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# THE ENERGY REGULATION AND MARKETS REVIEW

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EDITOR  
DAVID L SCHWARTZ

LAW BUSINESS RESEARCH

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THE ENERGY  
REGULATION  
AND MARKETS  
REVIEW

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Editor  
DAVID L SCHWARTZ

LAW BUSINESS RESEARCH LTD

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# EDITOR'S PREFACE

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Safe and reliable delivery of electricity and natural gas has been the hallmark of energy policy and regulation in the industrialised world for the past 75 years. More recently, regulators, policymakers and the industry began to focus their attention on ways to improve economic efficiency, increase productivity and reduce costs through a seemingly endless series of reforms.

In some countries, utilities were encouraged to enhance transmission and interconnection facilities with neighbouring systems in order to pool energy resources. More recently, utilities have been encouraged to participate in regional organisations to buy and sell power, and to administer transmission, dispatch and scheduling of a variety of energy products. Certain countries have encouraged utility efficiency through a variety of performance-based incentives.

Policymakers have tried to reduce the barriers to entry by requiring non-discriminatory treatment among transmission users, and prohibiting affiliate abuse. Utilities were encouraged to unbundle certain utility services; in some cases, regulators required the divestiture of generation or transmission facilities. Utilities have even been encouraged to provide retail wheeling services to facilitate competition for delivery service customers.

Many markets have developed competitive bid-based electricity auctions to set energy and capacity prices, which often take into consideration the cost of transmission congestion. These markets tend to be administered by independent or governmental entities that do not have a market position bias. Clearing prices set in these markets are intended to send price signals to maximise short-term efficiency (scheduling, dispatching and selling energy), as well as long-term efficiency (building new or retiring old generation and transmission facilities).

In certain countries, lawmakers and policymakers have encouraged developers to build and finance new renewable resources and to develop more effective means of conserving energy, through a variety of 'carrots' and 'sticks'. These measures have included subsidies such as feed-in tariffs and renewable energy credits, as well as utility

requirements through renewable portfolio standards. In certain competitive markets, conserving electricity has been converted into a demand-side product ('negawatts') with near or equal value to supply-side generation (megawatts). New 'smartgrid' technologies have been created to increase the efficiency of transmission, generation, distribution and individual consumers' energy use.

Now, however, the myriad of efficiency mechanisms faces new and unprecedented challenges. Transmission and distribution systems are ageing and desperately need upgrading. Severe new environmental requirements are leading to mass retirements of baseload coal-generation resources. Fuel prices are volatile, adding long-term uncertainty to energy prices. Spikes in the price of raw materials are making the development of new infrastructure all the more expensive. Cyber-security threats are exposing the vulnerabilities of our energy networks. And the global economy continues to threaten our ability to obtain the necessary credit to build and finance energy infrastructure.

This is the sobering backdrop for this inaugural edition of *The Energy Regulation and Markets Review*. I would like to thank all of the authors for their thoughtful consideration of these difficult challenges. As can be seen in these chapters, we have much to consider and resolve before we can achieve the kinds of energy security and efficiency that we have been pursuing.

**David L Schwartz**

Latham & Watkins LLP

Washington, DC

June 2012

## Chapter 7

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# FRANCE

*Fabrice Fages and Myria Saarinen<sup>1</sup>*

### I OVERVIEW

In France, the energy market has undergone a progressive liberalisation as a result of the European plan to establish a unique energy market that would end national monopolies. This has naturally led to an important legislative and regulatory change that was codified by an order dated 9 May 2011, which created the legislative part of the Energy Code.<sup>2</sup> This Code sets out provisions relating to electricity, gas, renewable energy, hydropower, oil and both heating and cooling networks.

This chapter will focus mainly on electricity and gas markets since they have been the main energy markets affected by such changes. It should, however, be underlined that the other sources of energy are also subject to specific regulation.

