#### **VII. LAWFULNESS AND CLASSIFICATION AS NEW AID**

- (142) Neither of the two tariff systems which come within the scope of the present procedure was notified to the Commission within the meaning of Article 108(3) of the TFEU before their implementation.

- (143) Although the regulated standard tariffs were introduced in 1945 — and therefore before the EC Treaty — at the same time as the EDF was established and have been applied for the entire period of the electricity monopoly in France, they nevertheless constitute new aid and not aid existing before the Treaties. In fact, the specific decisions which adjusted the level of the standard tariffs in both absolute and relative terms, in relation to other tariffs were taken every year. In addition, the annual decisions to establish their level involve a certain amount of discretion and are not taken in application of rules prior to the EC Treaty. In fact, although the general principles for setting the regulated tariffs described in recital 21 were laid down in implementing laws or regulations, which in any case are subsequent to the EC Treaty, the successive opinions of the CRE cited in recitals 112 to 114 clearly show that the annual decisions to establish the level of the tariffs did not necessarily follow a logic of covering the costs of supplying electricity.

- (144) The two tariff systems which are the subject of the present procedure implemented without prior notification are, consequently, unlawful.

#### **VIII. ASSESSMENT OF THE MEASURES — COMPATIBILITY OF THE AID**

- (145) As the Commission concludes in its decision to initiate the procedure, Article 107(2) and Article 107(3)(a), (b) and (d) of the TFEU are not applicable in the present case.

- (146) Likewise, the Commission continues to consider that Article 106(2) of the TFEU concerning services of general economic interest cannot apply, contrary to the claims of certain interested third parties. In fact, Article 3(2) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC <sup>(1)</sup> limits any services of general economic interest solely to enterprises in the electricity sector. In the present case, the beneficiaries of the aid are not only enterprises in the electricity sector, but the customer enterprises, which in no way provide a service of general economic interest.

- (147) The only basis for compatibility of the aid in question with the internal market could be Article 107(3)(c) of the TFEU, which provides that: 'The following may be considered to be compatible with the internal market: [...] aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest [...].'

- (148) In its decisions to initiate and extend the procedure, the Commission pointed out that the aid at issue could not be authorised in the light of the guidelines and frameworks explaining its application of Article 107(3)(c) of the TFEU. In fact, the aid measures examined in the present procedure concern regulated tariff mechanisms which have no precedent in the Commission's past practice. They are applicable to thousands of enterprises and can be assimilated to aid schemes on a completely different scale from those governed by rules derived from its past individual decision-making practice or consolidated in specific instruments or frameworks. In areas not covered by the various detailed instruments governing the assessment of the compatibility of the aid, it cannot be precluded that aid may satisfy the conditions of Article 107(3)(c) of the TFEU.

- (149) Under these conditions, it is appropriate to examine, given the commitments undertaken by France in the context of the present procedure, whether the State aid which falls within the scope of the present procedure contributes to an objective of common interest, whether it is necessary to correct market failure and whether, for this purpose, it is proportionate and does not adversely affect trading conditions to an extent contrary to the common interest.

<sup>(1)</sup> OJ L 211, 14.8.2009, p. 55. Article 3(2) specifies that: 'Having full regard to the relevant provisions of the Treaty, in particular Article 86 thereof, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection. Such obligations shall be clearly defined, transparent, non-discriminatory, and verifiable and shall guarantee equality of access for electricity undertakings of the Community to national consumers. In relation to security of supply, energy efficiency/demand-side management and for the fulfilment of environmental goals and goals for energy from renewable sources, as referred to in this paragraph, Member States may introduce the implementation of long-term planning, taking into account the possibility of third parties seeking access to the system.'

*Objective of common interest*

- (150) The success of the full liberalisation of the electricity markets is an objective of common interest emphasised by the Union institutions in their respective activities and competences.
- (151) The Commission has recognised, on the basis of Article 107(3)(c) of the TFEU, the justification for State aid for a limited time having as its object or effect to accompany and facilitate the successful achievement of the electricity market liberalisation process where market forces alone prove to be insufficient to achieve this, including therefore that these measures may concern the incumbent operators with a strong position on their national market<sup>(1)</sup>. It is therefore appropriate to check whether the aid at issue can contribute to successful achievement of this liberalisation of which the final beneficiaries must be electricity consumers.
- (152) The French authorities entered into the commitment on 12 January 2012 to put an end to the regulated tariffs in 2015, whereas the return tariffs were already abolished in July 2011. On account of its transitional nature and the fact that it is henceforth limited in time, the State aid may facilitate a gradual transition to a genuinely competitive market under conditions deemed acceptable, given the situation prevailing in France before the liberalisation and, taking into account all the circumstances in the present case, contribute to an objective of common interest.

