EUROPEAN
COMMISSION

Brussels, 31.3.2023
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COMMISSION DECISION

of 31.3.2023

on the exemption of TotalEnergies LNG Services France’s LNG Terminal in Le Havre (France) from certain provisions of Directive 2009/73/EC of the European Parliament and of the Council pursuant to Article 36 of that Directive

(only the English version 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 (9) thereof,

Whereas:

1. INTRODUCTION

(1) TotalEnergies LNG Services France ('TELSF') intends to install and operate a floating liquefied natural gas ('LNG') storage and regasification ('FSRU') terminal ('the terminal'), in Le Havre, France. The terminal is expected to commence operations in September 2023 for a period of five years.

(2) The regasification capacity of the terminal is expected to be 5 billion m³ ('bcm') of LNG per year.

(3) From a technical perspective, the terminal will consist of:

(a) the installation of an FSRU vessel at the port of Le Havre, on the Bougainville wharf, fitted with (i) flexible LNG transshipment equipment between the supply vessel and the FSRU tanks; (ii) an LNG storage capacity of 142,750 m3; (iii) a fire-fighting system; and (iv) equipment to assess the quality of the unloaded LNG and to measure the gas emitted after the regasification process; and

(b) installations on the Bougainville wharf, including the mooring equipment for the FSRU vessel and the supply vessel, a system for transferring regasified gas between the terminal and the French transmission network, a fire-fighting system and a control system for the entire installation.

(4) The terminal will use the so-called closed-loop regasification technology, that is to say, the heat that will be used to reheat the LNG will not be generated through seawater, as is the case at many onshore regasification terminals, but will instead be produced by boilers fueled with natural gas. TELSF estimates that for the purposes of this heating process, the terminal will make use of approximately 2.5% of the total

[1] OJ L 211, 14.9.2009, p. 94.

volume of LNG that will be regasified under normal operating conditions. As a result, the terminal will incur an additional variable cost, compared to the other conventional LNG terminals with which it will be competing.

(5) TELSF, the terminal operator, is a French company and a wholly owned subsidiary of TotalEnergies Gaz & Electricité Holdings SAS (‘TEGEH’), which is, in turn, wholly owned by TotalEnergies SE (‘TotalEnergies’), as illustrated below.

(6) TotalEnergies, through another subsidiary, TotalEnergies Gas & Power Ltd (‘TEGPL’), intends to book 50% of the terminal’s capacity, that is to say, 2.5 bcm. According to the terminal operator, TEGPL’s commitment to book 50% of the terminal’s capacity would allow TELSF to secure the coverage of a substantial portion of the terminal’s costs and, following the grant of an exemption, enable it to set a more competitive and predictable tariff for the terminal users.

(7) No company in the TotalEnergies group has any shares in GRTgaz’ transmission network to which the terminal will be connected.

(8) Besides the 50% of the terminal’s capacity that will be reserved to TEGPL, TELSF has not signed any binding capacity contracts at this time. On 16 January 2023, TELSF launched a market test for the remaining capacity at the terminal, that is to say, 2.5bcm. Out of the 21 participants that registered during the market test, 11 submitted non-binding offers, all of which were conditional on the terminal being exempted from the third party access and tariff requirements provided for under the French regulatory regime.

2. NATIONAL PROCEDURE

(9) Under French law, all requests for exemption from the third party access and tariff requirements provided for under the French regulatory regime are submitted to the French Ministry of Energy Transition (‘the French Ministry’), which, prior to issuing a decision, seeks the opinion of the French Regulatory Authority (the ‘CRE’). In addition, under French law, prior to the decision adopted by the French Ministry, CRE should adopt the rules regarding the allocation of the capacity of the terminal.

(10) On 20 October 2022, TELSF submitted a request for exemption to the French Ministry. The exemption was requested for a period of five years from the beginning of commercial operations of the terminal, currently scheduled for September 2023.

(11) On 27 October 2022, the French Ministry asked for CRE's opinion on the exemption request submitted by TELSF. In November 2023, CRE issued a preliminary opinion and held a public consultation on both its opinion and TELSF's request[2].

(12) On 24 November 2022, CRE issued a decision containing its opinion on the exemption request submitted by TELSF to the French Ministry (Délibération de la Commission de Régulation de l'Energie du 24 novembre 2022 portant avis sur la demande d'exemption de la société TotalEnergies LNG Services France pour le terminal méthanier flottant du Havre) (the 'CRE decision').

(13) On 16 December 2022, the French Ministry informed the Commission of TELSF's exemption request and the CRE decision, and announced its intention to follow the CRE decision in its entirety in the Ministerial decision granting an exemption to TELSF (the 'Ministerial decision').

(14) Pursuant to Article 36 (3) of Directive 2009/73/EC, CRE consulted the regulatory authorities in Germany, Belgium, the Netherlands, Italy and Spain, all likely to be affected by the terminal, giving them the possibility to comment on the project. No objections to the project were received in the course of that consultation.

3. THE CRE DECISION AND CAPACITY ALLOCATION RULES

3.1. The CRE decision

(15) The CRE decision was issued on 24 November 2022, and was conditional on certain requirements, as described in this recital. CRE considered that an exemption should be granted to TELSF for 5 years from the start of operations of the terminal, for an annual capacity of up to 5 bcm, and subject to the following conditions:

(a) TELSF will make available 50% of the terminal's capacity to third parties on the basis of transparent and non-discriminatory rules. The capacity allocation rules will be set by CRE, following the submission of a proposal by TELSF;

(b) TELSF will set up and publish the conditions for the release to the market of subscribed, but unused capacities. Those should be released sufficiently in advance to allow bookings by other market players. CRE will ensure that TELSF does not withhold capacity;

(c) TotalEnergies and any companies within that group may only acquire secondary capacity on a short-term basis (that is to say, bookings up to one year);

(d) TELSF will communicate to CRE the tariffs applicable to the terminal users together with copies of the signed versions of the capacity booking contracts;

(e) TELSF will publish, at a minimum, the same information that is required from operators of regulated terminals. Such information will relate to unloading slots, available capacity at the terminal and any information necessary for the proper functioning of the transmission network to which the terminal will be connected;

(f) TELSF will comply with the specifications applicable to interfaces between other infrastructures and other French LNG terminals.

[2] The public consultation document together with the non-confidential responses submitted thereto are accessible here.

3.2. Capacity allocation rules

(16) TEGPL will book 50% of the capacity of the terminal, based on a "ship or pay" model, according to which TEGPL will pay for the whole 2.5 bcm of subscribed capacity, irrespective of whether this is ultimately used or not (the 'Base Tariff'). TELSF submitted that this financial arrangement is in line with the commercial model generally used in conventional LNG terminals.

(17) The remaining 50% of the terminal's capacity will be commercialised and offered to third parties on the basis of transparent and non-discriminatory rules which were validated by CRE on 22 March 2023, following the submission of a draft set of rules by TELSF.

(18) The capacity allocation rules submitted by TELSF to CRE are described in recitals (19) to (26) and CRE's assessment of those rules, as set out in its decision of 22 March 2023, are described in recitals (27) to (30).

Primary capacity

(19) A binding open season to market the remaining 2.5 bcm at the terminal is scheduled to take place in March or April 2023. Participants will have the option (but not the obligation) to offer a premium on top of the Base Tariff. TotalEnergies will not be allowed to participate in the binding open season.

