

NO OIL, BUT IDEAS: DEFINING EUROPEAN
COMPETITION AND NATIONAL SOVEREIGNTY IN
THE AGE OF ENERGY INNOVATION

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“In France, we don’t have oil, but we have ideas.”
-Government Communication, 1974.¹

I. INTRODUCTION

For European observers and competition authorities, it seemed timely for France to host the twenty-first worldwide Climate Change Conference of 2015, or Convention of Parties 21 (COP21), which united world leaders in Paris for a forum on sustainable development. As host, France aimed to project an image of itself as an innovator in the clean energy and environmental protection movement in conformity with the global community’s pledge to pursue similar objectives in the Kyoto Protocol of 2001.² But industry insiders and academics contend that France seeks to occupy this leadership position in environmental protection at the cost of failing to achieve another type of compliance: competition in the electricity sector. Indeed, France’s unique investment in nuclear energy means that it can deliver clean, renewable energy in unprecedented

1. “En France, on n’a pas de pétrole mais on a des idées.” This famous quip was uttered in a 1974 government-sponsored TV commercial, during the “oil crisis” of the 1970’s and under the presidency of Valéry Giscard d’Estaing. The French often attribute the phrase to him. CULTURE PUB (1974), www.culturepub.fr/videos/agence-pour-les-economies-d-energie-on-n-a-pas-de-petrole (“*Agence pour les économies d’énergie : On n’a pas de pétrole . . .*”). See also http://www.francetvinfo.fr/replay-radio/histoires-d-info/on-n-a-pas-de-petrole-mais-on-a-des-idees-en-1976-on-passe-a-l-heure-d-ete_1774731.html.

2. MINISTÈRE DE L’ÉCOLOGIE, DU DÉVELOPPEMENT DURABLE ET DE L’ÉNERGIE, RAPPORT SUR LES OBJECTIFS FRANÇAIS DE CONSOMMATION D’ÉLECTRICITÉ PRODUITE À PARTIR DE SOURCES D’ÉNERGIE RENOUVELABLE ET SUR L’ANALYSE DE LEUR RÉALISATION EN APPLICATION DES ARTICLES 2 ET 3 DE LA DIRECTIVE N° 2001/77/CE DU 27/10/2001 (2007).

quantities at low prices.³ France's history of economic protectionism places Électricité de France (EDF), the majority state-owned monopoly in the power sector and chief provider of this low-cost energy, in the spotlight. Financed by the French taxpayer, EDF's nuclear parks and transmission networks are national treasures using economies-of-scale to generate lower prices for the French consumer. Considering the nuclear fleet to be a return on the state's investment, and fearing the political consequences of raising prices for a public accustomed to cheap, subsidized rates, French leaders have a strong incentive to secure supply.

The EU liberalization directives of the 1990's and the Treaty on the Functioning of the European Union (TFEU), articles 102–106, mandate that France integrate its domestic market into the European Community market. Those directives place France in a political and economic predicament. Integrating its energy market with the European Community would raise French domestic prices and diminish EDF's market position, but maintaining lower tariffs and refusing to join the common market would contravene these liberalization regulations. France would also be in violation of the competition provisions of the TFEU, which prohibit abuse of a dominant position in the form of discriminatory state aids.⁴ Articles 102 and 107 stipulate that grants of state aid amount to anticompetitive behavior where states use their resources to enhance a public entity's dominant position on the market. Actions under Article 102, such as “imposing unfair purchase prices” or “applying dissimilar conditions to equivalent transactions,” satisfy the 107 definitions of illegal aid when they “[distort] or [threaten] to distort competition,”⁵ There is a clear discord between European notions of centralized market

3. The French have an impressive record, sourcing seventy-five percent of their electricity from nuclear reactors. *Nuclear Power in France* WORLD NUCLEAR ASS'N (last visited Nov. 2015), <http://www.world-nuclear.org/info/Country-Profiles/Countries-A-F/France>. In contrast, Germany and the EU as a whole source only twenty-eight percent of their electricity from nuclear sources. Jacques Percebois, *Electricity Pricing: The French Paradox*, 12TH INT'L ASSOC. FOR ENERGY ECONS. EUROPEAN ENERGY CONFERENCE (2012), <http://www.iaee.org/en/publications/proceedingssearch.aspx?conference=energy%20&%20Security%20in%20the%20Changing%20World>.

4. Consolidated Version of the Treaty on the Functioning of the European Union art. 102 May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

5. TFEU art. 102, 107.

growth and integration and the French protectionist conception of the welfare state and state-based ownership structure.

This Note will argue that the tension between the French Republic and the European Union will either resolve itself through France's assimilation into the EU market or will prevent French assimilation altogether. In order to integrate, France will inevitably need to sacrifice subsidizing its nuclear energy sector. To assess the consequences of this outcome, this Note will provide an overview of the governing treaties and then discuss the political, economic, and market consequences of "French procrastination," and the risks of noncompliance. If integration is unsuccessful, France, other Member States, and interest groups may decide that European market homogenization is a perverse infringement on sovereign identity and governance of Member States and consumers. This Note will analyze whether France's refusal to integrate would represent a broader rejection of competitive values and market structure.

Before exploring these two possible outcomes, this Note will introduce the history of the conflict between individual markets and European market integration in more detail. Then it will discuss the relevance of these issues to competition policy more generally.

A. *Energy, Competition, and the French Nuclear Exception*

Predictably, the French state is quite reluctant to open its national energy network to a newly integrated European energy market.⁶ Because the state regulates both access tariffs in the wholesale market for electricity and retail tariffs in the consumer market, full integration would inevitably mean raising domestic French prices to match the EU market price.⁷ In what Percebois terms the "French paradox," the alternative is for smaller suppliers to lower their own prices to compete with EDF, which they cannot afford to do without EDF's sourcing

6. See Council Directive 96/92/EC, 1997 O.J. (L 27/20).

7. Percebois, *supra* note 3, at 2 ("There is a dual system for electricity pricing: regulated electricity tariffs fixed by the government and set largely according to the production cost of nuclear energy (TRV) [and] market electricity prices paid by consumers who have exercised their eligibility and largely correlated to the higher prices observed on the European wholesale electricity market (O.M.).").

capacity.⁸ In the early 2000's, the European Commission, the competition authority of the EU, issued an Official Notice, stating that France was in violation of Directive 2003/54 for maintaining a regulated price regime for nonresidential consumers of electricity. The Commission subsequently made sector inquiries into the French public utility's activity and the government's state aid policies, focusing on several infractions resulting from EDF receiving aid "in any form" from its single largest shareholder, the sovereign French Republic.⁹ Both the TFEU and the European integration directives of the 1990's bar such favorable treatment on the premise that it may promote anticompetitive conduct.¹⁰

B. *The French Approach*

This section describes French political enthusiasm for the development of nuclear energy, and discusses the French reticence to confront the antitrust implications of EDF's growth. The following part provides a history of EDF and both the French and European competition legislation that concerns the entity.

Électricité de France is both the apparent cause of French competition violations and one of the main reasons France presents itself as a pacesetter in the development of a cheaper, cleaner energy and as a dominant market player.¹¹ The recent plans to construct a nuclear power plant at Hinkley Point C in

8. *Id.*

9. European Commission Press Release IP/07/815, State Aid: Commission Opens Investigation into Regulated Electricity Tariffs in France (June 13, 2007); European Commission Press Release IP/09/376, State Aid: Commission Extends Investigation into Regulated Electricity Tariffs in France (March 10, 2009); European Commission Press Release IP/07/26, Competition: Commission Energy Sector Inquiry Confirms Serious Competition Problems (Jan. 10, 2007); Council Directive 2003/54/EC 2003 O.J. (L176/37).

10. *Competition*, EUROPEAN COMMISSION, http://ec.europa.eu/competition/sectors/energy/overview_en.html (last updated Apr. 4, 2012) ("When controlling State aid to energy companies the Comm ensures that any aid is necessary and proportionate.").

11. COP21: quelle place pour le nucléaire, SOCIÉTÉ FRANÇAISE D'ÉNERGIE NUCLÉAIRE (Mar. 31, 2015), <http://www.sfen.org/fr/rgn/cop-21-quelle-place-pour-le-nucleaire>.

Somerset, England,¹² the establishment of the European Atomic Energy Community (EURATOM),¹³ the foundation of other nuclear trade groups, such as the Belgian FORATOM,¹⁴ and the cooperative efforts among countries to incentivize nuclear development tend to exalt French progress. In addition, French leaders explicitly advocate for a unique role for nuclear energy in the clean energy plans for a new and sustainable Europe.¹⁵ Christian Masset, France's Minister of Foreign Affairs and International Development, characterized nuclear energy as vital to the advancement towards low-carbon functioning.¹⁶ Tellingly, he proclaimed France and the United Kingdom, which recently passed an Electricity Market Reform Act (UK 2011) embracing nuclear power, as the "avant-gardists" of Europe.¹⁷

However, this discourse surrounding the energy market has also taken on a certain ambivalence. Laurent Michel, General Director for Energy and Climate at the French Ministry for Ecology, Sustainable Development and Energy, praised nuclear energy as beneficial for climate change efforts and cost-effective, but did not address its role in a healthy, competitive energy market extending *beyond* French borders.¹⁸ At the same time, he clearly stated that France will not deprive itself of ex-

12. This is a U.K. government-backed project. *Hinkley Point C: Securing the UK's Energy Future*, ÉLECTRICITÉ DE FRANCE, <http://www.edfenergy.com/energy/nuclear-new-build-projects/hinkley-point-c> (last visited Jan. 2, 2017).

