COMMISSION DECISION

of 3.12.2009

relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement

(Case COMP/39.316 – Gaz de France)

(Only the French text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[1], and in particular Article 9(1) thereof,

Having regard to the Commission decision of 16 May 2008 to initiate proceedings in this case,

Having expressed concerns in its preliminary assessment of 22 June 2009,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns[2],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer,

Whereas:

1. SUBJECT

(1) This Decision is addressed to GDF Suez SA, its subsidiaries, in particular GRTgaz SA ("GRTgaz") and Elengy SA ("Elengy"), and the companies controlled by them (together referred to as "GDF Suez"), and concerns the behaviour of GDF Suez on the French gas markets, in particular the markets for the import and supply of gas.

(2) In its preliminary assessment of 22 June 2009 the Commission provisionally concluded that GDF Suez held a dominant position on the gas import and supply markets in the balancing zones of the GRTgaz transport network. The Commission's preliminary assessment took the view that GDF Suez might have abused its dominant position within the meaning of Article 102 of the Treaty on the Functioning of the European Union (TFEU)[3] by foreclosing for a long period access to gas import capacities in the balancing zones of the GRTgaz transport network, thereby restricting competition on the downstream gas supply markets in those zones. The Commission argued that this foreclosure was a result of the

[1] OJ L 1, 4.1.2003, p. 1. From 1 December 2009, Articles 81 and 82 of the EC Treaty became Articles 101 and 102 respectively of the TFEU. The substance of the two articles was not changed. For the purposes of this Decision, the references to Articles 101 and 102 of the TFEU are understood to refer to Articles 81 and 82 of the EC Treaty, where appropriate.

[2] OJ C 156, 9.7.2009, p. 25.

[3] In the following text a reference to Article 102 TFEU is to be understood as a reference to both Article 102 TFEU and Article 54 of the EEA Agreement.

long-term reservation of most gas import capacity, the determination of the reception capacity and the procedures for allocating long-term capacity at the new Fos Cavaou LNG terminal, and the strategic limitation of investment in additional import capacity at the Montoir de Bretagne LNG terminal.

2. ADDRESSEE

(3) GDF Suez, which was created by the merger in 2008 between Gaz de France SA ("GDF") and Suez SA, is one of the world's main energy suppliers, present in the entire economic chain of the electricity and natural gas sector. In 2008 the GDF Suez group recorded a turnover of EUR 83 billion. In France GDF is the incumbent, vertically integrated operator in the natural gas sector. In 2007 it sold […]* TWh (around […] Gm^3) of natural gas to French customers. GRTgaz, a subsidiary of GDF, owns and operates the gas transport network in most of France[4]. Another subsidiary of GDF, Elengy, owns and operates the two French LNG terminals currently in service. Elengy also has a stake of around 70% in the capital of the company that owns a new LNG terminal which is due to come on stream in 2009 at Fos Cavaou in southern France. Elengy will be in charge of the operational management of this new terminal. Storengy, another GDF subsidiary, owns most of the gas storage sites in France. Lastly, GDF controls an energy trading company, Gaselys, and has minority shareholdings in gas pipelines that are upstream from France.[5]

3. PROCEDURAL STEPS UNDER REGULATION (EC) NO 1/2003

(4) The investigation was based on the results of an inspection at GDF's premises in May 2006[6] and further fact-finding carried out inter alia following various requests for information to GDF Suez and other market participants between 2006 and 2009.

(5) On 16 May 2008 the Commission initiated proceedings against GDF, pursuant to Article 2 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating

* *Some parts of this text have been deleted to avoid divulging confidential information: these parts have been indicated by square brackets and marked with an asterisk.*

4 Following the merging of the North, East and West balancing zones into a single balancing zone with effect from January 2009, the GRTgaz transport network is divided into two balancing zones for H gas known as the North and South zones, and one balancing zone for B gas, known as the North-B zone. The gas transport network in south-western France is owned and operated by TIGF SA ("TIGF"), a subsidiary of Total SA. TIGF's network constitutes a separate balancing zone.

5 MEGAL, which crosses Germany, and SEGEO, which crosses Belgium (GDF Suez recently sold its stake in the latter pursuant to paragraph 30 of GDF Suez's commitments to the Commission in Case COMP/M.4180 *GDF/Suez*).

6 Inspection decision of 5 May 2006 in Case COMP/B-1/39.316 ordering Gaz de France SA to undergo an inspection under Article 20(4) of Council Regulation No 1/2003.

to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty[7].

(6) On 22 June 2009 the Commission adopted a preliminary assessment pursuant to Article 9(1) of Regulation (EC) No 1/2003 in which it set out its competition concerns in relation to GDF Suez's behaviour on the French gas markets. That assessment was notified to GDF Suez SA, GRTgaz and Elengy by letter of 22 June 2009.

