The EDF long term contracts case: addressing foreclosure for the long term benefit of industrial customers

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Introduction

On 17 March 2010, the Commission adopted a decision (1) making legally binding the commitments offered by EDF (the incumbent operator) on the French market for the supply of electricity to large industrial customers (2). Following the investigation it started in 2006, the Commission had in December 2008 sent EDF a statement of objections, identifying two competition concerns. First, the Commission was concerned that EDF may have abused its dominant position within the meaning of Article 102 of the TFEU by concluding supply contracts which, given their scope, duration and exclusive nature, had the effect of foreclosing the market. According to the Commission, this behaviour could have significantly hindered other undertakings from concluding contracts for the supply of electricity to large industrial customers in France. Secondly, the Commission concluded that EDF’s contracts included resale restrictions limiting the customers’ freedom to manage the electricity volumes they purchased from EDF.

In the Commission’s view, these practices might have impeded the development of competition on the French electricity market by preventing alternative suppliers from entering or expanding on this market. These practices might also have decreased the market’s liquidity, thereby delaying its effective liberalisation.

Faced with the Commission’s objections, and while not acknowledging any wrongdoing, EDF decided to offer commitments pursuant to Article 9 of Regulation (EC) No 1/2003.

The competitive situation on the relevant market

Progressive liberalisation of the electricity markets pursuant to the electricity directives (3) started in France with Law No 2000-108 of 10 February 2000, and industrial customers on the relevant market became eligible (4) in February 2003. From this date, therefore, alternative suppliers were in theory able to acquire new industrial customers in order to build a customer base and gain market shares. However, in spite of this new potential competition, the incumbent operator EDF has kept a very large and fairly stable share of the liberalised market, and the Commission considered in its statement of objections that EDF was still dominant on that market.

In the Commission’s view, a number of factors, taken together, have contributed to EDF holding a dominant position in the relevant market even today. Apart from its large market share, both in absolute and relative terms with respect to its competitors, there were and still are considerable barriers to entry into the French electricity market. These barriers are created, for instance, by the difficulty of acquiring electricity for resale, by the regulatory framework (5) and by problems in accessing information on customers. EDF’s position is further strengthened by other factors, such as the size of its client portfolio and also EDF’s vertical integration, which allows it to use a variety of means of production, including the most competitive ones with low variable costs.

In spite of its already privileged position on the market, EDF had – in the Commission’s view – behaved in a way that further hindered effective competition. With a large proportion of the industrial customers on the French market EDF had concluded contracts that significantly hindered other firms from competing to supply those customers with

(1) The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.


(3) The relevant market was defined as the supply of electricity in France to large industrial customers who have exercised their eligibility and whose annual consumption is at least 7GWh.


(5) This means having the right to remain supplied under the regulated tariffs or to opt for a supply contract on the liberalised market.

(6) Such as the introduction and the extension of the TAM regime (tarif réglementé transitoire d’ajustement du marché — transitory regulated market adjustment tariff).
electricity (1). In other words, the Commission concluded in its statement of objections that this foreclosure of the market by EDF through its portfolio of contracts was a violation of Article 102 TFEU.

Addressing foreclosure by ensuring regular contestability of customers

The foreclosing effect of EDF contractual portfolio

In the Commission’s view, the foreclosure effect of EDF contractual portfolio was the consequence of a combination of three different elements: (i) the volumes covered by EDF contracts on the relevant market, (ii) the actual duration of its contracts (2), and (iii) their nature. According to the Commission, the two first factors taken together meant that alternative suppliers had insufficient opportunities to compete ‘for the contracts’, i.e. to acquire EDF customers in order to become their sole supplier.

While reinforcing the foreclosure effect of the first two factors, the third one, i.e. the nature of the contract, had the additional effect of preventing the customers from sourcing their electricity from an additional — or secondary — supplier, thereby foreclosing competition ‘during the contracts’. Indeed, for the vast majority of EDF contracts, some provisions would either explicitly require the customers to exclusively source their electricity from EDF (de jure exclusivity) or would have the same effect by, for instance, imposing high take-or-pay obligations and/or imposing strict obligations on the consumption profile of the clients over specific time periods (de facto exclusivity).

The duration of the contract is thus only one factor leading to market foreclosure. Indeed, as a general principle, long-term agreements are not considered anti-competitive as such under the competition rules. They do not fall under Article 101 TFEU, and can even be concluded by dominant companies under Article 102 TFEU, provided that they do not have a foreclosure effect. A good illustration is the Exeltium contractual framework. Exeltium is a consortium of large industrial customers that intended to conclude a contract with EDF for the supply of a substantial amount of electricity over a very long period of time. While reviewing EDF supply contracts in the main case, the Commission raised specific concerns regarding the announced Exeltium framework. Having understood the concerns of the Commission, the parties decided to make substantial amendments to the initial design of the contracts, notably by securing effective opt-outs for members of the consortium wishing to sign contracts with other suppliers, thereby decreasing the potential foreclosure effect of the framework in the medium to long term (3). In the main case, thereafter, the Commission raised no specific objection with regard to this contractual framework; however, the electricity volumes covered by the Exeltium framework were taken into account when analysing the foreclosure effect of EDF’s portfolio during the main case investigation (4).

As a result of market foreclosure, alternative suppliers were hindered from competing effectively with EDF on the French electricity market. Access to customers, and their regular contestability are among the essential elements allowing alternative suppliers to compete effectively on the market in France, the other main elements being access to generation capacity and adequate generation portfolio. Addressing market foreclosure was therefore key to improving the competitive landscape of the electricity markets in France.

