REGULATORY CONSTRAINTS FOR THE COMPETITIVE OPERATION OF LNG TERMINALS: THE REGULATORY DEBATE ON COEXISTENCE OF REGULATED AND UNREGULATED TERMINALS

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BACKGROUND

The approval of the Hackberry decision in the United States (US) in 2002 and later codification of this decision in the Energy Policy Act 2005 (EPAct 2005), and the approval of Directive 2003/55/EC in the European Union (EU), establishing regulated third party access (rTPA) as the default access regime for LNG terminals and allowing at the same time exemptions from it on a case-by-case basis, gave raise on both sides of the Atlantic to the coexistence of regulated and non-regulated LNG regasification terminals.

OBJECTIVES OF THE PAPER

The paper describes the regulatory developments in the US and in the EU that have resulted in both cases in the coexistence in the same markets of two fundamentally different access regimes and investigates into the issues that this coexistence might provoke.

From these findings, some conclusions on the possible evolution of regulations in the US and EU to enhance market functioning will be provided.

REVIEW OF REGULATORY DEVELOPMENTS AND STATUS IN THE US AND THE EU

Overview of LNG access regulation in the US

LNG terminals in the United States were for many years considered to be part of the transportation chain, and thus subject to open access service under Section 7c of the Natural Gas act.

The three terminals which entered in operation from 1978 to 1981 (Cove Point, Elba Island and Lake Charles) are subject to open access regulation, while the Everett terminal (1971) was exempt from that regulation and has always operated as a dedicated terminal. This exception was allowed because when its owner Distrigas filed its application to build the terminal, it took the position that the terminal would not be engaged in interstate commerce but in foreign commerce.i

A significant policy shift took place in 2002 with the “Hackberry decision”, which was later (partially) codified in the Energy Policy act 2005. This decision was consistent with the amendment of the 1974 Deepwater Ports Act made through the Marine Transportation Security Act of 2002 to include deepwater LNG ports, which clarified that a developer of an offshore LNG terminal in federal waters was not subject to the “open access” requirements or regulation of rates and terms.

All terminals approved since 2002 in the US have therefore been exempted from open access regulation.

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The Hackberry decision (December 2002)

On December 18, 2002, the Federal Energy Regulatory Commission (FERC) voted to remove regulatory barriers to the construction of new LNG import regasification terminals. In the new policy, FERC terminated open access requirements (i.e., tariff requirements and non-discriminatory rates) for LNG import terminals in an attempt to encourage more LNG site development. The policy was announced in FERC's decision to approve an application by Dynegy to build an LNG terminal in Hackberry, Louisiana. In its ruling, FERC granted preliminary approval (the first such approval for an import terminal in the continental United States in over 20 years) for the construction of Hackberry LNG, clarifying that Dynegy could provide services to its affiliates under rates and terms mutually agreed upon (i.e., market-based), rather than under regulated cost-of-service rates, and exempted the company from having to provide open access service. In essence, from a regulatory perspective, LNG import facilities would be treated as supply sources rather than as part of the transportation chain. Sales of natural gas from the LNG plant were considered competitive with other sales of natural gas in the Gulf Coast region in a deregulated competitive commodity market, relieving the need for regulatory scrutiny.

FERC's new policy was highly influenced by the strong lobbying for a relaxation of regulatory requirements. Some LNG industry representatives at a public conference hosted by the FERC in October 2002 on issues facing the natural gas industry argued that open access requirements deterred investment in new LNG facilities. In particular, they said that investors in LNG projects need to be assured access to import terminal capacity in order to advance capital-intensive liquefaction projects in other countries. Because FERC's open access requirements for LNG terminals had formerly mandated public, non-discriminatory auctions for capacity, LNG industry representatives considered that regulations were hindering this investment and that many foreign governments would not approve liquefaction projects in their countries without regasification terminal access.

The Hackberry decision marked a significant departure from previous FERC practice. FERC specifically stated that it hoped the new policy would encourage the construction of new LNG facilities by removing some of the economic and regulatory barriers to investment. The Hackberry decision also made onshore terminal proposals competitive with proposed offshore LNG facilities, which under amendments to the 1974 Deepwater Port Act did not have to operate on a common carrier basis or provide access to third parties. While FERC's decision marked a lighter-handed regulatory regime for marketing operations at onshore LNG terminals, other regulations, such as those involving siting, were unchanged by this new policy.
Offshore terminals - 2002 Amendments to Deepwater Port Act of 1974

The Deepwater Ports Act (DWPA) of 1974, which applied to the siting and operation of deepwater oil ports, was amended by the Marine Transportation Security Act of 2002 to include deepwater LNG ports. Under this act, a developer of an offshore LNG terminal in federal waters is not subject to the “open access” requirements or regulation of rates and terms as the FERC was then requiring for onshore facilities.

The DWPA authorizes the Secretary of Transportation to issue a license to own, construct, and operate a deepwater port. This can be either a floating or manmade structure, other than a vessel, located beyond state seaward boundaries. The original legislation (1974) applied only to facilities storing, transporting, or handling oil, and was enacted to allow deep-draft oil tankers to unload offshore because many U.S. ports were too shallow to receive such large ships. In 2002, however, Section 106 of the Maritime Transportation Security Act amended the DWPA to include the storage, transportation, and handling of natural gas. This amendment has provided the natural gas industry the means to pursue the construction of offshore terminals for receiving LNG.

The amendment provisions also transferred the regulatory oversight of offshore natural gas terminals from the Federal Energy Regulatory Commission (FERC) to the Maritime Administration (MARAD) within the Department of Transportation (DOT) and the U.S. Coast Guard, which moved from DOT to the Department of Homeland Security in 2003. In addition, licensing procedures were streamlined, and licensees can have exclusive rights to the terminal's capacity rather than being subject to open access requirements.

In June 2003, the Secretary of Transportation delegated the authority to license deepwater ports to the MARAD Administrator. The license application process is administered jointly between MARAD and the Coast Guard, with MARAD primarily responsible for project financial reviews and the Coast Guard primarily responsible for project engineering, operations, safety, and environmental reviews, which include compliance with the National Environmental Policy Act (NEPA). The license review process, including a decision on the license application, must be completed within 356 days of the filing of an application.

In order for MARAD to approve a deepwater port license application, approval must be obtained from the governor of each adjacent coastal state. The governor can veto the project, however if the governor does not respond within 45 days after the final public hearing on the license application, approval is deemed given under the DWPA.

Deepwater ports for natural gas are not subject to “open access” provisions. Owners can utilize the entire capacity of the port and storage facilities or can make unused capacity available to others.

After the passage of the 2002 Amendments to the DWPA, there have been a number of license applications for new offshore facilities. As of August 2009, eighteen Deepwater Port License Applications have been filed for approval. Sixteen applications were filed for licenses to import LNG and two applications were filed for licenses to import oil. Seven applications have been approved (including the two LNG facilities already in operation, Gulf Gateway and Northeast Gateway); of the seven applications that have been approved, six licenses have been issued to import both LNG and oil; currently one license is pending for an approved application for an LNG port proposed for construction and operation in the Gulf of Mexico. Additionally, one application has been denied; six applications have been withdrawn or are inactive; and four applications are currently under review.

The inconsistency between the DWPA, as amended in 2002, and the previous FERC regulations on onshore facilities, was a relevant driver for the position adopted by the FERC on Hackberry LNG.


The Energy Policy Act of 2005 (EPAct 2005), passed on August 8, 2005, was the first major energy law enacted in more than a decade, and made the most significant changes in FERC authority since the New
Deal’s Federal Power Act of 1935 and the Natural Gas Act of 1938. Title II of the Act addressed oil and gas issues and contained significant provisions related to the importation of LNG. Some of these provisions were to be incorporated into the Natural Gas Act (NGA), while others were stand-alone provisions.