*Market failure: need for the aid*

- (153) The regulated tariffs were applied throughout the period of the monopoly in the generation, transmission and distribution of electricity in France. Their existence and maintenance after the full liberalisation of the electricity

market, which occurred on 1 January 2004 for business customers and on 1 January 2007 for all customers, corresponds to the logic of the protection of consumers confronted by the dominance of a single supplier. Whilst being an inheritance from the period of EDF's monopoly in France which has gradually been abolished, the regulated tariffs, in structure and level, pursue the objective of avoiding EDF making extraordinary profits by applying excessive tariffs by an operator likely to retain a large share of the retail market for a long period after liberalisation. However, the prevention by the French authorities of possible abusive tariffs imposed by EDF has given rise to aid in favour of French electricity consumers.

- (154) In fact, on account of the specific structure of the French market, described in recitals 48 to 52, EDF, at the time of the liberalisation, was in a near-monopoly situation which conferred on it total freedom to set the retail prices on the French electricity market. In the present case, a restriction of the freedom to fix prices by maintaining *ex ante* regulatory instruments may prove to be justified by the situation and characteristics of the French market.
- (155) In view of the scale and uniqueness of the competitive advantages conferred in the past and still conferred on this undertaking by the operation of its nuclear power capacity explained in more detail in recitals 48 to 50, it would have been pointless to hope that competition alone by new entrants would have permitted optimum conditions of competition to be created in the provision of electricity supply services. In the absence of other structural measures, *ex post* monitoring alone of any abusive conduct in respect of prices would not be sufficient in isolation to ensure optimum functioning, including through the entry of new competitors. On the contrary, absolute freedom to set tariffs could have led to perpetuating the specific situation of EDF, which would have had sufficient financial resources available to squeeze out its competitors or to maintain income enabling it to increase and diversify its means of production, in France and elsewhere in the internal market.

<sup>(1)</sup> In its 2001 Communication relating to the methodology for analysing State aid linked to stranded costs (adopted on 26 July 2001 and communicated to Member States by letter SG (2001) D/290869 of 6.8.2001), the Commission stated:

'The gradual transition from a situation of largely restricted competition to one of genuine competition at European level must take place under acceptable economic conditions that take account of the specific characteristics of the electricity industry. [...] The State aid corresponding to the eligible stranded costs defined in this Notice is designed to facilitate the transition for electricity undertakings to a competitive electricity market. The Commission may take a favourable view of such aid to the extent that the distortion of competition is counterbalanced by the contribution made by the aid to the attainment of a Community objective which market forces could not achieve. Indeed, the distortion of competition that results from aid paid to facilitate the transition for electricity undertakings from a largely closed market to one that has been partially liberalised cannot be contrary to the common interest where it is limited in time and in its effects, since liberalisation of the electricity market is in the general interest of the common market in accordance with Article 2 and Article 3(1)(t) of the EC Treaty and supplements moves to establish the internal market.'

- (156) Furthermore, this market failure must also be analysed from the point of view of the beneficiaries of the aid. A large number of enterprises, and especially the largest consumers, took their decisions, especially regarding investment in heavy equipment, on the basis of the estimated costs of electricity associated with regulated tariffs essentially reflecting the average costs of nuclear power stations, and not fluctuating prices depending on the prices of fossil fuels and CO<sub>2</sub>, which henceforth largely determine price formation on the free market. An abrupt transition from one price system to the other, what is more involving a distinct average increase, could therefore have created significant

difficulties for a large number of enterprises with capital tied up in electricity-consuming equipment which offers little flexibility in the short term. A transition period for a clearly defined time therefore appears appropriate.

