22 March 2017: Energy sector

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The *Autorité de la concurrence* fines ENGIE 100 million euros for abusing its dominant position by using in particular its historical data file to convert its customers on regulated gas tariffs to market-based contracts for gas and electricity.

Furthermore, in another case regarding ENGIE pricing practices for market-based gas contracts, it is submitting to public consultation the commitments proposed by ENGIE to resolve the problems identified by the Autorité.

In Brief

Following a complaint by Direct Énergie and the consumer association UFC-QUE CHOISIR, the *Autorité de la concurrence* is today issuing a decision to fine ENGIE for having abused its dominant position in the gas markets in order to induce its customers to switch to its market-based gas and electricity contracts.

In particular, ENGIE used its file of customers eligible for regulated tariffs on gas (*Tarifs réglementés de vente du gaz* - TRV), which it holds in its capacity as the incumbent operator, as well as its dedicated TRV business infrastructure to sell its market-price gas and electricity supply contracts to private individuals and small business customers. ENGIE also used a misleading selling point to consumers, according to which it guaranteed a better security of gas supply than its competitors in order to incite customers to choose its contracts.

ENGIE did not contest the facts, but wished to make a deal with the *Autorité*, which set the sum of the fine at 100,000,000 euros.

It should be remembered that the decision on the merits issued today was preceded, on 9 September 2014, by an interim decision (see press release), substantially upheld by the Paris Court of Appeal, under the terms of which ENGIE was required to share part of its client database with its competitors so that they would be able to compete on an equal footing with the incumbent operator in markets open to competition.

The responsibilities of former monopoly holders in competitive markets

The *Autorité* drew attention, in this case, on the principles applicable in the event of diversification of monopolies or incumbent former monopoly holders in the relevant markets in competitive sectors. It is in particular lawful, for a company in a dominant market position as a result of a legal monopoly, to enter one or more markets in competitive sectors. However, this in on condition that the company concerned does not abuse its dominant position for the purpose of restricting or attempting to restrict access to the market by its competitors using means other

than competition on merits.

Where practices concern not only a diversification, but a continuation of business by an operator in a dominant position on a market as a result of a former legal monopoly, in a market opened up to competition, the operator concerned must be careful to avoid any abusive use of resources that cannot be employed by newcomers entering the market opened to competition at a reasonable cost and within acceptable periods of time, given the particular responsibility of the original operator in this market.

ENGIE used resources inherited from its former status as the incumbent supplier to sell market-based contracts

When the gas and electricity retail markets were opened to competition, ENGIE used the resources that it held as a result of its former state monopoly gas supplier selling at the regulated selling price (TRV) to market its market-based gas and electricity contracts to consumers.

- Use of TRV customer historical data file

ENGIE used the information from its TRV subscriber database, which gathered almost all French gas customers (11 million in 2007), to facilitate selling of its market-based contracts. Use of the data began as soon as the gas market was opened to competition in 2004 for non-residential customers (small businesses) and 2007 for residential customers (individuals)

- Use of the TRV business structure

These market-based gas and electricity contracts were marketed using the same business infrastructure and resources developed for its TRV gas supply activity. It thus profited from contacts with TRV customers in order to offer them market-based contracts (cross-selling) It also tried to win back former TRV customers that had changed supplier (customer winbacks) in order to offer them its market-based contracts.

- A misleading sales pitch

At the end of 2013, the company claimed in marketing that the security of supply for its gas contracts would be superior to that offered by its competitors. However, this selling point is misleading because it in no way reflects the reality of the gas market, in which all suppliers are indeed subject to the same supply obligations. Therefore, the ENGIE customers are no more and no less affected by gas shortages in the event of a major disruption to the national gas supply. This argument is likely to have had a potential effect on the market by dissuading some consumers from leaving ENGIE for a different gas supplier.

Practices implemented in the special context of a market opening up to competition

These various practices, which are cumulative, based on use by ENGIE of its advantages resulting from its activity as a public utility supplying gas at the regulated selling price (TRV) and in some cases, impossible to copy under reasonable cost and time, have resulted in confusion between its activity as a public utility and its competitive activity selling gas and electricity supply contracts at market price.

These practices took place at a time when the market was characterised, on one hand, by a very low level of consumer knowledge (almost 1 in 2 people did not know that they could change gas supplier[1]) and, on the other hand, by the advantageous reputation and good image of ENGIE (a large majority of small non-residential consumers are unable to spontaneously name a competitor[2]).

Amongst other things the practices concerned were implemented when the gas market was in the process of opening up to competition, i.e. at a sensitive period during which an incumbent operator had the advantage of a significant market power whilst new market entrants were in a phase of development.

Nevertheless, in this context, ENGIE may not have been immediately aware of its obligations under the specific conditions of its situation. Uncertainty regarding this matter may, under the circumstances of the case, be considered as a factor mitigating the severity of some of the practices identified.

Consequently, given the information and the settlement procedure requested by ENGIE, which is not contesting the facts, the Autorité, has imposed a fine of 100,000,000 euros.

Launch of a market test concerning the case of ENGIE's pricing practices for its market-based contracts

Furthermore, the commitments proposed by ENGIE are published today on the *Autorité* website. The *Autorité* aims to respond to the competition concerns identified during examination of another case, concerning, this time, practices carried out by ENGIE regarding prices of its market-based contracts (a case which had led the *Autorité* to call for urgent interim measures on 2 May 2016).

In its decision for urgent interim measures of 2 May 2016, the *Autorité de la concurrence* considered, given the information to date, that ENGIE had set the prices of its customised market-based contracts (i.e. non-catalogued offers), reserved for businesses, without taking account of its real costs, at risk of putting into place predatory pricing. Consequently, pending its decision on the merits, the Autorité urgently required ENERGIE to comply with various measures in order to ensure that the prices of these contracts better reflect the reality of its costs.

In the context of examination of the case on its merits, ENGIE requested the commitment procedure and informed the *Autorité* of its proposals aiming to resolve the identified competition problems. The proposed commitments submitted by the *Autorité* for consultation today, concern the level of ENGIE's tariffs for its market-based contracts for residential customers and for non-residential customers, on the one hand, and the time period and conditions for exit from metered service and gas supply contracts concluded with co-ownerships, on the other hand.

At the end of the market test, the board of the *Autorité* will meet to hear the parties and to examine the comments made by third parties. Where applicable, it will be able to ask for changes or additions to be made to the commitments. After having made them mandatory, it will be able to close the proceedings. In the event that the commitments remain unsatisfactory, even when amended, the *Autorité* will resume the standard litigation procedure.

Interested parties have until 24 April 2017 to submit their comments on the proposed commitments. All of the practical information is specified in the market test available here.

› **Link to market test**

[1] *According to the 2016 Barometer of the national energy ombudsman*
[2] *According to the 2016 Barometer of the national energy ombudsman*

> For more details about this case, consult the full text of decision 17-D-06 of 21 March 2017 regarding practices implemented in the sector of gas, electricity and energy services available on the *Autorité de la concurrence* website (www.autoritedelaconcurrence.fr)

Press contact:
Chloé Duretête /Tel.: (+33) 01 55 04 01 20/ Mail



> See decision of the cour d'appel de Paris (6th July 2017)

> See décision of the cour d'appel de Paris (25th January 2018)