EUROPEAN
COMMISSION

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COMMISSION DECISION

of 8.12.2020

on the exemption of the LNG Terminal South Hook from the requirements regarding third party access and tariff regulation under Article 36 of Directive 2009/73/EC

(Only the English text is authentic)

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THE EUROPEAN COMMISSION,

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

Having regard to Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009, concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC[1], and in particular Article 36 thereof.

Whereas:

1. BACKGROUND

(1) South Hook LNG Terminal (hereafter "SHT") is a LNG terminal in the United Kingdom, which started operations in 2009. It currently has an annual send out capacity of 21 billion cubic metres per year (hereafter "bcm/yr"), equivalent to ~650 GWh/d. SHT owners are Qatar Petroleum ("QP") with 67.5 % of shares, ExxonMobil Corporation ("EM") with 24.15 % and Total with 8.35 %.

(2) In November 2004[2], the Office of Gas and Electricity Markets ("Ofgem"), granted an exemption under Article 22 of Directive 2003/55/EC (hereafter "2004 decision") from the requirement of regulated third-party access to the SHT (instated by Article 18 of the 2003 Gas Directive). By letter of 10 February 2005[3] the European Commission had informed Ofgem of its decision not to request amendment or withdrawal of the exemption decision.

(3) Under the 2004 decision, an initial capacity of 10.5 bcm/yr and an expansion capacity of another 10.5 bcm/yr were exempted from the regulated third party access requirements. The exemption was granted with a duration of 25 years each from start of commercial operation for the initial capacity and the expansion capacity, respectively. The access to the terminal is subject to long term contracts between SHT and South Hook Gas Company Ltd ("SHG"), which is owned to 70 % by QP and to 30 % by EM. The project is linked to the upstream Qatargas II project.

1 OJ L 211, 14.09.2009, p. 94.

2 Application by South Hook LNG Terminal Company Ltd (SHTCL) (owned by Qatar Petroleum and ExxonMobil) under section 19C of the Gas Act 1986 for an exemption from section 19D of the Gas Act 1986, Ofgem final views, November 2004 https://www.ofgem.gov.uk/sites/default/files/docs/2004/11/267-04_0.pdf.

3 TREN D(2005)101791 of 10 February 2005, https://ec.europa.eu/energy/sites/ener/files/documents/2005_south_hook_decision_en.pdf.

2. PROCEDURE

(4) On 9 October 2018, SHT requested an additional exemption from regulated third party access requirements, including tariff regulation requirements. This additional exemption would cover additional capacity at the SHT of approximately 5.3 bcm/a or ~162 GWh/d ("incremental capacity"), exempting it for a duration of at least 25 years from start of operations.

(5) On 14 February 2020, Ofgem published a consultation document on its website, stating that it was minded to grant the requested exemption and setting out the reasons for this preliminary conclusion. Two out of three respondents (EM and SHG) were directly involved in the project and expressed clear support. The third respondent, is BBL Company ("BBLC"), the operator of the BBL pipeline interconnecting the United Kingdom and the Netherlands[4]. BBLC accepts that an exemption could be necessary for the investment to take place and that the investment could increase security of supply in the United Kingdom. Thus, BBLC does not object to the preliminary conclusion reached by Ofgem, but highlights that a number of service providers, including BBLC, compete in the provision of flexibility services to the gas market of the United Kingdom. BBLC highlights that the different competitors in this market should act on a level playing field and that BBLC, contrary to many competitors including SHT, is subject to requirements under EU network codes (network code on transmission tariff structures for gas [5] and network code on capacity allocation mechanisms in gas transmission systems [6]) and thus have lesser flexibility in setting and adapting their pricing and conditions.

(6) On 11 May 2020, Ofgem published its decision[7] to approve the request for exemption and notified this decision to the European Commission (hereafter "Ofgem decision").

(7) On 4 June 2020, the European Commission published a notice on its website informing the public of the notification and inviting third parties to send their observations by 17 June 2020. The European Commission did not receive any observations in response.