13. *See generally* Treaty Establishing the European Atomic Energy Community, March 25, 1957, O.J. (C 327) 1.

14. FORATOM, EUROPEAN ATOMIC FORUM, <http://www.foratom.org> (last visited Jan. 2, 2016).

15. COP21: quelle place pour le nucléaire, *supra* note 11.

16. *Id.*

17. *Id.*

18. However, post-Fukushima, the legal context more specific to nuclear energy reflects a trend away from cooperation. As of late, France has been standing alone in its fixation with nuclear energy. Article 194 of the Treaty on the Functioning of the European Union dictates that the center shall allow a Member State a sovereign autonomous role in the choice of its energy policy, or the "right to determine the conditions for exploiting its energy sources." TFEU art. 194(2). Article 192(c), however, gives the Union some latitude to take measures having a considerable effect on an individual state's energy choices. TFEU art. 192(c). Finally, Article 191(3) points to the economic considerations that may complicate energy policy generally. TFEU art. 191(3). It is especially here that France has had to reevaluate its own reliance on nuclear energy. COP21: quelle place pour le nucléaire, *supra* note 11.

port opportunities in the context of a lucrative nuclear energy market where it maintains a marked advantage.¹⁹ The state's piecemeal legislative response in the form of the Macron and Hamon laws only highlights French reserve.

This tension between supporting domestic enterprises and complying with European integration efforts provides a useful example of the problems plaguing recent E.U. efforts to construct an internal community market.²⁰ Certainly, these issues are not unique to the French state, and thus shed light on the problems inherent in creating large-scale competitive markets.²¹ While French leaders expound upon the virtues of European and global cooperation, skeptics might point to the impediments France is experiencing with multi-regional competition law.

Competition policy is one lens to examine this rosy image of the European energy landscape, and the innate divisions within the European federal authority, praised as the world's most successful regional competition regime.

II. OVERVIEW OF THE COMPETITION LANDSCAPE AND SECTOR IN QUESTION

A. Électricité de France (*EDF*)

Électricité de France is a French public utility company present across the electricity supply chain, encompassing gen-

19. *COP 21 et transition énergétique*, YOUTUBE (Mar. 31, 2014), <https://www.youtube.com/watch?v=AA09jC5wwA0> (“On va pas se priver d’exporter.” [“We will not deny ourselves the chance to export.”]).

20. Alberto Heimler & Jenny Frédéric, *Regional Agreements*, in *BUILDING NEW COMPETITION LAW REGIMES: SELECTED ESSAYS* 183 (David Lewis ed., 2013).

21. See generally ELEANOR FOX & DANIEL CRANE, *GLOBAL ISSUES IN ANTI-TRUST AND COMPETITION LAW: CASES AND MATERIALS* (2010) (describing challenges to regional cooperation in an age of globalization); THE WORLD BANK GROUP, *UNLOCKING AFRICA’S POTENTIAL THROUGH VIGOROUS COMPETITION POLICY* (2016), <http://documents.worldbank.org/curated/en/243171467232051787/Breaking-down-barriers-unlocking-Africas-potential-through-vigorous-competition-policy> (explaining the legal, administrative, political, and economic barriers to the establishment of the Economic Community Of West African States community market and effective antitrust enforcement under the regional competition authority, West African Economic and Monetary Union, including jurisdictional and sovereignty issues).

eration, transmission, distribution, and supply.²² Headquartered in France and French in origin, it is now a dominant player in the global energy market and equally active across the European Union, maintaining a presence in Germany, the United Kingdom, Spain, Switzerland, Eastern Europe, Asian nations including China, Vietnam, and Laos, the Americas, and even Africa. Founded in 1946 by the French state as part of the nationalization of the energy and other sectors, EDF's market presence and legal character have evolved substantially in the ensuing decades.²³

Nearly two decades after EDF's establishment, it launched the development of its nuclear and hydraulic industrial base; in the 1990s, it put in place its commercial nuclear program.²⁴ EDF simultaneously undertook a robust global expansion, resulting in economic dominance.²⁵ As of 2011, EDF controlled 91% of the market in generation and 94% of customer supply.²⁶ In 2004, it became a limited liability company, though the French government remains a majority shareholder (84.5%).²⁷ The creation of the high-voltage network operator Réseau de Transport d'Électricité (RTE), or Electricity Transmission Network, a legally independent subsidiary of EDF consistent with the 2007 E.U. legal unbundling rules, followed a

22. France's electricity market is split among these four sectors. While generation is a competitive market, transmission is a public activity undertaken by RTE, distribution is dominated by EDF but peopled by several smaller local distributors. Finally, supply is competitive. *La Structure et le Fonctionnement du Marché de L'électricité en France*, MINISTÈRE DE L'ENVIRONNEMENT DE L'ÉNERGIE ET DE LA MER (June 23, 2015), <http://www.developpement-durable.gouv.fr/La-structure-et-le-fonctionnement.html>.

23. At its founding, EDF had the status of EPIC (*établissement public à caractère industriel et commercial*), an industrial and state-owned company in French public law. *Facts and Figures: 2014*, ÉLECTRICITÉ DE FRANCE 1, 17 (April 5, 2009), https://www.edf.fr/sites/default/files/documents/faits_et_chiffres/2015/F%26F_EDF_2014_VA.pdf.

24. *Id.*

25. *Id.*

26. François Lévêque, *Regulating Access to Nuclear Power Generation: The French Case*, 7th Seoul Int'l Conference on the Electricity Market: Electricity Deregulation—Retrospect and Prospect 3 (June 16, 2011), <http://www.cerna.mines-paristech.fr/Donnees/data08/833-ARENHSeoul.pdf>.

27. *Facts and Figures: 2014*, *supra* note 23, at 26 (“EDF: a listed company with the French State as major shareholder”).

year later.²⁸ EDF's sizeable market share can be attributed to a series of acquisitions made in the 2000s.²⁹ To this day, its considerable nuclear assets, including fifty-eight power plants, make it the hegemon of global nuclear power.³⁰

EDF's course of development shows a French state eager to perpetuate its ownership control over the entity, and only slowly open access and transmission markets to intermediary players and smaller suppliers. This reality, coupled with EDF's overwhelming success across transcontinental markets, has set the stage for conflicts with competition authorities.

B. *The French Competition Framework: Entities, Enforcement, and Legislation*

1. *Institutional Structure*

Though tightly ensconced in the European competition infrastructure, France's own competition regime is robust. The regulatory bodies and institutions that oversee compliance with integrated markets and the electricity sector are active. The *Autorité de la Concurrence* (French Competition Authority, or FCA) undertakes enforcement tasks and acts as an advisory authority, with a prevailing hearing officer and team providing investigation services. Merger control is, as in most national contexts, a top priority and is undergone in two phases, the second of which includes a market test and economic analysis. Finally, an emphasis is placed on procedural simplification.

This outlook is consistent with a broader structural streamlining undertaken with the implementation of the Law on the Modernization of the Economy in 2008, which fused the Directorate General for Competition Policy, Consumer Affairs, and Fraud Control (DGCCRF) with the Competition Counsel (*Conseil de la concurrence*) to create the unitary FCA. This single entity now pursues antitrust activities, merger control, inquiries and investigations, and the publication of opin-

28. *Id.* at 31. (*Transmission and distribution are regulated; while generation and supply are unregulated*, "France-country profile."). See also *Energy Topics*, EUROPEAN COMMISSION (Oct. 27, 2016), <https://ec.europa.eu/energy/en/topics/markets-and-consumers/market-legislation>.

29. Its latest construction of nuclear reactors, known as Electric Pressurized Reactors (EPR), in partnership with Germany, represents an important example. *Facts and Figures: 2014*, *supra* note 23, at 271 ("Glossary").

30. Percebois, *supra* note 3, at 12, 14, 19.

ions.³¹ The French administrative supreme court, or *Conseil d'État*, has jurisdiction to hear appeals of decisions on certain matters, most notably merger review decisions.³² These recent changes aim to increase cohesiveness and cease the divvying up of enforcement mechanisms previously in place, thereby achieving efficiency and increased authority to implement structural remedial reforms.³³ Observers might have expected an increase in enforcement activity, but the European Commission, rather than the national agency, has become the principle challenger of EDF's activities. EDF and the French government, as the utility's primary shareholder, must also comply with agencies regulating the energy supply chain. Upstream, the French Nuclear Safety Authority (ASN)³⁴ oversees nuclear site maintenance, while, downstream, the French Energy Regulatory Commission (CRE), supervises the energy markets and the implementation of the regulated tariff system currently governing access and retail prices.

2. *Legislative Evolutions*

It is worthwhile to note that frequent legislative activity has characterized the past few decades. In 1996, the Galland Law outlawed below-cost resale of electricity.³⁵ The 2001 NRE Law mandated corporate disclosure and seemed to respond to a spike in consumer prices following implementation of the resale restrictions. The National Assembly changed course with subsequent regulations that appeared more favorable to corporate interests, and in retrospect, to the French government itself.³⁶ The most notable pieces of legislation included

31. French Competition Authority, *A New French Competition Autorité*, http://www.autoritedelaconurrence.fr/doc/autorite_conc_eng.pdf.

32. French Competition Authority, *Merger Control Guidelines* (July 2009), http://www.autoritedelaconurrence.fr/doc/ld_mergers_final.pdf.

33. Press Release, French Competition Authority, Reform of the French Competition Regulatory System: The Conseil de la Concurrence Becomes the Autorité de la Concurrence (March 2009), http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=317.

34. *Facts and Figures: 2014*, *supra* note 23, at 29.

35. Xavier Boutin & Guillaume Guerrero, *The "Loi Galland" and French Consumer Prices*, in *Conjoncture in France* 17 (2008).

