25 April 2007: Market for electricity supply / KalibraXE case

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The Conseil de la concurrence orders EDF to change its general business conditions within two months to inform customers to know the conditions in case of early contract termination

>Version française

Following a complaint filed by KalibraXE on January 22nd 2007 concerning practices implemented by EDF (the French historic electricity supplier) on the market for electricity supply, the Conseil de la concurrence orders interim measures, before reaching its decision on the merits.

KalibraXE's complaint : exclusivity clauses in EDF's supply contracts

KalibraXE's business consists in supplying part of eligible customers' demand in electricity. The company does not have the aim nor the capacity to compete directly with EDF or its alternative suppliers for the bulk of eligible customers' demand. Its offer consists in selling electricity units to customers, who have exercised their eligibility in exploiting price opportunities on the free market.

KalibraXE considers that the inclusion of exclusivity clauses -or clauses leading to de facto exclusivity- in certain EDF contracts in exchange for a commitment on a fixed price over the duration of the contract (generally 2 or 3 years) results in preventing new suppliers from entering the market with complementary offers.

The Conseil de la concurrence will examine the complaint on the merits…

The Conseil de la concurrence considers that in order to ensure that exclusivity clauses do not create artificial barriers to entry on the market, four elements have to be taken into account: the scope of exclusivity, its duration, the existence of potential technical justifications and the economic quid pro quo obtained by the customer.
The Conseil considered that, in the present case, an examination of the merits of the case is warranted to assess the impact on competition of the contracts concerned.

…and is particularly interested in the conditions for early termination of EDF contracts

The Conseil stressed that the analysis of exclusivity clauses' potential anticompetitive effects must take into account the possibility for early termination of contracts by customers and the applicable conditions for such early termination. Regularly challenging acquired business positions favours competition, all the more in the context of a business only recently open to competition and dominated by a company with significant market power.

The Conseil observed that conditions for early termination are either nonexistent or defined in incomplete or inaccurate terms, in particular as concerns the amount for early termination fees. In addition, EDF's general business conditions, as mentioned in the file, do not deal with the conditions for early termination, except in the case of default.

This lack of transparency concerning conditions for early termination and the ambiguity of certain clauses may prevent the effective possibility for the customer to take advantage of potential market opportunities or may deter customers from switching suppliers.

This conclusion must be considered in light of the July 1st 2007 deadline, which will mark the opening of the whole electricity market to competition. Industrial customers, which have not exercised their eligibility to date may wish to take advantage of the development of supply offers, due to the complete

liberalization of the market. The situation is urgent since the date is approaching, when all electricity consumers will have access to the free market.

Before reaching a decision on the merits, the Conseil orders EDF to change its contractual clauses for early termination

In order to remedy the serious and direct damage to the sector's economy, the Conseil ordered EDF to define the rules applicable in case of early termination of contract at will and include these rules in its general business conditions, at least as regards electricity supply contracts with customers who have exercised their eligibility. These rules - to be introduced in the general business conditions within two months - will notably provide for the calculation principles for the early termination fee, which must be proportionate and not excessive.

> Decision 07-MC-01 of 25 April 2007 relative to a request for interim measures from the company KalibraXE

> See decision of the Paris court of appeal (26th June 2007)