(8) On 24 June 2020 the European Commission requested additional information from Ofgem. Based on Article 36(9), the request for additional information extends the two months period in which the European Commission may take a decision requiring the regulatory authority to amend or withdraw the decision to grant an exemption.

(9) Ofgem provided the requested information on 28 August 2020. The European Commission considered the provided information as not complete as it did not contain the financial information justifying the need for the exemption and requested to provide information as regards the required investment in South Hook LNG Terminal.

(10) On 16 October 2020 Ofgem provided the requested missing information.

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4 https://www.ofgem.gov.uk/system/files/docs/2020/05/bblc_response_to_ofgem.pdf.

5 Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas, OJ L 72, 17.3.2017, p. 29–56.

6 Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013, OJ L 72, 17.3.2017, p. 1–28.

7 https://www.ofgem.gov.uk/publications-and-updates/final-decision-south-hook-lng-terminal-company-ltd-s-application-exemption-regulated-third-party-access-additional-capacity

3. DESCRIPTION OF THE PROJECT

(11) The planned expansion of SHT consists in an increase of annual throughput by increasing the availability and reliability of peak capacity. The 2004 decision provides for ~15.6 MTPA LNG throughput, equating to ~650 GWh/d base capacity. By setting an annual limit, the decision allows to use higher peak capacity, which is currently ~812.5 GWh/day (as confirmed by a flow test on 10 May 2016) but only used occasionally for operational purposes. This peak capacity also provides backup to the base capacity. Thus, use of the peak capacity is subject to higher reliability risks and technical constraints reducing its availability.

(12) By reinforcing the SHT to improve the availability of the peak capacity. The expansion of SHT would allow an increase of the annual capacity by 3.9 MTPA of LNG (~162.5 GWh/d, or ~5.3 bcm/a of natural gas). This increase represents the incremental capacity subject to the present decision. It should be noted that the incremental capacity is not technically identical to an increase in the base capacity, as technical constraints would continue to significantly reduce its availability compared to the base capacity.

(13) In January 2019, the majority owners of SHT (QP and EM) took a final investment decision to construct an export LNG terminal in the United States of America, referred to as the Golden Pass LNG Project (“Golden Pass”). They declared their intention to use the incremental capacity at SHT as an outlet for a share of the LNG output from Golden Pass. SHT has stated that without the requested exemption, the investment to create the incremental capacity would not take place as the requirement to offer the incremental capacity to the wider market would mean QP and EM would not be able to guarantee this outlet for volumes from Golden Pass.

(14) The incremental capacity is expected to be operational from 2024, in parallel to the startup of the Golden Pass facility.

4. THE NOTIFIED EXEMPTION DECISION

(15) The Ofgem decision grants a derogation from regulated third party access and tariff regulation for the incremental capacity for a duration of 25 years from start of operation of the incremental capacity, subject to conditions.

(16) The Ofgem decision expressly sets out that it does not impact the 2004 decision. Thus, the time limitations of the 2004 decision for the initial capacity and the expansion capacity remain fully applicable.

(17) The Ofgem decision itself sets out the exemption conditions, but does not contain substantive reasoning. However, the decision states that it fully confirms the reasoning set out in the consultation document. In view of the Commission, the consultation document thus forms a necessary and integral part of the notified decision, and both documents together will form the basis for the Commission to conduct its analysis.

(18) The Ofgem decision furthermore sets out that the terms of the exemption shall continue to apply also beyond the United Kingdom’s exit from the EU, except as regards those conditions which give a procedural role to the European Commission, which shall apply only for as long as the provisions of Directive 2009/73/EC have a legal effect in the United Kingdom.

(19) Importantly, the Ofgem decision sets out conditions that closely bind the exemption to the upstream Golden Pass project. The exemption is only applicable if the intended commercial agreements, or agreements Ofgem deems equivalent, are executed, and if the Golden Pass terminal is licensed to export LNG to the SHT. Those agreements represent the Golden Pass value chain. Whereas the request for an exemption still left open the possibility of using other sources, this possibility is considerably limited by the Ofgem decision.