From the point of view of LNG policy, the primary element of the Act was the codification of the “Hackberry policy” adopted by the FERC in the December 2002 Hackberry LNG decision. Under the amended NGA, the FERC is prohibited before January 1, 2015 from:

- denying an application solely on the basis that the applicant proposes to use the LNG terminal exclusively or partially for gas that the applicant or an affiliate of the applicant will supply to the facility; or
- conditioning an order on approving a terminal:
  1. a requirement that the LNG terminal offer service to customers other than the applicant, or any affiliate of the applicant, securing the order;
  2. any regulation of the rates, charges, terms, or conditions of service of the LNG terminal; or
  3. a requirement to file with the Commission schedules or contracts related to the rates, charges, terms, or conditions of service of the LNG terminal.

However, these statutory provisions are applicable only to Commission decisions made before January 1, 2015, and the provisions will cease to have effect on January 1, 2030. The Act also provided protection from degradation of service and undue discrimination to existing shippers at a terminal already providing open access service in the event the terminal sought FERC approval to expand.

Apart from the codification of the Hackberry decision, the EPAct 2005 amended the NGA to clarify the role of the FERC as the final decision-making body to approve the siting, construction, expansion or operation of a terminal importing, exporting or processing LNG located onshore or in State waters. Moreover, it established that the FERC may approve application “with such modifications and upon such terms and conditions as the Commission finds necessary or appropriate”.

However, authorisations are conditioned on the applicant’s satisfaction of other statutory requirements for various aspects of the projects. States have the ability to effectively “veto” an LNG facility by denying permits associated with the Clean Water Act, the Coastal Zone Management Act, and the Clean Air Act, since nothing in the EPAct 2005 changed the states’ authorities in this regard.

Pursuant to EPAct, the Commission adopted a rule requiring potential developers to initiate pre-filing procedures at least six months prior to filing a formal application with the Commission, decreasing the time needed for creating a complete application for new LNG terminals. It also proposed in 2006 rules to implement provisions that granted authority to coordinate the processing of federal and state authorisations required under federal law for natural gas projects, as well as maintain a consolidated record of decisions for judicial review.

**Rationale for LNG access regulation in the USA**

The Hackberry decision was primarily intended to foster investment in new LNG facilities, in a context of uncertain future natural gas production in North America, which could make necessary to find new import sources of natural gas. In order to understand the rationale of LNG access regulation in the USA, particularly if conclusions are to be drawn for other markets, it is important to describe the context in which the Hackberry decision was adopted.

1. The US oil and gas E&P industry consisted (and still consists) of about 5,000 companies in direct competition. LNG terminals could hardly be regarded as essential infrastructures for suppliers to compete in the market, but more likely as one more source of gas in competition with the others.
2. Domestic gas production was difficult to predict in the US, with regional independent producers directly competing with gas majors and large reserves of unconventional gas. There were also uncertainties on the level of natural gas production in Canada, which was by far the largest exporter to the US (around 90% of total imports to the US), and whose production includes conventional production in the Western Canadian Sedimentary Basin (WCSB), coalbed methane and shale gas.

The Hackberry decision was adopted in a moment when forecasts indicated a probable decrease of natural gas production in North America.

3. The Hackberry decision was very much supported by the idea that investors in LNG projects need to be assured access to import terminal capacity in order to advance capital-intensive liquefaction projects in other countries.

4. At the time of adopting the decision, the FERC emphasized that it intended to put onshore receiving terminals on an equal footing with offshore facilities. A regulatory problem, not present in Europe, had previously emerged in the US: the Deepwater Ports Act of 1974, which previously applied to the siting and operation of deepwater oil ports, was amended by the Marine Transportation Security Act of 2002 to include deepwater LNG ports. Under this act, a developer of an offshore LNG terminal in federal waters would not be subject to the “open access” requirements or regulation of rates and terms as the FERC was then requiring for onshore facilities. Through FERC’s order in December 2002, the same requirements were eliminated for onshore facilities. The latter policy was partially codified in the Energy Policy Act of 2005 (see above), and a current LNG developer need only obtain siting, environmental and operational approvals in order to construct and operate a new LNG terminal.

From the regulatory point of view, some interesting observations can be made:

- The Hackberry decision suggested that the FERC would continue to regulate LNG import facilities on a case-by-case basis. The FERC could have opted to announce the change in a Notice of Proposed Rulemaking but officials said that this kind of generic approach was more applicable to natural gas pipelines than it is to LNG import capacity. In announcing its new policy, the FERC warned that it could revisit its decision in the event that complaints of discrimination or anticompetitive behaviour were received. Moreover, in the codification of the policy through the EPACT 2005, it was made clear that the statutory provisions were applicable only to Commission decisions made before January 1, 2015, and the provisions will cease to have effect on January 1, 2030.

- The decision was a departure of the FERC from the previous doctrine, under which it generally treated LNG facilities the same as interstate natural gas pipelines. However, there are remarkable differences between the treatment of interstate pipelines in the US and the treatment of transmission systems in Europe. It is widely recognised that “the interstate pipelines are formally subject to cost-of-service regulation by FERC, whereas in practice most of the contracts are negotiated in a fairly competitive environment”. viii

- Finally, it is worth mentioning that in the US, in spite of the new framework provided by the Hackberry decision, private “merchant” entrants (and not only players vertically integrated along the LNG value chain) remained in the sector. The most prominent example is Cheniere Energy, which decided to develop four natural gas importing “tolling” facilities. ix Therefore, it is asserted by some authors that “the re-emergence of such quasi-open access regimes at several terminals suggests that exclusive rights for the upstream business of the investing party are not necessarily a condition for investment.” x In this context, the author of the previous sentence also asserts that “nor is it evident that waiving open access was really necessary to induce investment, or clear whether or not this investment would have taken place in any event.”
Nevertheless, given the evolution of the market, waiving access was not only an adequate decision in the US given the information available at the time, but has avoided placing on consumers the burden of sunk costs in LNG incurred due to the shale gas revolution.

**The new rush for LNG export applications**

The North American shale gas development has dramatically changed the LNG market and many existing and projected LNG terminals are applying for export permits for both free-trade and non-free trade export licenses. At the date of completion of this paper, only the Sabine Pass plant has seen its project completely approved, while the rest of authorisations for non-FTA exports have been on hold pending a DOE determination of whether such exports would be in the public interest.

These applications have not triggered any further regulatory debate, but several opponents of export applications have appeared including several lawmakers, utilities, manufacturers, consumer associations, petrochemical producers and aluminium companies. Supporters of export applications, notably from the oil&gas industry, have also intensified efforts in early 2013.

A decision on the applications by DOE is expected soon after the publication in December 2012 of a report commissioned by the DOE which found LNG exports would be a net benefit to the US economy,\(^{x}\) which followed an earlier EIA analyses published in January 2012.\(^{xii}\)

**Overview of LNG access regulation in the EU**

LNG regulation in the European Union has significantly evolved in the last 15 years.

Before the 1\(^{st}\) Gas Directive was enacted in 1998, the LNG market was characterized by a lack of access regulations at a European level, and LNG terminals were typically owned by vertically integrated companies with exclusive rights over them.

Under the 1\(^{st}\) Gas Directive in 1998, LNG terminals were subject to regulated third party access (rTPA) or negotiated third party access (nTPA): it was up to each Member State to opt for one regime or another. However, given the lack of progress as regards effective access to these infrastructures in most countries, under the 2\(^{nd}\) Gas Directive, in 2003, rTPA became the default regime, and nTPA was not anymore allowed. However, at the same time exemptions to rTPA, assessed on a case-by-case basis in the light of five pre-established criteria, were allowed. This regime has remained fundamentally unchanged after the approval of the 3\(^{rd}\) Gas Directive in 2009.

