EUROPEAN
COMMISSION

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COMMISSION DECISION

of 17.7.2023

on the exemption of Gate Terminal B.V. from certain provisions of Directive 2009/73/EC of the European Parliament and the Council pursuant to Article 36 of the 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 thereof,

Whereas:

1. DESCRIPTION OF THE PROJECT

(1) The Gate Terminal B.V. ('Gate') intends to extend its existing facility of liquefied natural gas ("LNG") at Maasvlakte in Rotterdam, the Netherlands. Gate is a joint venture of N.V. Nederlandse Gasunie ('Gasunie') and Koninklijke Vopak B.V. ('Vopak').

(2) The extension of the LNG facility (the 'extension') will consist of the construction of an additional fourth storage tank for LNG, low-pressure pumps, high-pressure pumps, pipes to and from the tank, evaporators, and boil-off gas compressors. The fourth storage tank will function in the same way as the existing three storage tanks. The original construction of the LNG facility already made allowance for the possibility of a fourth storage tank. The underground infrastructure is therefore ready for the fourth storage tank to be connected without significant interruptions to the use of the LNG facility.

(3) The extension will enable the import capacity of the LNG facility to expand by 4 bcm within three to four years after the final investment decision (scheduled for September 2023). The total import capacity of the Gate LNG terminal at Maasvlakte, including the extension, will then be 20 bcm.

(4) Gate expects the extension to be operational on 1 October 2026.

(5) Gate will offer a service to its intended customers with regard to the capacity provided by the fourth tank, consisting of three components, namely: the unloading of ships carrying LNG, the temporary storage of LNG and the regasification of LNG to inject it in the form of natural gas into the gas transport system operated by Gasunie Transport Systems B.V. ('GTS').

(6) In view of the current situation and the importance of ensuring security of supply, the Netherlands consider that measures must be taken regarding supply and demand developments in the medium and long term.

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

(7) Although, according to the Dutch authorities, demand for natural gas in the Netherlands is expected to fall in the years ahead from 316 TWh in 2020 to a maximum of 229 TWh in 2030[2], the shut-off of Russian pipeline gas and the closure of the Groningen field mean that a large part of the required natural gas will have to be supplied in the form of LNG. This also includes meeting delivery obligations to other Member States.

(8) According to the Dutch authorities, the extension of the current capacity to four tanks will provide a structural, long-term solution to the security of supply issue. This approach is consistent with the Commission's objective of rapidly phasing-out Russian gas and of diversifying energy sources, in particular via LNG terminals, to ensure Europe's security of supply, as outlined in the Communication 'REPowerEU: Joint European Action for more affordable, secure and sustainable energy'[3]. The diversification of energy sources through the use of LNG was also endorsed by EU Heads of State and of Government at the Versailles European Council[4].

2. NATIONAL PROCEDURE

2.1. Gate exemption request

(9) By letter dated 30 December 2022, Gate requested for the extension an exemption from third party access requirements and tariff regulation, namely Sections 13, 14a, 15 and 19 of the Dutch Gas Act, which transposes Directive 2009/73/EC from 1 October 2026 to 30 September 2046. Gate already has an exemption for the existing terminal at Maasvlakte, approved by the Commission[5].

(10) Pursuant to the applicable Dutch legislation[6], the competent authority for issuing such exemptions is the Dutch Minister for Climate and Energy Policy ('MCE').

2.2. Consultation of the Netherlands Authority for Consumers and Markets (ACM)

(11) On 14 March 2023, in accordance with the Dutch Gas Act, the MCE asked the ACM to issue an opinion on the exemption requested by Gate, before issuing a decision. On 21 March 2023, Gate sent additional information to the ACM at the ACM's request. On 27 March 2023, Gate sent the ACM an updated version of the risk assessment carried out by an external consultant.

(12) The ACM issued a positive opinion on 31 March 2023, advising the MCE to attach certain requirements to the exemption decision.