36. Michel Doucin, *The French Legislation on Extra-financial Reporting: Built on Consensus*, MINISTÈRE DE L'ÉCOLOGIE, DU DÉVELOPPEMENT DURABLE ET DE L'ÉNERGIE 2 (April 9, 2013), <https://www.globalreporting.org/SiteCollectionDocuments/GoFPara47PoliciesInitiatives-France.pdf>.

the 2005 Dutreil Law (permitting partial deductions for preferred suppliers), the 2008 Chatel Law (allowing full reduction of “margins” in the calculation of purchase prices), the Law on the Modernization of the Economy (implementing the TaRTAM tariff), and the 2014 Hamon and Macron Laws. While on the whole this statutory framework demonstrates a particular breed of state interventionism, the Hamon and Macron laws are of particular importance to regulation of the energy market. While the Hamon law expands the investigative and sanctioning powers of the FCA, the Macron law gives the Authority wider margins for action. For example, the FCA has greater injunctive power for merger control and may mitigate potential abuse of dominance violations by demanding price modification for firms with more than fifty percent of market share.³⁷

3. *Overlapping Systems*

Describing the French regime in isolation would be slightly misleading, given that national competition law is largely calqued on the corresponding European legislation. Indeed, any discussion of French competition law must necessarily reference EU law regarding abuse of a dominant position, anti-competitive/restrictive agreements, and illegal state aids. Article 102 of the TFEU governs the abuse of a dominant position and states that “any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.”³⁸ The equivalent French legislation in Book IV of the French Commercial Code is comprised mainly of abuse of dominance offenses, including abuse of a dominant position, abuse of economic dependence, and abusively low

37. Mélanie Thill-Tayara & Marta Giner Asins, *The New “Hamon Law” Introducing French Class Actions and its Effects on Competition and Distribution Law*, NORTON ROSE FULBRIGHT, (March 2014), <http://www.nortonrosefulbright.com/knowledge/publications/114016/the-new-hamon-law-introducing-french-class-actions-and-its-effects-on-competition-and-distribution-law>; Renaud Christol & Elsa Pinon, *Adoption of Macron Bill: Broader Powers for the French Competition Authority*, AUGUST DEBOUZY (July 21, 2015), <http://www.august-debouzy.com/en/flash/001109-adoption-macron-bill-broader-powers-french-competition-authority.html>.

38. TFEU art. 102.

pricing.³⁹ The latter may include imposing unfair purchase or selling prices, limiting production, and discriminatory pricing practices.⁴⁰ Exemptions do exist for certain conduct and the finding of an abuse must always be defined in relation to a specifically circumscribed market.⁴¹

Corresponding provisions related to prohibited state aids are contained in Article 107 of the TFEU. Article 107(1) enunciates the guiding principle of the provision: “any aid granted by a Member State or through State resources in any form whatsoever which *distorts or threatens to distort competition* by favoring certain undertakings . . . shall, in so far as it *affects trade* between Member States, be incompatible with the internal market.”⁴² Article 107(3)(c) provides for an exemption to the general limitation on state subsidies, allowing Member States to grant aid for “certain economic activities” provided that they do not “adversely affect trading conditions to an extent contrary to the common interest.”⁴³ Articles 108–109 also aid the authorities in policing the parameters of compatible and incompatible state aid, laying the procedural framework for review and providing an “exceptional circumstances” loophole.⁴⁴

The Treaty’s regulation of public utilities is of equal relevance, considering EDF’s status as both a public concern and recipient of state funds. Article 106 of the Treaty thus stipulates that states are not exempt from their obligations under

39. CODE DE COMMERCE [C. COM.][COMMERCIAL CODE] art. L. 420-2 (Fr.).

40. Louis Vogel and Joseph Vogel, *Abuse of Dominance Under French Law: Desirable Evolutions*, March THE EUROPEAN ANTITRUST REVIEW 1 (2012), <http://www.vogel-vogel.com/sites/vogel-vogel/files/france%20abuse%20of%20dominance%20GCR%202012.pdf>.

41. *Id.*

42. TFEU art. 107 (emphasis added).

43. *Id.*

44. *Id.*; *Id.* art. 108(2) (“On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances.”); *Id.* art. 109 (“The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.”).

the Treaty, notably its competition and trade provisions “in the case of public undertakings and undertakings to which Member States grant special or exclusive rights.”⁴⁵ Again, however, the Union recognizes that states must have space to structure their economies and meet the needs of their citizens. In this vein, the second subsection of the same article provides that “undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly” must abide by the treaty only to the extent that its limitations “[do] not obstruct the performance, in law or in fact, of the particular tasks assigned to them.”⁴⁶ Yet the Treaty also explicitly states that “the development of trade must not be affected to such an extent as would be contrary to the interests of the Union.”⁴⁷ In essence, within the treaty text itself, there is some ambivalence about the privileging of central as opposed to domestic policies, even while public utilities and state-owned enterprises receive a measure of deference from regional authorities.

The legal structure and substance of French domestic competition law is modeled after the EU legislation. As Italian economic scholar Alberto Heimler and OECD Competition Chairman Frédéric Jenny note, the establishment of EU competition law prior to the issue of domestic legislation in the Member States created a “spillover effect.” Without preexisting national laws, national governments used EU law as their raw material in crafting domestic legislation, so that EU law inevitably “spilled over” into domestic competition provisions.⁴⁸ This facilitated the process of creating an integrated market, since the principle of *subsidiarity* allows the central authority to

45. *Id.* art. 106.

46. *Id.*

47. *Id.* art. 101.

48. Heimler & Frédéric, *supra* note 20, at 121 (“This was facilitated in the E.U. because the E.U. Treaty was adopted long before domestic antitrust laws were adopted at the national level, with the exception of Germany, whose antitrust law was implemented the same year as the E.U. Treaty. In some of the other regional agreements the process is the opposite. As a result, while establishing supremacy of union law occurred easily in the E.U., it is much more difficult when it requires reducing the sovereignty of established domestic authorities. The fact that E.U. law was established first also had positive spillovers on the evolution of Member States’ institutional settings.”).

devolve jurisdiction to Member States.⁴⁹ Under this principle, also known as the *effet utile* rule, Members have the choice to enforce either domestic or regional competition legislation. In all cases, internal authorities will need to reach a result that achieves the goals of EU law. This effectively guarantees that the law to be applied within each state will be consistent with EU law.⁵⁰ It is integral to note that, for competition purposes, EU law only applies where activity affects trade between or amongst Member States. This caveat will limit the conduct for which the European Union can properly reproach the French state and will illuminate the scope of tensions underlying national sovereignty and compliance concerns.

III. CONFLICTS

A. *France as a Sovereign State: History and Organization of the French Energy Sector*

1. Dirigisme

The particular profile of the French energy market, largely localized to its sourcing methods and the dominant place of nuclear power, disallows any standard analysis. It has been molded by *dirigisme*, or economic interventionism, which is the defining feature of French economic and social policy since the mid-twentieth century, first under President de Gaulle and more recently under President Sarkozy. That both presidents were members of the conservative party indicates the impregnation of *dirigiste* policy in French political culture which, even in its more conservative shades, is critical of intervention-free *laissez-faire* capitalism.⁵¹ At least to some extent in

49. *Id.* at 193. (“The European experience suggests that the adoption of the principle of ‘*effet utile*’ may be a way to alleviate the jurisdictional issue faced by regional groupings such as COMESA. According to the principle of *effet utile*, what matters, even in order to determine jurisdiction, is the substance of the decision. Judges or domestic antitrust authorities could apply either Union or domestic antitrust laws, but the decisions they reach should in any case conform to Union case law and jurisprudence. As a result of the principle of *effet utile*, domestic competition laws became fully integrated with union law, not simply complementary to it, as it might have been presumed.”).

50. *See id.*

51. Daniel Gilbert, Does Dirigisme or/nor Competition Dominate the Non-Technical Dynamics of Electricity Supply in France? 3-44 (Jan. 1, 2014) (unpublished manuscript) (on file with the University of Dundee).

the national consciousness, the heavy-handed role of the state in certain industries, especially energy, has been key to long-lasting success. Certainly, Daniel Gilbert notes that the government's pledge to undertake *grands travaux*, or public works, undergirds continued state ownership of EDF and various consumer welfare arguments made across the political spectrum.⁵²

As a particularly French policy goal, competitive energy also implicates national sovereignty concerns. The nation's attachment to its past investment in nuclear development has prevailed over President François Hollande's pledge to halve electricity that France sources from nuclear energy. However, recent developments in climate change reform and critiques of nuclear energy surfacing in the wake of the Fukushima disaster may have pressured Hollande to deliver empty promises.⁵³ That is, despite international calls to decrease nuclear production, Hollande declined to abandon an energy policy that is profitable for the French state and in the best economic interests of his constituents. The maintenance of EDF's nuclear park thus fits squarely within the parameters of an interventionist framework.

2. *The Regulated Market: Market Landscape and Segments*

The particular legal structure of EDF as an effective state-run monopoly has had a considerable impact on the configuration of the French and European energy markets. Two principal features are important to note here: market actors and state-regulated tariffs. The latter category includes recent transitional forms, namely the TaRTAM (Transitional Regulated Tariff for Market Adjustment)⁵⁴ and ARENH (Regulated Access to Historic Nuclear Power) tariffs and the market segments for which they are destined.⁵⁵

a. Market Actors

EDF's status as a vertically integrated incumbent electricity supplier and distributor on the European markets is un-

52. *Id.* at 3.