In Europe nowadays both regimes (exemptions and rTPA) coexist, sometimes in the same country or market area, and in some cases even applied to the same physical terminal.

**Third Energy Package**

The main pieces of regulation as regards LNG in the European Union are Directive 2009/73/EC and Regulation 715/2009. These are integral part of the so-called “Third Energy Package”, which was approved by the European Parliament and by the Council on 13 July 2009.

While the Third Energy Package is focused on the implementation of measures to ensure the independence of, and attribution of all relevant competencies to, National Regulatory Authorities (NRAs), and the effective unbundling of Transmission System Operators (TSOs) through either structural (mainly ownership unbundling) or behavioural measures, it also contains relevant measures regarding LNG operators.
As regards the natural gas sector, the Third Energy Package contains the following legal documents:

- the Gas Regulation (Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005),\textsuperscript{xiv} and
- the Agency Regulation (Regulation 713/2009 establishing an Agency for the Cooperation of Energy Regulators).\textsuperscript{xv}

The relevance of these documents on LNG regulation in the European Union is analysed below.

**Directive 2009/73/EC**

According to Directive 2009/73/EC Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 3 March 2011.\textsuperscript{xvi}

As regards specific provisions on LNG, the Third Gas Directive is in line with the Second Directive. Most of new provisions related to LNG in the Third Package have been introduced in Regulation 715/2009, since the previous regulation did not cover LNG operations at all. The Third Directive, however, strengthens the role and independence of NRAs, which may have an impact on who is responsible for developing regulations concerning LNG in each Member State.

**Table 1: Main articles affecting LNG operators in Directive 2009/73/EC**

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<tr>
<th>Article No</th>
<th>Title</th>
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<tr>
<td>Art. 8</td>
<td>Technical rules</td>
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<td></td>
<td>Establishes that Member States shall ensure that technical</td>
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<td>safety criteria are defined and that technical rules</td>
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<td>establishing the minimum technical design and operational</td>
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<td>requirements for the connection to the system of LNG</td>
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<td>facilities, storage facilities, other transmission or</td>
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<td>distribution systems, and direct lines, are developed and</td>
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<td>made public. These technical rules shall ensure the</td>
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<td>interoperability of systems and shall be objective and</td>
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<td>non-discriminatory.</td>
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<td>It also recognizes the potential role of regulatory</td>
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<td>authorities where Member States have so provided, and the</td>
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<td>role of the Agency (ACER) on making appropriate</td>
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<td>recommendations towards achieving compatibility of</td>
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<td>technical rules, where appropriate.</td>
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<td>Art. 12</td>
<td>Designation of storage and LNG system operators</td>
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<td>Establishes that Member States shall designate, or shall</td>
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<td>require natural gas undertakings which own LNG facilities</td>
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<td>to designate, for a period of time to be determined by</td>
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<td>Member States, having regard to considerations of efficiency</td>
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<td>and economic balance, one or more LNG system operators.</td>
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<td></td>
<td>This article introduces for natural gas undertakings which</td>
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<td>own LNG facilities the same requirement previously</td>
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<td>established in Article 7 of Directive 2003/55/EC.</td>
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<td>Art. 13</td>
<td>Tasks of transmission, storage and/or LNG system operators</td>
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<td>Establishes the requirements for LNG operators as regards</td>
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<td>technical terminal operations, non-discrimination and</td>
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<td>information obligations to other parties.</td>
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<td>Art. 29</td>
<td>Combined operator</td>
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<td>Maintains the clarification formerly contained in Article 15 of Directive 2003/55/EC, which states that unbundling provisions on distribution system operators (Article 26(1)) “shall not prevent the operation of a combined transmission, LNG, storage and distribution system operator”, under certain independency requirements.</td>
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<th>Art. 31</th>
<th>Unbundling of accounts</th>
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<td>Maintains the already existing provisions for LNG operators to keep separate accounts for transmission, distribution, LNG and storage activities, with a view to avoiding discrimination, cross-subsidisation and distortion of competition.</td>
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<th>Art. 32</th>
<th>Third-party access</th>
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<td>Maintains rTPA as the default access regime to LNG terminals in Europe: Member States shall ensure the implementation of a system of third party access to LNG facilities based on published tariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users. It is also maintained that Member States shall ensure that these tariffs, or the methodologies underlying their calculation are approved prior to their entry into force by a regulatory authority, and that those tariffs — and the methodologies, where only methodologies are approved — are published prior to their entry into force.</td>
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<th>Art. 36</th>
<th>New infrastructure</th>
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<td>Regulates the exemption procedure formerly regulated by Article 22 of Directive 2003/55/EC. Article 36 maintains the five exemption criteria contained in the Second Directive, while detailing the new role that the Agency will play in the procedure when the infrastructure in question is located in the territory of more than one Member State. Moreover, exemptions can only be granted by regulatory authorities, and not by Member States, as allowed under the Second Directive.</td>
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It is worth developing on the last 3 articles (29,32 and 36).

As regards article 29, a relevant tendency observed in Europe is that of operators combining two or more of the activities, being Enagás in Spain, Gasunie in The Netherlands, Fluxys in Belgium, National Grid in Great Britain, and REN in Portugal, combined operators subject at the same time to ownership unbundling provisions. Snam has also joined the club in 2012, being ENI’s share progressively reduced.
An interesting finding is that, although ownership unbundling is not a requisite for LNG operators, and behavioural measures at European level to prevent LNG operators from granting undue preferences to, or discriminating in favour of, their supply affiliates, are rather weak, a majority of LNG operators in Europe is effectively subject to ownership unbundling. This is ensuring independency of many operators in Europe other than TSOs through structural measures that have not been imposed on them, but are an indirect effect of structural measures imposed on TSOs – and sometimes even voluntarily adopted by TSOs.

In fact, as regards terminals in operation as of January 2013, France’s Elengy is the only operator in Europe among regulated LNG operators for which the majority of the ownership remains in hands of a company with supply interests. This is more common among exempted terminals (e.g. South Hook LNG and Dragon LNG in the UK, and Adriatic LNG in Italy).

Article 32 maintains rTPA as the default access regime to LNG terminals in Europe, as already established in the Second Directive. While Article 32 roughly maintains the wording of Article 18 of the Second Directive, the former makes reference to Article 39(1), by which each Member State shall designate a single national regulatory authority at national level (Article 25 of Directive 2003/55/EC allowed for the designation of one or more competent bodies with the function of regulatory authorities), and to Article 41. Its duties are contained in Article 41 (which substitutes part of Article 25 of Directive 2003/55/EC).

It is clear that under the new legislation all missions and duties listed in the Gas Directives and Regulations (and also in the Electricity Directives and Regulations) have to be attributed to a single regulatory authority at national level. According to the European Commission’s Interpretative Note on Directive 2009/72/EC and on Directive 2009/73/EC, regarding “the regulatory authorities”:

> “a single national regulatory authority at national level must be entrusted with all the regulatory duties provided for in the Electricity and Gas Directives. This means that the core duties of the NRA can no longer be split between the NRA and the Ministry.”

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2 This table does not include vertically integrated undertakings (VIUs) which perform two or more infrastructure activities through different affiliates, such as GDF SUEZ, and which might be considered combined operators under article 29 of Directive 2009/73/EC.

Note that Gasunie owns only 40% of Gate LNG. Vopak owns 40%, and the remaining 20% is distributed among 4 minority shareholders.
“the NRA can no longer be part of a Ministry. The Commission’s services are of the opinion that e.g. sharing personnel and sharing offices between the NRA and any other (public or private) body is, in principle, not in line with Article 35(4)(a) of the Electricity Directive and Article 39(4)(a) of the Gas Directive”

The Interpretative Note clarifies that provisions on independence of the NRA in Article 39.4 are key because they are aimed at ensuring that regulatory decisions are removed from political and specific economic interests which is necessary to create a stable and predictable investment climate. Article 39.4 establishes, among other guarantees, that Member States shall ensure that, when carrying out the regulatory tasks conferred upon it by this Directive and related legislation, the regulatory authority ensures that its staff and the persons responsible for its management:

(i) act independently from any market interest;

(ii) and do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. This requirement is without prejudice to close cooperation, as appropriate, with other relevant national authorities or to general policy guidelines issued by the government not related to the regulatory powers and duties.

Finally, Article 36, “New infrastructure”, regulates the exemption procedure formerly regulated by Article 22 of Directive 2003/55/EC. Article 36 maintains the five exemption criteria contained in the Second Directive, while detailing the new role that the Agency will play in the procedure when the infrastructure in question is located in the territory of more than one Member State. Moreover, exemptions can only be granted by regulatory authorities, and not by Member States, as allowed under the Second Directive.

“Major new gas infrastructures, i.e. interconnectors between Member States, LNG and storage facilities, may, upon request, be exempted from the provisions of Articles 18, 19, 20, and 25(2), (3) and (4) under the following conditions:

a) the investment must enhance competition in gas supply and enhance security of supply;

b) the level of risk attached to the investment is such that the investment would not take place unless an exemption was granted;

c) 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;

d) charges are levied on users of that infrastructure;

e) 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.”

Although exemptions are granted by NRAs or Member States, the decision must be notified to the European Commission, without delay, by the competent authority to the Commission, together with all the relevant information with respect to the decision. Within two months after receiving a notification, the Commission may request that the regulatory authority or the Member State concerned amend or withdraw the decision to grant an exemption. 3 In particular, the information shall contain:

(a) the detailed reasons on the basis of which the regulatory authority, or Member State, granted the exemption, including the financial information justifying the need for the exemption;

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3 The two-month period may be extended by one additional month where additional information is sought by the Commission.
(b) the analysis undertaken of the effect on competition and the effective functioning of the internal
gas market resulting from the grant of the exemption;
(c) the reasons for the time period and the share of the total capacity of the gas infrastructure in
question for which the exemption is granted;
(d) in case the exemption relates to an interconnector, the result of the consultation with the Member
States concerned or regulatory authorities;
(e) the contribution of the infrastructure to the diversification of gas supply.

common rules for the internal market in natural gas, both negotiated and regulated third party access to LNG
 terminals was allowed, as stated in articles 14, 15 and 16. Directive 98/30/EC was repealed by Directive
2003/55/EC where only regulated third party access is allowed if an exemption is not granted.

A new element of the procedure is the emphasis made on Capacity Allocation Mechanisms (CAM) and
Congestion Management Procedures (CMP). It is established that, before granting an exemption, the
regulatory authority shall decide upon the rules and mechanisms for management and allocation of capacity.
In particular, the Directive indicates that the rules shall require that all potential users of the infrastructure are
invited to indicate their interest in contracting capacity before capacity allocation in the new infrastructure,
including for own use, takes place. The regulatory authority shall require congestion management rules to
include the obligation to offer unused capacity on the market, and shall require users of the infrastructure to
be entitled to trade their contracted capacities on the secondary market. It is worth noting that regulators are
making use of this new element and there is an increasing tendency to impose conditions on the allocation of
part of the exempted capacity, as has been the case for Dunquerke in 2010 and Porto Empedocle in 2012.

This is in line with the Commission’s and ERGEG and CEER’s efforts to monitor and, to certain extent,
harmonise, aspects of CAM and CMP at least for regulated LNG terminals.

As regards the role of the European Commission in the exemption decision and the information that must be
submitted to it by regulatory authorities, the conditions remain fundamentally unchanged, although some
periods have been slightly modified.

Another new provisions is that the Commission’s approval of an exemption decision shall lose its effect two
years from its adoption in the event that construction of the infrastructure has not yet started, and five years
from its adoption in the event that the infrastructure has not become operational unless the Commission
decides that any delay is due to major obstacles beyond control of the person to whom the exemption has
been granted.

Regulation on exemptions introduced by the Second Gas Directive has resulted on the coexistence of two
regimes, rTPA and exemptions to it, sometimes in the same market or country, and in the case of Italy even
applied to the same physical terminal. This is shown in the figure below:
The tables below provide further details on existing and planned terminals in the European Union under regulated TPA, and the exemptions already granted to LNG terminals.
Table 3: LNG terminals in the EU subject to regulated TPA

<table>
<thead>
<tr>
<th>LNG Terminal</th>
<th>Country</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Zeebrugge LNG Terminal</td>
<td>Belgium</td>
<td>In operation (since 1987)</td>
</tr>
<tr>
<td>Montoir de Bretagne LNG Terminal</td>
<td>France</td>
<td>In operation (since 1980)</td>
</tr>
<tr>
<td>Fos Tonkin LNG Terminal</td>
<td>France</td>
<td>In operation (since 1972)</td>
</tr>
<tr>
<td>Panigaglia LNG Terminal</td>
<td>Italy</td>
<td>In operation (since 1971)</td>
</tr>
<tr>
<td>Revithoussa LNG Terminal</td>
<td>Greece</td>
<td>In operation (since 2000)</td>
</tr>
<tr>
<td>Sines LNG Terminal</td>
<td>Portugal</td>
<td>In operation (since 2003)</td>
</tr>
<tr>
<td>Barcelona LNG Terminal</td>
<td>Spain</td>
<td>In operation (since 1968)</td>
</tr>
<tr>
<td>Huelva LNG Terminal</td>
<td>Spain</td>
<td>In operation (since 1988)</td>
</tr>
<tr>
<td>Cartagena LNG Terminal</td>
<td>Spain</td>
<td>In operation (since 1989)</td>
</tr>
<tr>
<td>Bilbao LNG Terminal</td>
<td>Spain</td>
<td>In operation (since 2003)</td>
</tr>
<tr>
<td>Sagunto LNG Terminal</td>
<td>Spain</td>
<td>In operation (since 2006)</td>
</tr>
<tr>
<td>Mugardos LNG Terminal</td>
<td>Spain</td>
<td>In operation (since 2007)</td>
</tr>
<tr>
<td>North Adriatic LNG Terminal</td>
<td>Italy</td>
<td>In operation (since 2009)</td>
</tr>
<tr>
<td>only 20% of capacity subject to rTPA</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fos Cavaou LNG Terminal</td>
<td>France</td>
<td>In operation (since 2010)</td>
</tr>
<tr>
<td>El Musel LNG Terminal</td>
<td>Spain</td>
<td>Under construction (est. 2013)</td>
</tr>
<tr>
<td>Polskie LNG</td>
<td>Poland</td>
<td>Under construction (est. 2014)</td>
</tr>
<tr>
<td>Arinaga LNG Terminal</td>
<td>Spain</td>
<td>Planned</td>
</tr>
<tr>
<td>Arico-Granadilla LNG Terminal</td>
<td>Spain</td>
<td>Planned</td>
</tr>
</tbody>
</table>

Source: GLE’s LNG map, June 2010 and self-made.
### Table 4: Exemptions granted to LNG terminals in the EU under Art. 22 of Directive 2003/55/CE or Art. 36 of Directive 2009/73/CE

<table>
<thead>
<tr>
<th>LNG Terminal</th>
<th>Country</th>
<th>Notification</th>
<th>Decision date</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>LNG Porto Empedocle</td>
<td>Italy</td>
<td>7 Dec 2011</td>
<td>7 May 2012</td>
<td>Planned</td>
</tr>
<tr>
<td><em>Only 20% of capacity subject to rTPA</em></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Shannon LNG</td>
<td>Ireland</td>
<td>27 Apr 2010</td>
<td>26 Jul 2010</td>
<td>Planned</td>
</tr>
<tr>
<td>Livorno LNG Terminal</td>
<td>Italy</td>
<td>11 Sep 2009</td>
<td>11 Dec 2009</td>
<td>Under construction (est. 2011)</td>
</tr>
<tr>
<td>Eemshaven LNG Terminal</td>
<td>Netherlands</td>
<td>23 Jul 2007 &amp; 19 Feb 2009</td>
<td>15 May 2009</td>
<td>Cancelled\textsuperscript{ix}</td>
</tr>
<tr>
<td>Liongas Rotterdam</td>
<td>Netherlands</td>
<td>18 Jul 2007</td>
<td>18 Oct 2007</td>
<td>Cancelled\textsuperscript{xx}</td>
</tr>
<tr>
<td>Grain LNG Terminal (expansion – phase 3)</td>
<td>UK</td>
<td>4 May 2007</td>
<td>Not reported by the EC</td>
<td>In operation (expansion est. winter 2010/2011)</td>
</tr>
<tr>
<td>Gate Terminal Rotterdam</td>
<td>Netherlands</td>
<td>23 Nov 2006</td>
<td>26 Mar 2007</td>
<td>In operation (since 2011)</td>
</tr>
<tr>
<td>Brindisi LNG Terminal</td>
<td>Italy</td>
<td>18 Apr 2005</td>
<td>13 Sep 2005</td>
<td>Planned</td>
</tr>
<tr>
<td>Dragon LNG Terminal</td>
<td>UK</td>
<td>3 Feb 2005</td>
<td>29 Mar 2005</td>
<td>In operation (since 2009)</td>
</tr>
<tr>
<td>North Adriatic LNG Terminal</td>
<td>Italy</td>
<td>3 Dec 2004</td>
<td>10 Feb 2005</td>
<td>In operation (since 2009)</td>
</tr>
<tr>
<td><em>80% of capacity exempted</em></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>South Hook LNG Terminal</td>
<td>UK</td>
<td>1 Dec 2004</td>
<td>10 Feb 2005</td>
<td>In operation (since 2009)</td>
</tr>
<tr>
<td>Grain LNG Terminal</td>
<td>UK</td>
<td>1 Dec 2004</td>
<td>10 Feb 2005</td>
<td>In operation (2005)</td>
</tr>
</tbody>
</table>

Source: European Commission\textsuperscript{xxi} and GLE’s LNG map, June 2010

Since the introduction of exemptions in Europe, most of new LNG terminals have applied for them successfully. However, contrary to the general perception:

\textsuperscript{4} Notification of the exemption decision to the European Commission by the National Regulatory Authority.
• a relevant portion of new capacity added after the Second Directive has been developed under rTPA, not only including all expansions of already existing LNG terminals, but also some new terminals.

• around 60% of the total LNG capacity is still offered under regulated conditions.

This is so because all capacity expansions of regulated terminals have been put forward under regulated conditions.

\[\text{LNG REGASIFICATION CAPACITY}\]

\[\text{LNG STORAGE CAPACITY}\]

Source: GLE Investment Database (various versions) and self made.

**Figure 3. Regasification and LNG capacity added in the European Union since 2000: Regulated vs. Exempted (data until Sep 2011)**

Whether the balance will shift towards exempted terminals in the next few years is not clear, and depend on the success of various investment projects. The additions of Livorno LNG terminal in Toscana, and later on Dunkerque LNG in France, both under construction, will notably increase the weight of exempted terminals. Regulated El Musel in Spain and Polskie LNG in Poland, also under construction, will also be connected, and other regulated terminals are either under expansion, or considering it. With the latest information available on FIDs already adopted, it can be asserted that in the long-term regulated capacity is expected to represent more than 50% of total capacity.

In any case, substantial amounts of both regulated and exempted regasification and LNG storage capacities will coexist in the European Union for many years, since under provisions in the Second and Third...
possible to exempt already regulated capacities, and exemptions have been generally granted for 20 or 25 years. Lessons learned from this coexistence of both regimes will surely influence the regulatory debate in Europe.

Regulation (EC) No 715/2009

Regulation (EC) No 1775/2005 did only cover natural gas transmission. However, Regulation (EC) No 715/2009 widened its scope to include LNG (and storage) facilities. The Regulation, as in the case of the Third Gas Directive, shall apply from 3 March 2011.

The European Commission, in the explanatory memorandum of Regulation (EC) No 715/2009, highlighted the relevance of LNG to the EU, and the areas that would be regulated under the new Regulation (underlined added):

“The role of LNG in the supply of gas to the European Union is becoming ever more important, and a lot of investment in LNG terminals is planned or under way. For that reason, transparent rules on access to LNG terminals are needed. Regulators have identified the need, and ERGEG has prepared guidelines with a goal create a common approach to third party access for LNG terminals.

Although many LNG terminals constructed have used the possibilities to be exempted from third party access and regulatory intervention under Article 22 of the Directive, there are also LNG terminals for which third party access rules apply. Since the current Directive [Directive 2003/55/EC] only imposes a general requirement that access has to be regulated, this leaves room to diverging interpretations among Member States. Moreover, an exemption under Article 22 is always temporary, and when the exempted period has passed, LNG terminals will become regulated.

Therefore the Commission proposes to impose more clearly defined third party access rules to LNG terminals. To make the guidelines legally binding, the Regulation will be extended to define how LNG terminal operators should offer third party access services and how they should allocate capacity and manage congestion. It will also define the transparency requirements and propose measures to enable a secondary market in terminal-capacity to develop. These rules shall also serve to ensure consistency with the proposed minimum requirements on exempted infrastructure.”

According to the Regulation itself, the Commission was concerned about the effectiveness of the regulatory dispositions on TPA:

“Access to gas storage facilities and liquefied natural gas (LNG) facilities is insufficient in some Member States, and therefore the implementation of the existing rules needs to be improved.”

The Regulation includes three articles of particular relevance for LNG on services, capacity allocation mechanisms and congestion management procedures, and transparency.
<table>
<thead>
<tr>
<th>Article</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 15</td>
<td><strong>Third-party access services concerning storage and LNG facilities</strong>&lt;br&gt;States the conditions that LNG system operators must fulfill regarding TPA services.</td>
</tr>
</tbody>
</table>
| | “1. LNG and storage system operators shall:<br>   (a) offer services on a non-discriminatory basis to all network users that accommodate market demand; in particular, where an LNG or storage system operator offers the same service to different customers, it shall do so under equivalent contractual terms and conditions;<br>   (b) offer services that are compatible with the use of the interconnected gas transport systems and facilitate access through cooperation with the transmission system operator; and<br>   (c) make relevant information public, in particular data on the use and availability of services, in a time-frame compatible with the LNG or storage facility users’ reasonable commercial needs, subject to the monitoring of such publication by the national regulatory authority.<br>   […]
| | 3. LNG and storage facility contracts shall not result in arbitrarily higher tariffs in cases in which they are signed:<br>   (a) outside a natural gas year with non-standard start dates; or<br>   (b) with a shorter duration than a standard LNG and storage facility contract on an annual basis.<br>4. Where appropriate, third-party access services may be granted subject to appropriate guarantees from network users with respect to the creditworthiness of such users. Such guarantees shall not constitute undue market-entry barriers and shall be non-discriminatory, transparent and proportionate.<br>5. Contractual limits on the required minimum size of LNG facility capacity and storage capacity shall be justified on the basis of technical constrains and shall permit smaller storage users to gain access to storage services.” |
| Art. 17 | **Principles of capacity-allocation mechanisms and congestion-management procedures concerning storage and LNG facilities.**<br>“1. The maximum storage and LNG facility capacity shall be made available to market participants, taking into account system integrity and operation.<br>2. LNG and storage system operators shall implement and publish non-discriminatory and transparent capacity-allocation mechanisms which shall:<br>   (a) provide appropriate economic signals for the efficient and maximum use of capacity and facilitate investment in new infrastructure;<br>   (b) be compatible with the market mechanism including spot markets and trading hubs, while being flexible and capable of adapting to evolving market circumstances; and<br>   (c) be compatible with the connected network access systems.<br>3. LNG and storage facility contracts shall include measures to prevent capacity-hoarding, by taking into account the following principles, which shall apply in cases of contractual congestion:<br>   (a) the system operator must offer unused LNG facility and storage capacity on the primary market without delay; for storage facilities this must be at least on a day-ahead and interruptible basis;<br>   (b) LNG and storage facility users who wish to re-sell their contracted capacity on the secondary market must be entitled to do so.” |
Art. 19  

Transparency requirements concerning storage facilities and LNG facilities

"1. LNG and storage system operators shall make public detailed information regarding the services it offers and the relevant conditions applied, together with the technical information necessary for LNG and storage facility users to gain effective access to the LNG and storage facilities.

2. For the services provided, LNG and storage system operators shall make public information on contracted and available storage and LNG facility capacities on a numerical basis on a regular and rolling basis and in a user-friendly standardised manner.

3. LNG and storage system operators shall always disclose the information required by this Regulation in a meaningful, quantifiably clear and easily accessible way and on a non-discriminatory basis.

4. LNG and storage system operators shall make public the amount of gas in each storage or LNG facility, or group of storage facilities if that corresponds to the way in which the access is offered to system users, inflows and outflows, and the available storage and LNG facility capacities, including for those facilities exempted from third-party access. That information shall also be communicated to the transmission system operator, which shall make it public on an aggregated level per system or subsystem defined by the relevant points. The information shall be updated at least daily.

[...]"

5. In order to ensure transparent, objective and non-discriminatory tariffs and facilitate efficient utilisation of the infrastructures, the LNG and storage facility operators or relevant regulatory authorities shall make public sufficiently detailed information on tariff derivation, the methodologies and the structure of tariffs for infrastructure under regulated third-party access."

Notably, Article 19(4) is also applicable to LNG terminals exempted under Article 36 of Directive 2009/73/EC (Article 22 of Directive 2003/55/EC), consistently with the assertion by the EC that rules in the regulation shall also serve to ensure consistency with the proposed minimum requirements on exempted infrastructure.

LNG system operators are also explicitly affected by Article 20 on “Record keeping by systems operators” and Article 22 on “Trading of capacity rights”. The latter is relevant for the well-functioning of secondary capacity markets:

“Each transmission, storage and LNG system operator shall take reasonable steps to allow capacity rights to be freely tradable and to facilitate such trade in a transparent and non-discriminatory manner. Every such operator shall develop harmonised transport, LNG facility and storage contracts and procedures on the primary market to facilitate secondary trade of capacity and shall recognise the transfer of primary capacity rights where notified by system users.

The harmonised transport, LNG facility and storage contracts and procedures shall be notified to the regulatory authorities.”

Guidelines for Good Third Party Access Practice for LNG System Operators (GGPLNG) and monitoring activities by CEER

ERGEG, CEER and ACER

The Council of European Energy Regulators (CEER) and the European Regulators’ Group for Electricity and Gas (ERGEG) were two organisations established for the cooperation of the independent energy regulators of Europe. Both organisations pursued the same overall aim of facilitating the creation of a single, competitive, efficient and sustainable internal market for gas and electricity in Europe.

CEER and the ERGEG shared similar objectives and the work and achievements of the CEER and ERGEG were intrinsically linked until 3rd March 2011 when ERGEG disappeared and its duties where transferred to the new created ACER (Agency for Cooperation of Energy Regulator).
ERGEG was set up by the European Commission in 2003\textsuperscript{xxiii} as its advisory body on internal energy market issues. It was made up of the national energy regulatory authorities of the EU’s Member States. Its purpose was to facilitate a consistent application, in all Member States, of the provisions set out in Community legislation in the field of electricity and gas.

Cooperation in the framework of the CEER is based on a voluntary agreement among the regulators themselves.

ACER was created by Regulation 713/2009 of the European Parliament and of the Council of 13 July 2009, established ACER\textsuperscript{xxiv}. The purpose of ACER is to assist the regulatory authorities at Community level, the regulatory tasks performed in the Member States and, where necessary, to coordinate their action.

**GGPLNG**

ERGEG deliver its first "Guidelines for Good Practice on TPA to LNG facilities" (GGPLNG) in May 2008\textsuperscript{xxv}. Previously, a consultation process among stakeholders took place between 2007 and 2008 in order to develop the guidelines.\textsuperscript{xxvi}

The main objective of the GGPLNG was to establish common rules to guarantee transparent, non-discriminatory and appropriately homogeneous TPA to LNG regasification facilities in the European Union. ERGEG clarified that the GGPLNG should only be applied on a voluntary basis to regulated TPA LNG facilities, in accordance with Article 18 of the European Directive 2003/55/EC.

ERGEG also clarified that the GGPLNG did not go beyond the Directive 2003/55/EC in creating or restricting TPA rights, but that the GGPLNG were intended as possible input from ERGEG for an amendment to Regulation 1775/2005 and its annexes. Before the approval of the modification of the Regulation, the GGPLNG could serve as non-binding guidelines. Since the GGPLNG were developed before the Third Package had been adopted, some of its voluntary guidelines are now contained in the Third Package as binding regulation.

The ERGEG conclusions Paper on the GGPLNG addressed:

- the basic principles for access tariffs
- the role and duties of LSOs in providing TPA services, as well as other conditions and requirements to assure proper TPA services
- the principles underlying the capacity allocation and congestion management procedures
- transparency requirements; and
- trading of capacity rights.

**Monitoring activities by CEER**

CEER has adopted an active role in monitoring the implementation and compliance with the requirements for LNG terminals established in the GGPLNG in 2008, and has extended this monitoring and compliance analysis of LNG regulations to the Third Package.\textsuperscript{xxvii}

As of January 2013, ERGEG/CEER have produced three relevant regulatory documents related to these monitoring activities:

- A monitoring report of the implementation of ERGEG’s GGPLNG, in June 2009, and
- Two related studies on congestion management procedures & antihording mechanisms in the European LNG terminals in November 2010 and April 2011.
At the XV Madrid Forum, in November 2008, the European Commission approached ERGEG with a request to monitor the degree of implementation and compliance with the GGPLNG. ERGEG carried out in 2009 a monitoring exercise of the GGPLNG. ERGEG's monitoring exercise therefore covered LSOs, System users and NRAs. The aim was to assess the degree of implementation and hence compliance with the requirements outlined in the GGPLNG, to identify benefits and failures, as well as users' requests and main trends in the market, to obtain clear conclusions and recommendations for how the potential difficulties in LNG regimes could be reduced and access improved.

The overall result of the monitoring was satisfying, in particular when compared with previous GGP monitoring exercises for underground storages, although ERGEG showed some concerns on the representativity of the results for certain areas due to the low number of responses. The main outcome of the GGPLNG monitoring was presented at the XVI Madrid Forum on 28th May 2009, highlighting the recommendations below:

- Users favour greater standardisation, wider services provision and hence, implementation of general practices at the European level
- A degree of improvement is necessary regarding tariff structures, certain service provision, CAM/CMP definition and anti-hoarding principles
- Secondary markets must be fostered for the dynamic and competitive growth of the market, responding to the most common users' complaint
- Rules to avoid congestion problems and the mechanisms to manage them must be settled under consensus-building, taking into account market's preferences
- More time would be beneficial in order to allow NRAs and LSOs the full implementation of GGPLNG provisions in their systems
- In some markets the number of users is still low, so new surveys should be undertaken in the future, once market develops

As a result of the previous report, and after a workshop organised by GLE in April 09, and a meeting with the Commission, GLE, EFET and Eurogas in July 09, ERGEG committed to do a specific study on CMP and anti-hoarding.

In the 17th Madrid Forum, in January 2010, ERGEG presented the preliminary results of the study on CMP and anti-hoarding. ERGEG already announced that a second step would consist on developing CMP and anti-hoarding guidelines leading to a higher availability of capacity for spot/short notice cargoes, and that in order to produce such guidelines, a public consultation and a workshop would be celebrated.

The initiative somehow lost momentum during 2010, and the publication of the final study, including conclusions, was delayed until November 2010; however, recommendations were not drafted until 2011. As regards the way forward the 2010 study indicates that:

"ERGEG future work in 2010 and 2011 is to be developed taking into consideration the conclusions of this study addressed to European level. They should serve as a basis for further analysis on how these problems are influencing each national or regional market preventing the single European market. Final decision on the way forward needs to be taken once the document had been submitted for a public survey and the recommendations had been drafted."

After the publication in November 2010, a survey among LNG terminal users and potential users in Europe was launched by ERGEG aimed at collecting information on their situation in the different markets, sounding their conditions for accessing firm and spot LNG capacity and their experience with the antihoarding mechanisms in the European terminals. According to ERGEG, the responses collected would serve to complete the study and reach conclusions that would assist to define more efficient and more transparent
CMPs and promote the potential development of guidelines on best-practice approaches for CMPs in LNG terminals.

The final study was released in April 2011, xxxiii included conclusions from the study and public consultation on CAM, CMP transparency, secondary capacity markets and access to short-term capacity for spot cargos. The analysis led to conclusions that there are several areas where regulations and procedures can be improved, or further harmonised. According to ERGEG, efforts should notably aim at eliminating barriers to the creation of secondary markets, improving transparency, introducing products that take into account the needs and constraints of small players and/or establishing notice periods allowing for the development of spot markets. The intention of ERGEG is to build on these considerations and introduce pragmatic actions to be taken by ERGEG/CEER in 2011 and 2012; they aim to obtain suitable and concrete progress which will pave the way for further harmonisation. CEER announced in the study that:

- The work will focused on the implementation of the 3rd package transparency requirements applying to LSOs.
- CEER will make available a common template that each LSO can fill in with the existing requirements and publish this on its website in order to help the potential users identify the type of license needed, the nature of the arrangements to be signed with the LSO, the main regulatory and technical provisions applying to the terminal etc.
- A case by case study would be needed to assess the existence of capacity hoarding and to state whether the current CMPs and anti-hoarding mechanisms provide effective use of available capacity (it made clear, however, that there is no evidence that the underutilisation of capacity observed in some of the European terminals results from a deliberate intention of the primary capacity holders to block entrance to the terminal). The results from these case by case assessments could be collected and analysed by the CEER LNG TF in order to raise conclusions at the European level and eventually propose measures to tackle the potential problems and inconsistencies.
- The fact that LNG will account for an important part of the European supplies in the future should be taken into account in the discussion of the target model; LNG has benefits in terms of security of supply, market arbitrage and competition but it can also have side effects with an impact on the internal market.

Building on the findings of the Monitoring of GGPLNGs, and the conclusions of the April 2011 paper, ERGEG/CEER announced that its future work could be focused on demonstrating whether regulated or exempt LNG access regimes could be improved, mainly through the development of effective, simple and consistent CMPs. Also, according to ERGEG/CEER, analysis is needed on how more transparency regarding this issue and a progressive European harmonisation of these principles will fortify the common market.

In September 2011 CEER organized a workshop in Madrid xxxiv presenting the results of the study and announcing the agreement with Gas LNG Europe (GLE)5 to work on a transparency template in line with the legally binding obligations of the 3rd Package. The aim was to have a harmonised tool used by all EU terminals to publish the information on their website, ensuring that potential users can easily gather the information necessary for accessing the EU LNG terminals. This tool was already implemented by GLE members during 2012.

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5 GLE represents LNG operators in Europe. It is a subdivision of Gas Infrastructure Europe (GIE), an association representing the sole interest of the infrastructure industry in the natural gas business such as Transmission System Operators, Storage System Operators and LNG Terminal Operators. GIE has currently 67 members in 25 European countries. www.gie.eu.com
CONCLUSIONS

Regulated and non-regulated regimes are not good or bad per se, the decision to choose between them by regulators should take into account the characteristics of the market.

Regulatory models range from those where terminals are heavily regulated, in a similar way to the transmission business downstream, to those based on a light-handed regulatory approach which rely on market forces. In practice, many regulatory schemes are hybrid, showing features of both extreme models, and sometime allowing for coexistence of two models in the same market.

Regulatory regimes in Europe and the US are in general well adapted to the different market models where they are inserted. More importantly, they evolve as a result of the recurrent interaction between the industry and regulators, for which strong evidence has been found in both markets. In particular, the Hackberry decision in the US and its later codification in the EPAct 2005 was widely perceived as an adequate decision in the US given the information available at the time; given the evolution of the market, it is obvious that it has also proved beneficial afterwards, avoiding placing on consumers the burden of sunk costs in LNG incurred due to the shale gas revolution.

The coexistence of different models in the same market does not seem to be an issue in the US, where only three terminals remain bound to open access, the prospect is that they will not be used for importing LNG, and they represent an non-significant portion of gas imported or produced since there are thousands of producers in competition. In the US the debate since 2011 is dominated by the export applications to both free-trade and non-free trade countries by existing and projected LNG terminals. Several opponents and supporters of export applications have appeared.

In import-dependent Europe the situation is different: terminals account for a large share of gas imports (and in the future will account for a larger one), and there might be competition between terminals situated nearby or in the same balancing area. In Europe, most of new terminals that have started operations since 2005 have been exempted. However, all capacity expansions of regulated terminals have been put forward under regulated conditions. As of 2013, around 60% of existing capacity in European terminals is still regulated and in the long-term regulated capacity is expected to represent more than 50% of total capacity.

While exemptions have been beneficial to attract LNG investments and have generally had a positive impact on competition, the asymmetric situation of regulated and exempted terminals as regards the access services they are required to offer, the access services they are allowed to offer and the flexibility to implement them, the prices they can charge for those services or the costs they are required to cover, and the transparency requirements they are subject to, might place some terminals in a more advantageous situation than others. This could have a significant impact on competition between suppliers in the future, putting pressure on national and European authorities to create a level-playing field for all users.

This is especially true in a context of integration of national markets and balancing-zones mergers, taking into account that the five criteria to grant each exemption were assessed against a particular relevant market and not against the newly-created market (e.g., an exemption that was beneficial for a national market prove detrimental to the efficient functioning of the regulated system to which the infrastructure is connected if the market is enlarged).

Then, the regulatory debate is likely to remain open in Europe, where exemptions are granted for a given period (typically around 20 or 25 years), and can only be granted to new terminal or significant expansions. It is difficult to predict whether, in case the asymmetric regulatory situation between terminals required action from authorities to restore a level-playing field, this would result in a more light-handed approach for already regulated terminals under a new regulatory package, or in harmonization through a more exhaustive regulation for currently exempted terminals. The former would imply ensuring a fair rate of return to terminals suddenly confronted with competition (e.g. operators could face difficulties in markets with planned
overcapacity to facilitate competition between suppliers, if investments are not largely underpinned by long-term contracts; the latter, a complex negotiation with terminal operators whose exemptions cannot be revoked unless an infringement of exemption conditions is proved, and whose reasonable profitability expectations would need to be fulfilled, and also with terminal users.

The increasing interaction between basic infrastructures in Europe has fostered the creation of combined transmission and regasification operators. Given the ownership unbundling conditions placed on many TSOs, the ownership structure of LNG operators in Europe is also evolving and most of operators, in particular the ones under rTPA, are already subject to ownership unbundling. This might put pressure the other operators to enhance effective unbundling provisions.

Regulated regimes tend to be more transparent and easier to monitor than non-regulated regimes; this is natural since it is a requisite to ensure a level-playing field for suppliers. Thus, non-regulated regimes, when approved in contexts where competition in the supply is structurally more difficult to achieve (because of lack of national production, an oligopoly of upstream supply, limited downstream demand, or other reasons) have more regulatory pressure for harmonisation and for increasing the level of transparency provided, as is the case in Europe. On the contrary, although in the past regulatory frameworks have evolved to adapt to new market conditions, regulated regimes are generally less adaptable to the changing market needs, since modifications in regulation are lasting and quite difficult to carry out on short notice.

Regulatory oversight will continue to be stronger in Europe than in the US. CEER has adopted an active role in monitoring the implementation and compliance with the requirements for LNG terminals established in the GGPLNG in 2008, and in the Third Package in 2009. CEER has also announced that its future work could be focused on demonstrating whether regulated or exempt LNG access regimes could be improved, mainly through the development of effective, simple and consistent CMPs.

REFERENCES


ii EIA, "Legislation and Regulations. The Hackberry Decision", Available at: http://www.eia.doe.gov/oiaf/archive/aeo04/leg_reg7.html

EIA, "FERC's Hackberry Decision (2002)", Available at: http://www.eia.doe.gov/oil_gas/natural_gas/analysis_publications/ngmajorleg/ferc.html

iii FERC's Hackberry decision: http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=9608751


v Details on approved projects are available at: http://www.marad.dot.gov/ports_landing_page/deepwater_port_licensing/dwp_current_ports/dwp_current_ports.htm

vi On March 24, 2004, the FERC had already asserted exclusive jurisdiction for LNG facilities. The Commission clarified its authority in an order responding to the California Public Utilities Commission’s (CPUC) claim that California had jurisdiction over LNG facilities within its borders.


ix Freeport LNG, in operation since 2008 (developed by Cheniere which then sold 70%, but maintains a 30% non-operating limited partner interest) Sabine Pass LNG, with Phase 1 in operation in 2009 (88,8%), Corpus Christi LNG (previously permitted for a regasification terminal, now reconverted to a liquefaction project) and Creole Trail LNG More information available at www.cheniere.com
HIRSCHHAUSEN, Christian von, Op Cit.


With the exception of Article 11 (Certification in relation to third countries), which they shall apply from 3 March 2013. This article does not affect LNG operations.


Interpretative Notes by the European Commission are not legally binding, but are intended to shed light on the Commission staff's understanding of how the provisions of the Electricity and Gas Directives are to be understood. In any event, giving binding interpretation of Community law is ultimately the role of the European Court of Justice.

GLE’s LNG Map is available at http://www.gie.eu.com/maps_data/lng.html


4Gas BV and the Port of Rotterdam announce on Liongas site they have decided to end the LionGas project with immediate effect. See http://www.liongas.nl/?id=20&LANG=EN Retrieved on 20th December, 2010


ACER homepage: http://www.acer.europa.eu/portal/page/portal/ACER_HOME

On 13th December 2007, ERGEG launched a public consultation on its Draft Guidelines of Good TPA Practice for LNG System Operators (GGPLNG). The consultation closed on 23rd January 2008. 19 responses were received from 18 stakeholders, 4 of which were confidential. All non-confidential responses were published on the ERGEG website as well as a document summarizing the main views of the stakeholders’ responses.

http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_CONSULT/CLOSED%20PUBLIC%20CONSULTATIONS/GAS/GGPLNG/CD/E08-LNG-06-02_GGPLNG_EoC_7-May-08_0.pdf

As regards underground storage activities, ERGEG launched on 28 July 2010 a Public consultation to enhance the GGPSSO taking into account the new requirements in the Third Package on CAM and CMP. ERGEG considered that “the 3rd Package rules alone were not considered sufficient to tackle the problems found in the ERGEG status reviews of 2008 and 2009”. This later on resulted in an amendment of the GGPSSO in mid-2011, adding guidelines for CAM and CMP. According to CEER “This amendment is supplementary to the 3rd Package and aims to ensure a level playing field from which market players will benefit. In general, without these additional provisions the market might remain as it is today for a long time; namely congested in some parts of the EU.”


The European Gas Regulatory Forum, or Madrid Forum, was set up to discuss issues regarding the creation of a true internal gas market. It is currently addressing cross-border trade of gas, in particular the tariffication of cross-border gas exchanges, the allocation and management of scarce interconnection capacity and other technical and commercial barriers to the creation of a fully operational internal gas market.

The participants include national regulatory authorities, Member State governments, the European Commission, transmission system operators, gas suppliers and traders, consumers, network users, and gas exchanges. Since 1999 the Forum meets once or twice a year in Madrid and is co-hosted by the “Fundación de Estudios de Regulación”. For further information see:


ERGEG: “Monitoring the implementation of the ERGEG Guidelines of Good TPA Practice for Liquefied Natural Gas System Operators (GGPLNG)”, Ref: E09-LNG-07-03, 3 June 2009. Full report available at:


http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_WORKSHOP/Stakeholder%20Fora/Madrid%20Fora/16supthsup%20Madrid%20Forum/ERGEG_GGPLNG-monitoring_v2.ppt

In order to carry out this monitoring exercise, ERGEG developed three online questionnaires, seeking views from National Regulatory Authorities (NRAs), LNG System Operators (LSOs) and LNG facility users (users) on how the GGPLNG have been implemented. ERGEG considered that since all of them were actively participating in the LNG market, they could provide the best insight as to whether and how the GGPLNG had been implemented or whether there were aspects of the GGPLNG which had been avoided. ERGEG highlighted that the regulation to be implemented was intended to reflect the necessities of all system actors, guaranteeing a cooperative and well balanced market framework.

ERGEG: “Congestion management procedures and anti-hoarding mechanisms in the European LNG terminals”, 17th Madrid Forum, Presentation delivered by Rocio Prieto (CNE) and Benoit Esnault (CRE) as ERGEG LNG TF Chairs. Available at:


ERGEG: “ERGEG study on congestion management procedures & antihoarding mechanisms in the European LNG terminals”, E10-LNG-11-03, 15 November 2010”. Available at:
ERGEG: "Final ERGEG study on congestion management procedures & anti-hoarding mechanisms in the European LNG terminals", Ref: E10-LNG-11-03b, 12 April 2012.


CEER First Workshop on access to European LNG terminals, Madrid, 6 September 2011. Agenda, list of participants and presentations available at:

http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_WORKSHOP/CEER-ERGEG%20EVENTS/GAS/1st%20workshop%20on%20access%20to%20European%20LNG%20terminals