(20) Finally, the Ofgem decision requires anti hoarding measures to be in place. These are identical to the measures already in place for the base capacity. First, SHG offers spare capacity to other shippers in two ways:

(21) So-called “additional users” can purchase bundled products which include a berthing slot, firm delivery capacity and LNG storage space. Those bundles can be resold to other additional users.

(22) An alternative are toll processing services, bilateral agreements with SHG where SHG offers secondary capacity at SHT.

(23) In addition, use it or lose it (“UIOLI”) is applied 14 days ahead of a berthing slot, SHG releases the slot to SHT, which offers it to the market via auctions. Those include a berthing slot, storage capacity and gas redelivery.

(24) This being said, Ofgem notes that secondary trading and UIOLI arrangements for LNG capacity currently see little use in the United Kingdom. This may, in view of Ofgem, also be due to overcapacity in the United Kingdom terminal market and other, more effective, possibilities such as secondary trading of LNG cargoes.

5. COMMISSION'S ASSESSMENT OF THE EXEMPTION CRITERIA OF ARTICLE 36 OF DIRECTIVE 2009/73/EC

5.1 General considerations

(25) Based on its assessment of the criteria listed in Article 36(1) of Directive 2009/73/EC and pursuant to Article 36(9) of that Directive, the Commission may decide to require the regulatory authority to amend or withdraw their decision to grant an exemption.

(26) In accordance with Article 36(9) of Directive 2009/73/EC the Commission's approval of an exemption decision ceases to have effect two (in the event construction is not started) or five years (in the event operation has not started) after its adoption unless the Commission decides that any delay is due to major obstacles beyond control of the person to whom the exemption has been granted.

(27) SHT is envisaged to operate the increased capacity by 2024 to receive the first commercial cargo from the new source of supply (Golden Pass)[8]. Consequently, construction needs to start before.

(28) The United Kingdom has left the EU and is no longer a Member State. However, at least until the end of 2020, the provisions of the Treaty on the Functioning of the European Union and Directive 2009/73/EC remain fully applicable to the United Kingdom under the transition period agreed with the United Kingdom.

5.2 The market test and congestion management rules

[8] SHT exemption request, p.4 and Ofgem consultation, p. 19

(29) Article 36(6) of Directive 2009/73/EC reads as follows:

"Before granting an exemption, the regulatory authority shall decide upon the rules and mechanisms for management and allocation of capacity. 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. In its assessment of the criteria referred to in points (a), (b) and (e) of paragraph 1, the regulatory authority shall take into account the results of that capacity allocation procedure."

(30) The purpose of that test is to evaluate the demand for capacity in the project from third parties with the aim to assess the likelihood that non-exempted capacity finds buyers and to evaluate the appropriate size of the project. SHT conducted a market test from 21 March to 18 April 2018[9], setting out that the incremental capacity could be subject to interruptions due to the lower reliability than base capacity. No offers were received in the 2018 market test.

(31) Based on the information provided, the market test meets the requirements under Article 36 (6) Directive 2009/73/EC.

5.3 "Major new gas infrastructure"

(32) Article 36(1) of Directive 2009/73/EC specifies that major new gas infrastructure, that is to say interconnectors, LNG and storage facilities, qualify for an exemption. Article 36(2) states that paragraph 1 “shall also apply to significant increases of capacity in existing infrastructure and to modifications of such infrastructure which enable the development of new sources of gas supply”.

(33) The exemption is requested for an increase of 20% based on the LNG facilites’ current peak technical send-out capacity and facilitates the uptake of gas from a new source of gas supply, i.e. the Golden Pass Terminal in the US.

(34) Therefore, the Commission concludes that the incremental capacity for SHT qualifies as a major new gas infrastructure within the meaning of Article 36(1) of that Directive.

5.4 "The investment must enhance security of supply"

(35) The Commission notes that in general, an investment which provides a new route or entry point to the relevant market and connects new upstream sources of gas from new suppliers to the market should increase the security of supply of that market. However, that has to be assessed on a case-by-case basis.

(36) Ofgem presents the view that SHT enhances security of supply. The expansion enables additional LNG import capacity representing ~6% of gas consumption in the United Kingdom in 2018, equivalent to approximately 2.5 % of EU regasification capacity in LNG terminals. Additional capacity positively impacts both the United Kingdom’s, and the EU's diversity of gas supply, and contributes to the diversification of sources of LNG based on expected imports from the United States of America for the additional LNG capacity. This is a new source of in relation to the former exemption decision.

[9] Annex 13 of the exemption application provides details on the market test.

(37) Ofgem considers that the granting of the exemption to SHT is not expected to negatively affect the interests of the EU or other Member States as regards security of supply, its economic and political viability, the diversification of supply or of sources of supply having regard to interdependence and de facto energy solidarity.

(38) Finally, Ofgem highlighs that the long-term supply agreements between Golden Pass and SHT do not prevent the delivery of gas from Golden Pass to other terminals in the EU, should market demand in those areas be considerably higher.

5.4.1. Conditions

(39) Ofgem imposed a condition on SHT to have effective anti-hoarding measures in place[10]. These measures should further contribute to security of supply preventing non-utilisation of the LNG facility if needed for security of supply reasons.

(40) The Commission understands that the anti-hoarding measures need to be effective, subject to periodic review and approved by Ofgem. In this regard, the Commission recommends that Ofgem ensures that the anti-hoarding measures are transparent and easily accessible, for example on the SHT website. Furthermore, the tariff or price charged at the secondary market should be made public to further increase transparency and ensure the effectivness of the anti-hording measures in the integrated EU gas market.

(41) Ofgem granted the exemption under the condition that Golden Pass is licensed to export LNG to SHT, and that contracts for such exports are concluded. The license and contractual agreement for exports of gas to the United Kingdom can contribute to the security of supply of both the United Kingdom and the Union.

5.4.2 Conclusion

(42) The Commission agrees that the proposed investment should bring about an overall positive impact for the United Kingdom and the Union's security of supply. Although it does not add new suppliers, it enables increased access to new sources of gas, specifically from the United States of America, but in principle also from other LNG export locations globally.

5.5 "Principle of solidarity"

(43) As recently set out in case T-883/16[11], the General Court concludes that the principle of solidarity also entails a general obligation on the part of the European Union and the Member States, in the exercise of their respective competences, to take into account the interests of the other stakeholders. Notably, Member States shall endeavour, in the exercise of their powers in the field of energy policy, to avoid adopting measures likely to affect the interests of the EU and the Member States as regards security of supply, its economic and political viability, the diversification of supply or of sources of supply, and to do so in order to take account of their interdependence and de facto solidarity.

(44) Both Ofgem and the European Commission have given the possibility to all interested stakeholders, including Member States, to comment on the requested exemption. No Member State has commented, and no stakeholder has argued that the exemption shall not be granted.

[10] Exemption Order Appendix 2 Chapter 5.

[11] Judgment of the General Court of 10 September 2019 in Case T-883/16 Poland v European Commission, points 72-73.

(45) There is no indication that the planned project would negatively impact the security of supply and the economic or political viability of the EU or Member States. To the contrary, the creation of additional regasification capacity, and the conclusion of supply agreements with a new source of supply (in this case the Golden Pass liquefaction facility) positively contributes to security of supply and increases the possible number of supply choices for the United Kingdom and EU. There is also no indication that the additional capacity would negatively impact the functioning of the existing gas infrastructure in other Member States.

(46) Based on the above, the Commission considers the requirements set out by the General Court on the basis of Article 194 of the Treaty on the Functioning of the European Union to be met.

5.6 "The investment must enhance competition in gas supply "

(47) The Commission notes that in order to analyse the competitive effect of the exemption, the relevant gas markets and in particular the question whether the investment leads to the creation or strengthening of dominant market position needs to be considered. That has to be assessed on a case-by-case basis.

