

THE CONSTITUTIONAL COUNCIL

Decision n° 2006-543 DC November 30th 2006

Act pertaining to the energy sector

On November 13th 2006, the Constitution Council received a referral, pursuant to paragraph 2 of Article 61 of the Constitution, from Mr Jean-Marc AYRAUT et al.... Members of the National Assembly, and on November 14th 2006 from Mr Jean-Pierre BEL et al, Senators, for review of the constitutionality of the Act pertaining to the energy sector.

THE CONSTITUTIONAL COUNCIL

Having regard to the Constitution;

Having regard to Ordinance n° 58-1067 of November 7th 1958 as amended (Institutional Act on the Constitutional Council);

Having regard to the Treaty establishing the European Community, in particular Article 86 thereof;

Having regard to Directive n° 2003/54/EC of the European Parliament and Council of June 26th 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC;

Having regard to Directive n° 2003/55/EC of the European Parliament and Council of June 26th 2003 concerning common rules for the internal market in natural gas and repealing Directive 96/30/EC;

Having regard to Act n° 46-628 of April 8th 1946 as amended on the nationalisation of the electricity and gas industries;

Having regard to Act n° 86-912 of August 6th 1986 as amended concerning the methods of privatisation, in particular Title II thereof;

Having regard to Act n° 93-923 of July 19th 1993 on privatisation, in particular section 2 thereof;

Having regard to Act n° 2000-108 of February 10th 2000 as amended pertaining to the modernisation and development of the public electricity service;

Having regard to Act n° 2003-8 of January 3rd 2003 pertaining to gas and electricity markets and the public energy service;

Having regard to Act n° 2004-803 of August 9th 2004 pertaining to the public gas and electricity service and gas and electricity undertakings and to decision n° 2004-501 DC of the Constitutional Council of August 5th 2004,

Having regard to Act n° 2005-781 of July 13th 2005 of the programme setting out guidelines for energy policy;

Having regard to the observations of the Government registered on November 22nd 2006;

Having heard the Rapporteur;

ON THE FOLLOWING GROUNDS

1. The parties making the referral have referred the Act on the energy sector for review by the Constitutional Council; they contend that section 39 thereof is unconstitutional and that section 17 thereof also requires review by the Constitutional Council;

WITH RESPECT TO SECTION 17:

2. Section 17 of the statute referred for review amends section 66 of the Act of July 13th 2005 referred to hereinabove pertaining to regulated prices for the sale of electricity and inserts section 66-1 which does the same for natural gas. I of sections 66 and 66-1 makes these prices applicable, for a given location, to non domestic consumers if the latter or another person have not, for said location, exercised their right to choose an energy supplier. II of the same sections makes said prices applicable to domestic consumers if the latter have not exercised their right to choose an energy supplier for the location involved. III of these same sections compels in particular historical suppliers of said utilities supplying a given location with one of the two types of such utilities to offer consumers, other than major consumers, regulated prices for the two energy sources in the conditions provided for in I and II. In particular, this offer must be made to domestic consumers for the supply of such utilities to new consumer locations, said obligations not being limited in time.

3. These provisions are contained in a statute which is intended to transpose into French law the abovementioned Directives of June 26th 2003 concerning the internal market in electricity and natural gas.

4. Paragraph 1 of Article 88-1 of the Constitution states: "The Republic shall participate in the European Communities and in the European Union constituted by States which have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common". The transposition into

domestic law of a Community Directive thus stems from a constitutional requirement.

5. It is incumbent upon the Constitutional Council, called upon under Article 61 of the Constitution to review a statute designed to transpose a Community Directive into domestic law, to ensure compliance with this requirement. Such review is however subject to a twofold limitation .

6. Firstly, the transposing of a Community Directive cannot run counter to a rule or principle inherent in the constitutional identity of France, unless the constituent authority has given its consent thereto.

7. Secondly in so far as the Constitutional Council is required to give its ruling before the promulgation of a statute within the time allotted by Article 61 of the Constitution, said Council cannot request a preliminary ruling from the Court of Justice of the European Communities under Article 234 of the Treaty establishing the European Community. It may therefore only rule that a statutory provision clearly incompatible with the Directive which said provision is designed to transpose runs counter to Article 88-1 of the Constitution. In all events it is the task of national Courts of Law, if need be, to make a reference for a preliminary ruling to the Court of Justice of the European Communities.

