2 May 2016: Gas Markets/Market Offers

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The Autorité de la concurrence issues several urgent interim measures on Engie so that the price of some of its market offers to business customers reflects its costs.

> *Version française*

In brief

Last October, Direct Enrgie made a referral to the *Autorité de la concurrence*. In particular it reported that Engie's pricing practices on its market offers were liable, in its opinion, to be anticompetitive. It also requested the order of interim measures.

In a decision issued today, the *Autorité de la concurrence* found that, given the information in the file known to date, Engie had fixed the prices of its individual market offers, namely those that are non-catalogued and reserved for business customers, without taking the real costs into account, at the risk of establishing predatory or exclusionary pricing. Consequently and before reaching its decisions on the merits of the case, the Autorité has imposed various urgent measures on Engie so that the prices of these offers are a better reflection of the reality of its costs.

The gas supply sector

For a long time, Engie (ex-GDF Suez) supplied gas as the incumbent operator in a monopoly situation. Since the market was opened up to competition in the year 2000 and in particular since 2007, a dual distribution system has been established by law:

- Engie has continued as a monopoly in the supply of Regulated Tariffs on Gas (TRV - Tarifs réglementés de gaz). Consumers remain attached to these tariffs, whose prices are established on the basis of costs audited by the French Energy Regulation Commission (CRE - Commission de Régulation de l'énergie). These prices take into account gas supply costs, commercial costs and a reasonable margin. They are now only available to small consumers, both residential (individuals) and non-residential (small professional customers).
- In competition with alternative suppliers, Engie also supplies market offers for which it is free to establish the price.

Taking all offers together, Engie is currently likely always to be in the dominant position on the residential and non-residential gas distribution markets.

Direct Energie's complaint

Direct Energie referred several complaints to the *Autorité de la concurrence*, in reference respectively to Engie's commercial practices in relation to customers still on TRV tariffs, contracts offered to buildings under shared ownership and in particular, Engie's pricing practices.

In particular, Direct Energie considers that Engie's pricing strategy allows the incumbent operator to sell market offers aimed at residential and non-residential customers at a rate that is lower than its costs, thus implementing an eviction strategy that is liable to eliminate alternative suppliers from the market, as they are unable to offer a rival strategy.
The Autorité has decided to conduct an investigation into the merits of these three practices and, while a decision on the merits is pending, to impose urgent interim measures against one of the pricing practices denounced, in relation to business customers.

Competition regulation in the gas sector

According to case law, an incumbent operator that succeeds a public service must ensure, when the market opens to competition, that it does not pre-empt this market at the expense of new entrants who are its competitors, in particular through the abuse of the inherited advantages of its former monopoly. If, as is

the case with Engie and the regulated tariffs, it continues to distribute an offer inherited from the public service which consumers view with a high level of confidence, it must not use the file of these customers inherited from the public service in order to benefit its own market offers[1], nor to profit from the higher tariffs that the customers are prepared to pay for a regulated tariff offer in order to subsidise its own market offers that are subject to competition. This is why it must use separate accounts for these two types of offers, and the regulated tariffs are regularly audited by the CRE in order to avoid any cross-subsidisation between the two.

Market offers whose prices are below the costs borne by Engie

Despite this regulation, it would seem that it may in some cases be possible to classify Engie's offers as predatory or exclusionary pricing.

- *Offers to individuals*

While market offers aimed at individual consumers do cover their costs, according to analysis by the CRE, it would seem that part of their commercial costs are covered by the tariffs paid by customers on regulated tariffs. It is possible, therefore, that if commercial costs were correctly assigned to the two offers, the market offers would not cover their total costs.
Investigation into the merits must establish whether this is anticompetitive behaviour.

- *Offers to businesses*

The data on the file indicates that Engie changed its pricing strategy in 2014. Engie has acknowledged the fact that the total cost of its individual, "tailor-made" (i.e. non-catalogued) offers had not been covered since mid-2014.

According to the information at the *Autorité*'s disposal, the prices offered by Engie for all its activity related to the provision of individual offers to non-residential customers is liable not to allow it to be profitable, even in the short term, which would mean that Engie could lose money over a large part of the offers that it sells under these conditions. Indeed, Engie does not include the coverage of certain costs in its prices, for example commercial costs and costs linked to energy certificates.

Serious and immediate anticompetitive effect on the sector

Alternative suppliers currently exert limited competitive pressure and their market shares have stalled.

The practices implemented, with regard to individual offers in particular, deprives alternative operators of the development opportunity afforded by these market offers. The risk of exclusion to which this might lead could lead to impoverishment of the competitive environment, which in the future would have an effect on all companies' energy supply prices.

The measures pronounced

Consequently, while its decision on the merits of the case is pending, the Autorité has ordered Engie to set the prices of these individual market offers in such a way as to take into account all the costs that it must bear in the short-term for the sale of these offers, including commercial costs and costs linked to energy certificates.

[1] In its Decision 14-MC-02 of 9 September 2014, the Autorité de la concurrence ordered GDF Suez to grant its competitors access to some of the data in its historic file so they could compete with the incumbent operator on an equal footing (decision substantially upheld by the Appeal Court of Paris).

> For further details, see the full text of decision 16-MC-01 of 2 May 2016 concerning the exam of Direct Energie's demand of interim measures

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> See decision of the cour d'appel de Paris (28th July 2016)

> This judgement was appealed before the Court of cassation (Supreme Court of Appeal)