

Deliberation of 11 March 2010 regarding the French Energy Commission's decision on the market test procedure launched by Dunkerque LNG for its LNG terminal at Dunkirk

Attending the session were: Mr Philippe de LADOUCETTE, President, Mr Michel LAPEYRE, Vice-President, Mr Maurice MÉDA, Vice-President, Mr Jean-Paul AGHETTI, Mrs Anne DUTHILLEUL, Mr Eric DYEYRE, Mr Hugues HOURDIN, Mr Jean-Christophe LE DUIGOU and Mr Emmanuel RODRIGUEZ, Commissioners.

1. Context

1.1. *The regulatory framework applicable to third party access exemptions*

Article 22 of Directive 2003/55/CE of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal natural gas market provides for the possibility for major new gas infrastructures, i.e. interconnectors between Member States, LNG and storage facilities, to be exempted, upon request, from third party access in accordance with its article 22, provided that five conditions are met:

- the investment must enhance competition in gas supply and enhance security of supply;
- the level of risk attached to the investment is such that the investment would not take place unless an exemption was granted;
- the infrastructure must be owned by a natural or legal person which is separate, at least in terms of its legal form, from the system operators in whose systems that infrastructure will be built;
- charges are levied on users of that infrastructure;
- the exemption is not detrimental to competition or the effective functioning of the internal gas market, or the efficient functioning of the regulated system to which the infrastructure is connected.

The European Commission may request that the regulation authority or the Member State concerned amend its decision to grant an exemption. In the last resort the Commission is entitled to take the decision.

Article 22 of EU Directive 2003/55/CE is transposed by article 7-1 of law No. 2003-8 of 3 January 2003, as amended by Article 44 of law No. 2004-803 of 9 August 2004 concerning public electricity and gas services and electricity and gas undertakings. This article provides that "*the Minister for Energy may authorise the operator [...] to be exempted, as regards all or part of the facility, from the provisions of Articles [...]*" regarding regulated access to infrastructures, to tariff regulation and to the terms and conditions of access to underground gas storage facilities.

"This waiver is granted on the occasion of the construction or modification of the facility [...] on condition that the construction or modification helps to enhance competition [...] and to improve security of supply and that it could not take place in acceptable economic conditions without this waiver.

The decision on exemption is taken after the submission of CRE's opinion [...].

CRE's opinion shall be published with the decision of the Minister.

This decision defines [...] the conditions under which the beneficiary is authorised to refuse to conclude a contract of access to the installation or facility concerned."

Decree no. 2005-877 of 29 July 2005 concerning access exemptions for certain gas infrastructures specifies that:

- the Minister shall submit the exemption application to the CRE which has one month from the date of request to submit its opinion ;
- the Minister for Energy shall notify the European Commission of its draft decision on the request for an exemption, within a period of three months from the date of reception of the application.

1.2. The request for exemption for Dunkerque LNG's LNG terminal project

On 26 June 2009, the Dunkerque LNG company filed a request with the Ministry for Energy for a full exemption from third party access and tariff regulation for its terminal project, for a period of 20 years.

Two possible design solutions are planned: 10 bcm of gas per year or 13 bcm per year. In both cases, Dunkerque LNG undertakes to ensure that the EDF group does not book more than 8 bcm per year of the terminal's capacity.

On 6 July 2009, the Minister for Energy requested CRE to submit its opinion, which it rendered on 23 July 2009. This opinion was attached to the Minister's draft order notified to the European Commission on 22 October 2009.

The European Commission, in its decision of 20 January 2010 published in the OJ on 4 March, requested the Minister for Energy to amend his draft order concerning the exemption request of Dunkerque LNG. These amendments were taken into account in the order of 18 February 2010 authorising Dunkerque LNG to be exempted from regulated third party access for its Dunkirk LNG terminal project.

This order states, in particular, that "Dunkerque LNG implements a tendering procedure in compliance with the European Commission's decision of 20 January 2010 to effectively, transparently and indiscriminately assess the request for new regasification capacities. The Energy Regulation Commission (CRE) approves the market study conditions and the commitments made by Dunkerque LNG within the framework of this study prior to commercialisation operations. The CRE may, if required, audit the implementation of the test and the respect of commitments made after the test has been conducted."

Pursuant to the provisions of the order of 18 February 2010, Dunkerque LNG submitted to the CRE for approval, its market test procedure (in the annex of this deliberation).

2. The Dunkerque LNG market test

On 15 July 2009, Dunkerque LNG launched a market test, ending on 15 January 2010, to evaluate the market's interest in subscribing primary capacities in the Dunkirk LNG terminal.

Dunkerque LNG modified its market test procedure and schedule to take into account the European Commission's requests.

2.1. The principles of the market test

The market test is conducted in three phases:

Phase 1 – Qualification of companies:

During this phase, Dunkerque LNG contacts all companies holding a supplier permit and/or industrial clients. The list of these companies is addressed to the CRE.

At the end of this phase, Dunkerque LNG establishes an initial list corresponding to the companies (or groups of companies) which submitted applications. This list is transmitted to the CRE.

Phase 2 – Non-binding phase:

During this phase, Dunkerque LNG:

- sends to each company, depending on the type of interest expressed (capacity subscription, acquisition of holdings in Dunkerque LNG, etc.), the appropriate contractual documentation;
- will provide select companies with a data room assembling all of the data regarding the project (forecast regasification tariff, state of progress of the exemption request, etc.);
- schedule a series of bilateral meetings with each company.