8. Under 1 of Article 3 of the abovementioned Directives, Member States are required to ensure that electricity and natural gas undertakings "are operated with a view to achieving a competitive market". They must refrain from any discrimination between these undertakings as regards either rights or obligations. If 2 of this same Article provides that Member States may impose obligations on undertakings in the general economic interest, in particular with respect to the price of supplies, these obligations must clearly relate to a public service objective, not be discriminatory and guarantee equality of access to national consumers.

9. The provisions of Section 17 of the Act pertaining to the energy sector deal with regulated prices, which are not the same as the special prices introduced for social purposes for gas by Section 14 of the same statute and for electricity by Section 4 of the Act of February 10th 2000. They do not merely apply regulated prices to contracts in force at such time but impose on the historical operators in the energy sector, and on them alone, permanent obligations in matters of price, which are general and not connected with the pursuit of public service objectives. They therefore obviously do not comply with the requirement of the achievement of a competitive market for electricity and natural gas as laid down by the abovementioned Directives, which Title I of the statute is intended to transpose.

II and III of new Sections 66 and 66-1 of the Act of July 13th 2005, and consequently, the words "non domestic" appearing in I concerning contracts currently in force are therefore unconstitutional as running counter to the provisions of Article 88-1 of the Constitution.

WITH RESPECT TO SECTION 39 :

10. I of section 39 of the statute referred for review rewords as follows section 24 of the Act of August 9th 2004 referred to above : "Electricité de France and Gaz de France are Public Limited Companies. The State holds more than 70% of the capital of Electricité de France and more than one third of the capital of Gaz de France. II inserts into this statute two sections 24-1 and 24-2 worded as follows : " Section 24-1. In order to preserve the essential interests of France in the energy sector and in particular the continuity and security of energy supplies, a Decree will effect the transformation of an ordinary share of the State in the capital of "Gaz de France" into a specific share governed, in particular as regards the rights attached to said shares, by the provisions of section 10 of Act n° 86-912 of August 6th 1986 pertaining to the methods of privatisation. Section 24-2 : The Minister for Energy shall appoint a Commissaire du Gouvernement to assist Gaz de France or any other body succeeding to the rights and obligations of Gaz de France and companies created after the legal separation imposed on Gaz de France by sections 5 and 13 of the statute under review and said Commissaire du Gouvernement, in an advisory capacity, shall attend all meetings of the Board of Directors or the Supervisory Board of the company, and all the committees thereof, and may address his remarks to any General Meeting" III completes the list appended to the abovementioned Act of July 19th 1993 by the words " Gaz de France SA".

11. The Members of the National Assembly and Senators making the referral contend that said section 39 runs counter to indent 9 of the Preamble to the Constitution of 1946 insofar as it fails to respect the self-government of Territorial Communities, freedom of contract and the continuity of the public service.

- With respect to the argument based in failure to comply with indent 9 of the Preamble to the Constitution of 1946.

12. The parties making the referral argue that indent 9 of the Preamble to the Constitution of 1946 precludes any transferring of Gaz de France to the private sector. They contend firstly that this company retains the characteristics of a national public service in view of the tasks it is required to perform, in particular because of its permanent obligation to supply natural gas at regulated prices. Secondly they argue that Gaz de France still enjoys a de facto monopoly as regards both transport and distribution of gas. They also argue that in all events said company cannot be transferred to the private sector before July 1st 2007,

date of the opening up to competition of the market for the supply of natural gas to domestic customers.

13. Indent 9 of the Preamble to the Constitution of 1946 proclaims : " All property and all enterprises which have or acquire the characteristics of a national public service or a de facto monopoly, shall become the property of Society" Article 34 of the Constitution confers on Parliament the power to determine "the rules concerning ... transfers of ownership of companies from the public to the private sector".