(7) On 24 June 2009 GDF Suez proposed commitments within the meaning of Article 9(1) of Regulation (EC) No 1/2003 in response to the Commission's preliminary assessment. On 14 August 2009 GDF Suez submitted comments disagreeing with the Commission's main findings in the preliminary assessment.

(8) On 9 July 2009 the Commission published a notice in the *Official Journal of the European Union* pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the proposed commitments and inviting interested third parties to give their observations on the commitments within two months following publication of the notice.

(9) On 21 September 2009 the Commission informed GDF Suez of the observations received from interested third parties following the publication of the notice. On 21 October 2009 GDF Suez submitted amended commitments.

(10) On 9 November 2009 the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 17 November 2009 the Hearing Officer issued her final report.

4. PRELIMINARY ASSESSMENT

4.1. Relevant markets

4.1.1. Relevant product markets

(11) In line with its previous decision-making practice, the Commission distinguished in its preliminary assessment between the markets for the supply of gas and the markets relating to gas infrastructure[8].

(12) In the gas supply markets the preliminary assessment makes a distinction between the wholesale supply of gas to shippers, such as local distribution companies, and retail supply to final customers[9].

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7 OJ L 123, 27.4.2004, p. 18.

8 See for example the Commission decisions in Cases COMP/M.4180 *GDF/Suez*, paragraphs 341-342, and COMP/M.3410 *Total/GDF*, paragraphs 15-19.

9 See for example the Commission decisions in Cases COMP/M.4180 *GDF/Suez*, paragraphs 375-379, and COMP/M.3410 *Total/GDF*, paragraph 21.

(13) In its preliminary assessment the Commission considered that it was possible to subdivide the product market further, into supply via the transmission network and supply via the distribution network, on the one hand, and supply by type of customer - household, professional or industrial - on the other. In France only major industrial final consumers are directly connected to the transmission network. The needs and consumption habits of this type of customer are somewhat different to those of the average consumer connected to the distribution network[10]. In the case of supply via distribution networks, the Commission found that a distinction could be drawn between non-household customers and household customers – two categories which have somewhat different consumer habits and needs[11].

(14) As regards the markets relating to gas infrastructure, the Commission in its preliminary assessment defined a market in gas import capacity, including import capacity via gas pipelines and via LNG terminals. Within this market it distinguished between firm capacity and interruptible (including conditional) capacity.

(15) Finally, in line with its previous decision-making practice, the Commission made a distinction in its preliminary assessment between H gas, with a high calorific value, and B gas, with a low calorific value, both in the gas import capacity market and in the gas supply markets[12].

4.1.2. Relevant geographic markets

(16) In line with its previous decision-making practice[13], the Commission in its preliminary assessment found that each balancing zone of the transport network in France constituted a geographic market for the supply of gas because of the different conditions for transporting gas to and between those zones and the differences between the zones in terms of suppliers' market shares.

(17) As regards the market for gas import capacity, the preliminary assessment concluded that the capacities of all the gas import infrastructures in each balancing zone of the transport network in France, including interconnection capacity between the balancing zones of the GRTgaz network, could be considered as belonging to a single relevant geographic market[14].

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[10] See for example the Commission decision in Case COMP/M.4180 *GDF/Suez*, paragraphs 355-361.

[11] See for example the Commission decision in Case COMP/M.4180 *GDF/Suez*, paragraphs 371-374.

[12] See for example the Commission decision in Case COMP/M.4180 *GDF/Suez*, paragraphs 64-69 and 344-345.

[13] See for example the Commission decisions in Cases COMP/M.4180 GDF/Suez, paragraphs 380-385 and COMP/M.3410 Total/GDF, paragraphs 31-34.

[14] See for example the Commission decision in Case COMP/M.3410 *Total/GDF*, paragraphs 23-26.

4.1.3. GDF Suez's dominant position on the relevant markets

(18) In its preliminary assessment the Commission provisionally concluded that GDF Suez held a dominant position on the gas import and supply markets in each of the balancing zones of the GRTgaz transport network.

(19) As regards gas import capacity in France, the Commission noted that all the main gas-pipeline border entry points[15] and the interconnection between the North and South zone of the GRTgaz network were owned and operated by GRTgaz, a subsidiary of GDF. Furthermore, GDF was the main owner of capacity across all these entry and interconnection points. Finally, Elengy, a subsidiary of GDF, owned and operated the LNG terminals currently in service or about to come into service in France, and GDF Suez was the main holder of capacity at these terminals.

(20) The Commission found in its preliminary assessment that GDF Suez held a dominant position in the market for gas import capacity in each of the balancing zones of the GRTgaz network.

(21) As regards the supply of gas, the Commission demonstrated in its preliminary assessment that there were numerous barriers to entry to the French market because of difficulties relating to international purchases of gas, bottlenecks in import capacity and limited access to storage. GDF's strong position in the gas supply markets, achieved by vertical integration throughout the economic chain, was guaranteed in the foreseeable future because of its reservation of long-term capacity (see section 4.3.1). In view of these facts, the preliminary assessment concluded that no current or potential competitor on the French markets was able to challenge GDF's market power.

