

## **DELIBERATION NO 2022-86**

Deliberation of the French Energy Regulatory Commission of 17 March 2022 on the request for revision of the decision to exempt Dunkerque LNG from regulated third-party access.

Present : Jean-François CARENCO, President, Catherine EDWIGE, Ivan FAUCHEUX, Jean-Laurent LASTELLE and Valérie PLAGNOL, Commission Members.

Translated from the French: only the original in French is authentic

### **1. REGULATORY FRAMEWORK**

Article 36 of the Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas provides that major new gas infrastructures may benefit, on request<sup>1</sup>, from a derogation from the provisions on third-party access, provided that the following cumulative criteria are met:

- a) the investment must enhance competition in gas supply and improve security of supply;
- b) the level of risk associated with the investment is such that the investment would not be made if derogation were not granted;
- c) the infrastructure must be owned by a natural or legal person distinct, at least in terms of legal form, from the managers of the systems within which it will be built;
- d) access fees are collected from the users of the infrastructure concerned;
- e) the derogation must not affect competition in the relevant markets likely to be affected by the investment, the proper functioning of the internal natural gas market, the efficient functioning of the regulated systems concerned or the security of supply of natural gas in the EU.

Under the same article, the decision to grant a derogation is adopted either by the regulatory authority of the Member State concerned or by the competent body designated for the purpose of adopting the formal decision by that State.

This provision has been transposed into national law and now appears in articles L. 111-109 and R. 111-43 to R. 111-51 of the Energy Code.

Article R. 111-45 of the Energy Code provides that any request for a derogation must be addressed to the Minister of Energy, who must refer the matter to the Energy Regulation Commission (CRE) for an opinion, which must be issued within one month of its referral.

The Minister of Energy must notify the European Commission, within three months after receiving the complete file, its draft decision on the request for derogation, together with all relevant information.

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<sup>1</sup> Specifically, interconnections between Member States, liquefied natural gas facilities or storage facilities.

In accordance with article 36 of the above Directive, the European Commission may, within two months from the day following receipt of this notification, adopt a decision requiring that the decision to grant a derogation be amended or withdrawn<sup>2</sup>.

The purpose of this deliberation is to present CRE's opinion on Dunkerque LNG's request. .

## **2. THE DUNKERQUE LNG REQUEST**

### **2.1 Summary of the characteristics of the Dunkerque LNG terminal**

The Dunkerque LNG terminal, operated by Dunkerque LNG, is designed to receive and unload LNG carriers carrying up to 267,000 m<sup>3</sup> of liquefied natural gas (LNG), to regasify the LNG and to send gas to the French and Belgian transmission networks.

The terminal has a jetty and three storage tanks with a total capacity of 600,000 m<sup>3</sup>. The terminal can also be used to reload LNG carriers and LNG bunkering vessels, as well as to load trucks.

Dunkerque LNG markets a long-term regasification capacity of 13 Gm<sup>3</sup>/year, of which 9.5 Gm<sup>3</sup>/year has been subscribed by EDF and TotalEnergies until 2036 and of which 3.5 Gm<sup>3</sup>/year is regularly offered to the market.

### **2.2 Request for change of the derogation: lifting of the capacity subscription restriction applicable to Engie**

#### **2.2.1 Context of the introduction of the capacity subscription restriction applicable to Engie**

Following the opinion of the French Energy Regulatory Commission (CRE) of 23 July 2009<sup>3</sup> and the decision of the European Commission of 20 January 2010<sup>4</sup>, the Minister of Ecology, Energy, Sustainable Development and the Sea authorised Dunkerque LNG by decision of 18 February 2010<sup>5</sup> to benefit from a derogation to regulated third-party access for its LNG terminal project for a period of twenty years<sup>6</sup>.

This decision made this derogation subject to compliance with multiple conditions, in particular concerning the methods of marketing and allocating the terminal's capacity to the various gas shippers. In particular, in order to take into account the position of the Engie Group, formerly GDF-SUEZ, on the wholesale and retail natural gas markets in France at that time, the decision provides that *"the primary regasification capacity of the terminal sold on a long-term basis to the GDF-SUEZ Group may not exceed 1 Gm<sup>3</sup>/year. Without prejudice to the provisions of the ruling of 29 July 2005, this condition may, at the request of Dunkerque LNG, be reviewed in the event of a change in the legal or factual circumstances that led to its imposition;"*.