- (157) The aid resulting from the tariffs which fall within the scope of this procedure can therefore be regarded, in this specific case, as necessary to correct this market failure. Benefits from diversification of the supply associated with the reform of the electricity market in France downstream from the activity of the beneficiaries of the aid would allow balancing of the productive capital of these beneficiaries with market price signals distorted to a lesser extent by the dominant position of EDF, by improving the conditions for the development of the economic activities they engage in, which is the objective of Article 107(3)(c) of the TFEU.

*Proportionality of the aid*

- (158) On this same legal basis, under certain conditions, especially the time limit on the aid, operating aid reducing the current costs of energy for their beneficiaries, without valuable consideration or real incentive effect, is regarded as compatible with the internal market in the case of reductions in taxation on these costs where the absence of aid may be reflected in a substantial increase in the production costs of the sectors concerned <sup>(1)</sup>.
- (159) Since the period covered by the present procedure, both the standard tariffs system and the return tariffs have undergone continuous increases, including when the market prices fell from 2009. As shown by the deliberations of the CRE set out in recitals 113 and 114, this general upwards trend has moreover endeavoured, in a more targeted fashion since 2009, to reduce the number of consumption sites benefiting from the greatest advantages compared to market prices.
- (160) In accordance with the exchange of correspondence on 15 September 2009, the transition will last until 2015. Moreover, the commitments entered into by France with regard to the freeze in the price of regulated access to existing nuclear power in 2012 and 2013 and setting it in accordance with the parameters provided for by Law No 2010-1488 on the new organisation of the electricity market, on the one hand, and the increase in the regulated tariffs year after year until 2015 followed by their abolition, on the other, allow the assurance to be given, in a reasonable perspective, of continued convergence with market prices or, in any event, their progressive increase.
- (161) A system ensuring a gradual, continuous increase followed by the abolition of the tariffs facilitates the transition to market prices in a system where market failures have been corrected by a mechanism imposed by law which promotes the emergence of genuine

competition with access to supplies from the EDF operating capacity. The aid for a gradually decreasing amount allowing the beneficiary enterprises to adapt their tools of production of a size determined by prices resulting from the regulated tariffs to the new market conditions can be regarded as proportionate.

- (162) Under these conditions, the Commission concludes that the aid resulting from the existence of the tariffs covered by the present procedure to be proportionate.

*Affecting trade to an extent contrary to the common interest*

- (163) The measures at issue concern hundreds of thousands of electricity consumption sites and consequently thousands of beneficiaries supplied at the standard and return tariffs, in a context of transition to a fully liberalised market. Although selective within the meaning of Article 107(1) of the TFEU, in that they are reserved solely to electricity-consuming enterprises, the aid which is the subject of the present procedure in no way targets specific beneficiaries or even specific economic sectors. Measures which are little targeted to categories of beneficiaries such as those at issue may restrict competition less than more selective measures.
- (164) Moreover, the Commission considers that the conditions laid down during the exchange of correspondence between the Commission and France in September 2009 and January 2012 have been respected. The two main points, i.e. the implementation of an in-depth reform of the electricity market in France with, in particular, regulated access to existing nuclear power for EDF's competitors and the end of the green and yellow regulated tariffs, are laid down in Law No 2010-1488.
- (165) It results from its recent decision-making practice in the energy sector that, on the legal basis provided by Article 107(3)(c) of the TFEU, the Commission can take into consideration benefits in terms of improved competition in a market separate from that in which the beneficiaries of the aid operate to decide on its compatibility <sup>(2)</sup>. In the present case, it is appropriate to take into consideration the foreseeable benefits on the electricity supply market resulting from the commitments entered into by France during the present procedure.
- (166) The first results of over-the-counter electricity purchases via regulated access to existing nuclear power show demand in the vicinity of 60 TWh. In total, 32 alternative suppliers have had recourse to regulated access to existing nuclear power and their demands have been met in full. In view of the structural characteristics of the electricity supply market in France described in recitals

<sup>(1)</sup> Community guidelines on State aid for environmental protection (OJ C 82, 1.4.2008, p. 1), Chapter IV, points 153-154.

<sup>(2)</sup> SA.31953 (11/N) — Construction of a LNG Terminal in Świnoujście (OJ C 361, 10.12.2011), SA.30980 (11/N) — Construction of interconnection and cross-border power line between Poland and Lithuania (OJ C 79, 12.3.2011), SA.29870 (N 660/09) — Aid to PGNiG for underground gas storage (OJ C 213, 6.8.2010).

