COMMISSION DECISION

of 8 July 1999

concerning the application of France for a transitional regime under Article 24 of Directive 96/92/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity

(notified under document number C(1999) 1551/2)

(Only the French text is authentic)

(1999/792/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [1], and in particular Article 24 thereof,

Having informed the Member States of the application submitted by France pursuant to Article 24(1) of Directive 96/92/EC,

Whereas:

I. FACTS

1. *Procedure*

(1) By letter of 19 February 1998 to the Commission, the French authorities applied to be covered by a transitional regime pursuant to Article 24 of Directive 96/92/EC.

(2) Additional information from the French authorities concerning this application was received by the Commission on 4 November 1998.

2. *Structure of the electricity sector in France*

(3) The electricity sector in France is characterised by the monopoly of *Électricité de France* (EDF) in the production, transmission and distribution of electricity. EDF is responsible for more than 90 % of the production and distribution of electricity in France. All transmission of electricity, including imports and exports, is carried out by EDF.

3. *Liberalisation of the electricity market: transposition of Directive 96/92/EC*

(4) The new bill governing the electricity sector entitled 'Modernisation et développement du service public' (Modernisation and development of the public service) was given its first reading in Parliament in February 1999. The bill is expected to be voted on in September 1999.

(5) The main focuses of the bill are as follows:

— *eligible customers*: customers consuming more than 100 GWh per year will be eligible. This must represent the minimum required by the Directive, which is 26,48 %. Distributors will be eligible only for their eligible customers,

— *new production installations*: France has opted for the authorisation procedure as part of a multiannual investment programme, with a subsidiary invitation to tender,

— *access to the network* by third parties will be governed on the basis of published transmission rates,

— EDF will remain a vertically integrated company. In order to comply with the Directive, its *accounts* for production, transmission, distribution and other activities will be separated. In addition, the *transmission network manager* will have to be independent in terms of the management of other activities not related to the transmission network,

— an independent electricity commission will be responsible for *regulating* the market. Its decision-making powers will be mainly limited to settling disputes.

[1] OJ L 27, 30.1.1997, p. 20.

4. ***The transitional regime notified by the French authorities***

4.1. **Introduction**

(6) The French authorities have notified the following transitional measures in application of Article 24 of Directive 96/92/EC:

— contracts for purchasing the electricity produced by the 'peak' independent producers,

— commitments linked to the Superphénix fast breeder reactor,

— commitments linked to the financing of the special pension scheme for the employees of the electricity and gas industries.

(7) The transitional measure concerning the commitments linked to the financing of the special pension scheme for the employees of the electricity and gas industries was added to the notification by the letter of 4 November.

(8) This measure was not included in the initial notification of 19 February. The French authorities had, however, drawn attention to the problem of pensions in this notification, but did not include it because, in their view, Directive 96/92/EC did not cover social matters. Following the discussions on this aspect between the Commission and the Member States, the French authorities added this measure in the letter of 4 November.

4.2. **Details of the measures notified**

4.2.1. *Contracts for the purchase of the electricity produced by the 'peak' independent producers*

(a) Nature of the commitments

(9) EDF was under an obligation to buy the electricity produced during the peak-rate period by the small independent power stations — up to 8 MVA. This obligation stemmed from Decree No 55-662 of 1955, amended in 1994.

(10) The authorities removed the purchase obligation for new installations from January 1995. Any installation that had obtained the necessary authorisations before this date benefits from the favourable purchase conditions mentioned above.

(11) Remuneration conditions worsened considerably from 1993, but they were still enough to ensure that the operators of the small power stations continued to invest.

(12) In April 1997, a service contract between EDF and the French State provided for more substantial reductions in rates. New contracts known as 'dispatchable' contracts were concluded with the small 'peak' installations for a duration of 15 years, minus the period that had elapsed since the installations had been commissioned. The installations will be called solely on the basis of the needs of the electricity system. The remuneration comprises a fixed payment and remuneration for the energy supplied. An offer was made to any producers who did not wish to continue under these conditions to buy back their installations on the basis of the expenditure minus the income already received.

(13) The French authorities point out that EDF will no longer be able to bear the cost resulting from these contracts by means of its exclusive rights in the electricity sector.

(b) Amount of stranded costs

(14) The commitments resulting from 'dispatchable' contracts concluded between EDF and the independent producers concern installed power of 516 MW.

(15) The French authorities estimate that the commitment, limited to the foreseeable amounts to be paid in respect of the fixed payment under the contract, will be of the order of FRF 250 million (1997 value) per annum until the last contract expires in 2012.

(c) Recovery method

(16) EDF's costs would be financed by a fund supplied by a contribution payable by all users: suppliers, autoproducers and final customers who import or purchase electricity within the Community. The contribution would be based on the number of kWh supplied, purchased or produced. It would be divided up proportionally between the suppliers of eligible customers and the suppliers and non-eligible customers.

(17) No precise decision or method of calculation has been adopted so far. The French authorities presented the set of measures on a preliminary basis and subject to its examination by the French Parliament.