(20) TELSF proposed that primary capacity be allocated according to the following rules:

(a) Participants' offers will be ranked according to the revenue they will generate for the project. More specifically, they will be ranked on the basis of their contribution to the Net Present Value ('NPV') for TELSF over the 5-year period of commercial operations of the terminal;

(b) if the offered capacity is sufficient to cover all aggregated requested capacities, all participants will be allocated their respective requested capacity;

(c) if the offered capacity is not sufficient to cover all aggregated requested capacities, then capacity will be allocated among participants according to the following process:

(i). available capacity will allocated to the participant achieving the highest NPV

Priority Rule 1: if two or more participants' proposals would achieve an identical NPV for TELSF, then priority will be given to the proposal achieving the highest Weighted Duration ('WD'), which is defined as the ratio of the cumulated capacities requested by the participant over the 5-year period to the highest annual capacity requested by the participant;

Priority Rule 2: if two or more participants' proposals would achieve identical NPV and identical WD, then offered capacities will be allocated pro-rata to such participants' requested capacities. TELSF will contact the relevant participants to propose such pro-rated allocation. If one participant does not accept the proposal, then the relevant participants will be requested to bid an additional bonus (on top of the premium). The capacity will be allocated to the participant offering the highest bonus. If two or more participants have offered the same bonus, an auction will be held between these participants. If none of the participants offered a bonus or if the auction process did not allow for the allocation of capacity, a random draw will be organised by TELSF.

(ii). the remaining offered capacities will be allocated to the next eligible participant resulting from point (i). If the remaining offered capacity cannot meet the capacity (either the capacity amount or the duration) requested by the next eligible participant, TELSF will contact that participant to propose to allocate only part of the capacity requested. If the participant does not accept or does not respond to the proposal, the participant's request will be discarded, and no capacity will be allocated to it;

(iii). TELSF will repeat the procedure set out in point (ii) with regard to the next eligible participant resulting from point (i) until no further remaining offered capacity can be allocated.

(21) If, following the steps in recital (20), there is still unallocated capacity, TELSF will carry out successive annual campaigns to market and allocate that unallocated capacity over the remaining period of operation of the terminal. Each annual campaign will start, no later than 3 months before the end of year N-1 for the capacity remaining available from the beginning of year N until the end of the fifth year of the project.

(22) No company within the TotalEnergies group should be able to participate in these successive annual campaigns.

(23) Provided that unallocated capacity remains at the end of an annual campaign carried out in year N-1, the capacity for year N will be first offered to current capacity holders (including TotalEnergies) at the Base Tariff. If demand exceeds available capacity, capacity will be allocated pro-rata to the capacity requested by each participant.

(24) Then, where appropriate, the remaining capacity will be offered to market participants (including current capacity holders and TotalEnergies) through an open and non-discriminatory process applicable to each available berthing slot as follows:

(a) the list of available berthing slots will be published online by TELSF;

(b) available berthing slots will be offered on a "first come, first served" basis at the Base Tariff within a reasonable timeframe before the beginning of each berthing slot[3]. Alternatively, subject to prevailing market conditions, TELSF could organise an auction to market available berthing slots with a floor price being the Base Tariff. In this case, no company within the TotalEnergies group should be able to participate.

(c) If slots still remain available at the end of the process described in point (b) within a reasonable timeframe, an auction will be organised to market any unsold berthing slots[4].

Secondary capacity

[3] Available unloading slots will be offered with sufficient advance notice before the month M in which the start of the relevant unloading slot is to take place. TELSF wishes to be able to adjust this notice period in line with market conditions and proposed that the timeframe for proposing an unloading slot could vary between 25 and 15 days before the end of month M-1.

[4] TELSF proposed that the timeframe for launching this auction could vary between 15 and 10 days before the end of month M-1 preceding month M in which the start of the available unloading slot is to take place.

(25) Article 12 of Regulation (EU) 2022/2576 requires that "by 28 February 2023, LNG facility operators and gas storage facility operators, individually or regionally, shall set up or make use of an existing transparent and non-discriminatory booking platform for LNG facility users and gas storage facility users to re-sell their contracted capacity on the secondary market." In line with that Article, CRE mentioned to the Commission that its aim is that the same set of transparent and non-discriminatory rules for allocation of secondary capacity, as decided upon by CRE, will be applicable to all LNG terminals in France.

(26) In order to prevent the retention of unused capacity, capacity holders will be obliged to release any slots they do not intend to use. To that effect, TELSF submitted the following information to CRE regarding the introduction of a Use-It-Or-Lose-It ('UIOLI') mechanism at the terminal:

(a) capacity holders will have the obligation to release the berthing slots that they do not intend to use. An UIOLI mechanism will apply to those berthing slots released by capacity holders during the course of a contract year;

(b) the capacity holder must inform TELSF sufficiently in advance that it is not willing to use a berthing slot and indicate the reserve price for that berthing slot[5]. This reserve price may not exceed the Base Tariff.

(c) TELSF will issue a notice to all registered customers whereby TELSF offers such unused berthing slot for sale during a reasonable timeframe[6]; Companies within the TotalEnergies group should be able to participate in this phase.

(d) a berthing slot will be allocated on the basis of the highest price offered during such period;

(e) if two bidders submit an identical price, the slot will be allocated to the bidder that first submitted its offer;

(f) if the berthing slot is successfully sold, the capacity holder who released the slot will receive the proceeds from the sale after deduction of TELSF's marketing costs. These marketing costs cannot exceed either 5% of the sale price of the unused berthing slot, or EUR 50 000, whichever of the two amounts is higher.

CRE's assessment

(27) CRE agrees with the capacity allocation rules submitted by TELSF because they comply with the conditions for granting the exemption set out in the CRE decision. Moreover, they are comparable with the rules applicable to other LNG terminals and ensure transparent and non-discriminatory treatment of the capacity requests submitted by the participants interested in using the terminal.

(28) With regard to the first two marketing stages, CRE agrees with the ranking of offers by reference to the NPV and states that the possibility for offering premiums reduces the risk of capacity being booked solely for speculative purposes, that it to say

[5] TELSF wishes to be able to adjust this notice period in line with market conditions and proposed that the timeframe for notifying TELSF that an unloading slot will not be used may vary between 25 and 15 days before the end of the month M-1 preceding the month M in which the start of the unloading slot is to take place.

[6] TELSF submitted that this sale may take place between 15 and 10 days before the end of month M-1 preceding month M in which the start of the unloading slot concerned is to take place.

capacity booked by participants without an intention to use it, but only to resell it at a higher price on the secondary market.

(29) CRE also considers that the participation of companies in the TotalEnergies group should be limited to booking short term capacity at the terminal (that is to say, bookings up to one year), in order to avoid that capacity in excess of 50% is booked by the group over several years. CRE considers that the rules proposed by TELSF meet this requirement. Hence, the terminal will be accessible to other market participants as well. The possibility for companies in the TotalEnergies group to book capacity at the process described in recital (24) enhances security of gas supply by reducing the risk of unallocated capacity at the terminal.