The capacity restriction of 1 Gm<sup>3</sup>/year imposed on ENGIE, formerly GDF-SUEZ, took into account the group's position on the wholesale and retail natural gas markets in France at the time when CRE and the European Commission issued their opinions. In its decision of 20 January 2010, the European Commission considered that *"given the dominant position currently held by the GDF-SUEZ Group on the various gas supply markets as well as on the market for gas import capacity in France"*, the proposed restriction was (§32. of the decision) *"a necessary and proportionate measure to ensure the strengthening of competition on the gas supply markets in France. In particular, this condition will maximise the capacity of the new Dunkerque LNG terminal, which will be available to other gas operators, allowing them to import gas into France without having to subscribe to capacity in the import infrastructures (pipelines or LNG terminals) of the GDF-SUEZ Group. In this respect, it must be noted that all gas import infrastructures in France are currently owned by the GDF-SUEZ Group, through its subsidiaries GRTgaz and Elengy, the latter holding a majority stake in Société du Terminal méthanier de Fos Cavaou"*.

#### **2.2.2 Request to lift the restriction**

Dunkerque LNG considers that the market conditions and circumstances specific to the Engie Group, formerly GDF-SUEZ, have changed significantly since the date of the decision of 18 February 2010.

<sup>2</sup> This two-month period may be extended by two additional months if the Commission requests additional information. This additional period begins on the day following receipt of the additional information. The initial two-month period may also be extended by mutual agreement between the Commission and the regulator.

<sup>3</sup> CRE opinion of 23 July 2009 on the request for derogation from regulated third-party access submitted on 26 June 2009 by Dunkerque LNG for its Dunkerque LNG terminal project: <https://www.cre.fr/Documents/Deliberations/Avis/demande-d-exemption-a-l-acces-regule-des-tiers-de-posee-par-la-societe-dunkerque-lng>

<sup>4</sup> Decision C (2010)381 of the European Commission of 20 January 2010: [https://ec.europa.eu/energy/sites/ener/files/documents/2010\\_dunkerque\\_decision\\_fr.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/2010_dunkerque_decision_fr.pdf)

<sup>5</sup> Order of 18 February 2010 authorising Dunkerque LNG to enjoy derogation from regulated third-party access for its LNG terminal project in Dunkerque.

<sup>6</sup> This derogation was granted on the basis of Article 22 of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal natural gas market and Article 7-1 of the Law of 3 January 2003, as amended by Article 44 of Law 2004-8 03 of 9 August 2004 relating to the public service of electricity and gas and to electricity and gas companies

According to the Commission, the restriction to 1 Gm<sup>3</sup>/year of the capacity that can be reserved in the long term by the Engie Group in the Dunkerque terminal can no longer be considered as a measure "necessary and proportionate to ensure the strengthening of competition in the gas supply markets in France".

Dunkerque LNG has therefore submitted a request to the Minister for the Ecological Transition by letter dated 14 February 2022 to review this provision.

In accordance with the provisions of the decision of 18 February 2010, Dunkerque LNG offers the long-term residual capacity for the period 2023-2036 to the market players in the form of a market call. Dunkerque LNG has initiated a non-binding phase from 28 February 2022 to 29 April 2022. Dunkerque LNG plans to launch a binding phase at the end of the first half of 2022, after a deliberation by CRE to confirm the marketing conditions. Dunkerque LNG's request to lift Engie's restriction falls within this perspective.

**3. CRE'S ANALYSIS**

CRE's analysis regarding the change of the derogation request is based on the request sent by Dunkerque LNG to the Minister for Ecological Transition. It is based on the five criteria set out in Directive 2009/73/EC, as described in section 1.

**3.1 Criterion a) Impact on security of supply**

CRE considers that the subscription of available primary regasification capacity contributes to the diversification of supply sources by allowing the arrival of LNG cargoes from various countries, either through long-term commitments or through spot cargoes. The subscription of this capacity improves security of supply by reducing France's exposure to a prolonged interruption of gas supply by pipeline.

Thus, the subscription of 3.5 Gm<sup>3</sup>/year of additional capacity would significantly increase the volume of liquefied natural gas entering French territory. The subscribed capacity in French LNG terminals would be increased by 12% (by 7% with 2 Gm<sup>3</sup> subscribed).

Terminal (Gm <sup>3</sup> /year)	Subscriptions as of 1 January 2022	Situation with subscriptions 3.5 Gm <sup>3</sup>	Evolution
Montoir-de-Bretagne	10	10	-
Fos Tonkin	1.5	1.5	-
Fos Cavaou	7.5	7.5	-
Dunkerque	9.5	13 (11.5 with 2 Gm <sup>3</sup> subscribed)	+37%. (+21%)
<b>TOTAL</b>	<b>28.5</b>	<b>32</b> (30.5 with 2 Gm <sup>3</sup> subscribed)	<b>+12%</b> (+7%)

The lifting of the current 1 Gm<sup>3</sup>/year subscription restriction imposed on the Engie Group would increase the likelihood that the available 3.5 Gm<sup>3</sup>/year capacity would be fully subscribed. This would contribute to the strengthening of security of supply.