(48) Article 36 of Directive 2009/73/EC requires that the investment project enhances competition in gas supply and that the exemption is not detrimental to competition. While these two requirements are not identical, they imply that the project must enhance competition to the benefit of the consumers[12].

5.6.1 The SHT exemption is not detrimental to competition

The exemption from TPA

(49) TPA seeks to ensure that all competitors in a given market have non-discriminatory access to the infrastructure, including LNG facilities, and can compete on equal terms. Since an exemption from the TPA requirement is provided for 25 years for the full amount of the incremental capacity, it is necessary to assess whether and to what extent the SHT shareholders have the ability and the incentive to foreclose competitors on product markets adjacent to the LNG facility.

Incentive and ability to foreclose[13]

(50) The incentives to foreclose mainly emanate from the protection of the shareholders profits from their activities on the UK and adjacent downstream wholesale and retail gas markets.

(51) The Commission considers that SHT's and/or the capacity holder, i.e. Exxon Mobile's ability to foreclose the market is reduced by the obligations to have effective anti hoarding mechanisms in place approved by Ofgem. Additionally, Exxon Mobile does not have a dominant position in the UK market and is not a pivotal supplier that would be able to exert a foreclosure strategy. Based on the analysis of market share in the UK and wider European Economic Area (EEA), Exxon Mobile could gain a market share

12 Commission staff working document on Article 22 of Directive 2003/55/EC concerning common rules for the internal market in natural gas and Article 7 of Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity – New Infrastructure Exemptions, paragraph 30.

13 The present analyses of incentive and ability to foreclose is broadly based on the Commission's Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07) C265/6 of 18.10.2008.

of up to [redacted] in the UK and [redacted] in the EEA assuming a 100% utilisation of the existing base capacity and the incremental capacity. This is not very likely based on historical utilisation rates.

5.6.2 Conclusion

(52) Therefore, the Commission concludes that granting the exemption from TPA and regulated tariffs should not be detrimental to competition in the United Kingdom and the EEA.

5.7 "The level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted"

5.7.1 Investment risk for SHT

(53) All currently existing LNG terminals in the United Kingdom have been granted an exemption from regulated third party access requirements. Nonetheless, Ofgem has helpfully set out in 2012 its views on how a regulated third party access regime for LNG facilities would function[14]. It results from this guidance that Ofgem would consider auctions for capacity or open season procedures as compliant with the regulatory access regime. Whereas such auctions or open seasons would need to be based on concrete methodologies to be approved by Ofgem, there is no indication that these methodologies would exclude the conclusion of long-term contracts. Thus, depending on how Ofgem were to interpret the general requirements on non-discriminatory capacity allocation, one cannot exclude that contracts with a duration of 25 years could be concluded also under the regulatory regime. Against this background, the mere duration of the planned contracts does not demonstrate that the planned investment could not be equally realized in a regulated regime.

(54) However, in the exemption application, SHT argues that without the exemption, there would be no guarantee that the incremental capacity would be allocated to SHG. Thus, there would be no ensured offtake for Golden Pass volumes in the UK. In consequence, SHT argues that there would be a great uncertainty as to whether the upstream project Golden Pass would take a final investment decision ("FID"). Indeed, as set out in the Ofgem guidance on regulated third party access to LNG terminals, transparent and non-discriminatory capacity allocation is the core requirement. Such transparent and non-discriminatory allocation has as a consequence that there is, prior to the actual allocation, no guarantee for an individual shipper to be able to book the capacity.

(55) This is generally not a major concern for investments in regulated infrastructure, which aim to recuperate the investment cost in the given infrastructure (here the SHT upgrade). However, SHT sets out that the possibility of recovering the costs of the local investments for upgrades in SHT by selling the additional capacity to third parties is not of relevance for their assessment. Simply put, the project is not realised to increase revenues from SHT, but to ensure an offtake possibility for Golden Pass volumes.