(30) Finally, CRE considers that the UIOLI rules proposed by TELSF are effective in preventing capacity hoarding at the terminal. In particular, the envisaged notice period is sufficient to accommodate last-minute changes. The pricing rules for allocating unused slots result in providing an incentive to each capacity holder to maximise the use of the terminal.

4. Procedure at the Commission

(31) On 16 December 2022, the French Ministry notified the Commission of the CRE decision and its intention to follow it in its entirety.

(32) On 3 January 2023, the Commission published a notice on its website, inviting stakeholders to submit comments on the project within one week. No comments were received.

(33) On 24 January 2023 the Commission sent a number of questions to the French Ministry to which it received responses on 7 February 2023.

5. The Commission's assessment of compliance with the exemption criteria in Article 36 of Directive 2009/73/EC

5.1. Legal basis

(34) According to Article 36 (1) of Directive 2009/73/EC major new gas infrastructure may, upon request, be exempted, for a defined period of time, from the third party access and tariff requirements, provided that the following cumulative criteria are met:

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

(b) the level of risk attached to the investment must be 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 must be levied on users of that infrastructure;

(e) the exemption must not be detrimental to competition in the relevant markets which are likely to be affected by the investment, to the effective functioning of the internal market in natural gas, the efficient functioning of the regulated systems concerned, or to security of supply of natural gas in the Union.

(35) Article 36 of Directive 2009/73/EC furthermore specifies a number of procedural steps that need to be taken by the national authorities and the applicant when an exemption is requested:

(a) the national regulatory authority has to consult the national regulatory authorities of the Member States the markets of which are likely to be affected by the new infrastructure (Article 36 (3));

(b) all potential users of the infrastructure have to be invited to indicate their interest in contracting capacity before capacity allocation in the new infrastructure, including for own use, takes place (Article 36 (6)).

(36) Finally, pursuant to Article 36(9) of Directive 2009/73/EC, the Commission's approval of an exemption decision loses its effect two years from its adoption, if the construction of the infrastructure has not started or five years from its adoption, if the infrastructure has not become operational. However, the Commission may decide that the approval is not to lose its effect if any delay is due to major obstacles beyond control of the person to whom the exemption has been granted.

(37) Therefore it is necessary to assess whether the requirements set out in Article 36 of Directive 2009/73/EC are met.

5.2. Major new gas infrastructure

(38) Article 36 (1) of Directive 2009/73/EC specifies that major new gas infrastructure, that is to say interconnectors, LNG and storage facilities, may qualify for an exemption. It is therefore necessary to determine whether the terminal qualifies both as an LNG facility and as a major new gas infrastructure.

(39) Article 2, point (11), of Directive 2009/73/EC defines the term LNG facility as follows: "'LNG facility' means a terminal which is used for the liquefaction of natural gas or the importation, offloading, and re-gasification of LNG, and includes ancillary services and temporary storage necessary for the re-gasification process and subsequent delivery to the transmission system, but does not include any part of LNG terminals used for storage". The terminal will receive LNG, regasify it and feed it into the French gas transmission network. As such, it qualifies as an LNG facility within the meaning of Article 2, point (11), of Directive 2009/73/EC.

(40) The investment in question can also be considered as a major one within the meaning of Article 36 of Directive 2009/73/EC. Whilst there is no exact minimum threshold for an investment to qualify as major, the planned investment of EUR 110 million is sufficiently significant for the infrastructure in question to qualify as major. Furthermore, the terminal's planned annual capacity of 5 bcm, which represents around 12% of the French annual gas consumption in 2021, can be considered significant.

(41) Furthermore, the infrastructure must be new. Article 2, point (33), of Directive 2009/73/EC defines new infrastructure as "*an infrastructure not completed by 4 August 2003*". As the terminal was not completed by 4 August 2003, it is to be considered new infrastructure within the meaning of Directive 2009/73/EC.

(42) The Commission therefore concludes that the terminal constitutes a major new gas infrastructure within the meaning of Article 36 (1) of Directive 2009/73/EC.

5.3. Procedural requirements

(43) Article 36 of Directive 2009/73/EC sets out procedural requirements for the national authorities and the applicant, which include consultation of the national regulatory authorities of the Member States the markets of which are likely to be affected by the new infrastructure and a market test.

(44) Article 36(3) of Directive 2009/73/EC obliges the national regulatory authority concerned to consult the national regulatory authorities of the Member States, the markets of which are likely to be affected by the new infrastructure.

(45) On 7 November 2022, CRE carried out a consultation of the regulatory authorities in Germany, Belgium, the Netherlands, Italy and Spain, all likely to be affected by the terminal, giving them a possibility to comment on the project. No objections to the project were received in the course of that consultation.

(46) Article 36(6) of Directive 2009/73/EC requires a market test to be carried out. The purpose of the market test is to evaluate the market demand from third parties and assess the likelihood that the terminal's capacity will be booked by prospective buyers.

(47) TELSF conducted a market test from 16 January 2023 to 30 January 2023. As explained in recital (8), out of the 21 participants that registered at the market test procedure, 11 submitted non-binding offers, all of which were conditional on the granting of the exemption.

(48) The Commission therefore concludes that the procedural requirements in Article 36(3) and (6) of Directive 2009/73/EC were respected by CRE and the terminal operator respectively.

5.4. Security of supply

(49) Article 36 (1), points (a) and (e), of Directive 2009/73/EC provide that the investment must enhance security of supply and that the exemption must not be detrimental to security of supply of natural gas in the Union.

(50) The Commission notes that, 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 in principle increases the security of supply in that market in accordance with Article 36 (1), point (a), of Directive 2009/73/EC.

(51) The terminal provides a new entry point into the French and thus the interconnected European gas market. Through interconnectors with the French gas transmission grid, gas could be transported to Belgium, the Netherlands, Germany, Italy (via Switzerland) and Spain. Neither the Commission, nor CRE have received any comments from stakeholders that would indicate that the terminal could replace other existing infrastructure or push other facilities out of the market.

(52) With regard to the connection to additional sources of gas from new suppliers, CRE indicated that the terminal would help to diversify gas supply sources and decrease dependence on Russian gas.

(53) The current geopolitical situation shows that Russia is no longer a reliable source of gas supply. It no longer delivers gas to several Member States[7]. In 2021 Russian gas

[7] Including Bulgaria, Poland, Denmark, the Baltics, the Netherlands and Germany.

accounted for approximately 22% of France's and 40% of Europe's gas imports. Currently, France's dependence on Russian gas has dropped to approximately 17%.

(54) In its Communication *REPowerEU: Joint European Action for more affordable, secure and sustainable energy*[8], the Commission expressed the objective of phasing out Russian gas and stressed the importance of diversification of gas supply, notably via LNG terminals to ensure Europe's security of supply. The Le Havre terminal could cover around 12% of France's gas demand. As regards the source of any future gas imports, it should be noted that there is no certainty, as the terminal has not yet signed any capacity contracts, but the non-binding market test conducted by TELSF shows that there is an interest from some undertakings that have access to various sources of LNG.

(55) TELSF submitted information to demonstrate how the terminal's capacity would improve security of supply in both France and neighbouring Member States.

(56) With respect to France, TELSF submitted that before the outbreak of the war in Ukraine, pipeline gas and LNG import capacity in France reached a cumulative total of 2,060 GWh/d. Since the beginning of the war in Ukraine, this figure has dropped to 1,735 GWh/d, that is to say, by 325 GWh/d. The terminal's capacity of 150 GWh/d (corresponding to 5 bcm) will limit the deficit to 175 GWh/d. This means that the project, which aims to replace former Russian gas imports with LNG, only partially compensates the reduction of Russian imports.