2.3. Consultation of regulatory authorities in other Member States

(13) On 12 April 2023, the MCE conducted a consultation with the relevant regulatory authorities in Germany, Belgium and France in accordance with Article 36 (3) of Directive 2009/73/EC. The MCE consulted the Bundesnetzagentur ('BNetzA'), the Belgian Commission for Electricity and Gas Regulation ('CREG') and the Commission de Régulation de l'énergie ('CRE') on the draft exemption decision.

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[2] From data sets of ENTSOG's TYNDP 2022 Global Ambition and National Trends scenarios and the Climate and Energy Outlook of the Netherlands 2022.

[3] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, REPowerEU: Joint European Action for more affordable, secure and sustainable energy, COM(2022) 108 final, 8.3.2022.

[4] European Council, *Informal Meeting of the Heads of State or Government, Versailles Declaration,* 10 and 11 March 2022. Accessible at: 20220311-versailles-declaration-en.pdf

[5] Exemption decision No. G/2006/01, 26 March 2007.

[6] Section 18(h) of the Dutch Gas Act, which transposes Article 36 of Directive 2009/73/EC.

(14) On 18 April 2022, BNetzA stated that it had no comments on the draft exemption decision.

(15) On 22 June 2022, CRE confirmed that it had no objections to the draft exemption decision and that it welcomed the creation of new liquefied natural gas import capacities, which will in particular help reduce dependence on natural gas imports from Russia in both the Netherlands and the Union.

(16) On 15 May 2023, CREG confirmed that it had no objections to the draft exemption decision as long as (a) the capacity is allocated and sold in a transparent and non-discriminatory manner and (b) the costs related to the project are solely recovered by the commercial services provided by the project and the project does not impact tariffs on cross-border interconnection points.

2.4. Bidding procedure for the capacity allocation

(17) From 5 September to 14 October 2022 market participants had an 'open season' in which to file an expression of interest with Gate to book capacity at the extension in any form and without thereby entering into any obligations.

(18) In January 2023, Gate sent a call for bids, the bidding procedure, general terms and conditions and capacity allocation rules to the market participants that had expressed interest.[7] These market participants had until 3 March 2023 to submit a binding bid for the capacity and to accept the throughput agreement.

(19) On 6 March 2023 Gate announced that under the above-mentioned allocation rules it had accepted two bids each for a capacity of 2 bcm for a duration of 20 years (subject to a positive decision in response to the exemption request). This means that the full primary capacity of the extension of the LNG facility has been allocated, namely to BP and Petro China.

3. THE NOTIFIED EXEMPTION DECISION

(20) On 17 May 2023, the MCE notified to the Commission an exemption decision for the requested exemption from third party access and tariff regulation requirements for the extension of the Gate terminal. The Commission requested additional information on 12 June 2023, which the MCE submitted on 23 June 2023.

(21) The exemption is granted from 1 October 2026 to 30 September 2046 and for an annual capacity of 4 bcm, subject to several conditions which will be detailed in recitals (40) and (43) and section 3.".

3.1. Third party access rules

(22) Under the notified exemption decision unused capacity must be offered to the market and all potential users of the extension must be given the opportunity to express their interest before the capacity of the extension is allocated, including for their own use.

3.1.1. Primary capacity allocation

(23) Gate has set up a process by which all market participants who submitted an expression of interest were able, without obligation, to familiarise themselves with the tariffs, terms and conditions for allocating capacity and were given the opportunity to submit a binding bid.

[7] The capacity allocation rules are discussed in Section 5.2.2.

(24) Bids will be considered only from market participants who have declared that their planned LNG volumes are of non-Russian origin. Gate states that a provision to this effect is included in the conditions for booking capacity at the extension.

(25) The allocation criteria used for the primary capacity allocation are the same for each market participant and have been made available in advance to all market participants which have submitted an interest.

(26) The allocation rules are described in recitals (27) to (33).

(27) The **first allocation criterion** is the period for which the primary capacity is booked. Market participants can bid for a capacity of 1, 2, 3 or 4 bcm per year for a minimum duration of 10 years and a maximum duration of 20 years. The winning bids or combinations of bids will be those totalling 4 bcm per year with the highest weighted average term.