As a matter of history, after World War II, the French authorities decided, in order to rebuild the infrastructures and the network, to grant a state monopoly to Electricité de France ('EDF') and Gaz de France ('GDF', today 'GDF Suez') with regards respectively to the production, transportation and distribution of electricity and gas.<sup>3</sup> This situation remained substantially unchanged for half a century until France had to implement into its national law two directives dated 1996 and 1998 adopted by the European Commission in order to promote an effective and efficient internal energy market, open to competition. These directives were progressively transposed into French law as of 2000<sup>4</sup>

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1 Fabrice Fages is a counsel and Myria Saarinen is a partner at Latham & Watkins AARPI. This chapter was written with the contribution of Julie Ladousse, an associate at the firm.

2 Order No. 2011-504 of 9 May 2011.

3 Law No. 46-628 of 8 April 1946 concerning the nationalisation of electricity and gas, repealed by the Law No. 2004-803 of 9 August 2004.

4 Law No. 2000-108 of 10 February 2000 concerning the modernisation and the development of the electricity public service, transposing Directive 96/92/EC of 19 December 1996 concerning common rules for the internal market in electricity; Law No. 2003-8 of 3 January

and initiated the beginning of the liberalisation, although initially only large industrial consumers could benefit from this system.

Further opening of the energy market occurred several years later with the transposition into French law of new directives dated 2003, which aimed to make such opening available to all professional consumers by 1 July 2004, and to all consumers, including residential or customers, by 1 July 2007.<sup>5</sup>

Although significant progress had been made, the European Commission adopted the Third Energy Package to further liberalise the energy market, which included two new directives<sup>6</sup> replacing the former electricity and gas directives. These directives were transposed into French law on 7 December 2010 by a new law commonly referred to as 'Law NOME'.<sup>7</sup> In addition, Law NOME led to the removal of obstacles of the development of competition on the French electricity market. Greater price liberalisation for industrial and residential customers has been achieved, by requiring EDF to sell a substantial part of its existing nuclear facilities to alternative suppliers at a regulated price (ARENH), from January 2011 to 2025, so as to allow alternative suppliers to fairly compete with the historical supplier.

## II REGULATION

### i The regulators

Compliance with the new energy market regulations is mainly controlled by the Commission of Regulation of Energy ('the CRE'), the sectoral regulator, which was created by the Law dated 10 February 2000.<sup>8</sup> Its overall mission is to 'contribute to

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2003 concerning the electricity and gas markets and the public service of energy, transposing Directive 98/30/EC of 22 June 1998 concerning common rules for the internal market in natural gas.

5 Law No. 2004-803 of 9 August 2004 concerning the electricity and gas public service and the electricity and gas companies, transposing (1) Directive 2003/54/EC of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, and (2) Directive 2003/55/EC of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC. Law No. 2005-781 of 13 July 2005 setting out the guidelines for energy policy regarding professionals and Law No. 2006-1537 of 7 December 2006 for individuals completed the transposition of these directives.

6 Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC; Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

7 Law No. 2010-1488 of 7 December 2010 establishing a new organisation of the electricity market.

8 CRE is governed by three founding acts: Law No. 2000-108 of 10 February 2000, concerning the modernisation and the development of the electricity public service; Law No. 2003-8 of 3 January 2003 concerning the gas and electricity market and the public service of energy; Law No. 2010-1488 of 7 December 2010 establishing a new organisation of the electricity market.

the proper operation of the electricity and natural gas markets, to the benefit of final customers’.

The CRE is principally in charge of:

- a* powers of decision, approval or authorisation (system operators, contributions to the public electricity sector, etc.);
- b* dispute settlement and sanctions relative to access to the electricity and gas networks;
- c* powers of proposal (tariffs for the use of public electricity grids, contributions to public electricity services, etc.);
- d* information and investigative powers with stakeholders;
- e* advisory powers (tariffs, regulated access to incumbent nuclear electricity, etc.); and
- f* additional powers (processing of tenders for electricity generation, etc.).

The CoRD*S* committee, which is an independent body of the CRE executes CRE competencies with regard to sanctions and settles disputes related to the access and use of public electricity grids and natural gas networks.