EDF commitments on foreclosure

EDF submitted commitments addressing the Commission concerns over the foreclosing nature of its contracts. In many respects, they follow the line set by the earlier and similar case in the retail gas sector, namely the Distragaz decision (5).

The first aim of the commitments was to ensure that alternative suppliers could have a real opportunity to compete for EDF’s customers. However, it would have been disproportionate if EDF was obliged to ‘give away’ some of its customers, which would amount to imposing a market share cap on the electricity operator. Accordingly, in order to ensure regular contestability of the customers by alternative suppliers, EDF undertook that from 1 January 2010 and throughout the duration of the commitments, on average at least 65% of the electricity supplied to large industrial customers will return to the market (6). This commitment by no means requires EDF to give up every year 65% of its customers to alternative suppliers. It means that EDF has to organise its contractual portfolio

(1) This applies both to firms acting as the main supplier and to firms acting as the secondary supplier, i.e. providing only part of the customers’ electricity needs.

(2) In its analysis, the Commission took into account not only the stated duration of the supply contracts but also whether it was actually possible for a given customer to switch supplier at the end of its contract with EDF, comparing this option with the conditions for renewing the previous contract.

(3) Other modifications included the removal of resale restrictions that were originally foreseen.


(6) The commitments also contain a yearly minimum of 60%, for each calendar year during which the commitments apply.
in such a way that, every year, the contracts correspond to 65% of its portfolio in terms of volume either expire or contain an exercisable opt-out clause, allowing the customer concerned to switch suppliers at no additional cost.

This commitment is binding for a period of 10 years, with a possibility of suspension, under certain market conditions, or early termination should EDF’s market share fall below 40% for two consecutive years.

The second aim of the commitments was to ensure that EDF would not be able to cherry-pick the most profitable customers and secure them via stricter contractual provisions and for a longer period of time. From the perspective of an individual cherry-picked customer, such a situation could ensure a stable supply of electricity in the long term: but it would be contrary to the interests of customers in general, as it would hinder true competition. To ensure the regular contestability of all its customers, therefore, EDF undertook to limit the duration of its supply contracts concluded on the relevant market, without a free opt-out, to five years.

The third and final aim of the commitments was to allow genuine competition during the contract period. EDF undertook to allow its customers real freedom of choice by systematically and simultaneously proposing an alternative which allows the clients to partly source their needs from another supplier. This commitment thus gives customers the opportunity to source electricity simultaneously from two suppliers, or to be supplied under an exclusive contract if the customer considers this a more attractive option.

Market players were consulted on the proposed commitments, and in the light of their response the Commission decided that these commitments adequately addressed the concerns it had expressed in its statement of objections.

**Addressing resale restrictions which hinder the development of a liquid wholesale market in France**

The second competition concern of the Commission was related to resale restrictions being imposed by EDF in the vast majority of its supply contracts with large industrial customers. These provisions were either explicitly stated in the contractual provisions or were implied in those provisions, for instance by strictly requiring that the electricity supplied be consumed at the point of delivery mentioned in the contract. It should be noted that these restrictions could also apply to volumes that were covered by take-or-pay obligations, i.e. volumes of electricity to be paid for by the customers even if they are neither consumed nor delivered. In its statement of objections, the Commission considered that such clauses could hinder the development of a liquid wholesale market, and that they amounted to an abuse of EDF’s dominant position.

In order to address the Commission’s concern, EDF offered two commitments. First, it undertook to inform its clients that any resale restriction clause in their supply contracts will cease to be applicable. It also undertook not to include in the future clauses that have the effect of restricting resale. Second, EDF committed itself to more actively helping industrial users to resell the electricity volumes it supplies to them. In practical terms, EDF undertook to accept that one or more of the power delivery points originally indicated in the contract would be replaced by another delivery point or points — possibly those of another customer — provided sufficient notice is given and the new arrangement complies with the consumption profile initially defined in the contract. The commitments related to the issue of resale restrictions were initially applicable as from 1 July 2010. However, following a request for extension from EDF, the Commission decided to postpone the deadline for the implementation of the commitments relating to the resale restrictions until 1 January 2011 (13).

These commitments were also tested on the market, and since the Commission considered them adequate to address the competition concerns it declared them binding in its commitment decision and made them applicable for ten years without any possibility of earlier termination.

**Conclusion**

This case is an important step towards a more liquid and more competitive electricity market in France. However, the achievement of this goal now depends on the alternative electricity operators and the industrial customers themselves. Indeed, these market players will play a central role in monitoring the commitments (14), and — most importantly — in reaping the benefits of the new opportunities they offer. The Commission believes that these commitments give alternative electricity suppliers a real chance to compete effectively for EDF’s customers and thus to expand their market presence and exert competitive pressure on the incumbent.

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(14) The more formal monitoring of the commitments will take place via annual reports drafted by EDF on the basis of audited figures. Each report will be sent to the Commission and to the French Energy Regulator (CRE) during the year following the calendar year covered. The last report will be presented to the Commission in 2021.
Whilst EDF’s commitments constitute an important step forward, they need to be accompanied by other changes to the French electricity landscape. Indeed, while EDF’s commitments give its competitors access to its customers, they do not address the remaining problems on the French market. The Commission has been working to open up this market to greater competition by investigating the regulated tariffs. In the wake of this investigation, further action should be taken to give alternative operators easier access to some of EDF’s existing nuclear generation in France. This would create positive synergies for the benefit of the customers. The Commission therefore looks forward with great interest to seeing what further steps the French authorities will take to reform the French electricity market (15).