(22) In its preliminary assessment, therefore, the Commission concluded that GDF enjoyed a dominant position in the wholesale supply market and the retail supply markets within each balancing zone of the GRTgaz network[16].

4.2. Substantial part of the internal market

(23) In its preliminary assessment the Commission took the view that each of the balancing zones of the GRTgaz transport network represented a substantial part of the internal market within the meaning of Article 102 TFEU. The North, North-B and South balancing zones of the GRTgaz network were comparable to some Member States in terms of surface area and population size[17]. Moreover, in 2007

[15] Dunkirk, Taisnières-H, Taisnières-B and Obergailbach.

[16] In the South-West balancing zone, where the transport network is owned and operated by TIGF, the Commission's preliminary assessment concluded that GDF enjoyed a dominant position as regards retail supplies to household customers and professional customers connected to the distribution network.

[17] See Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 38, in which the Court of Justice held that the German *Land* of Rheinland-Pfalz might constitute a substantial part of the internal market as it "covers a territory of almost 20 000 km² and has a high number of inhabitants, around four million, which is higher than the population of some Member States".

consumption of gas in the North zone was around 26 Gm³, in the North-B zone around 4.5 Gm³ and in the South zone around 13 Gm³; these annual consumption figures were higher than that of some Member States[18].

4.3. Practices giving rise to competition concerns

(24) In the preliminary assessment the Commission stated that GDF Suez might have abused its dominant position on the relevant markets contrary to Article 102 TFEU by foreclosing for a long period access to gas import capacity in each of the balancing zones of the GRTgaz network, thereby restricting competition on the markets for the supply of gas in each of those zones.

(25) The Commission argued that the foreclosure was a result of the long-term reservation of most of the import capacity in the balancing zones of the GRTgaz network (see section 4.3.1), the determination of reception capacity and the procedures for allocating long-term capacity at the new Fos Cavaou LNG terminal (see section 4.3.2), and the strategic limitation of investment in additional import capacity at the Montoir de Bretagne LNG terminal (see section 4.3.3).

4.3.1. Practices concerning the long-term reservation of import capacity in France

(26) In its preliminary assessment the Commission found that GDF Suez's gas infrastructure and import capacity in France, including interconnection capacity between the North and South balancing zones of the GRTgaz network, constituted an essential input, as access to this infrastructure and import capacity was an objective requirement in order to be able to supply gas in the balancing zones of the GRTgaz network.

(27) The Commission also felt that, because of the technical, legal and economic barriers, it was impossible – or at least extremely difficult – for a shipper, acting alone or in cooperation with other shippers, to reproduce GDF Suez's infrastructure, or even to establish import capacities that could constitute an effective competitive constraint on GDF's infrastructure, and to use them for its own gas supply activities in France.[19]

(28) The Commission considered that GDF Suez's reservations accounted for a very substantial part of total firm import capacity in each of the balancing zones of the GRTgaz network over a very long period of time. This capacity had generally been reserved for historical reasons and had not been assigned to GDF Suez by any transparent or non-discriminatory procedure. Moreover, there was no procedure in place guaranteeing that a substantial share of import capacity in

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[18] For example: Portugal: 4 Gm³/year; Denmark: 5 Gm³/year; Slovakia: 6 Gm³/year; Austria: 9 Gm³/year. Figures from *BP Statistical Review of World Energy*, June 2008.

[19] See the judgment of the Court of Justice in Case C-7/97 *Oscar Bronner* [1998] ECR I-7791, paragraph 44: "Moreover, it does not appear that there are any technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult, for any other publisher of daily newspapers to establish, alone or in cooperation with other publishers, its own nationwide home-delivery scheme and use it to distribute its own daily newspapers".

France would be put on the market again at regular intervals and allocated in a transparent and non-discriminatory manner[20].

(29) According to the Commission's preliminary assessment, there was therefore considerable unsatisfied demand from third-party shippers; the refusal to supply was both explicit and (more often) implicit, as the lack of available capacity was known to the market, being published on the websites of GRTgaz and Elengy. As explained in section 4.3.3, the refusal to supply also took the form of a strategic limitation of investment in additional import capacity.

(30) The preliminary assessment found that GDF Suez had reserved over the long term a very substantial proportion of firm import capacity in each of the balancing zones of the GRTgaz network, with the result that third-party shippers did not have access to this capacity under conditions that would allow them to exert effective competition on the downstream gas supply markets in these zones. The Commission's preliminary assessment concluded that this situation amounted to a refusal by GDF Suez to supply an essential input and might constitute an abuse of its dominant position.

4.3.2. Practices concerning import capacity at the Fos Cavaou LNG terminal

(31) In the preliminary assessment the Commission also identified competition problems relating to a possible refusal by GDF Suez to supply import capacity at the Fos Cavaou LNG terminal.