Further, an energy ombudsman has been put in place whose role is to provide consumers with all necessary information concerning their rights, current legislation and the means of dispute settlement available to them in the event of a dispute.

In addition, the French Competition Authority (‘the FCA’) has the power to prevent and sanction anti-competitive practices in any economic sector, including electricity and gas. It must inform the CRE when seised of any matter that would fall under the CRE’s jurisdiction. The FCA must also notify the CRE of any abuse of a dominant position or any anti-competitive practice in the gas or electricity sector.<sup>9</sup>

## ii Regulated activities

The energy market is composed of four main areas of activity: production (generation), transmission, distribution and supply (commercialisation). Under the previous regime, which was applicable until 2000, these four activities were carried out by EDF and GDF, which self-regulated the monopoly.

There have now been greater strides towards liberalisation as production and supply are open to competition. Transmission and distribution are still, however, public service activities supervised by the CRE (see Section II, *infra*). In the regard, in order to guarantee this public service mandate, a legal and financial separation between such activities has taken place:<sup>10</sup> transmission is performed by GRT (Gas) and RTE

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The legal framework applicable to the CRE is defined in Articles L131-1 to L135-16 of the French Energy Code.

9 Article L134-16 of the French Energy Code.

10 Law No. 2004-803 of 9 August 2004 concerning the electricity and gas public service. Law No. 2010-1488 of 7 December 2010 on the new organisation of the electricity market.

(Electricity), and distribution is performed by GRDF (Gas) and ERDF (Electricity) or local distribution companies.<sup>11</sup>

More generally, some activities require an administrative authorisation such as the exploitation of electricity production facilities. This authorisation is delivered by the Minister of Energy according to specific considerations such as security, energy efficiency, technical and economic capacities of the applicant.<sup>12</sup> Similarly, gas exploration also requires an administrative authorisation or a concession, which is granted further to a public enquiry and a tender procedure.<sup>13</sup>

### iii Ownership and market access restrictions

Although the French Energy Code does not provide for any restriction or requirement in relation to the acquisition of assets in the energy sector by foreign companies or individuals, it clearly states that the French state must hold at least 70 per cent of the capital and voting rights of EDF and 30 per cent of GDF Suez<sup>14</sup> (in order to protect the French national interest, the state may benefit from specific shares within the capital of GDF Suez<sup>15</sup>).

### iv Transfer of control and assignments

Any merger or any change in control over businesses in the energy sector, or any acquisition of utility assets, must be notified and supervised by the FCA if the following three cumulative conditions are met:<sup>16</sup>

- a* worldwide aggregate turnover of all the parties to the concentration exceeds €150 million;
- b* turnover in France of each or at least two parties concerned exceeds €50 million; and
- c* the transaction does not meet the EC Merger Regulation thresholds.

The examination process by the FCA is twofold. In stage I (which takes up to 40 working days), the FCA has 25 working days to examine the transaction starting from the date when a complete notification is received. When remedies are proposed to the FCA, this period is extended by up to 15 working days. At the end of this period, the FCA can clear the transaction, with or without remedies or proceed to an in-depth investigation. In the absence of any decision, the transaction is tacitly cleared.

Stage II takes between 65 and 85 working days. If serious doubts remain as to the competitive impact of the transaction, the FCA proceeds with an in-depth investigation. During this stage, if the transaction relates to a regulated area, the FCA may request a

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11 Local distribution companies are defined by Article L111-54 of the French Energy Code.

12 Article L311-5 of the French Energy Code.

13 Articles L131-1, L132-3 and L132-4 of the French Mining Code.

14 Articles L111-67 and L111-68 of the French Energy Code.

15 Article L111-69 of the French Energy Code and Article 10 of the Law No. 86-912 dated 6 August 1986.

16 Articles L430-1 and L430-2 of the French Commercial Code.

non-binding opinion from the relevant regulator (e.g., the CRE). At the end of stage II, the FCA can either clear the transaction with or without remedies or prohibit the transaction.