53. See Jérôme Fourquet, *L'opinion Publique Française et le Nucléaire, Deux Ans Après Fukushima*, HUFFINGTON POST (Nov. 3, 2013), http://www.huffingtonpost.fr/jerome-fourquet/anniversaire-fukushima_b_2851304.html.

54. See Lévêque, *supra* note 26, at 7.

55. See *id.* at 11–13.

questioned. Wholesale distribution, intermediary participation by other traders, and marketing activity, however, also serve to structure the market and exist as potential access points for non-dominant companies. The European Union's prodding of France to liberalize its domestic energy market further in an eventual bid to integrate the latter into the European market presupposes the viability of these other competitors while EDF is dominant along a chain of production, transmission, distribution, and delivery to end consumers. The breaking up of EDF's expansive "holding" seems feasible only to the extent that potential players such as GDF Suez, the merged Gaz de France and Suez, Société hydro-électrique du Midi (SHEM), Compagnie nationale du Rhône (CNR), and Société nationale d'électricité et de thermique (SNET), are able to take advantage of various market opportunities. It appears that political factors will have more than a small role in determining whether such links can be broken in order to provide other businesses an opportunity for entry.

b. Tariffs

In order for French taxpayers of various profiles to capture the benefits of the state's considerable advances in the energy sector, the government has put in place a dual system of fixed price rates for electricity. The rates apply to a market that is sliced into several classes of consumers. These are, respectively, residential and professional consumers (blue), small and mid-sized businesses (yellow), and large industries (green).⁵⁶

The main priority, of course, is to spare French consumers the elevated costs currently offered on the free market of the European Union.⁵⁷ In the wake of the EU's 2007 sector inquiry into the French energy market and the issuance of its Official Notice to France for prohibited state aid in breach of Directive 2003/54, the government agreed to wean its consumers off of regulated prices via a series of phased-out, programmatic tariffs.⁵⁸ The French thus replaced the TaRTAM tariff,

56. *See id.* at 4.

57. François Lévêque, *France's New Electricity Act: A Barrier Against the Market and the European Union* 4 (Energy Policy Research Grp., Working Paper No. 1036, 2010).

58. Gilbert, *supra* note 32, at 3.

which had been a transitional price applicable to industrial (green and yellow) consumers and which was set to expire in 2010, with the ARENH tariff.⁵⁹ The NOME Act of 2010, in which this new ARENH tariff is codified, addresses the competition issue by focusing on the upstream region of the supply chain and setting a price ceiling for access by smaller competitors to the lower cost nuclear energy over which EDF has effective market control.⁶⁰ It additionally modifies the TaRTAM structure, setting forth predetermined quantity and price categories for green and yellow consumers, while maintaining the tariff structure for blue consumers.⁶¹

As the ARENH tariff was meant to expire in 2015, it is, at least facially, consistent with the EUs goals of integrating France's domestic market into the common market. Its objective is to increase competition by removing the beneficial tariffs provided to industrial entities (though keeping them in place for smaller consumers) and providing ease of access to inexpensive nuclear energy.⁶² Smaller suppliers, currently lacking abundant energy stores, are the main beneficiaries of more affordable sourcing costs, since they are otherwise unable to charge EDF's low prices and obtain elevated profits. As a policy matter, transitional regimes should be put in place to ease the financial and market jolts of full, immediate integration.

In effect, industrial consumers are confronting a phase-out of all these tariffs, while the French government maintains the norm for residential consumers during the two transitional periods. Indeed, a parliamentarian in the National Assembly, P. Ollier, remarked that "this [act] has appeared as the best way to enable our country to protect its nuclear fleet and continue to make the French its benefiter."⁶³ Yet, the question for French authorities is how they are factoring in this cost to residential consumers. Indeed, it is hard to imagine that the gradual disappearance of the retail tariffs will not affect resi-

59. *Id.* at 4, 7.

60. *Facts and Figures: 2014*, *supra* note 23, at 32.

61. *Changing France's TARTAM: Encore une Fois?* ICIS (March 15, 2010) <http://www.icis.com/resources/news/2010/03/15/9342884/changing-france-s-tartam-encore-une-fois/>.

62. See Lévêque, *supra* note 57, at 13; see also Gilbert, *supra* note 32, at 2.

63. Lévêque *supra* note 26, at 12 (quoting M.P. Patrick Ollier, National Assembly (June 2010)).

dential prices. Academics have focused on the potential unfavorable economic implications of these changes, predicting that retailers will pass on increased costs to smaller, less capital-rich consumers.⁶⁴ It is useful to note here, however, that this question highlights the pains that full European integration may entail and the concrete issues implicated in national sovereignty. These are the motivating factors that will affect the French choice between EU compliance and noncompliance.

B. *The Prerogatives of the European Union*

The EU effort to construct a common internal market in the 1990s marked the onset of tensions between French and European objectives regarding energy policy. The 1996 European Community Directive, 96/92/EC, issued by the European Parliament and Council, laid out common rules for the internal market in electricity.⁶⁵ Underlining the free trade obligations found in the TFEU, the Directive highlights the need for efficiency, security of supply, and competitiveness in the market, as well as the interconnection of electricity grids.⁶⁶ The mandates of the Directive will frame the subsequent strengthening of EU competition enforcement, and the particularities of France's resistance as well as of its efforts to conform.

The European Council takes care to address the weight and needs of national sovereignty and specificity of systems. Notably, it carves out a place for public service obligations⁶⁷ and Member States' sovereign authority to tailor their electricity infrastructures and markets to their internal needs, all the while recalling states to their obligations under the TFEU.⁶⁸ In this same vein, the Council reiterates the important procedural feature of subsidiarity⁶⁹ in which the Union devolves implementation choices to Member States; beyond giving governments enough latitude to make policy choices appropriate to

64. Percebois, *supra* note 3, at 24; Dominique Finon, *Le compromis de la loi NOME: Les limites d'un Dispositif de Marché aux Principes Economiques Faibles*, REVUE DE L'ENERGIE May/June 2010 at 596.

65. Council Directive 96/92, 1997 O.J. (L 27/20).

66. *Id.* arts. 4, 6.

67. *Id.* art. 9.

68. *Id.* art. 19.

69. *Id.* art. 11.

themselves, subsidiarity further “[allows] each Member State to choose the regime which best corresponds best to its particular situation.”⁷⁰ Interestingly enough, the Directive makes clear that states have the right to implement transitional regimes with regard to the eventuality of full-scale integration.⁷¹

More specific to competition concerns, the Directive mandates transparency as integral to successful liberalization.⁷² In EDF’s case, the goal as stipulated in the Directive is to avoid *abuse of a dominant position*, which is defined in the TFEU treaty as a violation resulting in irregular pricing.⁷³ Other terms are more specific to the electricity sector, such as the notion of choice in access.⁷⁴

Article 12 neatly ties this collection of goals and principles together, suggesting an overarching ethic to guide the European Union in its action against France: “whereas, whatever the nature of the prevailing market organization, access to the system must lead to equivalent economic results in the States and hence to a comparable level of opening up of markets and to a directly comparable degree of access to electricity markets.”⁷⁵ While state aid and abuse of a dominant position are the substantive legal principles and offenses under which the Commission has enforced its integration objectives, a focus on *equivalency* clarifies what is at stake. Pitted against this notion of equality of access and benefits is the welfare of the French market and the French end consumer. Indeed, both the French market and French consumers benefit disproportionately from EDF’s dominant position and overly generous state subsidies.

In 2003 and 2007, the European Union built upon this first step and issued two subsequent directives “packages” intended to institute open trade.⁷⁶ These, in turn, clashed with

70. *Id.*

71. *Id.* art. 24.

72. *Id.* art. 22.

73. *Id.* art. 32.

74. *Id.* art. 34.

75. *Id.* art. 12.

76. Council Directive 2003/54, 2003, O.J. (L 27/20). The 2007 directives went into force in 2009. Council Directive 2009/72, 2009, O.J. (L176).

Member States' efforts to secure energy supply.⁷⁷ The issuance of the 2007 Directives coincided with a EU sector inquiry as well as an investigation into the French domestic markets for prohibited state aid and abuses by EDF itself.⁷⁸

The 2003 package is illuminating to the extent that it pinpoints particular ills plaguing the infant internal market in electricity. Directive 2003/54/EC avoids policy-oriented generalities in the enumeration of its goals.⁷⁹ It establishes as its purpose the confrontation of dominant impediments to the establishment of an internal market, noting among these market dominance and predatory behavior, and discusses the importance of fair tariffs along the length of the electricity supply chain.⁸⁰ With regard to the latter concern, it highlights above all goals related to market access, perhaps explaining the French state's later adoption of the ARENH tariff in its 2010 legislation. That law provides for small supplier access to EDF's cheap nuclear stores.⁸¹ Only several years later, the European Union's more aggressive approach to implementation of these directives in the form of investigative procedures highlighted *dirigiste* and tensions across the European Union.⁸²

77. *Competition*, *supra* note 10 ("Although significant progress had been made, competition was slow to take off, with markets remaining largely national, with relatively little cross-border trade, and highly concentrated.")

78. *Id.*

79. *Id.*

80. Council Directive 2003/54, *supra* note 76, art. 2.

81. Gilbert, *supra* note 51, at 2.

82. European Commission Press Release IP/05/716, Competition: Commission Opens Sector Inquiry Into Gas and Electricity (June 13, 2005); European Commission Press Release IP/05/1421, Energy: Member States Must do More to Open Markets; European Commission Memo/05/425, Competition: Commission Sector Inquiry Reveals Serious Problems in Energy Markets (Nov. 15, 2005). *See also* European Commission Press Release IP/06/174, Competition: Energy Sector Inquiry Confirms Serious Problems and Sets Out Way Forward (Feb. 16, 2006); European Commission Memo/06/78, Energy Sector Competition Inquiry – Preliminary Report – Frequently Asked Questions (Feb. 16, 2006); European Commission Press Release IP/07/26, Competition: Commission Energy Sector Inquiry Confirms Serious Competition Problems (Jan. 10, 2007).