(28) Multiple bids per lot (up to a maximum total of 4 bcm per year) are allowed. However, a multiple bid will only be awarded in its entirety and not in parts.

(29) Only the bid for 1 bcm per year with the longest duration will be considered under the first allocation criterion. In the event of more bids for 1 bcm per year with the same duration, that will be the bid with the highest mark-up price (see the second allocation criterion referred to in recital (30)). In the event of more bids of 1 bcm per year with the same duration and same mark-up price, the winner will be decided by drawing lots conducted by a notary. The reason for these specific rules for bids for 1 bcm is that certain operating processes are very complex if more than one market participant has only 1 bcm of capacity.

(30) The **second allocation criterion** is that in the event of different bids with the same term, priority will be given to parties based on their readiness to pay a mark-up on top of the minimum rate (mark-up price). That will allow bidders to differentiate themselves from other bidders by submitting a bid that reflects what the capacity is worth to them. The combination with the highest aggregate mark-up price will win.

(31) If there are two or more bids, but no possible combination totalling 4 bcm, all market participants that have submitted bids of 3 bcm or 1 bcm will be offered the opportunity to adjust their bid to 2 bcm with an unchanged duration and an updated mark-up price. This option would also be offered to any market participant that has bid 2 bcm. That makes it possible for two market participants to each be allocated 2 bcm. If it is not possible to arrive at a total of 4 bcm, the bidders will be offered the opportunity to change the bid to 4 bcm with an unchanged term and an updated mark-up price. In this way 4 bcm can be allocated to a single party.

(32) If the demand for capacity is insufficient to sell the total available primary capacity, Gate will launch a second round consisting of the bids already received and bids from market participants who have not signed an expression of interest. The second round will be announced by Gate on its website. In that second round the allocation rules will be the same as in the first round.

(33) Finally, the allocation rules referred to in recitals (23) to (32) state that in the event of an unsuccessful second round the primary capacity will be allocated on a first-come, first-served basis.

3.1.2. Secondary capacity allocation

(34) Gate will facilitate that capacity contracted by a market participant ('customer') which is not used by this customer will be made available to other market participants through the secondary market.

(35) Secondary trading can be facilitated by enabling a customer with contracted capacity at the extension to sell on all or part of their rights under the agreement with Gate to other existing customers at the Gate terminal or to new potential customers.

(36) Customers with contracted capacity at the extension can offer all or part of their capacity in the secondary market. In addition, Gate offers the possibility of publishing the available secondary capacity on the Electronic Bulletin Board, to which both existing customers at the Gate terminal, including the extension, and new potential customers have access.

(37) The proceeds from the secondary market go to the original customer. They have an incentive to trade capacity they do not wish to use themselves, because customers with contracted capacity must pay in advance for regasification capacity, regardless of actual use. If the customer with contracted capacity trades capacity in the secondary market, Gate charges administration fees.

(38) If customers with contracted capacity do not offer their unused capacity in the secondary market, Gate applies a use-it-or-lose-it (UIOLI) arrangement. Gate has already developed a UIOLI arrangement for the existing LNG facility and this will also be used for the capacity created by extending the LNG facility.

(39) This UIOLI rule works as follows: A customer with contracted capacity must give notice not later than 30 days before a scheduled arrival window for a berthing slot that it will not be using that berthing slot. If less than 30 days remain before a scheduled arrival window, the customer must give such notice promptly. Unless, when indicating that they will not use a berthing slot, the customer designated a permitted transferee, they must offer their unused berthing slot for sale.

(40) The notified exemption decision included the following conditions related to the secondary capacity allocation and the UIOLI arrangement:

(1) Unused capacity must be offered in the market and the users of the significant extension of the LNG facility will have the right to trade their purchased capacity in the secondary market.

(2) Gate shall as soon as possible apply the procedure for offering the unused capacity in the market (use-it-or-lose-it system) in such a way that the procedure is transparent and non-discriminatory. Gate shall ensure that unused capacity is available to the secondary market no later than 30 days before the planned start of regasification.