(57) TELSF further explained that following the outbreak of the war in Ukraine the picture of gas flow transits changed considerably compared to the pre-war situation. More specifically while pre-war, France imported approximately 50 GWh/d of gas from Belgium via the Virtualys connection, the situation is currently reversed with Belgium importing approximately 150 GWh/d of gas from France. Moreover, while France exported up to 50 GWh/d to Switzerland before the war, such exports have currently increased to 200 GWh/d, a significant part of which is ultimately destined for Italy.

(58) It follows that the terminal would increase France's security of supply and thus also the security of supply of the interconnected European markets.

(59) Whilst it can, therefore, be concluded that the infrastructure as such contributes to security of supply, Article 36 (1), point (e), of Directive 2009/73/EC specifies that the exemption itself must not be detrimental to security of supply of natural gas in the Union either. Contrary to Article 36 (1), point (a), of Directive 2009/73/EC, the requirement in point (e) of that paragraph does not focus on the impact of the investment as such, but on the impact of the exemption decision. For example, exemptions which would make it possible to limit the access to critical infrastructure to a small number of market participants could bring negative impacts on security of supply in the Union.

(60) The Commission agrees with CRE's assessment of the capacity allocation rules submitted by TELSF, as described in recitals (27) to (30). These rules ensure that capacity allocation at the terminal will take place on the basis of transparent and non-discriminatory criteria. The Commission also duly notes and welcomes CRE's recommendation that the same transparent and non-discriminatory rules should apply to all LNG terminals regarding allocation of secondary capacity. Those rules enable potential access to different sources of supply, including via different suppliers.

8 COM(2022) 108 final.

Increasing the number of access points to the Union gas network for new or smaller suppliers contributes to security of supply.

(61) It follows that the terminal would effectively create additional supply options for the internal energy market.

(62) The Commission does not, therefore, consider that the exemption would be in any way detrimental to security of supply of gas in the Union in this case.

(63) Thus, the Commission concludes that the requirements in Article 36 (1), points (a) and (e), of Directive 2009/73/EC with regard to security of supply are met.

5.5. Principle of solidarity

(64) As set out in the judgment of the General Court in Case T-883/16[9] and confirmed by the Court of Justice in its judgment in Case C-848/19 P[10], the principle of energy solidarity also entails a general obligation on the part of the Union and the Member States, in the exercise of their respective competences, to take into account the interests both of the Union and of the various Member States that are liable to be affected and to balance those interests where there is a conflict. Notably, Member States have to endeavour, in the exercise of their powers in the field of energy policy, to avoid adopting measures likely to affect the interests of the Union and the Member States as regards security of supply, economic and political viability, and the diversification of supply or of sources of supply, and to do so to take account of their interdependence and *de facto* solidarity.

(65) The CRE decision analysed whether the exemption is likely to affect the interests of other Member States. CRE argues that the project will improve security of supply in France and other Member States, as gas imported through the terminal can be exported to them from France. Furthermore, imports to the terminal would not be of such a scale as to reduce the LNG imports available to other Member States. As the ultimate terminal capacity of 5 bcm/a represents a very small share of the global LNG market (485 bcm were traded worldwide in 2019 and this has been increasing since), the added demand via the terminal would have a negligible impact on terminals in other Member States.

(66) As explained in recital (42), on 7 November 2022, CRE carried out a consultation of the regulatory authorities in Germany, Belgium, the Netherlands, Italy and Spain, all likely to be affected by the terminal, giving them a possibility to comment on the project. No objections to the project were received in the course of that consultation. The Commission is also not aware of any Member State or market participant voicing concerns as regard the terminal. As mentioned in recital (32), the Commission did not receive any comments to the notice on the project published on its website.

(67) It follows that there is no indication that the planned project would negatively impact the security of supply of gas and the economic or political viability of the Union as a whole or Member States individually. To the contrary, the creation of additional regasification capacity positively contributes to security of supply for France and the Union.

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9 Judgment of the General Court of 10 September 2019 in Case T-883/16 Poland v European Commission, points 72 and 73, ECLI:EU:T:2019:567.

10 Judgment of the Court of Justice of 15 July 2021 in Case C-848/19-P Germany v European Commission, point 71, ECLI:EU:C:2021:598.

(68) Therefore the Commission considers that the requirements set out by the European Courts in Cases C-848/19 P and T-883/16 based on Article 194 TFEU, have been met.

5.6. Impact on competition

(69) Article 36 (1), point (a), of Directive 2009/73/EC requires the investment project to enhance competition in gas supply and point (e) of that paragraph requires the exemption not to be detrimental to competition in the relevant markets which are likely to be affected by the investment. While these two requirements are not identical, they both imply that the project must enhance competition to the benefit of consumers[11].

(70) In order to analyse the competitive effect of the terminal and its exemption, the relevant gas markets, and in particular the question whether the exemption would lead to the creation or strengthening of a dominant market position, need to be considered. This has to be assessed on a case-by-case basis.

(71) For the purpose of this Decision, the Commission assumes that the relevant markets primarily affected by the investment are the upstream wholesale and the downstream wholesale gas markets. Other affected markets are the downstream market for the retail supply of gas and the LNG import terminals market. More specifically:

(a) The upstream wholesale gas market is a market where producers sell large quantities of gas to importers and wholesalers for subsequent resale. With regard to the geographic aspect of this market, TELSF submitted that it should be defined as being wider than the French territory and encompass a zone including the main markets whose gas networks are directly or indirectly interconnected with the French gas transmission grid. The Commission does not take a definitive view as to the geographic scope of this market, as, for the reasons set out in section 5.6.1.2, competition concerns are unlikely to arise.

(b) The downstream wholesale gas market includes sales by suppliers (who have sourced gas at the upstream wholesale gas market) to traders or resellers. TELSF submitted that the geographic aspect of this market should be defined as regional in scope. The Commission does not take a definitive view as to the geographic scope of this market, as, for the reasons set out in section 5.6.1.3, competition concerns are unlikely to arise.

(c) The downstream market(s) for the retail supply of gas include supply of gas to consumers, for example, households and large industrial consumers. TELSF submitted that the geographic aspect of this market should be defined as national in scope. The Commission agrees with TELSF’s position.

(d) The LNG import terminals market is the market where LNG terminals compete to import LNG. The Commission does not take a definitive view as to the geographic scope of this market, as, for the reasons set out in recital (109), competition concerns are unlikely to arise.

The project enhances competition in gas supply

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[11] 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.

(72) Firstly, investments which enable gas supplies from new sources tend to improve competition in upstream gas supply, unless those sources are controlled by undertakings with a strong or dominant position on the relevant market. The terminal is not linked to a specific upstream source. Therefore, upstream gas supply is expected to come from the worldwide market for LNG supply. LNG imports can constitute a direct competitive constraint for imports of natural gas via pipelines[12].

(73) Regardless of whether the relevant geographic markets are defined at national level, that is to say, France, or wider than national, that is to say, the regional North-West-European market, the addition of further import routes and sources from the liquid and global LNG market is expected to enhance competition in upstream gas supply.

