



France Moves Toward Ending All Regulated Tariffs For Natural Gas Sales

IN SHORT

The Ruling: The *Conseil d'État* (France's Administrative Supreme Court) has ruled that the public service obligation to supply natural gas at regulated tariffs in France contravened EU law. In particular, it affirmed that no objective of general economic interest could justify the French legislation on regulated tariffs for the sale of natural gas.

The Result: This judgment lays the foundations for a fully competitive retail market for the supply of natural gas in France.

Looking Ahead: Following the *Conseil d'État* judgment, the French government must set an end date for regulated tariffs for the supply of natural gas in France. Households and small businesses, which are currently supplied at regulated tariffs, will therefore need to consider and compare market offers for the supply of natural gas. In addition, it is likely that regulated tariffs for the sale of electricity in France will attract scrutiny in the coming months and possibly also be terminated.

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In July 2013, the *Association nationale des opérateurs détaillants en énergie* (National Association of Energy Retailers, or "ANODE") brought an action before the *Conseil d'État* to invalidate the French Decree on regulated tariffs for the sale of natural gas in France (Decree N° 2013-400). ANODE argued that the legal basis of the Decree (Articles L. 445-1 to L. 445-4 French Energy Code) erroneously disregarded the objectives of the common rules for the EU internal market in natural gas, as set out in Directive 2009/73/EC of July 13, 2009.

As this case raised serious difficulties of interpretation, the *Conseil d'État* decided to stay the proceedings in December 2014, referring two questions to the Court of Justice of the European Union ("CJEU") for a preliminary ruling. The CJEU replied as follows in September 2016 (Case C-121/15):

- State intervention in fixing the price of supply of natural gas to the final consumer is an obstacle to achieving a competitive natural gas market, even if such intervention does not prevent competing offers at prices lower than regulated tariffs.
- Such State intervention may nonetheless fall within the framework of Directive 2009/73/EC, if it fulfills three conditions: (i) it must be a necessity in pursuing an objective of general economic interest; (ii) it must comply with the principle of proportionality; and (iii) it must lay down public service obligations that are clearly defined, transparent, non-discriminatory, and verifiable, and that guarantee customers' equal access to EU gas undertakings.



The French government must now set an end date for regulated tariffs for the supply of natural gas to households and small businesses.



No General Economic Interest Objective Can Justify Regulated Tariffs for Natural Gas Sales

On July 19, 2017, the *Conseil d'État* invalidated the Decree in its final judgment (CE, 19 July 2017, N° 370321), as the Decree derived from provisions of the French Energy Code that were incompatible with the objectives set out in Directive 2009/73/EC. Under the principle of primacy of EU law, national courts are required to annul administrative decisions that are contrary to EU law.

In annulling the Decree, the *Conseil d'État* emphasized that the national legislation failed to pass the first step of the above-referred three-tier assessment set forth by the CJEU—the necessity test.

The *Conseil d'État* held that no objective of general economic interest could justify national legislation that had hindered the achievement of a competitive natural gas market. It rejected all three of the French State's claimed objectives of general economic interest—security of supply, territorial cohesion, and reasonable supply prices.

Repercussions for Gas Consumers and Suppliers

While contracts for the sale of natural gas at regulated tariffs remain valid at present, even if entered into on the basis of the annulled Decree, the French government must now set an end date for regulated tariffs for the supply of natural gas to households and small businesses. When this day comes, these customers must then conclude new supply contracts, either with the incumbent suppliers or their competitors.

Although some French consumer associations and trade unions fear that prices will subsequently increase, the fact is that natural gas prices are presently lower in countries without regulated tariffs, such as Germany, the United Kingdom, and Italy.

The End of Regulated Tariffs for the Sale of Electricity?

It would seem logical that the next move would be to end France's regulated tariffs for the sale of electricity to households and small businesses as well. However, unlike natural gas, electricity is a staple product (*produit de première nécessité*) under the French Energy Code. Thus, the *Conseil d'État's* reasoning may not fully apply to the electricity sector.

Compliance with EU Law—One Step Beyond the European Commission's Requirements

Remarkably, the impetus behind the clear move toward the end of all regulated gas tariffs was the *Conseil d'État* itself, not the government under pressure from the European Commission.

In 2014, following the Commission's infringement proceedings against France for its failure to correctly implement the second gas liberalization directive (Directive 2003/55/EC), France adopted legislation limiting eligibility to benefit from regulated gas tariffs to only households and small businesses consuming less than 30 MWh/year (Law n° 2014-344 of 17 March 2014). As a result, the Commission closed its infringement procedure against France pertaining to regulated gas tariffs the same year.

The *Conseil d'État* judgment of July 2017 therefore clearly exceeds the requirements (and expectations) of the Commission itself, which had never dared to challenge regulated tariffs for the sale of energy to the smallest customers—households and small businesses.

The *Conseil d'État* judgment can be found [on its website](#).

THREE KEY TAKEAWAYS

1. The *Conseil d'État* judgment is a decisive step in bringing French law into compliance with EU law for the achievement of a fully competitive natural gas market. Remarkably, it goes one step beyond the Commission's own requirements for France, by imposing the termination of regulated tariffs for the sale of natural gas to all customers (including households and small businesses).
2. The French government must now take into account the

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3. It is likely that regulated tariffs for the sale of electricity to households and small businesses in France will attract scrutiny in the coming months and possibly also be terminated.



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