(3) Gate shall include the procedures for the use-it-or-lose-it system, including the secondary market, in the agreements with its customers and submit a copy of the procedure to the MCE and the ACM.

(4) Gate shall submit a copy of the results of the procedure for the use-it-or-lose-it system to the ACM at least every quarter.

3.2. Description of charges to be levied

(41) Gate explains that it is essential for Gate that charges can be levied on customers for the services they use.

(42) Gate points out that the bidding conditions, to which customers must commit, state that Gate will charge EUR 12.5 million per bcm for the use of the capacity of the extension. This is the same as the price that Gate already charges for the existing LNG facility.[8]

(43) The notified exemption decision contains a condition that Gate is to charge tariffs to all users of the significant extension of the LNG facility.

3.3. Further conditions included int the notified exemption decision

(44) Apart from the conditions related to the secondary capacity allocation and charges mentioned in section 3.1.2 and 3.2., the notified exemption decision also requires Gate to ensure that ownership of the extension of the LNG facility is and remains independent of GTS during the exemption period. In terms of its legal structure, Gate must be separate from and act independently in all other respects from GTS.

(45) In addition, Gate has to allocate no more than 50% of the capacity to an operator with a dominant position in the relevant geographic and/or product market(s) as part of the internal gas market.

(46) This condition has already been complied with for the primary allocation as neither of the new capacity holders has booked more than 50% of the capacity. As regards secondary capacity allocation, as the exemption decision will be public (published online in the Dutch Government Gazette) it will be transparent for all potential customers which conditions will apply and be considered in the allocation procedure. This will ensure an open and transparent process.

(47) Furthermore, all potential users of the extension of the LNG facility must be afforded the opportunity to express their interest before the capacity in the new infrastructure, including own use, is allocated.

(48) Finally, if any material changes are made to the exemption request or the notified exemption decision, Gate has to report these changes to the MCE and the ACM without delay.

(49) The ACM will monitor and ensure compliance with the exemption decision including the conditions attached thereto, including the 50% cap for the capacity booking, and if necessary, will liaise with the MCE.

4. PROCEDURE AT THE COMMISSION

(50) On 17 May 2023, the MCE notified the Commission of the exemption decision (the ’notified exemption decision’). The Commission requested additional information on 12 June 2023, which the MCE submitted on 23 June 2023.

(51) On 17 May 2023, together with the notification, the MCE sent an official language waiver to the Commission, authorising it to issue any formal documents or adopt any decision pursuant to Article 297 of the Treaty in English.

(52) On 26 May 2023, the Commission published a notice on its website, inviting stakeholders for comments within two weeks. No comments were received.

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8 www.gateterminal.com/en/commercial/tariff/.

5. ASSESSMENT OF THE EXEMPTION CRITERIA LAID DOWN IN ARTICLE 36 OF DIRECTIVE 2009/73/EC

5.1. Legal basis

(53) Pursuant to Article 36 (1) of Directive 2009/73/EC major new gas infrastructure may, upon request, benefit from an exemption from the third party access and tariff requirements in Article 32 of Directive 2009/73/EC, provided 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.

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

(a) the national regulatory authority shall consult the national regulatory authorities of the Member States the markets of which are likely to be affected by the new infrastructure (Article 36(5) of that Directive);

(b) all potential users of the infrastructure are 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) of that Directive).

(55) It is therefore necessary to assess whether the criteria and the procedural requirements set out in Article 36 of Directive 2009/73/EC are met.

5.2. Qualification as major new gas infrastructure

(56) Article 36(1), introductory sentence, of Directive 2009/73/EC specifies that major new gas infrastructure, that is to say interconnectors, LNG and storage facilities, can qualify for an exemption. It should be determined whether the extension qualifies both as an LNG facility and as a major new gas infrastructure.

(57) Pursuant to Article 2(11), of Directive 2009/73/EC ‘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. As described in section 1, the extension would return LNG to a gaseous state, to feed it

into the national gas transmission network. The extension, therefore, qualifies as an LNG facility within the meaning of Article 2(11), of Directive 2009/73/EC.