(74) The construction of the terminal as such is thus expected to enhance competition in gas supply and therefore fulfils the condition in Article 36 (1) point (a) of Directive 2009/73/EC.

The exemption is not detrimental to competition in the relevant markets which are likely to be affected by the investment

(75) Secondly, it needs to be ascertained whether the exemption, as opposed to the investment as such, could be detrimental to competition. The impact of the exemption from third party access rules and tariff regulation on competition in the markets likely to be affected will, therefore, also be examined in section 5.6.

(76) In the current case, the Commission considers that the capacity management and allocation rules that will govern 50% of the terminal's capacity aim at ensuring that access to the remaining capacity will be granted in a non-discriminatory and transparent manner. The Commission therefore agrees with CRE's reasoning in its decision of 22 March 2023. The Commission also duly notes and welcomes CRE's intention to ensure that the same transparent and non-discriminatory rules regarding allocation of secondary capacity will equally apply to all LNG terminals in France.

(77) Therefore, the capacity allocation rules at the terminal aim at ensuring fair competition, the potential impact of an exemption from third party access rules and tariff regulation will specifically be further assessed in section 5.6.1.

5.6.1. Impact of the exemption from third party access rules

(78) Third party access rules seek to ensure that all competitors in a given market have non-discriminatory access to the infrastructure and can compete on equal terms.

(79) TELSF requested an exemption from the applicable third party access rules for 50% of the planned capacity at the Le Havre terminal, for a period of 5 years. In view of this exemption request, it is necessary to assess whether and to what extent the capacity holders, including TotalEnergies, would have the ability and the incentive to foreclose competitors on relevant markets adjacent to the LNG facility.

5.6.1.1. Incentive and ability to foreclose

(80) Foreclosure would occur if actual or potential rivals' access to supplies or markets were to be hampered or eliminated as a result of the capacity allocation at the Le Havre terminal, thereby reducing those companies' ability or incentive to compete. Such foreclosure could discourage entry or expansion of rivals or encourage their exit. Thus, foreclosure effects could be established even if the foreclosed rivals are not

[12] See, for example, COMP/M.6477 BP/Chevron/ENI/Sonangol/Total/JB of 16 May 2012, paragraph 18.

forced to exit the market. It is sufficient that the rivals are disadvantaged and consequently led to compete less effectively.

(81) The incentives to foreclose mainly emanate from the protection of capacity holder profits for their activities on adjacent markets, such as the downstream wholesale and retail gas markets.

(82) To assess whether capacity holders would have the ability or the incentive to foreclose competitors it needs to be examined whether the exemption would enable them to acquire or strengthen a potentially dominant position on the market.

(83) To date, it is known that TotalEnergies will book 2.5 bcm, that is to say, 50% of the terminal's capacity. In the market test that TELSF launched for the remaining capacity at the terminal, that is to say, 2.5bcm, 11 companies submitted non-binding offers, all of which were conditional on the granting of the exemption. The total capacity allocation at the terminal is currently not known, as apart from the capacity reserved to TotalEnergies, TELSF has not received any binding offers, nor signed any terminal use contracts.

(84) The impact of the exemption therefore needs to be assessed partly on the basis of assumptions. In the event that the remaining capacity were booked by new market entrants or small market participants there would be no reasonable doubt that newly created capacity would enhance competition.

(85) However, to assess whether the exemption could have potential negative effects on competition, reasonable worst-case scenarios would need to be taken into account.

(86) To assess the competitive impact of the exemption on the different markets concerned, CRE has provided information on the strength of the relevant market participants, by reference to their market shares, taking also account of the Herfindahl Hirschman Index ('HHI'). HHI measures the concentration levels in a relevant market taking into account the market shares of all active players. The Commission has defined HHI thresholds within the framework of merger control, but they can also be useful, by analogy, in the current case[13]. In this regard, CRE included in its decision and in subsequent submissions to the Commission, information on the impact of the terminal on market shares of the main players as well as on the relevant HHI levels[14].

(87) If the exemption in question is not expected to (i) result in the increase of the market share of a player such that it would strengthen or create a dominant position; and (ii) lead to a higher concentration on the relevant markets it can be assumed that it will not have a negative impact on competition.

(88) For the purposes of this assessment, the Commission will follow a conservative approach. For each of the upstream wholesale market and downstream wholesale market, the analysis will focus on national geographic markets, that is to say, France. If no competition concerns arise on the relevant French markets, no competition concerns are expected to arise on broader geographic markets, that is to say, markets

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13 The thresholds defined within the framework of merger control stipulate that HHIs below 1,000 points indicate markets where competition concerns are generally not present (due to high competition). If the HHI value is between 1,000 and 2,000 points, but the change (in this case due to the exemption) is less than 250 points, there are usually also no competition concerns. If the HHI value is above 2,000 points, but the change (in this case due to the exemption) is less than 150 points, there are also usually no competition concerns.

14 If the market share rises above 40% an undertaking can be considered dominant.

which are regional in scope. Moreover, given that it is currently not known who will book the remaining 2.5 bcm at the terminal, the relevant analyses will be based on worst-case scenarios, whereby the biggest market players are assumed to book such remaining capacity in its entirety.

5.6.1.2. Upstream wholesale market

(89) For the upstream wholesale market, CRE submitted information on the countries of origin of the gas quantities that entered France in 2022. The submitted data demonstrate a very diverse landscape and a market with many suppliers. Out of a total of 615.9 TWh/y[15], the largest gas quantities were imported from Norway, Russia and the USA. More specifically, gas from Norway accounted for approximately 31.3%, gas from the USA accounted for approximately 28%, and gas from Russia accounted for approximately 16.8%.

(90) According to the information provided by CRE, no impact on competition on the French upstream wholesale market would be expected if 100% of the remaining capacity at the terminal (that is to say, 2.5 bcm) were to be booked by any of the following companies: Equinor/Petoro, the biggest gas exporter in Norway, Gazprom, the biggest gas exporter in Russia, and Cheniere Energy, a US company that has exported the majority of gas imported to France from the USA.

(91) More specifically, according to the information submitted by CRE:

(a) On the basis of a conservative assumption whereby 80% of the gas exported by Norway to France were to be attributed to Equinor, the latter's market share would increase from 25% to 28.2%, if it were to book 2.5 bcm at the terminal. This would imply an insignificant increase of the HHI from 1636 to 1722 and a delta of 86.

(b) On the basis of a conservative assumption whereby the entirety of gas exported by Russia to France were to be attributed to Gazprom, the latter's market share would increase from 16.8% to 20.3%, if it were to book 2.5 bcm at the terminal. This would imply an insignificant decrease of the HHI from 1636 to 1655 and a delta of 19.

(c) On the basis of a conservative assumption whereby 85% of gas exported by the USA to France were to be attributed to Cheniere Energy, the latter's market share would increase from 23.8% to 27.1%, if it were to book 2.5 bcm at the terminal. This would imply a limited increase of the HHI from 1636 to 1713 and a delta of 77.

(92) CRE also submitted information to account for a scenario where Russian gas would be phased out. In such a case gas from Norway would account for approximately 38.1% (as compared to 31.3%) of total French gas imports, while gas from the USA would account for approximately 34.1% (as compared to 28%). Moreover France would expect to see increased imports from Algeria (gas from Algeria would account for approximately 9% of total French gas imports)[16].