1. *Inquiries and Enforcement*

a. EU-wide Investigations (2005-2007)

Outside the French context, the Commission concluded a two-year sector inquiry in 2007, placing its emphasis on integration of the electricity market.⁸³ In its findings, the Commission pointed to several problem areas and repeatedly evoked the question of security of supply.⁸⁴ Carving out the problem of vertical integration, the Commission equally called attention to better prices for end consumers and intelligent resource use and allocation.⁸⁵ In the particular case of EDF, these investigations into market conditions focused on the utility's contribution to the state of market concentration in the early 2000s.⁸⁶

The Commission found that EDF's upstream contracts contributed to market downstream concentration, and conveyed concern for the related issues of generation and lack of access to infrastructure.⁸⁷ In naming these principal "problem areas," the Commission pronounced that the concentration of operations in the hands of a few large suppliers would lead to a toxic self-perpetuating process.⁸⁸ This was true because the placement of barriers to entry would translate into anemic investment in new infrastructure, networks, and capacity-development operations on the part of smaller players.

More interesting is perhaps the Commission's aggressive stance regarding the imposition of remedies. Notably, it has evoked its recourse to the "far-reaching structural" remedies under Articles 101 and 102 of the TFEU.⁸⁹ Member State interventionism in domestic economies and markets does not escape its concerns: "[rigorous application of state aid control] is called for particularly when state subsidies contribute to

83. European Commission Press Release IP/07/26, Competition: Commission Energy Sector Inquiry Confirms Serious Competition Problems (Jan. 10, 2007).

84. *See id.*

85. *Id.*

86. *See* European Commission Press Release IP/05/716, *supra* note 82.

87. *See* European Commission Press Release IP/07/26, *supra* note 82; European Commission Memo/07/313, Antitrust: Commission Initiates Formal Proceedings Against Electrabel and EDF for Suspected Foreclosure of the Belgian and French Electricity Markets (July 26, 2007).

88. European Commission Press Release IP/07/26, *supra* note 82.

89. *Id.*; TFEU arts. 101–02.

maintaining concentrated markets and prevent market liberalisation from taking root.”⁹⁰ Here, the Commission notified EU members that state subsidies were thereafter a red flag in the context of single-supplier controlled markets.⁹¹ Additionally, by declaring such domestic market interventionism an actionable violation under the European Union’s constitutive document, the Commission reserved for the Center the power to enforce its new integration objectives; the effect of the sector inquiry was to allow the Center to pass judgment on the internal economic policy of Member States.

b. *The European Union and France*

i. 2007 State Aid Investigations: 2007 (Extended in 2009): Investigation #1 into Illegal State Aid

The Commission pursued parallel proceedings against the French government regarding illegal state aid in June 2007,⁹² after a round of investigations performed in the same year, and extended in 2009.⁹³ The question was whether the regulated tariff system, namely the TaRTAM framework active from 2006 to 2011 and the ARENH tariff that presently regulates access, constitute prohibited state aid or subsidized prices to medium to large French companies within the meaning of the European treaty.⁹⁴ The investigators concluded that they were not incompatible with the internal market, but would be considered consistent with EU state aid rules upon France meeting certain conditions.⁹⁵ Thus, the Commission gave its consent to the state’s transitional scheme proposals contingent upon the utility’s compliance with three policies: regulated pricing, maintenance of the ARENH tariff, and a gradual shift towards cost-based-pricing with the disappearance of the regulated system at the end of 2015.⁹⁶ Significantly, the European Union stated that its premise for these rules was that the even-

90. European Commission Press Release IP/07/26, *supra* note 82.

91. *Id.*

92. European Commission Press Release IP/07/815, *supra* note 9.

93. European Commission Press Release IP/09/376, *supra* note 9.

94. See Org. for Econ. Co-Operation and Dev. [OECD], *OECD Policy Roundtables: Competition Policy in Subsidies and State Aid*, 6 OECD J.: COMPETITION L. & POL’Y 105, 109 (2001) (blocking new entry).

95. European Commission Press Release IP/09/376, *supra* note 9.

96. Cost-based pricing implies that purchase prices will be calibrated to the cost of supply and distribution.

tual rise in tariff prices would level supplier positions on the market.⁹⁷

Without disputing the veracity of the EUs conclusions, Percebois highlighted the problem with the Commission's decision in his theory of a "French paradox."⁹⁸ While these changes will eliminate barriers to entry and enhance competition, they will increase prices for the French taxpayer in the long term.⁹⁹ The predicament then becomes whether the choice of integration, increased competition, and higher fees erodes the French sovereign's wish to regulate the system of supply and sale through EDF for the ultimate benefit of national consumers.¹⁰⁰

Several cases involving EDF clarify the meaning, implementation, scope, and implications of these provisions. In *Commission v. France* (1997), the General Court deliberated on exclusive import and export rights in gas and electricity commodities.¹⁰¹ Under 1946 French nationalization law, EDF and a subsidiary Gaz de France, or GDF, became sole operators to the State and the recipients of these privileges.¹⁰² Conceiving such subsidies as distortive of trade and thus violating the integration mandate articulated in the founding treaty, the Commission brought France before its competition tribunal.¹⁰³ However, because prohibitions on state aid are outlawed except where they serve a clear public purpose (TFEU 34-36), the Commission carried the burden of specifying its aims in prosecuting a Member State.¹⁰⁴ The French Republic defended its position as consistent with Articles 42 and 90(2) of

97. OECD, *supra* note 94.

98. Percebois, *supra* note 3, at 25 ("It is a contradiction to ask the market to set the electricity price for the end-user and at the same time to leave policy-makers choose the structure of the electric park.").

99. *Id.*

100. *Id.*

101. Case C-159/94, *Comm'n v. France*, 1997 E.C.R. I-5819.

102. *Id.* ¶ 4.

103. *Id.* ¶ 1 ("By application lodged at the Court Registry on 14 June 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by establishing exclusive import and export rights for gas and electricity, the French Republic had failed to fulfil its obligations under Articles 30, 34 and 37 of the EC Treaty.").

104. *Id.* ¶ 25.

the TFEU,¹⁰⁵ which allow for the protection of industries whose particular structural components and operational features make competition compliance infeasible.

As in a 1991 case,¹⁰⁶ the Court focused on the aims of Article 106: to find the proper balance between a Member State's needs and promotion of its "interests" with the "community interests" in question.¹⁰⁷ The Court sided with French authorities, rejecting the Commission's argument that abolishing exclusive import and export rights would free up trade for the general benefit of the internal market.¹⁰⁸ It concluded that the Commission was required to define the "community interest in relation to which development of trade must be assessed" and establish that failing to meet this supposed trade concern was a distortion of competition.¹⁰⁹ This became, stated the Court, integral in a context of increasing competition in the European electricity market.¹¹⁰ Finding that the Commission did not sufficiently articulate a community interest, besides that of full Member State compliance with internal laws, the Court essentially granted leave to the French Republic to continue its policies:

The Member States' interest being so defined, they cannot be precluded, when defining the services of general economic interest which they entrust to certain undertakings, from taking account of objectives pertaining to their national policy or from endeavor-

105. TFEU art. 42. ("The Council, on a proposal from the Commission, may authorize the granting of aid: (a) for the protection of enterprises handicapped by structural or natural conditions; (b) within the framework of economic development programmes.")

106. *Comm'n v. France*, 1997 E.C.R. I-5819, ¶ 16 (citing *Comm'n v. France*, 1991 E.C.R. I-1223, ¶¶ 11–12). Because the Treaty on the Functioning of the European Union is the product of a series of legislative amendments to the original European constitutive treaties, the numbering of its provisions changed in 1957, 1992, and 2007. Article 106 began as Article 86 in the European Economic Community treaty (EEC) of 1957, became Article 90 in the Treaty Establishing the European Community (TEC) of 1992, and was finally named Article 106 in the 2007 Treaty on the Functioning of the European Union (TFEU). Hence the reference to Article 90 in the 1991 opinion.

107. TFEU art. 42(a) ("The Council, on a proposal from the Commission, may authorize the granting of aid: (a) for the protection of enterprises handicapped by structural or natural conditions.")

108. *Comm'n v. France*, 1997 E.C.R. I-5819, ¶¶ 109–16.

109. *Id.* ¶ 113.

110. *Id.* ¶ 114.

ing to attain them by means of obligations and constraints which they impose on such undertakings.¹¹¹

Belgian competition scholar Harm Schepel characterizes such an attitude as the authority's refusal to "dismantle national monopolies" and thus construes it as the Commission's reversal of prior case law.¹¹² Though this 1997 case may reflect a reversal of precedent, the Commission became increasingly inclined to use the enforcement tools at its disposal to full effect in carrying out the integration directives. These regulations and the Commission's heightened vigilance may have prompted France's 2004 privatization of EDF in the first place.

In a line of cases, *Électricité de France (EDF) v. European Commission* (2003, 2009, 2012),¹¹³ the EU competition authorities addressed the question whether grants in the form of tax waivers constituted anticompetitive state aid distortive of member trade. The shift in position from Schepel's 1997 assessment, as well as the court's tendency to construe aid broadly, motivated the 2003 decision of the Commission.¹¹⁴ The latter declared EDF's 1997 corporate tax exemptions to be "incompatible with the common market" and directed the French government to recover these sums, which amounted to 888.89 million euros.¹¹⁵

When EDF appealed the decision six years later, the General Court annulled the two articles on state aid.¹¹⁶ In its analy-

111. *Id.* ¶ 56.