The FCA's authorisations for acquisitions may be subject to conditions.<sup>17</sup>

### **III TRANSMISSION/TRANSPORTATION AND DISTRIBUTION SERVICES**

#### **i Vertical integration and unbundling**

Vertical integration is the process in which different aspects of the market are controlled by a common company or entity. Prior to the deregulation of the energy industry, French energy companies were largely vertically integrated, which created potential conflicts of interests and monopoly situations.

The European Commission issued Directives 2003/54/EC and 2003/55/EC in order to principally ensure efficient and non-discriminatory network access, ensure free choice of suppliers by consumers, and encourage investment. This legislation was transposed into the French system by a law dated 9 August 2004, which provided for a legal unbundling of regulated activities (distribution and transmission) from non-regulated activities (production and supply). After an inquiry launched in 2005 by the European Commission, however, serious shortcomings in the electricity and gas markets were identified, including an inadequate current level of unbundling between network and supply interests deemed to have negative effects on the market and investment.<sup>18</sup> Consequently, under Directives 2009/72/EC and 2009/73/EC, priority was given to achieve effective unbundling of network and supply activities.

As explained above, these directives were transposed into French law in order for the transmission and distribution system operators to be legally and fully unbundled companies. Accordingly, transmission and distribution system operators must be equipped with all the necessary human, technical, physical and financial resources to fulfil their obligations under French law and, in particular, assets that are necessary for their activity must be owned by them.<sup>19</sup>

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17 See for example the decision of the FCA dated 7 February 2012: the FCA made its authorization of the acquisition of Enerest by Electricité de Strasbourg conditional on a number of commitments designed to resolve competitions concerns, such as the commitment not to make offers for two energies that include at least one component at a regulated tariff. This commitment, the effectiveness of which is to be guaranteed by separating the sales teams responsible for electricity and gas at Electricité de Strasbourg, notably eliminates any risk of the company using its business of supplying energy a regulated tariffs as a tactic to win customers on the open market.

18 Final report from the Commission relating to the inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into European gas and electricity sectors, dated 10 January 2007.

19 Articles L111-19 (transmission) and L111-59 (distribution) of the French Energy Code.

**ii Transmission/transportation and distribution access**

Non-discriminatory and fair access to transmission and distribution networks for gas and electricity are at the core of the free market approach.<sup>20</sup> Any discrimination, prevention of new participants from entering the market, and fair competition in favour of the consumer, is subject to sanctions issued by the CoRDIS committee.<sup>21</sup>

Among the measures guaranteeing such non-discriminatory and fair access, it should be noted that any refusal to enter into an agreement must be justified and notified to the applicant, as well as to the CRE, specifying that any refusal is justified by objective, transparent and non-discriminatory reasons.<sup>22</sup>

Furthermore, any transport or distribution system operator serving more than 100,000 clients must draw up a code of conduct in order to ensure compliance with the non-discrimination principle.<sup>23</sup>

Finally, the CRE must publish an annual report concerning compliance with the code of conduct and a summary of its assessment of the independence of the transport or distribution system operators.<sup>24</sup>

**iii Rates**

Pursuant to Articles L341-2 and L452-1 of the Energy Code, access tariffs to networks aim at guaranteeing transparent and non-discriminatory access to public networks. These fees are calculated in a way that cover all costs supported by the system operators (costs arising from their public service duties, the research and development needed to increase the transmission capacity, and the grid connection).

The methodology used to establish access tariffs to the network is set up by the CRE. In addition to fixing the rates the CRE grants appropriate incentives for transmission and distribution system operators over both the short and long term in order to increase efficiency, foster market integration and security of supply and support related research activities.<sup>25</sup>

**iv Security and technology restrictions**

Security of electricity and gas supply is an essential public service obligation.<sup>26</sup> The Ministers of Energy and Economy must ensure the fulfilment of this public service mission mainly by EDF, GDF, RTE, GRT, ERDF, GRDF and local distribution companies.

In case of serious energy shortage, the government may subject energy resources to control and allocation.<sup>27</sup> In case of a serious energy market crisis, threat to the safety or security of the networks and of people, the Minister of Energy may take protective

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20 Articles L111-91 et seq. of the French Energy Code.

21 Articles L134-25 et seq. of the French Energy Code.

22 Articles L111-93 (for electricity) and L111-102 et seq.. (for gas) of the French Energy Code.

23 Article L111-61 of the French Energy Code.

24 Article L134-15 of the French Energy Code.

25 Articles L341-3 (electricity) and L452-2 (gas) of the French Energy Code.

26 Articles L121-1 (electricity) and L121-32 (gas) of the French Energy Code.

27 Article L143-1 of the French Energy Code.

measures to grant or suspend licenses for the operation of power generating facilities . In times of war or serious international tension, the government may regulate or even suspend oil import or export completely.<sup>28</sup>

## **IV ENERGY MARKETS**

### **i Development of energy markets**

The sale of energy takes place within either the wholesale market or the retail market. The wholesale market is the market in which electricity and gas are traded (bought and sold) before delivery in the network to final customers (individuals or companies), whereas the retail market concerns the final clients who may freely choose their suppliers (eligible customers).<sup>29</sup>

The participants of the wholesale market are:

- a* the producers who trade and sell their production,
- b* the suppliers who trade and supply gas or electricity before selling gas or electricity to the final client, and
- c* brokers or traders who purchase gas or electricity for resale and thus favor market liquidity.

As most of the activity in the wholesale gas market and wholesale electricity market takes place over the counter, through direct transactions or through intermediaries (brokers and trading platforms),<sup>30</sup> the opening of these markets to competition has led to the emergence of organised markets, namely trading platforms (Epex Spot France and EEX Power Derivatives France and Powernext).

### **ii Energy market rules and regulation**

Even if the supply of energy is open to competition, it is still subject to certain requirements and monitoring.

First, the sale of electricity or gas is subject to governmental approval. Indeed, suppliers willing to purchase electricity or gas to sell them to consumers need an administrative authorisation that is delivered subject to their technical, economic and financial capacities, and according to their project's compatibility with the security of supply obligation.<sup>31</sup>

Second, each transaction performed on the French market that would involve the participation of a producer, broker or energy supplier, must be monitored by the

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28 Article L143-7 of the French Energy Code.

29 Article L331-1 of the French Energy Code.

30 Commission de Régulation de l'Energie, Electricity and gas market report, fourth quarter of 2011.

31 Articles L333-1 (electricity), L443-1 and L443-2 (gas) of the French Energy Code.

CRE, regardless of the trading method (two-way trades, with or without a broker or transactions within organised markets).<sup>32</sup>

Finally, free competition is limited with respect to pricing practices since, in certain circumstances, 'regulated tariffs' may be chosen by buyers. Such 'regulated tariffs', combined with the lack of access by alternative suppliers to the existing nuclear facilities, enhanced the European Commission's unhappiness, especially with the electricity retail market and the dominant position exercised by EDF. For this purpose, Law NOME provides that 'regulated tariffs' are to disappear after 2015 for customers having contracted for more than 36kVA ('yellow' and 'green' tariffs); however, for customers having contracted for less than 36kVA ('blue' tariffs), the 'regulated tariff' will remain applicable.<sup>33</sup>

Furthermore, all operators providing electricity to final consumers may benefit from the access to historical nuclear energy at the regulated price, ARENH, only up to the 100TWh to be allocated between the suppliers. The price of the ARENH is set at €42/MWh for the coming months.

### iii Contracts for sale of energy

The legal unbundling between the production and the distribution activities imposed by the energy market creates several inconveniences for the consumer who, as a result, gets an increasing number of contractors and the responsibilities of which are diminished.

In order to prevent this, the Law dated 7 December 2006, completed by the Law NOME, created a new section in the French Consumer Code entitled 'electricity supply or natural gas contracts' (Articles L121-86 to L121-94). These provisions apply to contracts concluded by consumers and professionals for less than 36kVA (electricity) or less than 30,000 kW (gas).

According to Article L121-92 of the Consumer Code, the energy supplier 'must give the client an opportunity to sign a single contract dealing with both the supply and the distribution of electricity or natural gas'. This contract, which should at least last for one year, thus creates a tripartite relationship between the supplier, the distributor and the consumer, even though the supplier often remains the consumer's main interlocutor.

The supplier must mention several specific provisions both in the offer and the contract. Failure to do so is subject to sanctions.<sup>34</sup> The consumer can rescind the energy supply contract at any time if it plans on changing supplier. Professionals are not entitled to ask the consumer for any other costs than the ones incurred by the rescission, provided that these costs were mentioned in the offer.<sup>35</sup>

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32 Article L131-3 of the French Energy Code and [www.cre.fr/en/markets/wholesale-market/introduction](http://www.cre.fr/en/markets/wholesale-market/introduction).

33 Articles L337-9 and L337-7 of the French Energy Code.

34 Articles R121-14 to R121-21 of the French Consummation Code.

35 Articles L121-89 of the French Consummation Code.

#### iv Market developments

Market developments have taken place in different areas, and in particular on the cost of electricity with the Law NOME. Moreover, the renewal of hydraulic concessions have recently been launched.<sup>36</sup> Finally, various reports were submitted at the beginning of 2012, aimed at clarifying what should be the investments to ensure the security of supply.

### V RENEWABLE ENERGY AND CONSERVATION

#### i Development of renewable energy

In July 2007, the French government launched the Grenelle Environment Forum, a major national consultation that led to the emergence of priority targets in terms of controlling energy consumption and promoting renewable energies. This forum led to the enactment of two ‘Grenelle Laws’, respectively on 3 August 2009 (‘Grenelle I’) and 12 July 2010 (Grenelle II),<sup>37</sup> aiming at promoting environmental objectives such as, the increase of the share of renewable energy to at least 23 per cent of final energy consumption before 2020, in accordance with European Union Directive 2009/28/EC.<sup>38</sup> These laws were codified in a separate section dedicated to renewable energy in the Energy Code.<sup>39</sup>

To enhance the development of renewable energies, public authorities can use two economic instruments.<sup>40</sup> First, feed-in tariffs require the historical operator to buy energy produced from renewable sources, for a regulated tariff over a long period, which can be changed and is slightly higher than the market price. Second, calls for tender can be used to determine *ex ante* the quantity of renewable energies benefiting from the public support.

#### ii Energy efficiency and conservation

In order to achieve a 20 per cent increase in energy efficiency, in accordance with the climate and energy package,<sup>41</sup> on 22 June 2011 the European Commission presented a

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36 [www.developpement-durable.gouv.fr/Les-concessions-hydroelectriques.html](http://www.developpement-durable.gouv.fr/Les-concessions-hydroelectriques.html).

37 Law No. 2009-967 of 3 August 2009 relating to the implementation of the Grenelle Environment Forum and Law No. 2010-788 of 12 July 2010 relating to national commitment for environment.

38 Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

39 Articles L211-1 to L261-1 of the French Energy Code.

40 [www.cre.fr/operateurs/producteurs/appels-d-offres](http://www.cre.fr/operateurs/producteurs/appels-d-offres).

41 The climate and energy package was presented by the European Commission on January 2008. It suggested to implement the ‘20-20-20 targets’: (1) A reduction in EU greenhouse gas emissions of at least 20 per cent below 1990 levels, (2) 20 per cent of EU energy consumption to come from renewable resources, and (3) a 20 per cent reduction in primary energy use compared with projected levels, to be achieved by improving energy efficiency.

draft Directive that is currently being discussed at the Council of the European Union and at the European Parliament. The Directive should come into force by the end of 2012 and be transposed by Member States by the end of 2013.

In France, energy efficiency is also a priority since Grenelle I sought to achieve a rate of energy efficiency between 19.7 per cent and 21.4 per cent by 2020. Examples of measures aimed at achieving this goal include certificates of energy savings and sustainable development tax credit.

The French government claims a strong European framework in order to achieve the '20 per cent target' it will benefit France, and confirmed on 13 April 2012 its full support of the European Commission's proposed Directive.