[15] This figure represents gas volumes with an identified country of origin.

[16] The figures presented in this recital are based on the assumption that any Russian gas currently supplied to France would be pro-rata attributed to France's existing LNG suppliers and Norway.

(93) More specifically, considering the phase out of Russian gas, CRE submitted the following projected figures for the biggest exporting countries (namely Norway and the USA) in relation to hypothetical future bookings in the terminal:

(a) In a scenario where Russian gas would be phased out, and on the basis of a conservative assumption whereby 80% of the increased gas volumes exported by Norway to France were to be attributed to Equinor, the latter's market share would increase from 30.5% to 33.4%, if it were to book 2.5 bcm at the terminal. This would imply a limited increase of the HHI from 1996 to 2097, and a delta of 101.

(b) In a scenario where Russian gas would be phased out, and on the basis of a conservative assumption whereby 85% of the increased gas volumes exported by the USA to France were to be attributed to Cheniere Energy, the latter's market share would increase from 29% to 32.1%, if it were to book 2.5 bcm at the terminal. This would imply a limited increase of the HHI from 1996 to 2085, and a delta of 89.

(94) Finally, TotalEnergies is active in the upstream wholesale market in France. However, its own gas does not represent more than 15% of the total gas imported in France. Considering such moderate share, competition concerns are unlikely to arise even in a worst case scenario where TotalEnergies would book the entire capacity at the terminal.

Conclusion upstream wholesale market

(95) Neither of the actual or projected shares in this section are indicative of the creation or strengthening of a dominant position, as a result of the exemption. Hence, the exemption would not be detrimental to the French upstream wholesale market, even under the worst case scenarios where the biggest market players in that market were to book 100% of the remaining capacity at the terminal. In the absence of competition concerns in the French market, no competition concerns are expected to arise in a wider, that is to say, North-West European regional, upstream wholesale market in which the remaining capacity at the terminal (2.5 bcm) is almost negligible.

(96) For completeness, the worst case scenarios described in this section are unlikely to materialise anyway, because first, none of Equinor, Gazprom and Cheniere Energy submitted non-binding offers in the market test of January 2023 and second because the requested exemption does not benefit any of these undertakings, but instead limits the capacity available to them.

5.6.1.3. Downstream wholesale market

(97) As mentioned in recital (71), the downstream wholesale market includes sales by suppliers (who have sourced gas on the upstream wholesale gas market) to traders or resellers. Given the possibility for numerous subsequent resales of gas in trading markets, an intrinsic difficulty in the downstream wholesale market is processing the vast amount of trading data, which, in turn, poses challenges in identifying the strongest market players and their respective shares. Considering this, CRE submitted market shares based on import capacity bookings, namely the capacity booked by the suppliers in the downstream wholesale market. Import capacity bookings serve as a good proxy to illustrate the strength of the suppliers in the downstream wholesale market because they provide the best available indication on how much gas they can supply to the buyers in this market.

(98) Based on the import capacity booking data provided by CRE, the five biggest market participants and their respective market shares in 2022 were as follows: ENGIE (25%), TotalEnergies (25%), ENI (12%), Equinor (11%) and EDF (7%). Other market participants are also present, with market shares of less than 5%. CRE also submitted that no major market share changes are expected to take place in the next 5 years, during the terminal's operations[17].

(99) The terminal will bring about insignificant changes in the market shares of the players referred to in recital (98). More specifically, CRE submitted that once the terminal becomes operational in September 2023, TotalEnergies' import capacity in 2023 will increase by 26.3 GWh/d (2.5 bcm/year), while the total import capacity will increase by 52.5 GWh/d (5 bcm/year). This would translate into an increase of TotalEnergies' market share from 25% to 26%.

(100) In the following years until 2028, TotalEnergies' import capacity will increase by 78.8 GWh/d (2.5 bcm/year), while the total import capacity will increase by 157.5 GWh/d (5 bcm/year). On this basis and on the assumption that the capacity bookings will remain the same as in 2023 for each player (apart from those of TotalEnergies), CRE submitted that the projected market shares of the 5 biggest suppliers would be the following: TotalEnergies (27%), ENGIE (23%), ENI (13%), SEFE Marketing & Trading (7%) and EDF (7%)[18].

(101) CRE submitted that the HHI of the market in 2023 without the project is 1587, which would slightly decrease to 1556 after the project.

(102) CRE also submitted projected market shares for two worst-case scenarios whereby the two biggest players, TotalEnergies and ENGIE would each book the remaining 50% of the terminal's capacity (2.5 bcm).

(103) In a hypothetical scenario where TotalEnergies would book 100% of the terminal's capacity, its market share would increase to 30%, followed by ENGIE (23%), ENI (13%), SEFE Marketing & Trading (7%) and EDF (7%). It should be noted though that such a scenario is unlikely to materialise due to the restrictions imposed on TotalEnergies regarding potential capacity bookings at the terminal, beyond the reserved 2.5 bcm. In such a scenario the HHI would increase to 1714 compared to a situation without the project in 2023 (1587), thereby leading to a limited delta of 127.

(104) In a hypothetical scenario where ENGIE would book the remaining 50% of the terminal's capacity, its market share would increase to 26%, while the market shares of the other players would be as follows: TotalEnergies (27%), ENI (13%), SEFE Marketing & Trading (7%) and EDF (7%). In such a scenario the HHI would increase to 1693 compared to a situation without the project in 2023 (1587), thereby leading to a limited delta of 106.

(105) Even under the worst-case scenarios presented in this section, the actual or projected market shares provide no indication of the creation or strengthening of a dominant position as a result of the exemption, which reserves 50% of the terminal's capacity to

[17] This statement is based on import capacity bookings for 2023. CRE clarified that given that only 45% of import capacity has been booked for 2024 and 30% for 2026 respectively, no such bookings were taken into account. Moreover, due to lack of information on short-term bookings, the latter were also not considered by CRE in their projected analysis.

[18] This projected market share allocation was also based on the assumption that the remaining terminal capacity of 2.5 bcm would not be attributed to any market player.

TotalEnergies and does not benefit ENGIE in any way. Similarly, the HHI levels and deltas confirm that competition concerns are unlikely to arise.

5.6.1.4. Conclusion on the downstream wholesale market

(106) The exemption of the terminal would not be detrimental to the French downstream wholesale market, even under the worst case scenarios that the biggest market players in that market were to book 100% of the remaining capacity at the terminal (that is to say, 2.5 bcm). In the absence of competition concerns in the French market, no competition concerns are expected to arise in a wider, that is to say, North-West European downstream wholesale market.

5.6.1.5. Other affected markets

(107) Article 36 (1), point (e), of Directive 2009/73/EC requires the assessment of '*all markets which are likely to be affected by the investment*'.

(108) Other markets that could possibly be affected by the investment are the upstream LNG import terminals and the downstream retail market.

(109) With regard to LNG import terminals, there is no indication that the terminal or its exemption from the applicable third party access and tariff regulation rules would result in the market exit or foreclosure of other, existing terminals. On the contrary, additional LNG terminal capacity is planned in other North-West European countries. Where the addition of one terminal does not result in the market exit or foreclosure of other terminals, but merely creates competitive pressure on those other terminals, this is, as such, a positive effect on competition in the internal market.