(32) The Commission found that, despite genuine requests from a number of third-party shippers to reserve capacity, GDF Suez did not conduct an open, transparent and non-discriminatory procedure, for example an open season procedure, to allocate capacity at the new Fos Cavaou terminal on a long-term basis[21]. On the contrary, the preliminary assessment showed that GDF Suez made third-party access to the Fos Cavaou terminal conditional on receiving non-monetary strategic assets in return and that, as a result, no third party (other than Total) obtained long-term capacity at the Fos Cavaou terminal.

(33) The preliminary assessment also found that GDF Suez never took into consideration, and *de facto* rejected, genuine proposals by third-party shippers to co-finance the construction of the Fos Cavaou terminal. So, while the terminal was being built, GDF Suez did not explore the possibility of increasing its reception capacity in order to facilitate third-party access to this infrastructure.

(34) Moreover, it was noted in the preliminary assessment that, over the long term, GDF Suez allocated a very significant proportion of total capacity at the

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[20] A minimum percentage of only 20% of firm capacity at each gas-pipeline border entry point on the GRTgaz network and 10% of capacity at the new Fos Cavaou terminal is put on the market at regular intervals and allocated by a transparent and non-discriminatory procedure - open subscription periods in the case of gas-pipeline entry points and open seasons in the case of the Fos Cavaou terminal.

[21] Under a decision by the Energy Regulation Commission (*Commission de Régulation de l'Energie* – "CRE") of 15 December 2003, 10% of capacity at the Fos Cavaou terminal was allocated for a period of three years by an open season procedure organised in 2007.

Fos Cavaou terminal to its own gas trading division (GDF-B3G) and to Total, without any open, transparent and non-discriminatory procedure.

(35) Finally, according to the preliminary assessment, GDF Suez deliberately reserved more capacity than it needed at the Fos Cavaou terminal so that it could exchange part of it later for assets held by third-party shippers.

(36) Given the considerable volume of unsatisfied demand from third-party shippers and the strategic assets requested from them by GDF Suez, the Commission concluded in its preliminary assessment that GDF Suez's behaviour in determining the reception capacity and allocating long-term capacity at the new Fos Cavaou terminal could be regarded as a refusal to supply an essential input and might constitute an abuse of a dominant position.

4.3.3. Practices concerning import capacity at the Montoir de Bretagne LNG terminal

(37) Finally, in the preliminary assessment the Commission identified competition problems relating to a possible refusal by GDF Suez to supply import capacity at the Montoir de Bretagne LNG terminal as a result of the company's strategic limitation of investment in additional capacity there.

(38) According to the preliminary assessment, GDF Suez decided, following an open season procedure, not to develop any additional import capacity at the Montoir de Bretagne terminal. As a result, GDF Suez not only prevented another shipper that had submitted a firm capacity request in the open season procedure from reserving capacity on a long-term basis, but it also greatly restricted any possibility of third-party access to this infrastructure until 2023, thereby making it even more difficult for third parties to import gas into France.

(39) The preliminary assessment also pointed to financial analyses carried out by [company name]* itself, which apparently concluded that, given the firm capacity requests received in the open season procedure, extension of the capacity at the Montoir de Bretagne terminal would have been sufficiently profitable [details concerning profitability]*.

(40) The Commission's preliminary assessment therefore concluded that GDF Suez's behaviour regarding the Montoir LNG terminal could be regarded as a refusal to supply an essential input by means of a strategic limitation of investments in additional capacity, and might constitute an abuse of its dominant position.

4.4. Effect on trade between Member States

(41) According to the Commission's preliminary assessment, the abusive behaviour by GDF Suez referred to in section 4.3 affected trade between the Member States within the meaning of Article 102 TFEU. Under the case law of the Court of Justice and the Commission's decision-making practice, to meet the criterion that there must be an effect on trade between Member states it is sufficient that there should be a direct or indirect, actual or potential influence on the pattern of trade

between Member States, provided that it is appreciable.[22] According to the Commission's preliminary assessment, GDF Suez's behaviour hindered trade between Member States, in particular by affecting the flow of imports and exports of gas and preventing foreign rivals from competing against GDF Suez in France.

5. PROPOSED COMMITMENTS

(42) GDF does not agree with the Commission's preliminary assessment. It has nevertheless offered commitments pursuant to Article 9(1) of Regulation (EC) No 1/2003 to address the Commission's competition concerns. The main aspects of these commitments can be summarised as follows.

(43) From 1 October 2010 and for the remainder of the period of GDF Suez reservations still to run at the date of notification of this Decision, GDF Suez will release to third parties firm, long-term capacities at the GRT gaz pipeline entry points of Obergailbach (80 GWh/day until 30 September 2027), Taisnières-H (10 GWh/day until 30 September 2026) and, subject to an agreement [details on the condition governing fulfilment of the commitment]*, Dunkirk (32 GWh/day until 30 September 2026).[23]

(44) From 1 October 2010, GDF Suez will also release to third parties which so request equivalent upstream transport capacities until 30 September 2027 from the Waidhaus entry point and from the Net Connect Germany[24] marketplace to the Medelsheim exit point; until 30 September 2025 from the Zeebrugge IZT entry point to the Blaregnies exit point; and until 30 September 2018 through the Interconnector gas pipeline from the "NBP exit" entry point to the Zeebrugge IZT exit point.