- *With respect to the existence of national public service*

14. Although the necessity of certain national public services derives from principles or rules of constitutional status, it is left to Parliament or the regulatory authority, as the case may be, to determine which other activities come under the scope of this definition, by deciding their organisation at national level and entrusting them to a single company. The fact that an activity may have been deemed to be a national public service without any constitutional requirement to this effect does not constitute any impediment to the transfer to the private sector of the company involved. Such a transfer does however imply that Parliament strips the company in question of the characteristics which made of it a national public service.

15. By its decision of August 5th 2004 referred to above, the Constitutional Council found that under statute law Gaz de France retained the status of a national public service. Parliament had maintained for this sole company the public service missions regarding the supply of natural gas to private persons which had already been vested in it. Indent 9 of the Preamble of 1946 was thus complied with once the State or other public bodies or undertakings belonging to the public sector had majority holdings in the capital of this company. Putting an end to this majority holding could therefore only take place under a subsequent statute stripping Gaz de France of its status of national public service.

16. Firstly, section 3 of the statute referred for review, combined with section 44 thereof, puts an end as from July 1st 2007 to the exclusivity enjoyed by Gaz de France for the supply of natural gas to private individuals .

17. Secondly, the public service obligations defined by section 16 of the Act of January 3rd 2003 referred to hereinabove are binding not only upon Gaz de France but also on all competing operators in the natural gas sector. The same holds good for all public service obligations laid down by statute, at national level, for each segment of this sector of activity.

18. Although section 29 of the statute referred for review imposes on Gaz de France constraints in terms of evening out of prices for using public distribution

networks, the distribution of natural gas is a local and not national public service. Furthermore, the same section imposes not only on Gaz de France but also on non nationalised distributors obligations as to the evening out of prices for use of public distribution networks "within the area serviced by each operator".

19. Lastly, the argument whereby Parliament maintained the national public service status of Gaz de France by compelling said company to permanently offer a regulated sale price must be dismissed in view of the censuring of the abovementioned provisions of section 66-1 inserted in the Act of July 13th 2005 referred to above by section 17 of the statute referred for review.

20. It is clear from the foregoing that the statute referred for review strips Gaz de France as from July 1st 2007 of its national public service status.

- With respect to the existence of a de facto monopoly

21. The concept of de facto monopoly mentioned in indent 9 of the Preamble of 1946 should be interpreted against the background of the whole internal market on which companies do business, together with the competition they encounter on this market from all other companies. Privileged positions which such and such a company may enjoy at a given time or as regards production which only represents part of its activities should not be taken into account.

22. The transporting of natural gas was excluded from nationalisation and opened up to all operators by the act of August 2nd 1949 amending the statute of April 8th 1946 referred to hereinabove.

23. The distribution of natural gas was entrusted not only to Gaz de France but also to other distributors not nationalised by the Act of April 8th 1946. Since the Act of July 13th 2005 referred to above, these activities are open to competition from all approved companies in areas other than those historically serviced by these operators.

24. Furthermore, activities involving the production of natural gas and the storing and exploitation of natural liquefied gas were excluded from nationalisation. The monopoly of importing and exporting of natural gas was ended by the Act of January 3rd 2003 referred to above. Since July 1st 2004 users of gas other than domestic customers may deal with the supplier of their choosing. The statute referred for review puts an end as from July 1st 2007 to all monopolies on the supply of gas including to domestic customers. Lastly, gas is a substitutable energy.

25. In these conditions, Gaz de France cannot be considered as being a company whose business constitutes a monopoly within the meaning of indent 9 of the Preamble of 1946.

- *With respect to the date of the transfer of Gaz de France to the private sector.*

26. As has been stated above, Gaz de France will only lose its national public service status on July 1st 2007. Its actual transfer to the private sector cannot therefore take place before this date.

27. With the qualifications set out in the foregoing paragraph, the argument based on failure to comply with indent 9 of the Preamble of 1946 must be dismissed.

- With respect to the arguments based on failure to respect self-government of Territorial Communities and freedom of contract

28. The parties making the referral contend that by maintaining for a period of unlimited duration the obligation imposed on Territorial Communities who have entrusted Gaz de France with the public distribution of natural gas to renew agreements entered into with this undertaking, while at the same time stripping said undertaking of its public service status, Parliament has failed to respect the principle of self-government of Territorial Communities and has disproportionately infringed the principle of freedom of contract in a manner not justified by any purpose in the general interest.