(110) As mentioned in recital (71), the markets for the retail supply of gas include supply of gas to final consumers, for example households and large industrial consumers. CRE submitted market shares for TotalEnergies and four other main suppliers in the French retail gas markets for (i) all consumer categories; (ii) households; (iii) non-household customers connected to the distribution network; (iv) large industrial customers connected to the transmission networks; and (v) large industrial consumers connected to the transport network without considering power plants[19].

(111) Based on the submitted market shares, the Commission concludes that the exemption is unlikely to generate any detrimental effects on competition in the French retail gas markets. In none of the retail markets did TotalEnergies' share exceed 15%, with competitive pressure being exercised from various market participants including ENGIE, EDF and ENI. While ENGIE's market share appears to exceed 50% in the overall French retail market for all consumer categories, the Commission sees no risk of foreclosure effects in the retail market as a result of the exemption, because even in a worst case scenario where ENGIE books the entirety of the remaining 50% of the terminal's capacity (2.5 bcm), its market share in the downstream wholesale market would not exceed 26%. Such a market share is insufficient to raise input foreclosure concerns and competition concerns are therefore unlikely to arise at the retail level.

(112) Therefore, the Commission has no grounds for concern as regards the impact on competition on possible other affected markets.

[19] These market shares were readily available to the CRE. They are without prejudice to the Commission's position on the product market definition.

5.6.1.6. The exemption from tariff regulation

(113) Despite the fact that the terminal operator and tariff setter, TELSF, belongs in the same group as TEGPL, who will be making use of 50% of the terminal's capacity, there is no risk of discriminatory tariff charging among the different terminal users. This is because the Base Tariff charged to TEGPL will be the same as that charged to other third parties.

(114) Moreover, pursuant to Article 13 of Council Regulation (EU) 2022/2576[20], such tariffs will have to be made public, ensuring tariff transparency among all terminal users.

(115) It follows that the requested exemption from tariff regulation is not expected to be detrimental to competition.

(116) In addition to tariff transparency, Regulation (EU) 2022/2576 created more transparency regarding the marketing and sale of secondary capacity through rules that are applicable to both regulated and exempted terminals[21]. Finally, one of the conditions of the CRE decision is that TELSF publish, at a minimum, the same information that is required from operators of regulated terminals. Such information is to relate to unloading slots, available capacity at the terminal and any information necessary for the proper functioning of the transmission network to which the terminal will be connected. All these requirements aim at ensuring a level playing field between regulated and non-regulated terminal operators with respect to the type of information that needs to be made public for purposes of transparency.

5.6.2. Conclusion

(117) Therefore the Commission concludes that granting the exemption from third party access and regulated tariffs would not be detrimental to competition.

5.7. The level of risk

(118) Pursuant to Article 36 (1), point (b), of Directive 2009/73/EC the level of risk attached to the investment has to be such that the investment would not take place unless the exemption is granted.

(119) In its decisional practice the Commission assesses two main aspects pertaining to the risk of an investment: the risk of non-use of the infrastructure and the risk of a change in costs or revenues in the future.

(120) In this case, 50% of the terminal's capacity is reserved to TotalEnergies. For the remainder of the long-term capacity a non-binding market test has shown interest for bookings from various players. It should be noted, however, that several LNG terminals are currently open for binding offers and it is highly uncertain whether the players expressing an interest in the non-binding phase will eventually submit binding offers. This is particularly the case considering that those players that expressed an interest in the non-binding phase were unaware of the Base Tariff.

(121) In addition, with respect to the risk of non-use, the CRE decision emphasised that the technical and operational characteristics of the project are such as to expose it to greater risks compared to other LNG terminals.

[20] Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders (OJ L 335, 29.12.2022, p. 1).

[21] See Articles 12 and 13 of Regulation (EU) 2022/2576.

(122) *First*, TELSF explained that the terminal will use 2.5% of the LNG it will receive for the LNG regasification process itself (see recital (4)) thereby increasing its costs compared to other competing terminals.

(123) *Second*, the terminal's attractiveness to third parties is likely to be compromised by the fact that French wholesale prices are lower than in other North-West European countries. Hence third parties could be more inclined to book capacity in terminals located in countries with higher wholesale prices, so that they ensure a higher income. The additional capacity currently being built or scheduled to be built in the immediate future in countries neighbouring France, gives potential terminal users the possibility to submit offers for more "economically attractive" terminals.

(124) *Third*, TELSF submitted that the terminal's storage capacities are limited compared to the LNG volumes usually shipped by LNG carriers, which generates constraints related to the upstream and downstream flexibility provided by the terminal. Indeed, the terminal's LNG storage capacity, which is lower than that of a conventional LNG terminal, does not enable TELSF to take into account contingencies associated with the offloading schedule of the LNG carriers at the terminal[22]. While this risk is partly addressed by the fact that 50% of the terminal's capacity is reserved to TotalEnergies, it nevertheless has a negative impact on the attractiveness of the terminal to third parties.

(125) *Fourth*, securing upstream supply for capacity users is relevant when assessing the risk of non-use of LNG terminals. The development of the international supply and demand of LNG over the duration of the requested exemption is uncertain. Whilst it is expected that there will be high demand for LNG capacity in the short and medium-term as a result of the Russian supply cuts, it is challenging to predict the long-term demand for LNG capacity at Union terminals. Even if in a more global context significant liquefaction and regasification capacity is coming onto the market, the direction of trade flows is difficult to predict.

(126) With regard to the risk of a change in costs or revenues in the future it should be noted that revenues are to a large extent uncertain at this stage, as no firm capacity bookings have taken place for the remaining 50% of the terminal's capacity.

(127) The risk of non-use and changing costs or revenues impacts the finances of the terminal. TELSF has submitted its expectations as regards the returns of the project. The profitability depends strongly on the rate at which the terminal is used over the 5 years of the exemption.

(128) France has in place a framework for regulated access to LNG terminals. Under that regulatory framework, TEGPL would not be able to reserve 50% of its capacity. However, such reserved capacity is crucial for TELSF because without it TotalEnergies would not be able to make the final investment decision. This is because the tariffs that would apply under the regulated regime would not properly reflect the risk and investment costs incurred by the project promoter. This is mostly linked to the fact that this is the first FSRU project in France with technical and operational characteristics that necessarily differ from those of conventional LNG terminals, to which the regulated tariff setting regime may be more tailored.

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22 This would create a risk of saturation of storage capacity if the timeframe between two offloading operations is not sufficient for injecting all of the gas into the network.

(129) Indeed, TELSF provided specific reasons regarding the unsuitability of the tariff setting rules under the French regulatory regime for the project and the necessity of an exemption, which, in turn, can give the investors sufficient financial certainty and attract shippers to book and make use of the terminal capacity.

(130) *First*, the French regulatory regime is such that tariffs are defined considering mostly capital expenditure (CAPEX). Given that the vast majority of costs incurred by the promoter are operating costs (OPEX), TELSF explained that if the terminal were to be regulated, the applicable tariffs would not correspond to a sufficient rate of return (considering a 5-year recuperation period, corresponding to the 5-year operation of the terminal).