112. See Harm Schepel, *Reconstructing Constitutionalization: Law and Politics in the European Court of Justice*, 20 OXFORD J. LEGAL STUD. 457, 459 (2000).

113. See generally Case C-124/10 P, *Comm'n v. Électricité de France (EDF)*, 2012 E.C.R. I-676; Case T-156/04, *Électricité de France (EDF) v. Comm'n*, 2009 E.C.R. II-4503; Commission Decision 2005/145/EC, 2005 O.J. (L 49) 9.

114. Joined Cases C-328/99 & 399/00, *Italian Republic v. 2003 E.C.R. I-4035*, ¶ 35 (the notion of what constitutes aid is broad); Commission Decision on the State Aid Granted by France to EDF and the Electricity and Gas Industries, 2003 O.J. C(2003)4637.

115. Commission Decision 2005/145/EC, 2005 O.J. (L 49) 9, ¶ 28.

116. *Comm'n v. Électricité de France (EDF)*, 2012 E.C.R. I-676 (citing *Électricité de France (EDF) v. Comm'n*, 2009 E.C.R. II-4503 para 48-49 and Commission Decision 2005/145/EC, 2005 O.J. (L 49) 9 (Article 3 provides: "The non-payment by EDF, in 1997, of corporation tax on some of the provisions created free of tax for the renewal of the RAG, corresponding to FRF 14.119 billion in grantor rights reclassified as capital injections, constitutes State aid that is incompatible with the common market." Article 4 provides: "France shall take all necessary measures to recover from EDF the aid referred to in

sis, it focused on EDF's procedural rights, the tax deals' effects on trade in the internal market, and the applicability of the private investor test, as argued by EDF.¹¹⁷ The latter has come to be a useful tool in the E.U.'s interpretation and implementation of the state aid limits in Article 107(1) and allowances given to Member States in granting certain benefits and privileges to public sector utilities, articulated in Article 106(2).¹¹⁸ The test is determinative of the scope under which the Court analyzes the French Republic's actions; it queries whether the state, as a shareholder of the utility, acted as any private investor would regarding its portfolio "in a market economy."¹¹⁹ It thus distinguishes between the state as a shareholder and the state as an authority "exercising public power."¹²⁰

The analysis boils down to whether the French Republic was making an administrative business decision, only with the added oddity of using the resources of a public authority to do so. The Court, rejecting the Commission's stance that the test could not apply where the state uses resources unavailable to a private actor, characterized the transactions as capital injections and not state aid "in circumstances corresponding to normal market conditions."¹²¹ It is also worth noting that the Court was attentive to EDF's allusions to *equality of treatment* between public and private entities.¹²² That is, because the public and private sectors should receive equal treatment under the law, the test should be utilized as the universal standard of analysis. Such notions of equality of treatment are meaningful when contemplating the larger question of how

Article 3 and unlawfully made available to it."). Commission Decision 2005/145/EC, 2005 O.J. (L 49) 9.

117. Formally known as Market Economy Investor Principle (MEIP).

118. TFEU arts. 106–107; Ben Slocock, *The Market Economy Investor Principle*, 2 COMPETITION POL'Y NEWSL. 23 (2002) ("The Market Economy Investor Principle or MEIP has been a cornerstone of state aid control since at least 1984 when the Commission published its communication on Government Capital Injections. It remains a key test of whether actions by public authorities represent state aid in the sense of Article 87(1) of the EC Treaty.")

119. *Électricité de France (EDF) v. Comm'n*, 2009 E.C.R. II-4503, ¶¶ 69, 155.

120. *Id.* ¶ 97.

121. Katharina Dietz, *European Commission v. Électricité de France: The Private Investor Test and State Aid*, MCDERMOTT WILL & EMERY (June 25, 2012), <http://www.lexology.com/library/detail.aspx?g=01eb1ceb-ff0f-4cb0-aa84-04b1598abd0d>; *Électricité de France (EDF) v. Comm'n*, 2009 E.C.R. II-4503, ¶¶ 247, 250.

122. See Case C-482/99, *France v. Comm'n*, 2002 E.C.R. I-4427.

the Center regards Member States' choices vis-à-vis privatization and nationalization.

EDF's views on the case are particularly informative. Though the utility prevailed on the state aid question, which took the analysis out of the Article 87 framework, it had less success in its interpretation of 107(1).¹²³ Key to EDF's position was the fact that the activity under scrutiny took place before the 1996 liberalization of the electricity sector, so that any effects on trade stemming from the government's financial measures would not be acting on a competitive market.¹²⁴ Similarly, EDF relegated its activity to the relations between itself and foreign, similarly-situated monopoly producers: "trade between national producers enjoying a monopoly position in their respective countries at the time, cannot be treated in the same way as a competitive situation."¹²⁵ The practical effect, according to EDF, was that intra-Community trade was left untouched.¹²⁶

The Court did not entertain such an argument, dismissing the relevance of the proposition, even if true, that "trade [was] in no way affected at inter-Community level."¹²⁷ The Court, citing to *Cassa di Risparmio di Firenze*, maintained that it only had to determine whether the aid in question changed EDF's position among other public or private entities participating in the market, and thus could have an actual or potential effect on trade.¹²⁸ It also qualified the issue of whether EDF was directly implicated in intra-Community trade as not determinative, posturing that even a contingent rise in domestic activity following aid measures could have implica-

123. *Électricité de France (EDF) v. Comm'n*, 2009 E.C.R. II-4503, ¶¶ 283–84/152.

124. See Case T-288/97, *Regione Autonoma Friuli Venezia Giulia v. Comm'n*, 2001 E.C.R. II-1169 (for the proposition that trade between Member States and competition is "inextricably linked").

125. *Électricité de France (EDF) v. Comm'n*, 2009 E.C.R. II-4503, ¶ 134.

126. See *id.*

127. *Id.* ¶ 141.

128. Case C-222/04, *Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze Spa*, 2006 E.C.R. I-00289 ("When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid (citing Case C-66/02 *Italy v. Commission* [2005] ECR I-10901, ¶ 77; Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137).").

tions for the internal market.¹²⁹ This was because any benefit EDF received could have produced many permutations in which a pre-liberalization benefit would strengthen the post-liberalization utility (i.e. via promotion of a dominant position in intercommunity trade, penetration of another Member State's market, or prevention of penetration of the French market).

Other positions taken by EDF reveal French views on interventionist policy. The undertaking argued that under compensation for recent increases in public service costs accounted for a financial agreement in the management contract between EDF and the state and offset any advantage it could have obtained from tax concessions.¹³⁰ Furthermore, it stated that the Commission did not consider the 1997 restructuring of the company as an element of these expense hikes and thus the relationship between EDF and the state.¹³¹ According to EDF, had the Commission done so, it would have found no advantage to EDF where administrative and development expenses cancelled out any tax breaks.¹³² EDF equated the Commission's oversight, or failure to take into account public service obligations, to an infringement of its procedural rights under Article 107 and cited as precedent Belgium's permissible capital increase to *La Poste*, the state-owned mail service.¹³³

The 2012 decision of the European Court of Justice (ECJ) reversed this outcome for EDF and the French state.¹³⁴ It is worth consideration that an October 2011 advisory opinion by the Advocate General had proposed upholding the appeal and

129. This is consistent with Article 101 ("concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market") and 107(1) ("threatens to distort" language); *Cassa di Risparmio di Firenze Spa*, 2006 E.C.R. I-00289, ¶¶ 142 ("...aid has real or potential effect on competition and affects trade between Member States. . .").

130. See *Électricité de France (EDF) v. Comm'n*, 2009 E.C.R. II-4503, ¶¶ 68–70, 116–19.

131. See *id.*

132. See *id.*

133. Commission Decision C-2508, *La Poste Belgium SA/NV* (2003) (historical under-compensation meant contributions did not qualify as state aid); *Électricité de France (EDF) v. Comm'n*, 2009 E.C.R. II-4503, ¶ 115.

134. Case C-124/10 P, *Comm'n v. Électricité de France (EDF)*, 2012 E.C.R. I-676.

remanding the case to the General Court, which had summarized more fully the defining criteria of the shareholder and public power categories and lingered on the question of equal treatment.¹³⁵ Ultimately, the Advocate General suggested upholding the Commission's grounds for the appeal, denying the applicability of the private investor test since the question of means for granting the tax breaks was determinative.¹³⁶ The ECJ, however, as the General Court did before it, denied the pertinence of the means used to perform the share capital increases.¹³⁷ The Third Tribunal pinpointed the *amount of aid* as the principal issue.¹³⁸ It concluded that the General Court was correct in basing its analysis on "the improvement—with a view to the opening up of the electricity market—in EDF's financial situation and on the effects of the measure in question on competition."¹³⁹

This decision informs us in significant measure about the French and Central approaches to state subsidies, market regulation, and weighing of domestic and regional priorities. First, the contested application of the prudent private investor test indicates the parties' positions on the use of public resources. In the same vein, it underlines the Commission's fear of public, governmental power as a "threat" to competition. EDF and the French governmental authorities would rather center the gaze on a Member State's unique political economy. If France chooses to facilitate the supply of electricity by public means, rather than delegate the task to uniquely private actors in a liberalized market, then the European Union must

135. *See id.* ¶ 56. Advocate Generals are attached to the Court of Justice and issue advisory opinions. Though they are not bound by these, the judges of the Court consider them in rendering decisions.

136. *Id.* ("The principle that the State's activities as shareholder should be kept strictly separate from activities undertaken by the State as a public authority . . . led the Court to consider that the fact that a dominant undertaking had acted at the same time both as a holder of special rights and as an economic operator created a risk of conflict of interest A system of undistorted competition. . . can be guaranteed only if equality of opportunity is secured as between the various economic operators. (55) . . . Similarly, the Court held that a State measure constitutes an infringement of Articles 86(1) EC and 82 EC where it gives rise to inequality of chances between economic operators and, in consequence, to distorted competition.").

137. *See id.* ¶ 98.

138. *See id.* ¶ 91.

139. *Id.*

respect a choice under the Treaty's neutrality mandate.¹⁴⁰ However, there is a palpable tension between this principle of Member State autonomy and the establishment of an internal market. The arguments over whether to equate state benefits with capital maneuvers by a market actor point to this tension.¹⁴¹

As for public service costs, though the Court denied the pertinence of the public service argument, again, consideration of such a notion is instructive for the question of integration.¹⁴² The possibility of the European Union glossing over the cost of electricity born by a public utility operating, at least nominally, for the greatest achievable consumer welfare is heavy with consequences. Its rejection was premised on the notion that EDF improperly qualified the acquisition of new subsidiaries abroad as public service tasks.¹⁴³

However, the question remains whether the EDF's expansion is vital for the relaying of cheap electricity costs to the French end consumer in a competitive, globalized market where, in the word of former president Valéry Giscard d'Estaing: "We don't have oil, but we have ideas."¹⁴⁴ *La Poste* offers a different perspective: could smaller French suppliers rightfully argue that under compensation for its expenses as a public utility justified any favorable treatment, assuming the retail tariffs would count as such?¹⁴⁵ Such a situation seems unlikely from a doctrinal standpoint, but it illustrates how the role of a public utility and its legal profile complicates European plans for integration. If a public utility is meant to shoulder certain costs and benefit the public by so doing, within the meaning of Article 87, it must be perfectly legitimate unless

140. See TFEU art. 345. ("The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.")

141. See *Comm'n v. Électricité de France (EDF)*, 2012 E.C.R. I-676; Case T-156/04, *Électricité de France (EDF) v. Comm'n*, 2009 E.C.R. II-4503.

142. See *Électricité de France (EDF) v. Comm'n*, 2009 E.C.R. II-4305, ¶¶ 127, 133.

143. See *id.* ¶ 143 ("The form of exceptional derogations from the provisions normally applicable in the accounting and commercial field conferred on EDF an operational advantage which seems at this stage to exceed the costs of any public service.")

144. CULTURE PUB, *supra* note 1.

145. Commission Decision C-2508, *La Poste Belgium SA/NV* (2003).

European integration is favored over the permissible preservation of Member State sovereignty.¹⁴⁶

The French government has justified its grants to the utility as the actions of a private investor.¹⁴⁷ Second, it has argued that the Commission's arguments are simply a "formal" application of the law, without regard to substance.¹⁴⁸ Does the French Republic thus contend that the Union is imposing discriminatory distinctions between private and public entities? Given the particularly weighty role and agency of the public entities and state financial involvement in the public sector, this would amount to a purposeful subordination of the needs of the French market, consumers, and the state's prerogative in maintaining its own market.

The European Union only grudgingly accepts EDF and the government's current position, which seems to contravene EU regulations. More precisely, the European model draws a clear distinction between conduct amounting to state aid and conduct amounting to action by a private investor.¹⁴⁹ It opposes a French model contemplating heavy state involvement in regulating the economy and maintaining a public utility. This tension echoes *Germany v. Commission* (2003), where the Commission refused to even conduct the private investor analysis because the government had to issue legislation to accomplish the aid.¹⁵⁰ If the Center will often argue that a distinction must be made between the obligations of a state as a public authority and as an investor or "owner of the share capital of a company," this would answer the question in the affirmative.¹⁵¹

Because the competition authority ultimately denied the Commission's appeals, the parties have avoided any overt political divisions. Given the contentious nature of the debate, however, the rounds of appeals, and the long time-span during which the dispute was adjudicated, such conflict seems inevitable. It will play out in the question of retail tariffs and may prove determinative in how the French decide to continue

146. See *Électricité de France (EDF) v. Comm'n*, 2009 E.C.R. II-4305, ¶ 143.

147. Case C-124/10 P, *Comm'n v. Électricité de France (EDF)*, 2012 E.C.R. I-676, ¶ 28.

148. *Électricité de France (EDF) v. Comm'n*, 2009 E.C.R. II-4305, ¶ 184.

149. Dietz, *supra* note 121.

150. See Case C-334/99, *Germany v. Comm'n*, (2003) ECR I-1139.

151. *Électricité de France (EDF) v. Comm'n*, 2009 E.C.R. II-4305, ¶ 185.

their electricity initiatives, EDF's development plans, and the Center's political and legal postures, and most especially the sector inquiries into the French regulated tariff system.

ii. *Official Notice and Procedures for Electricity Tariffs*

Though the electricity tariffs have recently unsettled Commission authorities and sparked consternation over their legality and effects on the common market, the General Court has not treated the question to the same extent as other state aid issues.¹⁵² A court's framing of the regulated tariffs as forms of prohibited state aid would be particularly discomfiting for the French state, and others, notably for the reasons stated above.¹⁵³ As part of its infringement procedures in the gas and electricity markets, the Commission issued a letter of formal notice to France for its maintenance of artificial tariff rates in April 2006.¹⁵⁴ The notice alleged that France violated the electricity market liberalization Directive 2003/54 mandating higher levels of competition, free movement of goods, and rules of fair treatment.¹⁵⁵

In-depth investigations continued throughout 2007 to 2009. Tellingly, in 2009, the Commission decided to extend the sector inquiries commenced in 2007.¹⁵⁶ It simultaneously proceeded to initiate a formal infringement procedure against the French Republic for violation of the 2003 directives.¹⁵⁷ Interestingly enough, the Commission also chastised France for its failure to implement the directive in its own national legislation.¹⁵⁸ Just as the TaRTAM tariffs, originally established as temporary and transitional, were set to expire in 2010, France

152. See Gilbert, *supra* note 32, at 3; see also European Commission Press Release IP/06/1768, The Commission Takes Action Against Member States Which Have Still Not Properly Opened Up Their Energy Markets, (Dec. 12 2006); European Commission Press Release IP/09/376, *supra* note 9.

153. European Commission Press Release, IP/06/152 (April 4, 2006).

154. *Id.* (“(1) Absence of, or insufficient legal unbundling distribution system operators in order to guarantee their independence; (2) Existence of regulated prices which block the arrival of new suppliers; (3) Absence of the notification of the public service obligations; (4) Preferential access for certain contracts in the market of electricity; (5) Non publication of commercial conditions for access to storage.”).

155. Gilbert, *supra* note 51, at 3.

156. European Commission Press Release IP/09/376, *supra* note 9.

157. Lévêque, *supra* note 31.

158. *Id.*

undertook the September 2009 structural change of its own electricity markets.¹⁵⁹

It is remarkable that the European Union's prodding prompted such a vigorous compliance effort. Certainly, this turn of events proved that a direct and immediate influence on a Member State's policies in the name of Union law was achievable.¹⁶⁰ However, skeptic commentators may decline to adopt such a positive interpretation. To be precise, France "made the commitment in particular not to maintain regulated tariffs for large and medium-sized companies beyond a limited transition period."¹⁶¹ This means that France simply prolonged the installation of the tariffs systems, albeit with modifications. Appropriately, a series of letters were exchanged among the Competition Commissioner Neelie Kroes, and then-Prime Minister François Fillon, discussing a new set of transition tariffs that would inch the French electricity market towards the free competition objectives that the Commission had set for itself and Members beginning in the 1990s.¹⁶²

159. Lévêque, *supra* note 57, at 4-5 ("The immediate reason for the new Electricity Act is to provide assurances to Brussels. This is attested by an exchange of letters between the French government and the European Commission. In a detailed letter dated 15 September 2009, the French prime minister, François Fillon, undertakes to Neelie Kroes. . . to eliminate tariffs for industrial consumers, beginning with TarTAM as soon as the new act is passed, and followed by yellow and green tariffs in 2015. . . [This is due to] an underlying national political concern, namely to guarantee French consumers the exclusive and lasting benefit of past investment in the nuclear fleet. That wish is asserted constantly during the early stages of the NOME bill, from the engagement letter to Paul Champsaur on 24 October 2008 to the discussion in parliament via the bill of 14 April 2009."); Paul Champsaur, Rapport de La Commission Sur l'organisation du marché de l'électricité, Ministère de l'Écologie, du Développement durable et de l'Énergie (2009) at 7 ("Plusieurs dispositions législatives et réglementaires arrivent à échéance le 1er juillet 2010. La forte instabilité du cadre et l'absence de cadre clair au-delà de 2010 sont sources d'incertitude pour le marché qui ne peut s'inscrire dans une logique de long terme réglementaire. Several provisions expire July 1, 2010 (i.e., the TarTAM tariff). The unpredictability of the regulatory framework and the absence of a clear framework beyond 2010 are sources of instability for the market, which cannot be conceived in the long-term.").