CRE considers that the criterion of improving security of supply is crucial. In the current geopolitical context, the diversification of natural gas supply sources, and in particular the maximisation of LNG import capacities, is a particularly strategic and priority issue at the European level.

On 8 March 2022<sup>7</sup>, the European Commission drafted a communication in which it states, in particular, that "the phasing out of our dependence on fossil fuels from Russia can be achieved well before 2030. For this purpose, the Commission is proposing a REPowerEU plan that will increase the resilience of the EU energy system [...]: Diversifying gas supplies by increasing LNG and pipeline imports from non-Russian suppliers and increasing biomethane and hydrogen levels. "

CRE considers that the conditions of criterion a) are met insofar as the criterion relating to the improvement of the security of supply remains satisfied.

<sup>7</sup>COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS



**3.2 Criteria b), c) and d)**

CRE considers that the analysis is unchanged from the ruling of 18 February 2010 and that the criteria are met:

- b) the level of risk associated with the investment is such that the investment would not be made if derogation were not granted;
- c) the infrastructure must be owned by a natural or legal person distinct, at least in terms of legal form, from the managers of the systems in which it will be built;
- d) access fees are collected from the users of the infrastructure concerned.

**3.3 Criterion e) Impact on competition and the functioning of the internal gas market**

**3.3.1 The distribution of capacities**

In 2010, the Engie Group had a dominant position in the market for gas import capacity in France. Its capacities have diminished considerably since then.

In accordance with the European Commission's decision in case COMP/39.316 - GDF of 3 December 2009, the Engie Group has implemented its commitments to reduce the share of its firm natural gas import capacity into France reserved for the long term. In particular, Engie has released 1 Gm<sup>3</sup> of import capacity onto the market from 1 October 2010 at the Montoir-de-Bretagne LNG terminal, the terms of which were approved by CRE on 4 February 2010<sup>8</sup>.

In its deliberation of 26 January 2012<sup>9</sup>, CRE certified that, in accordance with 1° and 4° of article L. 111-11 of the Energy Code, GRTgaz acts independently regarding the other parts of the vertically integrated undertaking (EVI) Engie and that it operates, maintains and develops the network independently with regard to the interests of EVI's production or supply activities. This certification decision was maintained by the deliberations of 6 July 2017<sup>10</sup> and 9 December 2021<sup>11</sup>.

In addition, in 2018, the Engie Group divested 2.5 Mt of liquefaction capacity, its portfolio of long-term LNG purchase and sale contracts, access to regasification capacity in France and Europe and its fleet of LNG carriers.

Engie's share has been significantly reduced since 2010:

	2010	2022
Share of import capacity held by Engie on French terminals	85%	5%
Share of import capacity held by Engie PIR + PITTM	66% <sup>12</sup>	19%

**3.3.2 Impact on natural gas markets in France**

The concentration of the natural gas supply market in France has decreased considerably since 2008, and the retail market has become much more competitive.

The Engie Group still has an important position in the retail market. However, the market share of alternative gas suppliers has increased significantly:

- for the residential segment, the market share of alternative suppliers rose from 3.9% at 31 December 2008 to 39.7% at 30 September 2021;
- for the non-residential segment, the market share of alternative suppliers rose from 14% at 31 December 2008 to 59.2% at 30 September 2021.

<sup>8</sup>Deliberation of the Energy Regulatory Commission of 4 February 2010 on the rules for the allocation of capacities marketed by GRTgaz and ELENGY within the framework of the GDF SUEZ commitments

<sup>9</sup>The CRE ruling of 26 January 2012 on the certification of TIGF, GRTgaz, RTE

<sup>10</sup>The CRE ruling of 6 July 2017 to maintain GRTgaz's certification following GRTgaz's acquisition of Elengy and approval of three contracts relating to the transaction.

<sup>11</sup>The CRE ruling of 9 December 2021 on the decision to maintain GRTgaz's certification following the increase in SIG's stake and on the proposed appointment of a minority member of GRTgaz's Board of Directors.

<sup>12</sup> In 2010, the French natural gas market consisted of two balancing zones. The figure presented here agglomerates the input capacities of the two zones.