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[14] Guidance on the regulated Third Party Access regime for Liquified Natural Gas facilities in Great Britain, Final Decision 53/12 of 13 April 2012, https://www.ofgem.gov.uk/ofgem-publications/40393/guidance-regulated-third-party-access-regime-liquefied-natural-gas-facilities-gb-pdf.

(56) Whereas the initial investment costs in SHT were of approximately 1.8 Billion USD and investment costs in Golden Pass are expected to be around 10 Billion USD, investment costs in upgrading SHT to offer the incremental capacity are relatively small in relation to the overall investments. Capital expenditure requirement in SHT is expected in the range of [redacted]. Operating costs and costs related to the necessary increase of entry capacity into the United Kingdom transmission network is expected to be [redacted] per year. It is therefore understandable that the main concern of QP and EM is not to recuperate the relatively limited, but still significant costs of the SHT investment, but to reduce the risks of the, much larger, Golden Pass investment. This is also reflected in the expectation that the rate of return for the terminal itself is quite likely to be lower than the overall project rate of return[15].

(57) Additionally, the market test conducted in 2018 has not shown any interest by third parties in booking the incremental capacity. The 2012 guidance by Ofgem does not contain any guarantees on socialisation of risks for regulated investments. Therefore, even given the relatively low investment costs, one cannot conclude that the SHT upgrade could be realised as an independent project, not linked to the Golden Pass investment, be it as a regulated or as an exempted project.

(58) Against the above, in determining whether the risk of the project under a regulated regime would be such as to prevent the investment from taking place without the exemption, it needs to be assessed whether without the exemption the investment in SHT would not take place. Assessing this criteria for the Golden Pass upstream project falls outside the scope of application, and can therefore be left open. Nevertheless, as described by Ofgem, demand for incremental capacity at SHT is clearly linked to the upstream project. The question is hence whether SHT would be able to recuperate the required investment for the capacity expansion without the exemption. Based on the conducted market test, which showed no interest from other shippers, it seems unlikely that there is any demand for the capacity.

(59) Although the investment in SHT is relatively small it remains significant. Consequently the risk of underrecovery in the case that there is no demand without the exemption leads the Commission to conclude that the risk attached to the investment in SHT is such that it would not take place without the exemption.

5.7.2 Scope and duration of the exemption from TPA

(60) SHT requested an exemption for at least 25 years for 100% of the capacity (i.e. ~5.3 bcm/a or 162.5 GWh/d).

(61) The Commission notes that the exemption from TPA is linked to the investment in the upstream export Terminal currently known as ‘Golden Pass’. While the investment in SHT in relation to the capacity provided seems relatively small, the risk is not only linked to the “value chain” but is sufficiently high in relation to assessing SHT alone.

(62) Ofgem granted the requested exemption subject to eleven conditions[16]. One of these conditions is that the export Terminal “continues to be licensed to export LNG to SHT throughout the period of this exemption”. Another is “that the intended agreements

[15] The overall project rate of return including Golden Pass varies depending inter alia on price spreads between the US and Europe. Based on a spread of US$4/mbtu sustained over 25 years, the rate of return would be [redacted], a spread of US$3/mbtu translates into [redacted] rate of return based on calculations from the project promoters.

[16] Joint Opinion, pp. 52-54.

described in a Letter of Intent from South Hook Gas Company LTD to Ocean LNG Limited, dated 11 July 2019 (and shared with the Authority), representing the Golden Pass value chain, or such other agreements as the Authority considers to be equivalent, are executed." This means that the conditions introduced by Ofgem are targeted to ensure that the upstream source is available throughout the exemption period. If this is not the case anymore, the exemption can be revoked as the assessment of the exemption criteria would be based on a false assumption.

(63) It is therefore justified and proportional that the exempted capacity is subject to additional conditions imposed by Ofgem.

5.7.3 Conclusion

(64) In light of what has been said, the Commission considers the scope and duration of the exemption proportionate.

(65) The Commission notes however, that the exemption for 25 years refers to the incremental capacity, which is subordinant to the current base capacity. Thus,once the exemption for the base capacity ends, the quality of the exempted capacity shall not be improved to the detriment of the base capacity as this would constitute a tacit prolongation of parts of the original exemption.