(58) The investment can also be considered as major within the meaning of Article 36 of Directive 2009/73/EC. The extension will increase the total maximum capacity of the existing Gate LNG facility from 16 to 20 bcm per year, this is to say by 25%. For the whole Dutch territory, the total LNG import capacity is currently 24 bcm per year. The extension will thus represent an increase of 16.66% in that capacity. The extension also involves considerable investments, budgeted at EUR [redacted] at the time of the exemption request and adjusted to EUR [redacted] at the beginning of 2023.

(59) Furthermore, the infrastructure has to be new. Article 2(33) of Directive 2009/73/EC defines new infrastructure as 'an infrastructure not completed by 4 August 2003'. As the extension is expected to start operations on 1 October 2026, it should be considered new infrastructure within the meaning of Directive 2009/73/EC.

(60) Therefore, the extension constitutes a major new gas infrastructure within the meaning of Article 36(1) of Directive 2009/73/EC.

5.3. Invitation to potential users to indicate their interest ('market test')

(61) Article 36(6), third subparagraph, of Directive 2009/73/EC requires a market test to be conducted, this is to say all potential users of the infrastructure have to be invited to indicate their interest in contracting capacity before the capacity of the new infrastructure, including for own use, is allocated.

(62) The purpose of such a market test is to assess the likelihood that capacity finds buyers and to evaluate the appropriate size of the project.

(63) As described in Section 2.4., Gate held an 'open season' from 5 September to 14 October 2022, during which market participants could file an expression of interest to book capacity of the extension with Gate. And in January 2023 it sent a call for bids to the market participants who had expressed interest.

(64) The requirement set out in Article 36(6), third subparagraph, of Directive 2009/73/EC is thus fulfilled.

5.4. Requirement to consult national regulatory authorities of affected Member States

(65) Article 36(3) of Directive 2009/73/EC requires the competent authority to consult the national regulatory authorities of the Member States, whose markets are likely to be affected by the new infrastructure.

(66) As explained in Section 2.3., the MCE consulted the German, Belgian and French regulatory authorities.

(67) The requirement set out in Article 36(3) of Directive 2009/73/EC is thus fulfilled.

(68) Therefore, the procedural requirements set out in Article 36(3) and (6) of Directive 2009/73/EC were respected by Gate and the MCE.

5.5. The investment must enhance security of supply and the exemption must not be detrimental to security of supply

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

(70) 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 in accordance with Article 36(1), point (a) of Directive 2009/73/EC.

(71) The extension provides a new entry point into the Dutch market and thus the interconnected European gas market. Neither the Commission nor the MCE or the ACM have received any comments from stakeholders that would indicate that the extension could replace other existing infrastructure or push other facilities out of the market.

(72) The market situation of the Netherlands should be considered in analysing the security of supply. According to information provided by Gate, demand for natural gas in the Netherlands is estimated at approximately 23 bcm in 2030 and at a comparable maximum level in 2040. This should be compared with the total consumption of natural gas in the Netherlands in 2020, which amounted to approximately 41.8 bcm.

(73) Under the notified exemption decision, due to the phasing out of the Netherlands' own gas production and the shut-off of a major import flow from Russia as a consequence of the war in Ukraine, the bulk of the required natural gas, including for delivery and transit to other Member States, has to be imported in the form of LNG for the time being. The extension makes an important contribution to strengthening the Dutch LNG import capacity and the LNG import capacity of the Union. The fact that Gate has received bids for the entire capacity of the extension of the LNG facility increases the likelihood that the entire capacity of the extension will also actually be used for LNG imports.

(74) It can, therefore, be concluded that the infrastructure as such contributes to security of supply and that the requirement that the investment must enhance security of supply set out in Article 36(3) of Directive 2009/73/EC is met.

(75) In addition, Article 36(1), point (e) of Directive 2009/73/EC specifies that the exemption from third party access and tariff regulation must not be detrimental to security of supply of natural gas in the Union. