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Introduction

1. A significant portion of the themes and questions addressed by the WP2 call for papers concern the issue of rising energy prices in the current crisis and how sector-specific regulation and competition law can be combined to limit the impact of this situation while preserving the competitive functioning of markets.
2. In this context, the *Autorité de la concurrence* (hereinafter "the *Autorité*") has experience of the specific issue of energy price regulation. In France, the energy sector has long been subject to extensive and detailed pricing regulation at several points in the value chain (production, network and supply). From the point of view of the government, this regulation is generally viewed through the dual prism of protecting consumers and the industrial fabric from sudden increases in energy costs and preserving a competitive space in a national market that is sometimes still not fully open. The sectoral regulator, the Energy Regulatory Commission (*Commission de régulation de l'énergie*, CRE), ensures the correct functioning of the electricity and gas markets in line with France's energy policy objectives. The *Autorité* ensures that the sector's competitive balance is respected and intervenes when it is distorted.
3. However, the sectors concerned by this type of public intervention also have specific structural characteristics linked to physical considerations and to the history of the underlying infrastructure development. Whatever the type of energy considered (electricity, gas and oil in particular), the companies in charge of these sectors face the imperative of coordinating a network that comprises a large number of players in a complex production and distribution chain. This network must then function in a manner that is sufficiently integrated to allow supply and demand to be matched at all times.
4. So, while the electricity sector is a textbook case, insofar as production cannot be stored and consumption cannot be carried forward, to a lesser extent gas and oil present comparable difficulties due to the high relative cost of storage and the rigidity of downstream consumption.
5. In this context, the coordination of the entire production chain is at stake, and must also take into account several levels of temporality: short-term supply, medium-term production decisions and long-term investments.
6. In the current context of the crisis in the energy sectors, the preservation of clear and interpretable pricing signals is essential to allow the adaptation of both the production tool and consumption behaviour to the new realities. While public policy measures appear necessary, particularly to mitigate the impact of price increases on the categories of consumers most affected, these interventions must avoid blurring the signal and allow the preservation of coherent incentives for all the stakeholders in the markets concerned.
7. Marcel Boiteux, former Chairperson of *Electricité de France* (hereinafter "EDF") said the same when he stated before the French National Assembly (*Assemblée nationale*), *"I am finally convinced that it is not without benefit to let people know what their consumption costs. Once they are aware, many are able to find solutions that take the real cost into account. I still think that prices are meant to tell costs like clocks tell the time."*¹

¹ Hearing of the Investigation Commission into electricity prices, November 2014.

8. In its advisory function applied to the energy sector, in markets subject to strong regulation, the *Autorité de la concurrence* therefore takes into account the need to maintain pricing signals that are sufficiently clear to allow the market participants to implement coherent strategies.

9. In the following sections, the *Autorité* will explain how this question of the pricing signal was addressed in its opinions on the prices for access to the energy transmission and distribution networks (1), the specific prices for certain types of production (2) and, finally, the regulation of prices for supply to end consumers (3).

1. The pricing signal in energy supply networks

10. In the energy field, the transmission and distribution networks are generally natural monopolies, in that they are not replicable in a physically and economically viable way. They therefore constitute infrastructure that must be used by all operators.

11. In a market open to competition, the infrastructure manager is not expected to know the full operational strategies of users, and users are not expected to coordinate with each other. To avoid what are known as "tragedy of the commons" phenomena, the pricing system must play a twofold role :

- it must ensure fair remuneration for the network operator, while retaining its incentives to optimise the mode of operation and invest in capacity ;
- it must also ensure the fair treatment of users while avoiding congestion.

12. In the context of the opening up of the gas and electricity markets to competition, the French Competition Council (now the *Autorité de la concurrence*) was consulted by the government on the principles to be respected and the provisions to be made to transpose the first European directives on the opening up of the electricity and gas markets into French law. In this context, it expressed a view on the main principles of network pricing². It then received a referral regarding several texts organising the pricing of electricity transmission and distribution networks and the pricing of gas transmission.

13. Within this framework, the Council soon faced the fundamental dilemma between, on the one hand, the need for clarity and non-discrimination in pricing and, on the other hand, the need to ensure that the price paid corresponded to the costs generated for the network operator. These issues arose in different forms each time, as the cases below show.

1.1. The issue of "postage stamp" invoicing for network access

14. In its Opinion 02-A-05 of 18 April 2002 on prices for the use of public electricity transmission and distribution networks³, the Council analysed at length the "postage stamp" pricing method, which assumes that a transmission service requires the use of the entire network, without distinguishing the infrastructures that are actually used. The transmission price is therefore uniform throughout the network and independent of distance, hence the name "postage stamp".

15. The Council stated that, "The choice of the flat rate postage stamp method is a compromise between two costs :

² Opinion 98-A-05 and Opinion 99-A-15

³ Opinion 02-A-05, page 9.