(131) *Second*, if the terminal were to be regulated, the applicable tariffs for the first two years of operations would have to be set on the basis of assumptions regarding the expected capacity bookings, information which is not currently available. Such tariffs would have to be readjusted and updated every two years, thereby creating uncertainty for the terminal users. As interested parties would not know what tariff they would have to pay throughout the duration of their contractual arrangement with TELSF, it would provide a disincentive to enter into long-term contracts.

(132) *Third*, in the context of the current energy crisis, the operator intends to commence operations as early as September 2023 in order to diversify gas supplies as soon as possible. The process for setting regulated tariffs would not allow for such tariffs to be set in time before September 2023.

(133) Hence, an exemption from regulated tariffs is crucial in that it will allow TELSF to set stable and predictable tariffs, properly reflecting the investment costs of the project.

(134) In addition to the above considerations, subsidies which could be granted to the investors can considerably reduce the investment risk. The parallel granting of an exemption and of subsidies is not excluded per se, but the granting of subsidies can require limiting the exemption, for example to a part of the capacity or to a shorter duration, as exemptions should be limited to what is necessary. CRE confirmed that no public support has been granted so far for the terminal and there is no intention to do so in the future.

(135) Another question which needs to be assessed is whether the duration of the exemption is justified in view of the risks related to the project. For such an assessment the relevant guidelines[23] specify that contractual arrangements should be taken into account and that the duration of the exemption should be equal to or less than the expected period for recovery of the costs of the new infrastructure.

(136) The exemption has been requested for 5 years, which is the same as the recuperation period of the project and the envisaged duration of the terminal user contracts[24].

(137) In view of this, the Commission considers that an exemption for 5 years is justified.

(138) Considering the risks of non-use as well as uncertainties around the future costs and revenues described in this section, the level of risk attached to the investment is such

[23] 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 SEC (2009) 62 final.

[24] This is based on TELSF's assumptions that an exemption will be granted to the terminal, its commercial operations will start in September 2023 and the terminal will receive bookings covering more than 4.5 bcm of its total annual capacity of 5bcm.

that the investment would not take place unless an exemption was granted, meaning that the condition in Article 36(1), point (b), of Directive 2009/73/EC is fulfilled.

5.8. Unbundling requirement

(139) Article 36 (1), point (c), of Directive 2009/73/EC provides that 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 operator in whose system that infrastructure will be built.

(140) Neither TELSF nor its shareholders are currently directly involved in the transmission operations of GRTgaz, the transmission network to which the terminal will be connected.

(141) GRTgaz is a certified transmission system operator owned by Engie, Société d'Infrastructures Gazière and Alto Employee Fund. GRTgaz does not hold an interest in TELSF or the TotalEnergies group.

(142) The LNG facility is, therefore, owned by a natural or legal person, which is separate at least in terms of its legal form from the system operator in whose system the infrastructure will be built.

(143) On the basis of the above, the requirement in Article 36 (1), point (c), of Directive 2009/73/EC is met.

5.9. Charges

(144) Article 36 (1), point (d), of Directive 2009/73/EC provides that charges must be levied on users of the infrastructure. TELSF has declared that tariffs will be charged to the users of the terminal, including TEGPL, and will be subject to a "ship or pay" commitment. All applicable tariffs must also be notified to CRE.

(145) On the basis of the above, the condition in Article 36 (1), point (d), of Directive 2009/73/EC that charges be levied is fulfilled.

5.10. Impact on the internal market and regulated systems

(146) Article 36 (1), point (e), of Directive 2009/73/EC provides that the exemption must not be detrimental to the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated systems concerned.

(147) Due to the additional gas imports the terminal will contribute to the diversification of gas imports as it offers new capacity enabling new market actors to access the Union gas market.

(148) Furthermore, the terminal must not compromise the regulated system to which it is connected. TELSF submitted that according to the analyses carried out by GRTgaz, the volume of gas flowing from the terminal will have a positive impact on the coverage of the balance peak demand in a cold day scenario without Russian gas, within the perimeter of the French network.

(149) Moreover, the CRE decision stressed that TELSF is in regular contact with GRTgaz in order to examine the changes that would be required to connect the terminal to the gas transmission network. CRE confirmed that GRTgaz' network is already relatively well-sized to accommodate such infrastructure without putting any pressure on the network.

(150) TELSF intends to enter into an inter-operator agreement with GRTgaz, which will allow for the establishment of the arrangements for flow management and the proper management of the interface between the terminal and the French grid.

(151) It can therefore be concluded that the exemption would not be detrimental to the effective functioning of the internal market in gas or the efficient functioning of the regulated systems concerned and that those two requirements in Article 36 (1), point (e), of Directive 2009/73/EC are thus fulfilled.

5.11. Other matters

5.11.1. State aid and application of competition law

(152) Any plan to grant State aid through public funds, including the Union Structural funds, to the terminal project is subject to the requirement of notification to the Commission pursuant to Article 108 of the TFEU.

(153) CRE confirmed that no State aid will be provided to TELSF for the purposes of operating the terminal.

(154) This Decision is without prejudice to the application of the Union rules on competition and State aid. In particular, the criteria and the methodology used to assess the enhancement of competition in gas supply and potential detriment to competition in the relevant markets which are likely to be affected by the investment under Article 36 of Directive 2009/73/EC are not necessarily identical to those used to perform an assessment under Article 101 or 102 TFEU or Council Regulation (EC) No 139/2004[25].

[25] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

6. CONCLUSION

In the light of the foregoing, an exemption should be granted to TELSF pursuant to Article 36(9) of Directive 2009/73/EC, subject to the amendments as set out in the operative part of this Decision. CRE or the French Ministry should inform the Commission about the final exemption decision pursuant to Article 36(9) of Directive 2009/73/EC,

HAS ADOPTED THIS DECISION:

Article 1

The French Ministry of Energy Transition shall ensure that all conditions included in the Délibération de la Commission de Régulation de l'Energie du 24 novembre 2022 portant avis sur la demande d'exemption de la société TotalEnergies LNG Services France pour le terminal méthanier flottant du Havre) (the 'CRE decision') in order to safeguard full compliance with the conditions set out in Article 36(1) of Directive 2009/73/EC are included in the Ministerial decision granting TELSF an exemption from third party access and tariff regulation rules set out in the applicable French regulatory system (the 'Ministerial decision').

That Ministerial decision should also incorporate CRE's decision of 22 March 2023 on the capacity allocation rules at the terminal.

Article 2

In line with Article 36(9) of Directive 2009/73/EC, the Commission's decision shall lose its effect two years from its adoption in the event that construction of the TotalEnergies LNG Services France terminal has not yet started, and five years from its adoption in the event that the TotalEnergies LNG Services France terminal has not become operational unless the Commission decides that any delay is due to major obstacles beyond control of TotalEnergies. The Ministerial decision granting an exemption to TotalEnergies LNG Services France should contain an expiry date and take proper account of this provision.

Article 3

The CRE shall monitor and, at the request of the Commission, report on the implementation of Article 1 and Article 2 in this Decision.

Article 4

This Decision is addressed to the French Ministry of Energy Transition.

Done at Brussels, 31.3.2023

For the Commission
Kadri SIMSON
Member of the Commission

CERTIFIED COPY
For the Secretary-General

Martine DEPREZ
Director
Decision-making & Collegiality
EUROPEAN COMMISSION