4.2.2. *Commitments linked to the Superphénix power plant*

(a) Nature of the commitments

(18) Construction of the Superphénix fast breeder reactor began in 1976. Initial criticality took place in 1985. In 1994, the plant was transformed into a research facility.

(19) On 28 February 1997, the reactor was shut down. On 2 February 1998, the French Government decided that Superphénix would be permanently abandoned.

(20) The NERSA company (51% EDF, 33% ENEL and 16% SBK) was set up to build and run the power plant. SBK and ENEL ceased to be part of NERSA from 1 January 1998. EDF is responsible for all the expenditure involved in shutdown and decommissioning.

(b) Amount of stranded costs

(21) The future expenditure to be met by EDF is estimated at around FRF 12,7 billion (1997 value) at the end of the 1998 financial year. This expenditure includes EDF's share for winding up NERSA, the resulting loss of equity and the back-end of the fuel cycle, and all expenditure for shutdown, post-operation and decommissioning of the power station.

(22) In the calculation, a loan granted by the Commissariat à l'Énergie atomique (Atomic Energy Commission) of FRF 2,1 billion has been deducted, on the assumption that reimbursement would not be necessary, as it was only payable in the event of sufficient availability of Superphénix.

(c) Recovery method

(23) EDF's costs would be financed from a fund made up of a contribution payable by all users: the suppliers, autoproducers and final customers who import or purchase electricity within the Community. The contribution would be based on the number of kWh supplied, purchased or produced. It would be divided up proportionally between the suppliers of eligible customers and the suppliers of non-eligible customers.

(24) Owing to the fact that some of the payment dates are a long way off, and given possible developments in the areas of technology, safety, security and the environment, the estimates of future expenditure and the calculation of charges may be revised.

(25) The authorities presented the set of measures on a preliminary basis and subject to examination by the French Parliament.

4.2.3. *Commitments linked to the financing of the special pension scheme*

(a) Nature of the commitments

(26) The national rules governing the employees of the electricity and gas industries establish a special pension scheme. The employers have made no reserve for these future commitments in the accounts.

(b) Amount of stranded costs

(27) The preservation of the staff rules will involve an additional cost, which will increase substantially from the year 2000. The French authorities point out that prior to liberalisation this additional cost could be covered by the exclusive rights of the employers on the electricity market. The authorities provide no calculation or estimate of this additional cost. They provide no information in the notification on future pensions or on any change in these staff rules in the new Electricity Act.

(c) Recovery method

(28) The method of recovery of this future expenditure is not indicated in the notification.

II. **LEGAL ANALYSIS**

1. ***Legal basis: Article 24(1) and (2) of Directive 96/92/EC***

(29) The French authorities applied to be granted a transitional regime with respect to alleged commitments and/or guarantees of operation pursuant to Article 24 of Directive 96/92/EC. However, no explicit derogation from the provisions of Chapters IV, VI or VII was requested.

2. ***Requirements of Article 24(1) and (2) of Directive 96/92/EC***

(30) Under the terms of Article 24 of Directive 96/92/EC:

'1. Those Member States in which commitments or guarantees of operation given before the entry into force of this Directive may not be honoured on account of the provisions of this Directive may apply for a transitional regime which may be granted to them by the Commission, taking into account, amongst other things, the size of the system concerned, the level of interconnection of the system and the structure of its electricity industry. The Commission shall inform the Member States of those applications before it takes a decision, taking into account respect for confidentiality. This Decision shall be published in the *Official Journal of the European Communities*.

2. The transitional regime shall be of limited duration and shall be linked to expiry of the commitments or guarantees referred to in paragraph 1. The transitional regime may cover derogations from Chapters IV, VI and VII of this Directive. Applications for a transitional regime must be notified to the Commission no later than one year after the entry into force of this Directive.'

(31) Article 24(1) and (2) of Directive 96/92/EC (hereinafter referred to as 'the Directive'), in the light of the EC Treaty, thus require the following elements to be examined by the Commission when considering any application for a transitional regime.

A. *Requirements concerning the nature of the commitments or guarantees of operation in question*

(1) The existence of a commitment or guarantee of operation must be proven.

(2) The commitment or guarantee of operation must have been given before 20 February 1997.

(3) A causal link between the entry into force of the Directive and the inability to honour the commitment must be established.

B. *Requirements concerning the measures proposed to achieve the objectives in question*

(1) The measures of the transitional regime must fall within the scope of derogations from Chapters IV, VI and VII of the Directive.

(2) The transitional regime must be of limited duration and linked to the expiry of the commitments or guarantees of operation in question.

(3) The transitional regime must apply the least restrictive measures reasonably necessary to achieve the objectives, which themselves must be legitimate. In deciding on these issues, the Commission must take into account, amongst other things, the size of the system concerned, the level of interconnection of the system and the structure of its electricity industry.

3. ***Assessment of the French transitional regime***

3.1. **'Peak' producers**

(32) In the present case of the transitional regime introduced by France concerning the commitments linked to the contracts for the purchase of the electricity produced by the 'peak' independent producers and those linked to the permanent shutdown of the Superphénix power plant, it is not necessary to determine whether the requirements A(1), (2), (3) or B(2), (3) have been met.