(45) GDF Suez will also release to third parties firm, long-term capacities in the Montoir de Bretagne (one block of 1 Gm³/year from 1 October 2010)[25] and Fos

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22 See paragraphs 23 *et seq.* and 44 *et seq.* of the guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty. OJ C 101, 27.4.2004, p. 81.

23 Following the market investigation, GDF Suez undertook, instead of releasing a block of 1 Gm3/year at the Montoir de Bretagne LNG terminal, to release equivalent capacity (32 GWh/day) at the Dunkirk entry point. This commitment is dependent on GDF Suez reaching, within two months following the notification of this Decision, an agreement [details concerning the condition governing fulfilment of the commitment]*. In the absence of such an agreement, GDF Suez will maintain its commitment to release a second block of 1 Gm3/year at the Montoir de Bretagne LNG terminal, as had been proposed in the commitments to the Commission set out in the notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.

24 In reply to the comments received by the Commission in the context of the market investigation, GDF Suez replaced the initial commitment of selling 80 GWh/day from 1 October 2010 until 30 September 2027 from the Waidhaus entry point to the Medelsheim exit point by a commitment to release from 1 October 2010 until 30 September 2027: (i) 30 GWh/day from the Waidhaus entry point to the Medelsheim exit point, and (ii) 50 GWh/day from the Net Connect Germany market place to the Medelsheim exit point .

25 As has been indicated, in the absence of an agreement [details on the condition governing fulfilment of the commitment], within two months following the notification of this Decision, between GDF

Cavaou (two blocks of 1 Gm3/year and one block of 0.175 Gm^3/year from 1 January 2011[26]) LNG terminals.

(46) [Information concerning the content of the confidential annex containing the commitments subscribed to by GDF Suez]*[27].

(47) From 1 October 2014 at the latest, and for a period of ten years, GDF Suez will limit its reservations of capacity to less than 50% of total firm, long-term capacity of H gas in the North and South balancing zones of the GRTgaz network and throughout French territory[28].

(48) Between 1 October 2014 and 1 October 2021, GDF Suez undertakes, with respect to the period from 1 October 2024 to 1 October 2029, to limit its reservations of firm, long-term entry capacities in H gas in all infrastructures existing as of 1 October 2014 to less than 50% of the total firm, long-term capacity available for these infrastructures.

(49) Lastly, GDF Suez undertakes to continue, under more or less identical conditions to those in force, with the swap service involving H gas and B gas supplied to GRTgaz so that the latter can ensure the continuation of the regulated service of converting H gas into B gas.

(50) An independent trustee will be asked to supervise the fulfilment of these commitments by GDF Suez.

6. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) NO 1/2003

(51) In response to the publication on 9 July 2009 of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003, the Commission received observations from 23 interested third parties, including the CRE.

(52) Generally speaking, third parties welcomed the commitments proposed by GDF Suez and considered that they addressed adequately the concerns expressed by the Commission in the preliminary assessment. The comments submitted by the third parties can be grouped into four categories.

Suez and its gas suppliers allowing it to reduce its gas offtake capacity at Dunkerque, GDF Suez will release a second block of 1 Gm3/year at the Montoir de Bretagne LNG terminal.

26 The block of 0.175 Gm^3/year will primarily benefit shippers who have subscribed to capacities at the Fos Cavaou terminal in accordance with the CRE decision of 25 October 2007 (Decision of the CRE of 25 October 2007 concerning the assignment of marketable capacities of the link between the North and South zones of the GRTgaz network and at the interface between the GRTgaz and TIGF networks from 1 January 2009).

27 [Information concerning the content of the confidential annex subscribed to by GDF Suez]

28 For the purpose of the commitments, the gas entry points include all existing and future gas entry points in France, including the Spain-France entry points.

(53) A first category of observations concerns the margin of manœuvre available to GDF Suez to fulfil the commitments concerning capacity sales. Several third parties considered that it was necessary to describe in detail in the commitments the arrangements for the sale of capacities by GDF Suez, or else to organise prior consultation of market players. In addition, some third parties felt that the procedure for selecting the subscriber or subscribers to the capacity to be sold by GDF Suez at the Fos Cavaou terminal should, in the event that this capacity was sublet, be specified in order to take better account of the various scenarios likely to arise should demand exceed supply.

(54) The Commission considers that the comments made in the previous paragraph are relevant and should be taken into account in the commitments proposed by GDF Suez.

(55) A second set of observations concerns the importance from the point of view of shippers wishing to import gas into France of the various pipeline entry points on the GRTgaz network, and the importance of these entry points by comparison with the LNG terminals.