160. European Commission Press Release, Memo 09/394 (September 15, 2009).

161. *Id.*

162. European Commission Press Release IP/06/1768, *supra* note 152.

iii. 2006: *EDF and Long-term Contracts*

Though this Note does not venture beyond the state aid cases and tariff disputes, actions naming EDF as the sole defendant will also frame the policies governing French energy regulation. It is thus worth commenting briefly on one such dispute. In 2006, the European Union issued an Official Notice to *Électricité de France*, setting forth its principal concerns regarding competition in the domestic French market and, by extension, the ability of the French state to integrate the latter into the community market.¹⁶³ The European Union proceeded to commence an ex-officio investigation and subsequently formal procedures against the incumbent French supplier.¹⁶⁴

In December 2008, the Commission issued a statement of objections informing the company that it may have not only abused its dominant position by maintaining extended contracts, but may also have violated the TFEU by including resale restrictions in these same documents.¹⁶⁵ In a Letter of Objections, the Commission relayed its concerns about long-term contracts that EDF had concluded with larger industrial consumers.¹⁶⁶ The nature of the agreements was problematic, since they essentially tied these yellow and green tariff customers to EDF's services and thereby blocked entry for smaller players and decreased liquidity on the wholesale electricity market.¹⁶⁷ As such, they would possibly constitute a violation of the abuse of a dominant position provisions articulated in

163. *Id.*; Gilbert, *supra* note 51, at 3; European Commission Press Release IP/06/152; Regulated Access to Wholesale Base-Load Energy: Lessons from French Experience 13 (2014).

164. Gilbert, *supra* note 32, at 3.

165. European Commission Press Release IP/08/809, Antitrust: Commission Market Tests Proposed Commitments by EDF to Increase Competition in the French Electricity Retail Market (Nov. 4, 2009).

166. *Id.*; Nicolas Bessot, Maciej Ciszewski & Augustijn van Haasteren, *The EDF Long Term Contracts Case: Addressing Foreclosure for the Long Term Benefit of Industrial Customers*, 2 COMPETITION POL'Y NEWSL. 1 (2010), http://ec.europa.eu/competition/publications/cpn/2010_2_3.pdf.

167. Bessot, Ciszewski & van Haasteren, *supra* note 166, at 1. Gilbert, *supra* note 51, at 6 ¶ 2; European Commission Decision Relating to a Proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement Case 2001 O.J. (C 31) 1, 1–3 [hereinafter Article 102 Commission Decision].

Article 102 of the TFEU.¹⁶⁸ Because the overall effect of such conduct was to foreclose the market, EDF faced consequential accusations and decided to accede to EU wishes.¹⁶⁹ Though it did not disclose or concede any illegal conduct by itself, it acquiesced in submitting binding commitments.¹⁷⁰ The European Union formally accepted these terms in the spring of 2010, as they were essentially EDF's engagement to act in compliance with Article 9 of Regulation No 1/2003.¹⁷¹ The latter states:

(9) Articles 81 and 82 of the Treaty have as their objective the protection of competition on the market. This Regulation, which is adopted for the implementation of these Treaty provisions, does not preclude Member States from implementing on their territory national legislation, which protects other legitimate interests provided that such legislation is compatible with general principles and other provisions of [Union] law. In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory. Accordingly, Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.¹⁷²

168. See Article 102 Commission Decision, *supra* note 167, at 2-3.

169. *Id.* at 13; *Issues Paper on Antitrust: EDF Commitments to Open French Electricity Market to Competition Made Legally Binding*, (March. 17, 2010) http://europa.eu/rapid/press-release_IP-07-26_en.htm?locale=EN [hereinafter *Issues Paper*].

170. Article 102 Commission Decision, *supra* note 167, at 13; *Issues Paper*, *supra* note 169.

171. *Issues Paper*, *supra* note 169.

172. Council Regulation 1/2003, art. 9, 2003 O.J. (L 001) 1-25.

Thus, EDF has agreed to conduct its own business affairs in the same way that Member States have, attempting to take its own needs and prerogatives into account while not overstepping what the European Union considers lawful market practice.¹⁷³ In this way, it faces the same uncertainties in defining the line between national and EU rights. Phrases such as “an objective different from that of protecting competition” or “protects other legitimate interests” and “compatible with general principles” are conspicuously vague and will prove points of contention in the near future.¹⁷⁴ EDF’s “agreement” with the Commission, however, parallels the French state coming to terms with competition authorities by undertaking the 2009 set of reforms.¹⁷⁵

Both France and EDF’s actions reflect not only a political will to conform and find a market model palatable for both sides, but to eschew any accusations of inertia or indifference on the part of the entity and its shareholder. However, they are just as ambiguous as the French government’s choice to simply adopt a modified tariff system. While the Center’s warnings seem to be taken seriously, both the French government and its flagship company have clearly staked out a place for Gallic investment and political ambitions in the European circle. What the continuous appeals of EDF’s tax waivers and its tongue-in-cheek concessions in the form of official commitments do not entertain is a quick, silent integration into a European market. For the time being, both French and European authorities have been left to contemplate potential modalities within the framework of the TFEU that go beyond mere temporary “fixes.”¹⁷⁶

173. *Id.* at art. 9; Issues Paper at 1 (“The European Commission has made legally binding commitments offered by the French electricity group EDF. . . Under the commitments, EDF will make sure that every year a significant number of customers are free to contract with other electricity suppliers.”).

174. Council Regulation 1/2003, art. 9.

175. Lévêque, *supra* note 57, at 14.

176. Bessot, Ciszewski & van Haasteren, *supra* note 166, at 1.

IV. CONCLUSION: THE FUTURE OF A SOVEREIGN EUROPEAN MEMBER STATE: WILL ELECTRICITY TARIFFS BE THE TAX WAIVERS OF *EDF v. COMMISSION*?

The unwillingness of the European Court of Justice to find that EDF had improperly received state aid in violation of Article 107 of the TFEU leaves open the question of the treatment of the regulated tariffs. The sector inquiries, issuance of the Official Notice, and considerable political and legal jockeying that produced the TaRTAM and ARENH tariffs seem to indicate that the Commission is keen to take some further step. The words of then Commissioner Neelie Kroes only echo the urgency surrounding a French decision to do away with what appears to be a regulated pricing system anathema to a free, Union-wide market.¹⁷⁷ After the passing of the NOME Law, Prime Minister Francois Fillon related with alacrity the many free-market terms of the act. The positives included accessibility to non-French producers, unlimited export, and the permissibility of resale. The Commissioner's reluctance to issue the French state *carte blanche*, as Parisian antitrust and economics expert François Lévêque intelligently terms it, in the matter is apparent:

While the general principles of regulated access to base electricity detailed in your letter appear to comply with Union law, we would like to draw your attention to the importance of the technical terms derived from these general principles . . . [which] must not deviate from the general principles and infringe Union law . . . in particular the rules on competition The Union can only reserve the right to examine the situation in detail in the future if it appears that the principles and commitments you have set forth are not implemented fully or if problems of conformity with Union law emerge in the terms of their implementation.¹⁷⁸

Finally, the expiration of the tariffs this past year leaves France with few possibilities except to decide on the central issue, or face an enforcement action by the Commission. How-

177. Letter from Neelie Kroes and Andris Piebalgs, Commissioners, to François Fillon (15 September 2009), in Lévêque, *supra* note 57, at 32.

178. *Id.*

ever, it does not follow that France must choose between two diametrically opposed policies for its internal and external energy market. To the same extent, the Commission should not proceed under the theory that its mandate is to bar any effort by the French state to recoup its investments.

Instead, both parties should refer to the derogatory provisions, 107(3)(c)–(3)(e) and 108(2) of the Treaty. Reading the terms together, France could characterize the tariffs as aid enabling the expansion of the “economic activity” of energy transmission and distribution that is cost-calibrated and in alignment with French tax structures. Consistent with the “exceptional circumstances” clause of Article 108, parties would construe the latter half of the provision contained in Article 107 broadly.¹⁷⁹ That is, the aids would not be detrimental to trade nor “the common interest” under the following theory: because the tariffs promote an inclusive and equitable framework that finds a middle ground between fair economic treatment of EU citizens and other European consumers, they cannot run counter to the “common interest.” Furthermore, the Council and the French may recast the admittedly asymmetrical industrial and politico-economic profile of the Republic as unique, for, at the peak of a decades-long political strategy and several private-sector investments, the government found itself confronted with liberalization directives. In economic terms, the French would undoubtedly need to sacrifice a fraction of their advantageous contract costs to arrive at this midway point. However, the price differential would not be as dramatic as a simple switch to free market rates.

Article 109 stipulates the procedural equipment to pursue such an approach. More specifically, this provision allows the European Council to take a case-by-case approach in deciding whether aid is incompatible with the integrated market, issue

179. TFEU art. 102(2) (“On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances.”); TFEU art. 109 (“The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.”).

regulations, and except certain forms of aid from the Article 107 rules. In the case of litigation, or in a softer policy analysis undertaken by Commission and Council authorities, leaders should consider that even the European Union has been reticent to deprive individuals of such beneficial prices. Indeed, the expiration of the regulated tariffs in 2015 applied only to yellow and green consumers, or industrial consumers and wholesalers—excluding blue residential consumers.¹⁸⁰ This is a further indication that the Commission recognizes the need for a tailored remedy in the context of the uncommon legal and capital structure of EDF, as well as French industrial policy.

Finally, reviewing authorities, industry representatives, and national leaders should be especially cognizant of the neutrality obligation of article 345 (“The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.”). In one sense, EDF and the French may envision the neutrality mandate as a possible arm in any defense of the regulated tariff system, subsidization scheme, or manipulated pricing structure. A more progressive approach would be to read article 345 consistently with the very premise of Article 106. The latter balances the demands of a regional market economy with the needs of a particular public entity to properly execute its essential tasks. In other words, the treaty allocates a margin of consideration for the treatment of national sovereignty concerns in the context of public undertakings. The conclusion is that a public undertaking reliant on a particular form of state capital contribution and industrial strategy can properly be considered a state’s rightful decision to fashion its own “system of property ownership.”

180. Lévêque, *supra* note 57.