(33) This is because, as stated above, a transitional regime within the meaning of Article 24 of the Directive must provide for a derogation from the requirements laid down in Chapters IV, VI and VII thereof.

(34) The measures under consideration are based on a scheme of compensation or of levies and charges implemented by a Member State in order to offset stranded costs caused by the application of the Directive.

(35) The application of such levies does not require a derogation from the abovementioned chapters of the Directive and cannot therefore be regarded as a transitional regime within the meaning of Article 24 of the Directive.

(36) The measures in question do not come under the scope of the derogations from Chapters IV, VI and VII of the Directive and thus do not meet requirement B(1) above.

(37) The fact that measures such as those under consideration in this case can result in very considerable distortions of the internal market in electricity does not affect this conclusion.

(38) The Commission recognises that the payment of such levies can lead to economic consequences substantially similar to those resulting from a total or partial derogation from some of the obligations contained in Chapters IV, VI and VII of the Directive. However, such distortions, by their very nature, do not result from such a specific derogation as envisaged by the Directive.

(39) The transfer of a compensation payment to certain electricity producers, financed through a levy or charge on the consumers is, therefore, a measure which is not directly addressed by the directive but one which needs to be examined pursuant to the rules on competition, and in particular Article 87(3)(c) of the EC Treaty. Under these circumstances, it is understood that measures of similar economic effect will be treated in a consistent manner, regardless of the relevant procedure in each individual case.

(40) In the light of the non-applicability of Article 24 of the Directive, it is not necessary to assess requirements A(1), (2), (3) and B(2) and (3).

3.2. **Superphénix**

(41) In the case of the transitional regime introduced by France concerning the commitments linked to the permanent shutdown of the Superphénix power plant, it is not necessary to determine whether requirements A(1), (2), (3) or B(2), (3) have been met.

(42) This is because, as stated above, a transitional regime within the meaning of Article 24 must provide for a derogation from the requirements laid down by the Directive in its Chapters IV, VI and VII.

(43) The measures under consideration are based on a compensation scheme or on charges and levies, implemented by a Member State in order to offset stranded costs caused by the application of the Directive.

(44) The application of such levies does not require a derogation from the abovementioned chapters of the Directive and cannot therefore be regarded as a transitional regime within the meaning of Article 24 of the Directive.

(45) The measures in question do not come under the scope of the derogations from Chapters IV, VI and VII of the Directive and thus do not meet requirement B(1).

(46) The fact that measures such as those under consideration in this case can result in very considerable distortions of the internal market in electricity does not affect this conclusion.

(47) The Commission recognises that the payment of such levies can lead to economic consequences substantially similar to those resulting from a total or partial derogation from some of the obligations contained in Chapters IV, VI or VII of the Directive. However, such distortions, by their very nature, do not result from such a specific derogation as envisaged by the Directive.

(48) The transfer of a compensation payment to certain electricity producers, financed through a levy or charge on consumers, is therefore a measure which is not directly addressed by the Directive but on which needs to be examined pursuant to the relevant rules of the Treaties.

(49) In the light of the non-applicability of Article 24 of the Directive, it is not necessary to assess requirements A(1), (2), (3) and B(2) and (3).

3.3. **Commitments linked to the special pension scheme**

(50) The Commission takes the view that the information supplied by the French authorities concerning potential action to alleviate the difficulties of the special pension scheme for the employees of the electricity and gas industries is not sufficiently detailed to allow the commission to take a decision in accordance with Article 24(1) of Directive 96/92/EC,

HAS DECIDED AS FOLLOWS:

Article 1

This Decision concerns France's application for a transitional regime pursuant to Article 24 of Directive 96/92/EC, notified to the Commission on 19 February 1998 and supplemented on 4 November 1998. This notification concerns:

(a) contracts for the purchase by *Électricité de France* (EDF) of the electricity produced by the 'peak' independent producers;

(b) EDF's commitments linked to the Superphénix fast breeder reactor;

(c) the commitments linked to the financing of the special pension scheme for employees of the electricity and gas industries.

Article 2

The transitional regime notified by France concerning the commitments entered into by EDF linked to the contracts for

the purchase of the electricity produced by the 'peak' independent producers, and the commitments entered into by EDF linked to the Superphénix fast breeder reactor, contains no measures which would constitute derogations from Chapters IV, VI or VII of Directive 96/92/EC, as defined by Article 24(2) thereof. Article 24 of Directive 96/92/EC is, therefore, not applicable to the transitional regime notified by the French authorities.

Article 3

The provisions concerning the commitments linked to the financing of the special pension scheme for the employees of the electricity and gas industries are not approved by this Decision, in accordance with Article 24 of Directive 96/92/EC.

Article 4

This decision is addressed to the French Republic.

Done at Brussels, 8 July 1999.

For the Commission
Christos PAPOUTSIS
Member of the Commission