(56) Generally speaking, the comments by third parties on this subject reflect to a large extent the specific point of view of each shipper depending on its gas supply sources and portfolio of customers in France. No real common position emerges from the comments submitted by the third parties, so that they cannot be regarded as arguments that validly question the general balance of the commitments proposed by GDF Suez concerning capacity sales.

(57) A third set of observations concerns the nature and extent of the commitments proposed by GDF Suez. Some third parties suggested that measures concerning access to storage capacities in France should be included in the commitments. Others considered that GDF Suez's commitment to limit to under 50% its reservations of total firm, long-term capacity of H gas should be applied to each entry point in France (including the LNG terminals) and to the interconnection between the North and South balancing zones of the GRTgaz network (in the North-to-South direction). Other third parties suggested including binding interim thresholds to reduce the share of capacity reserved by GDF Suez between the date of entry into force of the commitments and 1 October 2014. Others, finally, suggested that the commitments should include a gas release programme to make H gas available in France.

(58) As is explained below, these objections cannot be taken into account because they are either irrelevant to the competition problems identified by the Commission in the preliminary assessment (see section 7.1), or clearly disproportionate (see section 7.3).

(59) Finally, a fourth group of observations concerns the arrangements for selling capacities at the Montoir de Bretagne and Fos Cavaou LNG terminals. Some third parties disputed the principle of selling these capacities in blocks of 1 Gm^3/year, pointing out that the blocks proposed were too big compared with the customer portfolio of many shippers operating in France. Several third parties also thought that the principle of allocating a capacity of 0.175 Gm^3/year in the Fos Cavaou

terminal primarily to shippers who had subscribed to capacities at this terminal in accordance with the CRE decision of 16 May 2007 was discriminatory[29].

(60) For the reasons set out in section 7.2, these objections cannot be accepted.

(61) In response to the comments received by the Commission in the context of the market investigation, GDF Suez submitted a revised proposal for commitments ("final commitments") on 21 October 2009, which took account of the comments received.

(62) In view of the results of the consultation, the Commission considers that the final commitments are sufficient to effectively remove the competition concerns identified in the preliminary assessment.

7. NECESSITY AND PROPORTIONALITY OF THE FINAL COMMITMENTS

7.1. Introduction

(63) According to settled case law, the principle of proportionality requires that the measures adopted by Community institutions must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued[30]. Where there is a choice between several appropriate measures, recourse must be had to the least onerous one, and the disadvantages caused must not be disproportionate to the aims pursued[31].

(64) For the assessment of the proportionality of the commitments submitted within the framework of Article 9(1) of Regulation (EC) No 1/2003, the Commission takes into account the fact that the final commitments are not imposed by the Commission for an infringement pursuant to Article 7(1) of Regulation (EC) No 1/2003, but voluntarily proposed by the undertaking seeking to bring the proceedings to an end without a formal decision on the existence of an infringement.

(65) The final commitments proposed by GDF Suez constitute a proportionate and necessary solution to the competition problems identified by the Commission in its preliminary assessment, namely the foreclosure for a long period of access to gas import capacities in France mainly because of the long-term reservation by GDF Suez of most of the import capacities in the GRTgaz balancing zones.

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[29] Decision of the CRE of 16 May 2007 concerning the allocation of short-term capacities at the Fos Cavaou LNG terminal. *Journal officiel de la République française* No 134, 12 June 2007.

[30] Court of First Instance in Case T-260/94 *Air Inter* v *Commission* [1997] ECR II-997, paragraph 144, and in Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II–4653, paragraph 201.

[31] Court of Justice in Case 265/87 *Schräder & Hauptzollamt Gronau* [1989] ECR 2237, paragraph 21, and in Case C-174/05 *Zuid-Hollandse Milieufederatie and Natuur en Milieu* v *College voor de toelating van bestrijdingsmiddelen* [2006] ECR I-2243, paragraph 28.

(66) These proceedings therefore relate only to certain alleged practices of GDF Suez in respect of capacities for the import of natural gas into France. Accordingly, the third parties' comments underlining the need for additional commitments concerning access to storage capacities are unrelated to the subject matter of these proceedings.

7.2. Commitments relating to the release of H gas import capacities

(67) GDF Suez's commitment to release significant H gas import capacities to third parties as of 1 October 2010 will enable third-party shippers to reinforce rapidly their foothold on the downstream H gas supply markets in France, thus increasing the competitive pressure on GDF Suez in the short term. The total volume of H gas import capacities (224 GWh/day, equivalent to around 82 TWh/year) which GDF Suez undertakes to release to third parties is both proportionate and necessary considering the large share of capacity reserved by GDF Suez compared with total H gas import capacity in France. The 82 TWh/year to be released by GDF Suez should be considered against the total annual gas consumption in France of around 524 TWh (in 2008), of which 86% was supplied by "historical shippers", the main one being GDF Suez.[32]

(68) Furthermore, GDF Suez's commitment to release significant firm long-term capacities at the Montoir de Bretagne and Fos Cavaou LNG terminals to third parties in the short term is a proportionate response to the Commission's concerns about GDF Suez's practices, which could have had the effect of preventing access by other shippers to these import infrastructures. This commitment will enable other parties to reserve significant firm long-term capacities in these two terminals.

(69) It should be noted that the effectiveness of the final commitments was appreciably strengthened by taking into account some of the interested third parties' comments.

(70) First, GDF Suez committed to selling upstream capacity from the Obergailbach entry point giving direct access to the Net Connect Germany marketplace and therefore further easing the import of gas to France via the Obergailbach entry point.

(71) Second, the procedures for the allocation of the capacities sold, whether sold as primary or secondary capacities, were specified and made clearer.

(72) Furthermore, GDF Suez committed to release, as a replacement for the release of a block of 1 Gm3/year at the Montoir de Bretagne LNG terminal, an equivalent amount of capacity (32 GWh/day) at the Dunkirk entry point. However, this new commitment is dependent on GDF Suez reaching, within two months following the notification of this Decision, an agreement [details concerning the condition governing fulfilment of the commitment]*. In the absence of such an agreement, GDF Suez will release a second block of 1 Gm3/year at the Montoir de Bretagne LNG terminal.

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[32] CRE, *Observatoire des marchés de l'électricité et du gaz*, fourth quarter 2008, page 26.

(73) In view of third parties' comments, the Commission considers that the release of two blocks of 1 Gm³/year at the Montoir de Bretagne LNG terminal constitutes an appropriate and sufficient remedy to the competition concerns identified in the preliminary assessment. Nevertheless, the Commission takes the view that the release of 32 GWh/day at the Dunkirk entry point, in replacement for an equivalent capacity (1 Gm³/year) at the Montoir de Bretagne LNG terminal, could have certain advantages. Clearly, such a replacement would result in GDF Suez's commitments covering all the main entry points to French territory.[33] Moreover, such a substitution would balance the capacities sold at pipeline entry points with those sold at LNG terminals, to the benefit of certain shippers, particularly the smaller ones, who might have difficulties setting up an LNG supply chain.

(74) However, the Commission considers that the commitment to release 32 GWh/day at the Dunkirk entry point must be made contingent on [details concerning the condition governing fulfilment of the commitment]*.[34]

(75) In the Commission's opinion, such an agreement between GDF Suez and [details concerning the condition governing fulfilment of the commitment]* must be concluded within the two months following the notification of this Decision, so as not to delay the implementation of the capacity release commitments. In the absence of such an agreement, GDF Suez will release a second block of 1 Gm3/year at the Montoir de Bretagne LNG terminal. While this solution does not have the same advantages in terms of diversification of entry points, the increased competitive pressure on GDF Suez and the effects of opening up the French gas supply markets would be globally equivalent.

(76) [Information concerning the content of the confidential annex containing the commitments subscribed to by GDF Suez]*

(77) Conversely, other comments made by third parties could not be accepted.

(78) A gas release programme does not seem to be necessary given the total volume of capacity which GDF Suez undertakes to release in the near future. As a result of these commitments, third-party shippers will be able to import significant volumes of gas into France from 1 October 2010. Moreover, it would be manifestly disproportionate to ask GDF Suez to sell large volumes of gas in France within a gas release scheme in addition to selling significant import capacities in the near future.

(79) Regarding the release of capacities at LNG terminals, it should be pointed out that a reception capacity of 1 Gm³/year of gas in an LNG terminal corresponds to the minimum LNG capacity that shippers generally contract on a long-term basis from producers. This is because of features specific to the functioning of an LNG supply chain, namely monthly delivery of a volume of LNG corresponding to the average capacity of the LNG tankers currently in operation (approximately

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[33] With the sole exception of the Fos Tonkin LNG terminal which, due to LNG ship size limitations, cannot be used by the majority of LNG ships currently in operation.

[34] [Details concerning the condition governing fulfilment of the commitment]*

140 000 m³). As a result, fragmenting the capacity which GDF Suez intends to sell at the Montoir de Bretagne and Fos Cavaou LNG terminals into sublots of less than 1 Gm³/year would make the capacity difficult to use for shippers wishing to unload LNG into these terminals on a regular basis.

(80) For the same reason, the final commitments provide for the allocation of a capacity of 0.175 Gm³/year in the Fos Cavaou terminal primarily to shippers who had subscribed to capacities at this terminal in accordance with the CRE decision of 16 May 2007 amounting to 0.825 Gm³/year.

7.3. Commitments relating to restricting the share of H gas import capacities

(81) GDF Suez's commitment to limit its reservations for ten years from 1 October 2014 to less than 50% of the total firm long-term entry capacity in H gas in the GRTgaz North and South balancing zones and throughout French territory will enable third-party shippers to obtain sufficient long-term H gas import capacities in France, which will put them in a position in the medium term to challenge GDF Suez's dominant position on H gas supply markets in France. The duration of GDF Suez's commitments concerning the limitation of its reservations of H gas import capacities in France is both proportionate and necessary considering the average length of GDF Suez's capacity reservations.