5.8 "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"

(66) The owner of the LNG facility for which the exemption is requested is South Hook LNG Terminal Company Ltd, a joint venture between Qatar Petroleum LNG Services (QG II) Limited and Exxon Mobile Qatargas (II) Terminal Company Limited. The transmission network to which the upgraded capacity will be connected is owned and operated by National Grid Gas plc.

(67) It follows that South Hook LNG Terminal Company Ltd is separate in its legal form from the existing TSO within the meaning of Article 36(1) of Directive 2009/73/EC.

5.9 "Charges must be levied on users of that infrastructure"

(68) Access to transmission capacity will be subject to charges. Based on information provided by Ofgem, tariffs will be applied to SHG for incremental capacity under a throughput agreement to be entered with SHT. No charges relating to SHT will be imposed on final consumers in the United Kingdom.

(69) It follows that SHT levies charges on users within the meaning of Article 36(1) of Directive 2009/73/EC.

5.10 "The exemption must not be detrimental to competition or the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected"

(70) The exemption is not expected to have a detrimental effect on competition considering the potential effect on market concentration, pivotality and market share analysis done by the applicant and Ofgem. Although the exemption leads to a higher HHI and market share, it does neither lead to enabling a dominant position for any of the

shareholders of SHT nor does it increase the HHI concentration to a level above the target treshold established in the ACER gas target model[17].

(71) SHT will improve the functioning of the internal gas market by increasing its liquidity and flexibility further through enabling additional LNG imports.

(72) However the exemption could result in additional gas delivered to this terminal, which could otherwise be taken up by competing terminals in the region that are regulated. However, as without the exemption the upstream investment is at risk, it cannot be concluded that there is a negative effect on the functioning of the internal market.

(73) The functioning of the regulated system is not compromised because SHT works on the basis of the pre-existing Planning and Advanced Reservation Capacity Agreement and in this context cooperate with National Grid to evaluate the work needed to reinforce the connecting pipeline. Ofgem considers that this will reduce the likelihood of a detrimental impact to the efficient running of the pipeline system.

(74) Finally, in light of what is stated in this section and in section 4.4, the exemption from regulated third party access and tariff regulation should not be detrimental to competition.

6. CONCLUSION

(75) In light of what has been stated and provided that the Exemption Decision is amended in accordance with this Decision the Commission takes the view that an exemption should be granted to the SHT in accordance with Article 36(9) of Directive 2009/73/EC. The final decision shall be notified to the Commission pursuant to Article 36(9) Directive 2009/73/EC.

[17] ACER defines the HHI to be in a competitive range below 2000, the HHI based on 2016/17 market shares in the United Kingdom market was 819 increasing to 1246 in the worst case scenario (cf. p. 33 Ofgem consultation)

HAS ADOPTED THIS DECISION:

Article 1

The Office for Gas and Electrictiy markets ('Ofgem') shall amend, in accordance with Article 36(9) of Directive 2009/73/EC, its Decision of 11 May 2020 (the Exemption Decision) notified to the Commission on 30 May 2020, in accordance with Article 3.

Article 2

Ofgem shall monitor and, at the request of the Commission, report on the implementation of the conditions set out in this Decision.

Article 3

Ofgem shall add as condition to the exemption decision that the incremental capacity subject to the exemption does not negatively effect the base capacity, neither in terms of volume nor quality, once the exemptions provided in 2004 and 2005 expire.

Furthermore, Ofgem shall, when approving the anti-hoarding mechanism, make sure that the tariff or price for the capacity offered in the secondary market is made public.

Article 4

This Decision is addressed to the Office for Gas and Electrictiy markets, 10 South Colonnade, Canary Wharf, London.

Done at Brussels, 8.12.2020

For the Commission
Kadri SIMSON
Member of the Commission

CERTIFIED COPY
For the Secretary-General

Martine DEPREZ
Director
Decision-making & Collegiality
EUROPEAN COMMISSION