Observatory of the retail energy markets of the 4<sup>th</sup> quarter 2008

Synthèse en nombre de sites

Situation (en nombre de sites)	Résidentiels		Non résidentiels	
	Au 31 décembre 2008	Au 30 septembre 2008	Au 31 décembre 2008	Au 30 septembre 2008
Nombre total de sites	10 800 000	10 800 000	680 000	680 000
• sites en offre de marché	858 000	704 000	207 000	193 000
• sites alimentés par les fournisseurs alternatifs	416 000	310 000	96 000	90 000
Parts de marché des fournisseurs alternatifs	3,9 %	2,9 %	14 %	13,2 %

Sources : GRT, GRD, Fournisseurs historiques – Analyse : CRE

Observatory of the retail energy markets of the 3<sup>rd</sup> quarter 2021

Tableau 6 : Synthèse en nombre de sites

Situation (en nombre de sites)	Résidentiels		Non résidentiels	
	Au 30 septembre 2021	Au 30 juin 2021	Au 30 septembre 2021	Au 30 juin 2021
Nombre total de sites	10 699 000	10 688 000	655 000	654 000
Sites fournis en offre de marché, dont :	7 728 000	7 635 000	641 000	640 000
▶ Fournisseurs historiques	3 476 000	3 457 000	253 000	252 000
▶ Fournisseurs alternatifs	4 252 000	4 178 000	388 000	388 000
Sites au tarif réglementé	2 971 000	3 053 000	14 000	14 000
Parts de marché des fournisseurs alternatifs	39,7 %	39,1 %	59,2 %	59,3 %

Sources : GRT, GRD, Fournisseurs historiques – Analyse : CRE

In addition, in accordance with article 63 of the energy-climate law of 8 November 2019<sup>13</sup>, the regulated sales tariffs (TRV) for gas will end on 30 June 2023 for individuals and condominiums. For small professionals, the end of the TRV came on 1 December 2020. It has already been in effect for many years for the largest business customers.

Given these developments, both in terms of entry capacities in France and on the retail market, CRE considers that the lifting of the restriction on capacities subscribed by the Engie Group in the Dunkerque terminal will not have any negative effects on competition.

CRE considers that the conditions of criterion e) are met.

<sup>13</sup> Energy and Climate Act No. 2019-1147 of 8 November 2019.

## CRE'S DECISION

By letter dated 14 February 2022, Dunkerque LNG submitted a request to the Minister for the Ecological Transition with a view to reconsidering the derogation decision from which it benefits. This request was sent to CRE, which was asked to render its opinion by the Minister for the Ecological Transition.

CRE has issued a favourable opinion on the request for revision of the derogation from regulated third-party access submitted by Dunkerque LNG for the Dunkerque LNG terminal. The derogation period is maintained until 2036.

It recommends that the following provision: "*The primary regasification capacity in the terminal sold on a long-term basis to the GDF-SUEZ Group will not exceed 1 Gm<sup>3</sup>/year.*", provided for in the decision of 18 February 2010, be removed.

In addition, it recommends that the other provisions of the decision be maintained:

- *"Dunkerque LNG should implement a market call procedure in accordance with the European Commission's decision of 20 January 2010 to assess the demand for new regasification capacity in an efficient, transparent and non-discriminatory manner. The Energy Regulatory Commission confirms the terms of the market test and the commitments made by Dunkerque LNG in the framework of the test, prior to the marketing operation. The Energy Regulatory Commission may, if necessary, verify the implementation of the test and compliance with the commitments made;*
- *the EDF Group's long-term subscription is limited to 8 Gm<sup>3</sup>/year of the terminal's regasification capacity;*
- *the EDF Group cannot purchase, under a contract of more than one year, gas imported by shippers holding the terminal's remaining long-term regasification capacity;*
- *in the event that the residual capacity has not been subscribed, Dunkerque LNG undertakes to regularly offer this long-term capacity to market players until it finds a buyer, in the form of a transparent and non-discriminatory tenders, the frequency and terms of which will be confirmed by the Energy Regulation Commission;*
- *Dunkerque LNG drafts and issues the conditions for putting subscribed and unused capacities on the market. Capacity that is subscribed but not scheduled will have to be released to the market sufficiently in advance to allow its use by other market participants. The mechanisms envisaged to avoid capacity retention are submitted to the Energy Regulatory Commission for confirmation. The Energy Regulation Commission may organise a consultation and, if necessary, ask Dunkerque LNG to change these mechanisms;*
- *Dunkerque LNG will send the Energy Regulation Commission its tariff for access to the terminal's capacities and the capacity subscription contracts signed;*
- *Dunkerque LNG will publish, as a minimum, the same information as that required of regulated LNG terminal operators concerning unloading slots, available capacities and any information necessary for the proper functioning of the transmission network to which it is connected. "*

This deliberation will be published on the CRE website. It will be sent to the Minister for the Ecological Transition and to the European Commission.

**So ruled in Paris on 17 March 2022.**  
**For the Energy Regulation Commission,**  
**The Chairman,**

Jean-François CARENCO