At the end of this phase, Dunkerque LNG establishes, **based on the priority criteria defined in section 2.2 below, a classification of the companies.**

The list of companies selected is addressed to the CRE.

Phase 3 – Binding phase:

During this phase, selected companies must formally commit to agreeing to subscribe regasification capacities in the terminal. Capacity allocation is conducted by Dunkerque LNG and submitted to the CRE. Then subscribers selected sign the contracts for regasification capacity reservation.

Once signed, these contracts are sent to the CRE.

2.2. The European Commission's requests

In its decision of 20 January, the European Commission requested the following changes regarding the market test procedure launched by Dunkerque LNG:

- Dunkerque LNG shall contact at minimum, all market players holding a gas supply permit in France, including GDF Suez (without reconsidering the 1 bcm per year capacity limit which GDF Suez may subscribe in the Dunkirk LNG terminal);
- Dunkerque LNG shall not limit the list of companies which may participate in the market test to companies (or groups of companies) capable of subscribing 2 bcm/year on a ship or pay basis for a 20-year period;
- the criteria for allocating regasification capacities in favour of companies expressing interest in regasification capacities exceeding 2 bcm/year, by size, shall be strictly tied to the objective to limit the number of subscribers in the terminal (for example if the short list established at the end of phase 1 contains more than four potential subscribers);
- Dunkerque LNG shall not resort to an allocation criterion for regasification capacities favouring players who are both regasification capacity subscribers and LNG suppliers for the EDF group.

Consequently, Dunkerque LNG made the following changes to its market test procedure in order to comply with the European Commission's requests.

a) Minimum subscription capacity

No limits are imposed on regasification capacity requests. Nevertheless, to facilitate the operational management of the terminal, Dunkerque LNG prefers that when the capacity requested by a company in the LNG terminal is less than 2 bcm/year, that this capacity be combined with that of other companies to attain the level of 2 bcm/year.

b) The choice of eligible companies for the market test

At the launch of its market test, Dunkerque LNG issued a call for expressions of interest by post to all market players holding a gas supply permit in France, with the exception of GDF Suez.

On 29 January 2010, Dunkerque LNG issued a call for an expression of interest to GDF Suez for the subscription of primary capacities in the Dunkerque LNG terminal of up to 1 bcm/year.

c) Priority criteria for the classification of companies

Dunkerque LNG suppressed from its market test procedure the initial criterion giving preference above all to “companies seeking to be both regasification capacity subscribers and LNG suppliers, through supply contracts proposed to EDF under competitive conditions (volume, prices, structure)[...]”.

Moreover, the procedure specifies that “to avoid an overly complex operational management, the final subscription of the terminal's capacities shall respect a maximum of four to five subscribers in total.”

Under these conditions, the market test procedure stipulates that if there are more than four or five subscription applicants, Dunkerque LNG shall use the following selection criteria:

- *“First level priority: companies being ranked in decreasing order of re-gasification capacity, priority being given to those with the largest capacity;*
- *Second level priority: where two companies apply for the same volume of re-gasification capacity, subscribers such companies are ranked according to their interest to be associated with the development of the Project and thus to share its risk through the acquisition of a share of Dunkerque LNG's equity.”*

d) Timetable

Dunkerque LNG revised the market test schedule in compliance with the order of 18 February 2010.

The new schedule is as follows:

- the end of phase 1 initially scheduled for 15 September 2009 was extended to 15 February 2010;
- the start of phase 2 was moved as a result to 16 February and its end, to the 15 March 2010;
- the start of phase 3 was moved to 16 March 2010.

3. CRE analysis

The CRE observes that the market test procedure submitted by Dunkerque LNG fully takes into account the modifications requested by the European Commission and complies with the order of 18 February 2010.

In particular:

- all of the companies holding a gas supply permit in France were solicited to participate to the market test launched by Dunkerque LNG (including GDF Suez);
- the market test is not limited only to companies (or groups of companies) with the financial capacity to subscribe a capacity of at least 2 bcm/year in the long term;
- the classification of companies no longer gives priority to bidders who are both regasification capacity subscribers and LNG suppliers for the EDF group;
- the selection criteria adopted are applied to classify the applicant companies only if the number of bidders exceeds the target of four to five subscribers.

Furthermore, the CRE observes that the market test is based on transparent and non-discriminatory principles as:

- all of the companies holding a supply permit in France were solicited by Dunkerque LNG;
- all of the companies expressing interest for the Dunkerque LNG terminal project have access to the same level of information depending on the type of interest expressed thanks to the data room database.

Lastly, the CRE considers that the adjustment of the market test schedule allows for formal approval of the procedure prior to the selection and commitment phase of bidders. The extension and shift of the different test phases also enable the operational implementation of the changes requested by the European Commission, by giving potential subscribers sufficient time to integrate the market test procedure changes.

Pursuant to the order of 18 February 2010, “the CRE may, if required, audit the implementation of the test and the respect of commitments made after the test has been conducted.”

Within this framework, at the end of the market test procedure, the CRE will ensure that the market test procedure is properly conducted in compliance with this deliberation. In particular, the CRE will ensure that, if the project for 10 bcm/year is selected, Dunkerque LNG's choice of the smaller size would not lead to limit the access to its terminal, where some stakeholders might have wanted to book capacity above 10 bcm/year.

4. CRE decision

The CRE approves the market test procedure proposed by Dunkerque LNG, which is included in the annex of this deliberation.

Paris, 11 March 2010

For the CRE
The President

Philippe de Ladoucette