



II-5.11: The french Government's price freeze on natural gas prices has been suspended by the Council of state

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MAIN INFORMATION

On November 28, 2011, the French Council of State issued a summary judgment suspending the Government price freeze on household natural gas prices because the 'price scissors' effect it had was harming competition, and because no superior legal norm justified the freeze.

CONTEXT AND SUMMARY

Click [here](#) to read the summary judgment (in French).

The French Government had planned to continue its price freeze on household natural gas prices, but asked the *Commission de Régulation de l'Énergie* (CRE — French electricity and natural gas regulator) to issue a non-binding opinion on the subject. On September 29, 2011, the regulator issued an unfavorable opinion regarding the continued freeze[1]. Since the opinion was unbinding on the Government, it adopted a decision[2] on September 29, 2011 in which these prices remained unchanged.

The *Association nationale des opérateurs détaillants en énergie* (French Energy wholesalers' association) requested a summary judgment from the Council of State. On November 28, 2011, the Council of State suspended the Government's price freeze and ordered the appropriate ministries to set new prices in conformity with the law within a month.

The Court considered that the French Act of Parliament of January 3, 2003 relating to natural gas and electricity markets and the provision of public service of these commodities[3] had provided for free competition on natural gas markets in accordance with the goals of European Union legislation. On this market, however, coexist consumers that have chosen alternative suppliers, and others that have chosen to remain with the historical operator, GDF Suez, and benefit from government-regulated tariffs.

The Court referred to this 2003 Act, which had inserted a provision in the Code of Energy according to which tariffs must cover all costs linked to the supply of natural gas in function of the intrinsic characteristics of said supply, but not including subsidies in favor of clients.

Continuing its analysis of existing legislation, the Court pointed out that the Decree of December 18, 2009 had provided that such tariffs must cover "the cost of purchasing natural gas and costs unlinked to said purchase," which "allows for the determination of an average cost of purchase for natural gas, according to which are set the regulated prices of sale." [4]

The Court observed that the regulated tariffs applicable to GDF Suez by the contested decision were identical to the previous decision, and were to apply to households and "small business clients," whereas tariffs were to increase 5% for other clients.

The Council of State, acting as a summary judge, can suspend the application of an administrative act in case of emergency, which it found to be the case here.

It then made reference to the opinion rendered by the CRE on September 29, 2011 in order to conclude that the tariffs set by government decision were grossly inferior to what was needed in order to cover GDF Suez's cost of purchase of natural gas. Because of the aforementioned Decree's requirement that tariffs cover costs, there is a serious doubt as to the legality of this decision.

Furthermore, alternative suppliers came into existence in order to compete with the historic supplier. But, in order to be able to do this, they have to be able to charge less than it does. But, because of the state of the wholesale market, which is unfavorable to intermediary purchasers, and the tariffs that GDF Suez is forced to charge, a permanent price freeze on natural gas prices creates 'price scissors' that force competitors to charge rates higher than their costs, therefore compromising their presence on the market.

This is why the decision was suspended, not only in that it froze prices, but also regarding the amount of the increase in tariffs it provided for in other cases.

[1] Frison-Roche, Marie-Anne, The French energy. Regulator published its first unfavorable opinion regarding the government's proposed natural gas tariffs for residential customers, *The Journal of Regulation*, II-5.9.

[2] Arrêté du 29 septembre 2011 *relatif aux tarifs réglementés de vente de gaz naturel fourni à partir des réseaux publics de distribution de GDF Suez*

[3] Loi du 3 janvier 2003 *relative aux marchés du gaz et de l'électricité et au service public de l'énergie*

[4] « *les coûts d'approvisionnement en gaz naturels et des coûts hors approvisionnement* »,...« *permet de déterminer un coût moyen de fourniture du gaz naturel, à partir duquel sont fixés les tarifs réglementés de vente* ».

Links with other documents in the same sector

BRIEF COMMENTARY

The Government therefore has to return to the drawing board. It was hardly to be doubted that the price freeze would not pass judicial review. Indeed, the firm position the energy regulator took in its September 29, 2011 opinion, and the care that opinion took to refer to the Council of State's jurisprudence, led one to think that the Council of State could but look harshly upon a continued price freeze. But, the overturn of the price freeze was obtained using the perilous tool of suspension of summary judgement, rather than through classic ultra vires proceedings. And though suspension is not the same thing as abrogation, the price freeze has been permanently quashed de facto. Furthermore, the price freeze was no longer tenable with regards to the free market principles applied to the natural gas market and the coexistence of free prices and regulated tariffs. However, it is surprising that even the 5% increase in price to large businesses was overturned on the grounds that it was insufficient. Indeed, the regulator and the Council of State had said that a 10% increase was necessary to allow the public service provider to properly fulfill its mission, but by increasing the price by half of that, the Government seemed to be attempting a compromise. But that is not enough. The Council of State demands that the government include its social concerns in its costs if it wants to avail itself of them (which it did in the summary judgment), and if it contests the reality of the costs used by the Court, it must show proof of the pertinent costs. This is evidence that cost-based pricing—as exemplified by Ramsey-Boiteux pricing—has found an echo in the Courts, who use it to protect operators against the Government's overuse of the argument that it defends a superior interest in its arbitrary price fixing. The Courts have the last word. Household natural gas prices will increase on January 1, 2012.