### **iii Technological developments**

The draft European bill on energy efficiency made public on 22 June 2011 includes several provisions related to the development of smart grids, the aim of which is to reduce bill by paying what was really consumed and by understanding how to consumption patterns better. The development of smart grids is based on the idea that it improves energy efficiency and better integrates renewable energy resources in the network.

The development of smart grids has also been decided in France. Indeed, a decree dated 31 August 2010 provided that new connection points must be equipped with smart grids from 1 January 2012 and provided for a test run or pilot for such equipment.<sup>42</sup>

Based on the results of a pilot programme conducted in 2010 and 2011 by ERDF, the largest French distribution system operator, the government plans to deploy 35 million smart grids to electricity customers throughout the country before 2020.

## **VI THE YEAR IN REVIEW**

2011 and the beginning of 2012 were characterised by several developments in the energy sector.

### **i Decrees following the publication of Law NOME**

Law NOME provides that every operator providing electricity to final consumers must have regulated access to historical nuclear energy (ARENH) produced by EDF nuclear power stations. The Law has been followed by a range of decrees on calculation of the ARENH tariff or prices such as :

- a* Decree n° 2011-466 of 28 April 2011 setting out the rules for regulated access to historical nuclear energy (ARENH),
- b* Order of 28 April 2011 setting out the maximum volume of electricity to be transferred by EDF,
- c* Order of 17 May 2011 relating to the calculation of the rights of access to historical nuclear energy,
- d* Order of 17 May 2011 setting out the price of regulated access to historical nuclear energy from 1st January 2012.

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42 Articles 6 and 3 of the Decree No. 2010-1022 dated 31 August 2010.

**ii Capacity mechanism in the electricity sector**

Pursuant to Article L335-6 of the French Energy Code,<sup>43</sup> the government intends to create by decree a market for capacity trading, planned as a way of encouraging investment in extra production capacity by suppliers and saving energy during peak demand periods. The FCA, which was asked for a notice on such decree and rendered it on 12 April 2012,<sup>44</sup> raises questions about the need to set up a market for capacity trading and considers that less expensive solutions exist to control peak demand of electricity such as the increase of the regulated tariffs. Furthermore, it warns that such a market could increase the costs of alternative suppliers.

**iii The cost of gas**

On 1 October 2011, the government decided to freeze gas prices. This decision provoked complaints from GDF Suez, which that claimed this would impede fair competition. The case was brought before the French Supreme Court, which invalidated such decision.<sup>45</sup> Therefore, an increase of 4.4 per cent in the cost of gas from 1 January 2012 has been decided by an Order dated 23 December 2011.

**VII CONCLUSIONS AND OUTLOOK**

Since 1 July 2007, all customers have been able to choose their gas and electricity suppliers and the Law NOME has increased competition in the electricity market. A fully free market as such still does not, however, exist. Several safeguards are in place, such as regulated tariffs and ARENH, which are in part due to the fact that France is strongly committed to energy public service and the preponderance of the French nuclear power plants.

Moreover, market developments are a matter for debate, especially about the Law NOME in the French presidential and legislative campaign. The French energy sector is thus not immune from new substantial developments.

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43 Article L335-6 provides that a decree shall specify the conditions of application for the provisions related to security of electricity supply (L335-1 et seq.).

44 Notice No. 12-A-09 dated 12 April 2012 concerning a draft decree linked to the creation of a market for capacity trading in the electricity sector.

45 Decision 28 November 2011, No. 353554 (Conseil d'Etat).

## Appendix 1

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# ABOUT THE AUTHORS

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Fabrice Fages is a litigator with a focus on litigation and arbitration. He has also developed strong experience in regulatory and public policy, notably in regulated sectors such as the energy sector. Prior to joining Latham & Watkins, Mr Fages has worked for the French Senate and the French National Assembly on various law drafts. He is a regular speaker at professional conferences related to energy. Mr Fages is also a lecturer at the University of Paris I (Sorbonne University), École Centrale de Paris and the University of Cairo.

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