(82) Limiting to less than 50% the capacity reserved by GDF Suez at each H gas entry point in France and at the interconnection between the North and South balancing zones of the GRTgaz network would be disproportionate compared with the competition problems identified by the Commission in the preliminary assessment. These proceedings concern the alleged foreclosure by GDF Suez of gas import capacities into each one of the balancing zones of the GRTgaz network, with each zone being considered globally, and not at each individual entry point to these zones.

(83) In addition, with regard to the interconnection between the North and South zones of the GRTgaz network, it must be emphasised that the capacity at this point in the north-to-south direction is not in fact foreclosed by GDF Suez, since the firm capacities reserved by GDF Suez are less than half of the firm marketable capacity. Moreover the interconnection capacities between the North and South zones in the north-to-south direction have been allocated to all interested shippers for a maximum of four years, in proportion to their requests, by means of a transparent, non-discriminatory procedure, organised following a CRE decision[35].

(84) Lastly, it is not necessary to include binding interim thresholds in order to reduce the share of capacity reservations of GDF Suez between the date of entry into force of the commitments and 1 October 2014, given GDF Suez's commitment to release substantial capacities for the import of gas into France in the near future. In addition, a commitment of this nature would very significantly reduce GDF Suez's flexibility to fulfil the commitment of limiting to less than 50% the share

[35] Decision of the CRE of 25 October 2007 concerning the assignment of marketable capacities at the link between the North and South zones of the GRTgaz network and at the interface between the GRT gaz and TIGF networks from 1 January 2009.

of capacity reserved by it by 1 October 2014. This would be an excessive constraint given the possibility of a delay in the entry into service of new capacities for gas importation into France during the period between the date on which the commitments take effect and 1 October 2014.

7.4. Commitments relating to B gas

(85) GDF Suez's commitment to continue, under more or less identical conditions to those in force, with the swap service involving H gas and B gas supplied to GRTgaz so that the latter can ensure the continuation of the regulated service of converting H gas into B gas, is a proportionate response to the concerns expressed by the Commission regarding the foreclosure of B gas import capacities in France and the inability of other shippers to challenge GDF Suez's dominant position on the French B gas supply market. This commitment will allow other shippers to have access to B gas supplies on French territory under financial conditions that enable them to compete effectively with GDF Suez.

7.5. Commitments relating to monitoring the compliance with the commitments

(86) GDF Suez's commitment concerning the appointment of an independent trustee is an appropriate and necessary measure to guarantee that GDF Suez respects its commitments. This measure is also in line with the Commission's usual practice as regards remedies in proceedings in respect of mergers[36] and the application of Articles 101 and 102 TFEU[37].

7.6. Conclusion

(87) The commitments proposed by GDF Suez will put an end to the long-term foreclosure of access to gas import capacities by GDF Suez and will therefore have an important structural effect on the ability of other shippers to gain access to French H gas supply markets.

(88) The public consultation pursuant to Article 27(4) of Regulation (EC) No 1/2003 has confirmed that GDF Suez's commitments are proportionate and necessary to address the competition concerns identified by the Commission on the French gas markets.

8. CONCLUSION

(89) By adopting a d decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes the final commitments offered by the undertakings to address the competition concerns expressed in its preliminary assessment binding upon them. This Decision does not take up a position as to whether or not there

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[36] See the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p.1.

[37] See the Commission decisions of 12 April 2006 in Case COMP/38.348 *Repsol CPP SA*, 26 November 2008 in Cases COMP/39.388 *German electricity wholesale market* and 39.389 *German electricity balancing market;* and 18 March 2009 in Case 39.402 *RWE gas foreclosure.*

has been or still is an infringement. The Commission's assessment of whether the final commitments offered are sufficient to meet its concerns and at the same time proportionate is based on the preliminary assessment it made following its investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.

(90) In the light of the final commitments offered by GDF Suez, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end,

HAS ADOPTED THIS DECISION:

Article 1

The attached commitments are made binding on GDF Suez SA, its subsidiaries, in particular GRTgaz SA and Elengy SA, and all undertakings controlled by them.

Article 2

There are no longer grounds for action by the Commission, and the proceedings in this case are terminated.

Article 3

This Decision is addressed to GDF Suez SA, 22 rue du Docteur Lancereaux, 75392 PARIS cedex 08 and to all its subsidiaries, in particular

- GRTgaz SA, Courcellor 1, 2 Rue Curnonsky, 75017 Paris, and

- Elengy SA, Courcellor 1, 2 Rue Curnonsky, 75017 Paris.

Done at Brussels, 3 December 2009

For the Commission

Neelie KROES

Member of the Commission