48 to 52, these first results show gradual opening up allowing competition which could not have developed without the commitments entered into by France with regard to access to existing nuclear power, which can reach up to about 25 % of EDF's production. No alternative supplier could have had means of production at its disposal on the same scale as those of the incumbent operator within such a short period. France's additional commitment concerning the freeze in the price of regulated access to existing nuclear power until the entry into force of the decree establishing the method for calculating this price and therefore its foreseeable reduction in real terms should accelerate this movement towards a more competitive market. With regard to the subsequent period, as pointed out in the letter from the Competition and Energy Commissioners dated 15 September 2009, the technical arrangements envisaged for this regulated access will be decisive in several respects. Consequently, it is appropriate to provide that the measure laying down the calculation method to establish the price of regulated access will be submitted to the Commission in draft form with a view to its prior approval. In this context, the Commission will check in particular that the method in question is objective, is based on generally accepted and established accounting principles and leads to prices being set which allow the development of effective competition in the market.

- (167) The Commission considers that the reform brought about by Law No 2010-1488 will have a favourable impact on the European internal market, in that it promotes the entry of new competitors and the maintenance of those which operate within it. The regulated access to nuclear power up to the sizeable ceiling of 100 TWh should contribute, in parallel to the gradual linking up of the markets within the European Union and the development of interconnections, to the development of competition leading to pressure on prices in France and in the other Member States.
- (168) In short, the advantages for the electricity supply market, of which the successful liberalisation is a priority for the internal market of the Union, counterbalance the admittedly negative effects on competition and trade between Member States, but which are nevertheless limited in view of the limited selectivity of the measure identified in recitals 101 to 106 and 139 to 140. As a result, the State aid present in the standard and return tariffs is not detrimental to trade to an extent contrary to the common interest of the Union and therefore complies with the criterion provided for in Article 107(3)(c) of the TFEU.

## IX. CONCLUSIONS

The Commission concludes that France unlawfully implemented the aid at issue in breach of Article 108(3) of the TFEU. However, in view of the fact that this aid is of a transitory nature linked to the liberalisation of the electricity market in France and that it is accompanied by commitments to an in-depth reform of the conditions of competition in the French

electricity supply market, the Commission considers that it has not and does not harm trade to an extent contrary to the common interest within the meaning of Article 107(3)(c) of the TFEU, on condition of compliance with the conditions set out in Articles 1 to 4,

HAS ADOPTED THIS DECISION:

### *Article 1*

The aid measure implemented by France by means of regulated tariffs for the sale of electricity ('green' and 'yellow' tariffs) and regulated transitional market adjustment tariffs for large and medium-sized consumers is compatible with the internal market, subject to the conditions set out in Article 2.

### *Article 2*

France shall introduce a mechanism of regulated access to nuclear power produced by the existing power stations, consisting of requiring the enterprise Electricité de France, for a period extending until 31 December 2025, to sell to its competitors on the electricity retail market, a portion of the nuclear power it generates up to a ceiling of 100 TWh, at a regulated price. The price for regulated access to existing nuclear power shall be re-examined each year and shall reflect the economic conditions governing electricity generation for the duration of the mechanism. The price level of regulated access to existing nuclear power may not exceed EUR 42 per MWh and shall not be adjusted until a measure laying down the calculation method to establish it has entered into force. This measure shall be submitted to the Commission at the draft stage, with a view to its prior approval.

France shall end any State aid resulting from the application of the regulated transitional market adjustment tariffs for large and medium-sized consumers which might remain and shall refrain from introducing any equivalent mechanism.

The decisions taken by France after summer 2012 concerning the regulated tariffs for the sale of electricity shall allow the gradual reduction, in relation to 2012 and then each year in relation to the previous year, of the difference between the sum of the costs and the regulated tariff.

France shall end any State aid resulting from the application of the regulated tariffs for the sale of electricity no later than 31 December 2015 for large and medium-sized consumers and shall refrain from introducing any equivalent mechanism.

### *Article 3*

France shall inform the Commission, within two months of the date of notification of this Decision, of the measures that it has already taken or that it proposes to take to comply with it.

*Article 4*

This Decision is addressed to the French Republic.

Done at Brussels, 12 June 2012.

*For the Commission*  
Joaquín ALMUNIA  
*Vice-President*

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