- the cost of measuring the "real costs" imposed on the network by each user and operating a pricing system that passes on to each user the "real costs" they have generated ;
- the cost of inefficiencies resulting from the transfers generated by flat rates, which inevitably causes a number of users to pay more or less than the real costs they have generated";"

16. Such an approach has the merit of simplicity for operators but can lead to significant differences in treatment. It may also generate negative incentives for the network operator, who may have less interest in maintaining and upgrading the most complex or expensive parts of the network, as they will not be specifically remunerated for this.

17. Consequently, the Council considered that "postage stamp" pricing could be used at the beginning of the market opening period, but that it should be possible to revise it regularly if problematic situations were identified in terms of discrimination.

1.2. The incentive nature of pricing from the operator's perspective

18. If access to a non-reproducible infrastructure is priced uniformly, regardless of the efforts made by the operator, the risk is that the operator's incentives to strengthen and modernise the network will be greatly reduced. This problem is all the more acute when the network is managed by several operators benefiting from the same pricing regulation.

19. In its Opinion 04-A-22 of 9 November 2004 on the draft decree setting the prices for gas distribution networks, the French Competition Council reiterated the need to ensure that the regulated prices for gas distribution networks were incentive-based.

20. In particular, many components of the proposed pricing took a uniform approach across multiple distribution companies, even though these companies varied widely in terms of business volume and organisational efficiency. *"The income of distributors appears to be guaranteed by the regulated prices in place, regardless of the efficiency of the management of each operator and the economic relevance of this company in relation to the market it targets."*⁴

21. Secondly, with regard to the consideration of investment policies, the proposed pricing provided for a uniform rate of return on capital. The Council insisted that the price should make each distributor responsible for its own investments, and therefore not provide for a uniform return on capital⁵.

22. Moreover, one of the characteristics of network pricing regulation is that it is generally cost-oriented, in that it aims to reimburse the costs actually incurred by the operator and thus avoid undue profit. However, such a mechanism does not provide an incentive for infrastructure operators to reduce their costs as they are certain to be reimbursed.

23. For example, in its Opinion 05-A-25 of 15 December 2005 on electricity transmission and distribution network prices, the French Competition Council stated that it was in favour of price cap mechanisms, which retain the incentive for operators to improve their internal processes⁶.

⁴ Opinion 04-A-22, paragraph 29.

⁵ Opinion 04-A-22, paragraph 41.

⁶ Opinion 05-A-25, paragraphs 29 and 30.

24. In total, with regard to the pricing of access to network infrastructure, one of the main challenges, in the *Autorité's* view, is to ensure that pricing regulation does not confuse the economic signals and actually provides an incentive to invest in modernising these networks and improving the operational performance of operators.

2. The pricing signal at the production and wholesale markets stage

25. In the energy sector, certain production or wholesale markets may require pricing regulation when the barriers to entry are high, the market concerned is too small, or other regulations, such as exclusive import agreements, limit the entry of new operators.

26. However, the *Autorité* believes that such regulation is only relevant when the supply stage can be clearly distinguished from the retail stage, and when price fixing cannot be circumvented by the manipulation of accounting details within vertically integrated companies or highly structured wholesale/distributor networks.

27. For example, in Opinion 09-A-21 of 24 June 2009 on the state of competition on the fuel markets in the *départements* of the French overseas territories, the *Autorité* questioned the relevance of regulating wholesale prices for fuels sold in these territories. When the organisation of marketing allows financial transfers between wholesalers and retailers, in the form of fees or discounts, regulation at the wholesale market stage is not necessarily effective⁷.

28. Second, even when it is possible to isolate a wholesale price in the value chain, the main risk of pricing regulation at the generation and/or wholesale market level is that it disrupts the economic signals underlying investment decisions in the sector concerned.

29. Most of the *Autorité's* work on generation or wholesale market pricing regulation has involved the mechanism specific to the French market for regulated access to nuclear energy set up for EDF's competitors.

2.1. The *Autorité's* initial analysis of ARENH

30. It should be noted that in France, most of the electricity produced is of nuclear origin (more than 70 % of the French electricity mix) and that all nuclear power plants are operated by a single operator, namely EDF. Nuclear power is naturally associated with supplying the market with basic electricity, i.e. a volume of electricity consumed continuously over a certain period, given its operation and marginal cost⁸.

31. In its advisory capacity, the *Autorité* noted that the preponderance of nuclear power in the structure of the French generation mix is likely to raise competition concerns in the long term. It has an immediate impact on competition at the generation level but also has consequences for the retail supply of electricity. The *Autorité* noted that "*[i]n the downstream supply of electricity to consumers, the preponderance of nuclear power in the market supply means that access to nuclear production is essential for the emergence of competitive retail offers. The concentration of nuclear power plants in the hands of the incumbent operator therefore gives EDF a cost advantage over competitors who do not have these production facilities.*"

⁷ Opinion 09-A-21, paragraphs 193 to 199.

⁸ Opinion 10-A-08, paragraph 18.

32. *This benefit has a significant effect on selling prices, as the generation portion of the energy accounts for around half of the extended pre-tax price charged to the electricity end-user. However, EDF's competitors, who cannot cover their basic electricity needs with their own generation facilities, must obtain supplies on the wholesale market. They are therefore subject to the sometimes considerable differences observed between the cost of nuclear generation and the price points found on the wholesale market.*⁹

33. In an emergency decision in 2007, the French competition authority ordered EDF, which was likely to have abused its dominant position by selling wholesale electricity to alternative suppliers at prices that did not allow them to compete on retail prices to eligible consumers, to supply wholesale electricity to these alternative suppliers without a price squeeze¹⁰.

34. To remedy the specific situation of the French market¹¹, the regulatory mechanism of "Regulated Access to Historical Nuclear Electricity" or "ARENH" was introduced by Law 2010-1488 of 7 December 2010 on the organisation of the electricity market (hereinafter "NOME Law"). This mechanism, created for a transitional period from 1 July 2011 to 31 December 2025, consists of granting alternative electricity suppliers in the French market a right of access at a regulated price to electricity from the historical nuclear generation facilities of EDF and within the limit of an overall annual volume, initially 100 TWh.

35. The ARENH mechanism was established to meet three objectives aimed at stimulating competition on both the upstream and downstream markets and protecting the consumer. These targets are as follows :

1. to allow all consumers to benefit from the competitiveness of France's historical nuclear power plants, regardless of the supplier with which they sign an electricity contract ;
2. to stimulate competition on the downstream market for the retail supply of electricity by allowing alternative suppliers to compete with EDF by giving them access to an electricity production price that cannot be matched in the medium term by other suppliers for reasons related to the technology used and the largely amortised nature of nuclear power plants ;
3. to stimulate competition in the upstream market by encouraging investment in production facilities¹². The objective is to allow EDF's competitors to adapt their generation facilities by granting them a temporary price advantage to help them make the major investments required by the generation business, which is by nature very capital intensive.

36. ARENH is not a market mechanism and is, by its very nature, an exception to the rules on free competition since it excludes a significant portion of the electricity produced in France from free trade on the wholesale markets and is instead based on an administered

⁹ Opinion 10-A-08, paragraphs 20-21.

¹⁰ Decision 07-MC-04

¹¹ Opinion 14-A-16, paragraph 36.

¹² See the explanatory statement of the NOME Law (<https://www.assemblee-nationale.fr/13/projets/pl2451.asp>). See also: <https://www.cre.fr/Electricite/Marche-de-gros-de-l-electricite/acces-regule-a-l-electricite-nucleaire-historique> .

supply mechanism at a fixed price with a capped drawing right¹³. In this context, this mechanism "(...) is analysed as start-up aid for alternative suppliers to enable them to compete successfully with EDF. Significant restrictions on the normal functioning of a competitive market only make sense if there is a real improvement in the competitive situation in the electricity market by the end of the 15-year regulatory period."¹⁴

37. Here again, the issue of the pricing signal is particularly prominent in the *Autorité's* various opinions and reports on the ARENH mechanism. In fact, such a mechanism constitutes, by nature, a pricing signal sent both to the producing company and to the alternative suppliers who benefit from the system.

38. Therefore, from the point of view of the generating company, the regulated access price is the level below which it must maintain its costs, including the costs of investing in updating the nuclear power plants. From the point of view of alternative suppliers, the ARENH price constitutes a *de facto* ceiling price for any investment in non-nuclear base generation facilities (such as renewable energy facilities).

39. In its initial opinion on the "NOME" draft law, which created the ARENH mechanism (Opinion 10-A-08 of 17 May 2010 on the draft law on the new organisation of the electricity market), the *Autorité* raised the central issue of free access to a resource for which the beneficiary operators had not made any investment. In particular, the *Autorité* recalled that "*an alternative solution was conceivable through the use of an auction system organising the real confrontation between supply and demand. This was the mode of access chosen for the nuclear generation access mechanism put in place by the French competition authority's Decision 07-D-43 (...)*".

40. "*Access to nuclear generation for suppliers who have not invested in base generation and do not bear the associated risks has a value of its own over and above the cost of the electricity alone. This value, if determined through auctions and paid for by new suppliers, would therefore represent the cost of an investment by an operator that intends to establish itself on the electricity sales markets on a long-term basis. It would therefore offer an incentive for investment in clean production means*".¹⁵

41. The *Autorité* also looked at the issue of the predictability and stability over time of the rules for setting the price of access to nuclear energy. In this respect, it considered that retaining the same methodology for setting the price for 15 years raised questions, given the impact on the electricity production cost of maintaining nuclear power plants and replacing the generating facilities. At the same time, unexpected changes in the price calculation rule, which would involve modifying the cost items to be taken into account, are likely to lead to significant and unpredictable increases. As a result, this could hinder the objective of developing competition in a market characterised by a long and costly investment cycle and in which new operators need visibility to build their development plan. In this context, the *Autorité* proposed announcing in the law the division of the initially planned 15-year period into three periods, making it possible to organise, in a predictable way, the consideration of the evolution of the real costs of nuclear installations¹⁶.

¹³ In this regard, see Opinion 11-A-06, paragraph 101 and Opinion 14-A-16, paragraph 39; see also Opinion 10-A-08, paragraph 57.

¹⁴ Opinion 10-A-08, paragraph 57.

¹⁵ Opinion 10-A-08, paragraphs 91-92.

¹⁶ Opinion 10-A-09, paragraphs 117 to 123.

42. In addition, the *Autorité* noted that the correct determination of the ARENH price, and therefore the pricing signal it sends to the various market players, is a major issue in achieving the objectives assigned to the mechanism, in particular the objective of encouraging EDF's competitors to invest in alternative production methods to nuclear¹⁷. In October 2014, in its Opinion 14-A-16, the *Autorité* again pointed out the risks associated with an incorrect assessment of the ARENH price from a competition perspective: "(...) *Indeed, an overvaluation of the ARENH price would create the risk of cross-subsidies between the nuclear business and EDF's other businesses, which would have consequences for competition conditions in the top-up supply segment in particular. Conversely, an undervaluation of the ARENH price would dissuade alternative operators from investing in new production resources and increase their dependence on a system that is deemed to be temporary.*"¹⁸

43. The method used to calculate the price must meet the requirements of Articles L. 336-1 and L. 337-14 of the Code de l'énergie (French Energy Code), which stipulate that the ARENH price, reviewed each year, must reflect the economic conditions of electricity production by EDF's historical nuclear power plants. This aims to ensure, on the one hand, fair remuneration for EDF and, on the other hand, purchase conditions for competitors that reflect EDF's supply costs through the internal transfer of the historical nuclear power.

44. In practice, the price set at €42/MWh in 2012 has never been changed. Very recently, the French law on purchasing power (*Loi pouvoir d'achat*) confirmed the increase of this price to €49.5/MWh for the next ARENH windows, subject to the validation by the European Commission of the compliance of this price increase with European Union law¹⁹.

45. However, since the ARENH mechanism was set up, the *Autorité* has always recommended that the rules for calculating the ARENH price be defined in a clear and predictable manner and be based on transparent accounting principles that guarantee coverage of the costs incurred by EDF²⁰.

2.2. Assessment of the ARENH mechanism

46. In general, the *Autorité* concluded that the ARENH mechanism has not achieved all of the initial objectives set by the legislator.

47. On the downstream supply market, the *Autorité* noted that the ARENH mechanism had had a beneficial effect on the development of competition: "*alternative suppliers were able to build competitive commercial electricity supply offers in all customer segments since ARENH allowed them, on the one hand, to benefit from basic electricity (via ARENH volumes) at a price reflecting EDF's costs for the production of this type of energy and, on the other hand, to be supplied on the market only for their residual needs.*"²¹

48. However, as the customer portfolio of alternative suppliers grows, ARENH requests increase, causing the 100 TWh cap to be exceeded and therefore capping these

¹⁷ Opinion 10-A-08, paragraph 126.

¹⁸ Opinion 14-A-16, paragraph 53, see also in this respect.

¹⁹ Article 40 of Law 2022-1158 of 16 August 2022 on interim measures to protect purchasing power.

²⁰ Opinion 10-A-08; Opinion 14-A-16; evaluation report of 24 December 2020 on the system for regulated access to historical nuclear electricity; Opinion 22-A-03.

²¹ 2020 Evaluation Report, paragraph 43; see also in this respect Evaluation Report of 18 December 2015 on the regulated access mechanism for historical nuclear electricity, paragraph 23.

requests. However, the capping of ARENH requests leads to a more significant part of customers' bills (including RST customers) being supplied not at the ARENH price, but on the basis of wholesale prices. In concrete terms, end consumers bear the consequences of this situation, which translates into *"higher electricity prices on the retail market, [as well as] price instability and unpredictability."*²² Paradoxically, the development of competition made possible by the mechanism does not seem to lead to a decrease in retail prices. In addition, the mechanism no longer meets one of its main objectives, namely allowing consumers to benefit from the competitiveness of France's historical nuclear power plants. This phenomenon is reinforced by the fact that the ARENH mechanism has not encouraged suppliers to develop models for covering their supply needs over the long term.

49. On the upstream electricity production market, the *Autorité* found that the objective of investing in the operators' own basic production facilities and signing mutually agreed supply contracts with the historical operator has failed. As early as 2015, the *Autorité* considered that, *"it [is] reasonable to believe that the ARENH mechanism will not bring substantial improvement by 2025 compared to those already observed in recent years. Indeed (...) while it has provided an impetus for alternative suppliers to propose competitive offers on the retail market, the facility provided by ARENH does not appear to be an effective solution for changing the structure of the upstream generation market."*²³ This finding is shared by the sector-specific regulator, the Energy Regulatory Commission, which presented similar conclusions in its 2018 report, *"the ARENH mechanism has not generated any of the upstream incentives mentioned in the explanatory statement of the NOME Law. The 2009 finding of a lack of competition in the generation segment (particularly basic), which led to the creation of the ARENH mechanism, remains valid in 2017."*²⁴

50. The pricing signal sent to competitors through the ARENH price, did not therefore allow the transmission of sufficient incentives to push them to invest in their own basic production facilities or develop long-term supply policies and thus allow the emergence of real competition on the upstream market²⁵.

51. While during its implementation the ARENH mechanism temporarily and partially neutralises difficulties related to access to nuclear resources and develops downstream competition, these concerns could resurface when the ARENH mechanism ends. The *Autorité* pointed out this risk in its first opinion on the mechanism in April 2010²⁶. In 2015, it again stated that *"(...) with the scheduled abolition of ARENH in 2025, the incumbent operator will retain a clear advantage, since even alternative operators who have opted for vertical integration will only be able to compete with EDF on the peak and semi-peak*

²² French Energy Regulatory Commission, ARENH 2020 Report, page 15.

²³ 2015 Evaluation Report, paragraphs 50 and 51.

²⁴ French Energy Regulatory Commission, "Evaluation of the ARENH mechanism between 2011 and 2017", 18 January 2018, p. 44.

²⁵ It should also be added that other legal, economic, financial and industrial constraints have contributed to discouraging alternative suppliers from investing upstream, except for the means of semi-peak and peak production.

²⁶ Opinion 10-A-08, paragraph 211: "In the absence of the emergence of truly integrated operators present at the stage of sale to the consumer, peak production and basic production, the market situation may not have changed significantly by the end of the mechanism (...) compared to today. Most of the basic electricity production capacity would remain in the hands of EDF, while alternative suppliers would be mainly involved in retail sales to the end consumer and peak electricity production. The likelihood of a request for an extension of the mechanism (...) would then be high".

price components and will remain dependent on EDF's arbitrations on the wholesale market for the basic electricity component."²⁷

52. In this context, the *Autorité* has, on several occasions²⁸, invited the government to draw the consequences of this finding by launching a major reflection on a new mechanism for improved access to basic nuclear production capacity for all players, with a view to the 2025 deadline.

53. The *Autorité* thus considers that the next regulatory mechanism should make it possible to "(...) ensure that competition can be exercised healthily downstream, by isolating the nuclear issue or making it neutral for the market" and, to do this, suggested two possibilities: "a form of financialisation of the mechanism", and "separating, at least in accounting and financial terms, the activity of producing nuclear electricity from that of marketing it and opening up access to this energy source to all operators who request it, including EDF, on objective and non-discriminatory bases. The problem of financing nuclear production investments would then be similar to that of financing transmission and distribution networks"²⁹. In any case, the *Autorité* recalled that "[a]s soon as a permanent regulatory system is put in place, the concern of placing operators on an equal footing will become fundamental. However, (...) for reasons related to its initial objectives and its transitory nature, the current system consists of quota-based, asymmetrical and price-administered access to the nuclear electricity product. It results in differentiated treatment for the incumbent supplier. Identical supply conditions would make it possible to completely neutralise the unparalleled advantage that the incumbent operator derives from the nuclear facilities."³⁰ In its Opinion 19-A-01, the *Autorité* also noted the existence of alternative regulatory systems in other countries, which could serve as a model for France, and in particular the use of long-term contracts for nuclear and renewable energy (in the United Kingdom) and what are known as heritage models (in Quebec)³¹.

54. The question of the future regulation of the French nuclear industry is all the more important as the French government recently announced the construction of six new EPRs by EDF by 2035 and the extension of the life of existing reactors. In its various opinions, the *Autorité* has always expressed its willingness to contribute to discussions on such a reform.

2.3. The *Autorité*'s analysis of the crisis measures based on ARENH

55. In the current context of rising electricity prices, the French government has favoured the ARENH mechanism to counter the negative effects of the crisis. In addition to other measures introduced at the beginning of the crisis (additional energy voucher, reduction of the TICFE, cap on the RST increase to 4% including VAT), the French government decided to temporarily increase the ARENH ceiling for 2022 by allocating 20 TWh additional ARENH to alternative suppliers, at a price increased to 46.2 euros/MWh.

²⁷ 2015 Evaluation Report, paragraph 44.

²⁸ 2015 Evaluation Report, paragraph 76; Opinion 17-A-01, paragraphs 44 and 45.

²⁹ 2015 Evaluation Report, paragraphs 76 to 78.

³⁰ 2020 Evaluation Report, paragraph 70.

³¹ Opinion 19-A-01, paragraphs 225 to 227.

56. This exceptional measure was referred to the *Autorité* for its opinion³². In this context, it observed in February 2022 that while this measure pursues the general objective of protecting consumers from the unprecedented rise in electricity prices on the market (both individuals and businesses), this objective is more justified for the categories of customers most likely to be affected (in particular the poorest households and electro-intensive companies). However, this measure is general in nature and does not directly target those clients most at risk from the crisis. The *Autorité* thus considered that "[t]he question arises as to whether all customers should benefit from this measure, while some have the capacity to adapt their budget or consumption to cope with sudden price increases"³³.

57. In addition, the *Autorité* emphasised that there were still uncertainties as to whether suppliers would actually pass on the benefits of these competitively priced volumes to all French consumers, regardless of the offer taken out³⁴. The *Autorité* noted that the link between the exceptional allocation of additional ARENH volumes and the objective pursued is indirect and that the ability of the measure to achieve this objective would depend on the behaviour adopted by suppliers in passing on this benefit to their end customers, it being understood that there is no legal obligation in the strict sense of the term for suppliers to pass on this benefit to their customers³⁵. The *Autorité* has not ruled out the possibility that some suppliers may prefer to resell volumes acquired at regulated prices at very high prices on the market to make a substantial margin, and then implement win-back strategies when market prices have fallen. While this type of behaviour should lead to the payment of price supplements (CP1 and CP2), the *Autorité* has stressed that these must be calculated in a sufficiently dissuasive manner to fully neutralise this margin³⁶. In this context, it recommended that the existing control mechanism be strengthened, in particular by requiring each supplier receiving additional electricity volumes to report in detail to the French Energy Regulatory Commission on how these volumes have been passed on in the various contracts, by customer category and by contract category.

58. In addition, the *Autorité* noted that the exceptional measure should lead to rebalancing on the market on both sides (alternative suppliers should theoretically resell the equivalent of 20 TWh and EDF should buy back an equivalent volume). It identified "*a risk that these exchanges could destabilise market prices and thus alter the pre-existing balance between suppliers beyond a simple exchange of net positions between buyers and sellers*"³⁷.

59. For all these reasons, the *Autorité* concluded that "*the use of measures directly favourable to customers is more effective and proportionate with the objective than greater*

³² Opinion 22-A-03.

³³ Opinion 22-A-03, paragraphs 74 to 77.

³⁴ In particular, the *Autorité* found that the pass-on would be almost automatic for contracts with a variable price indexed to the ARENH or the RST, or for semi-fixed price contracts that include contractual clauses allowing the price to be revised downwards according to changes in the RST or the ARENH component. However, for other types of contracts, in particular those with a fully fixed price, or those whose variable price only follows the evolution of market prices, it observed that the passing on of additional ARENH volumes to customers was uncertain and would depend on the contractual mechanisms that suppliers agreed to implement to pass on ARENH in these contracts.

³⁵ Opinion 22-A-03, paragraphs 80 to 82.

³⁶ Opinion 22-A-03, paragraph 93.

³⁷ Opinion 22-A-03, paragraph 121.

*recourse to a general regulation such as ARENH, which, on the one hand, already by its very nature derogates from the rules of free competition and, on the other hand, is based on an indirect financial transfer via intermediaries, the suppliers*³⁸. It therefore recommended that more targeted and direct measures be implemented in the future to achieve the objective of protecting those customers most severely at risk from the crisis³⁹.

60. Lastly, the *Autorité* emphasised that although the mechanism envisaged by the government meets a short-term objective, motivated by the unprecedented crisis in electricity prices, it was, in part, made necessary by the pre-existing dysfunctions in the ARENH mechanism, which are now being exacerbated by the current situation. It therefore recommended once again that a reflection on medium-term measures be undertaken as soon as possible, to enable all players to prepare adequate forecasts for their hedging operations, pending a general and permanent overhaul of the regulatory system that the *Autorité* calls for in preparation for the 2025 deadline.

3. The pricing signal at the supply stage

61. Pricing regulation at the supply stage concerns the prices actually paid by energy end consumers. As with other types of price controls, this type of measure constitutes a dual pricing signal, directed at both customers and suppliers :

- the public price informs customers of the real price of energy, regardless of the actual changes in the wholesale and retail markets ;
- it also informs suppliers of the level at which their own offers can be competitive, again independently of the actual developments on the wholesale and retail markets.

62. At the supply stage, there are two types of pricing regulation in France: social prices⁴⁰ and regulated prices.

63. Unlike social tariffs, regulated sales tariffs (hereinafter "RSTs") do not aim to protect the most vulnerable consumers, but rather to ensure relative price stability for large categories of customers, in particular by smoothing out the impact of changes in the wholesale markets.

64. In France, until 2014, most customers, except the largest industrial customers, could enjoy a RST for both energies. From this date, the RST of gas and electricity were progressively abolished for most non-residential customers during the 2010s⁴¹.

65. For residential customers, the regulated gas sales tariffs are due to be permanently abolished on 1 July 2023. On the other hand, there are no plans to abolish regulated electricity sales prices for residential customers and very small businesses at this stage. However, in accordance with Article 5 of Directive 2019/944 of 5 June 2019, electricity RSTs must be regularly reviewed with the European Commission.

³⁸ Opinion 22-A-03, paragraph 110.

³⁹ Opinion 22-A-03, paragraphs 104 and 110.

⁴⁰ The social tariffs offered by energy suppliers were abolished in 2018 and replaced by direct assistance to consumers in the form of the "Energy Voucher".

⁴¹ See Decision 22-D-17 of 11 October 2022, § 10, for the gas RST and Decision 22-D-06 of 22 February 2022, § 14 to 22, for the electricity RST

66. In its opinions on gas and electricity RSTs, the *Autorité* regularly reiterated the need to maintain clear pricing signals both for consumers and for suppliers competing with the RST.

3.1. Maintaining consistent pricing signals for the most vulnerable consumers

67. Social tariffs generally raise the fewest competitive questions, since they concern only a small percentage of total consumption and are financed by national solidarity. However, the *Autorité* has recalled on several occasions that, even for this type of price, the mechanism used should, as far as possible, preserve the pricing signals for both customers and suppliers.

68. Therefore, in its Opinion 13-A-13 of 24 July 2013 on social gas and electricity prices, the *Autorité* welcomed the possibility opened up to all suppliers, and no longer only to incumbent suppliers, to offer the social tariff. In fact, since this tariff only applies up to a certain level of consumption, consumers on this tariff could not increase competition on price for the additional consumption. Distinguishing the principle of the social tariff from the supplier in charge of it makes it possible to preserve part of the pricing signal, including for the most vulnerable customers⁴².

69. Moreover, the consideration of this pricing signal also depends on the level of information from the consumer who receives it. This is why the *Autorité* suggested that the government launch communication actions aimed at people receiving social tariffs, to remind them that they can also receive price reductions through a competitive bidding approach between suppliers⁴³.

3.2. Gas RSTs and the preservation of the link between the wholesale and retail markets

70. With regard to the RSTs for gas, which will disappear on 1 July 2023, the *Autorité* noted in its Opinion 13-A-09 of 25 March 2013 the existence of a paradoxical situation in relation to the formula for calculating these tariffs. The calculation method implemented by the government was based on the costs actually borne by the historical suppliers, particularly in terms of supply. At the time, these incumbent suppliers were bound by long-term contracts that were heavily indexed to oil prices, while their competitors were able to conclude contracts that were mostly indexed to gas prices⁴⁴. Due to the growth of shale gas exploitation in the United States, the price of gas was increasing significantly less than oil. As a result, based on the supply cost of the incumbent suppliers, the gas RSTs were not competitive with the new entrants. This situation led the French government to deviate from the initial calculation method in order to moderate the planned increase in gas RSTs⁴⁵.

71. According to the *Autorité*, this situation has produced a climate of mistrust among market operators with regard to the government's action. Faced with unpredictable pricing regulations, some operators have chosen not to enter the French market, or to enter with as little investment as possible.

⁴² Opinion 13-A-13, paragraph 31.

⁴³ Opinion 13-A-13, paragraph 36.

⁴⁴ Opinion 13-A-09, paragraph 25.

⁴⁵ Opinion 13-A-09, paragraph 29.

72. Indeed, the question of the pricing signal generated by a supply price to the consumer also concerns competitors. By analysing their own supply costs, these operators can determine the relevance of entering the market concerned by comparing them with the formula for calculating the RST. This ability of the regulated tariff to provide information on the competition conditions on the retail market is severely hampered in the event of unplanned intervention on the final price level⁴⁶.

73. In addition, the persistent weakness of commercial investments by alternative operators maintains the idea that the RST is the only price for gas in France and helps to reinforce a false pricing signal in the minds of consumers⁴⁷.

74. The *Autorité* concluded that "*RSTs dissuade suppliers from entering the market or, when they decide to enter this market, considerably hinder their development, preventing them from making their offers known on a large scale. Moreover, the publicity each quarter around the changes to the RST confirms households' idea that the State protects consumers by maintaining low gas prices and that RSTs are systematically more advantageous than the offers of alternative suppliers*"⁴⁸.

75. In the above-mentioned opinion, the *Autorité* also welcomed the switch to monthly changes to the gas RSTs. Increasing the frequency of price re-evaluation appears to be a positive step towards ensuring better coverage of the incumbent operator's supply costs. It also means that the evolution of supply costs could be more accurately reflected in the RSTs, which improves the pricing signal sent to competitors and consumers.

3.3. Electricity RSTs and cost coverage

76. The *Autorité* has issued several opinions on electricity RSTs⁴⁹. One of the main issues raised in these opinions is the coverage of the costs of the incumbent supplier by the regulated tariff. The general principle established by the law is that the electricity RSTs must cover the costs of the company that supplies them. However, the practical application of this principle is not obvious and unequivocal and depends largely on many factual circumstances.

77. Therefore, in its aforementioned Opinion 14-A-14, the *Autorité* considered that the principle of cost coverage does not in itself impose a single method for constructing prices, and does not require the use of the incumbent operator's internal accounting methods. Cost coverage is therefore not a self-regulating principle but the result of periodic adjustments. It cannot be implemented through a formula that can simply be applied, but must necessarily be verified in concrete terms at regular intervals⁵⁰.

78. In practice, this means that a flexible approach is preferable, allowing temporary deviations between prices and costs, while ensuring that these deviations are periodically closed. In addition, the *Autorité* is in favour of implementing a price cap to encourage the operator concerned to control its costs.

⁴⁶ Opinion 13-A-09, paragraph 35 to 36.

⁴⁷ Opinion 13-A-09, paragraph 37.

⁴⁸ Opinion 13-A-09, paragraph 40.

⁴⁹ The main ones are Opinion 14-A-14 of 26 September 2014, Opinion 15-A-18 of 15 February 2015 and Opinion 19-A-07 of 25 March 2019.

⁵⁰ Opinion 14-A-14, paragraphs 39 to 42.

79. Such flexibility must again be distinguished from the ability of the regulatory *Autorité* to override the cost recovery principle in order to pursue other public policy objectives. As indicated by the *Autorité* in its aforementioned Opinion 15-A-18, the possibility for the government to define "guidelines" for the electricity RSTs is contradictory to the existence of a methodology defined by law, and adds unpredictability for all market operators and consumers⁵¹.

3.4. What are regulated tariffs for ?

80. In its various opinions on the electricity RST, the *Autorité* had already mentioned the possibility of a contradiction between the principle of cost coverage, on the one hand, and the principle of price contestability, on the other.

81. In its report of 22 July 2021 on the regulated electricity tariff framework, the *Autorité* emphasised the fact that the successive changes in the electricity RSTs, which were intended to allow EDF's competitors to remain competitive with the regulated tariff, had greatly reduced the capacity of this same tariff to ensure price stability and the clarity of pricing signals for consumers.

82. In particular, the fictitious fixing of a 30% supply supplement on the wholesale market, intended to ensure the contestability of the tariff, exposes consumers on the RST to market volatility to a greater extent than would a price calculated on the basis of the incumbent operator's costs⁵². As indicated below, this phenomenon is reinforced when the ARENH ceiling is exceeded, which leads to a mechanical increase in the percentage of supply on the wholesale markets in the RST⁵³.

83. However, the RST has a significant structuring effect on the market, insofar as alternative operators almost systematically present their offers in the form of a discount compared to this tariff. Any increase in the RST therefore leads to an increase in a large part of the market prices⁵⁴.

84. This situation raises the question of the role that should be played by the electricity RST, even though this tariff is among the most expensive on the market. In particular, the *Autorité* indicated that *"the fact that consumers with a RST offer do not realise that an institutional mechanism that is supposed to protect them has in fact become a ceiling price for the market to allow effective competition should be a real concern for the government."*⁵⁵

85. Therefore, the persistent confusion about the purpose of the RST and the role it plays in the organisation of the electricity market is one of the major factors in the blurring of the pricing signal it is supposed to transmit to consumers and the various suppliers.

86. This is why the *Autorité* concluded in its report that, should the government want to maintain the electricity RSTs, it would be appropriate to launch proactive communication with consumers *"to inform them that RSTs are not designed to lead to the most competitive offer and that they are invited to compare all the competing offers indexed*

⁵¹ Opinion 15-A-18, paragraph 59.

⁵² Paragraph 127 of the report.

⁵³ Paragraphs 128 to 131 of the report.

⁵⁴ Paragraph 165 of the report.

⁵⁵ Paragraph 164 of the report.

on RSTs, whose main objective is to ensure the moderation of market prices and constitute a reference offer allowing them to make informed choices on the market."