29. Parliament may, on the basis of Article 34 and 72 of the Constitution, impose obligations on Territorial Communities or groups thereof, provided that such obligations serve purposes in the general interest. It may for the same purpose depart from the principle of freedom of contract which derives from Article 4 of the Declaration of the Rights of Man and the Citizen of 1789.

30. Parliament did not call into question the exclusivity of public gas distribution licences granted to Gaz de France and non nationalised distributors in their traditional supply areas under the combined provisions of sections 1 and 3 of the Act of April 8th 1946 referred to above, and those of section 25-1 of the Act of January 3rd 2003 referred to above and III of Article L. 2224-31 of the General Code of Territorial Communities. Solely those communes or groups thereof which, on July 14th 2005, did not have a public natural gas distribution network or in which no installations of such a system were underway may decide to grant an approved company of their choosing the licence to supply gas.

31. However this restriction placed on the self-government of Territorial Communities and contractual freedom is justified by the need to ensure the

coherence of the network of licences currently managed by Gaz de France and to maintain the balance of the prices charged to users of public distribution networks. The arguments raised must thus be dismissed.

- With respect to the argument based on failure to respect the principle of the continuity of public service.

32 The parties making the referral contend that by failing to provide for mechanisms designed to prevent Gaz de France, after its transfer to the private sector, from selling off strategic assets earmarked for its public service missions Parliament has failed to guarantee compliance with the constitutional requirements as to the continuity of the public service.

33. Firstly, under section 16 of the Act of January 3rd 2003 referred to above, the various obligations set out by Parliament, concerning in particular the "continuity of the supply of gas", the "security of supply", the "safety of persons and installations upstream of the connection to final consumers", the "balanced development of the territory" and the "supply of natural gas at the special solidarity rate" are binding upon Gaz de France as they are on all other operators in the gas sector. Compliance with these obligations is guaranteed by the verifications and penalties provided for in particular in Section 31 of the Act of January 3rd 2003.

34. Secondly, section 24-1 inserted by the challenged section in the Act of August 9th 2004 referred to above provides that in order to preserve "the essential interests of France" in the energy sector and in particular "the continuity and security of energy supplies", a Decree will effect the transformation of an ordinary share of the State in the capital of "Gaz de France" into a "specific share" which will be governed, in particular as regards the rights attached thereto, by the provisions of section 10 of the Act of August 6th 1986 referred to above. The State may thus oppose, in particular "decisions to sell certain assets or types of assets of the company or its subsidiaries or to pledge the same as security", which might be detrimental to the essential interests of the Nation. Such decisions would be in particular those taken by the company or its subsidiaries concerning pipelines for transporting natural gas, assets linked to the distribution and underground storage of gas and also to liquefied natural gas installations.

35. Lastly, in exceptional circumstances, the competent authorities of the State may, if need be, proceed to requisition persons, goods and services in the framework of their administrative police powers or under provisions of the Defence Code.

36. The principle of the continuity of the public service has therefore not been infringed by section 39 of the statute referred for review

37. In consequence of the foregoing, with the qualifications set forth in paragraph 26, section 39 of the statute referred for review is not unconstitutional

38. The Constitutional Council is not required proprio motu to review any other question of conformity with the Constitution,

HELD

Article 1 - In section 17 of the Act pertaining to the energy sector the following elements are unconstitutional:

- II and III of new section 66 of the Act of July 13th 2005 referred to hereinabove, together with the words " non domestic" in I thereof
- II and III of new section 66-1 of the same Act, together with the words " non domestic" in I thereof.

Article 2 - The remaining parts of section 17, and, subject to the qualifications set out in paragraph 29 above, section 39 thereof are not unconstitutional.

Article 3 - This decision shall be published in the Journal officiel of the French Republic

Deliberated by the Constitutional Council sitting on November 30th 2006 and composed of Mr Pierre MAZEAUD, President, Jean-Claude COLLIARD and Olivier DUTHEILLET de LAMOTHE, Mrs Jacqueline de GUILLENCHMIDT, Messrs Pierre JOXE and Jean-Louis PEZANT, Mrs Dominique SCHNAPPER and Simone VEIL.

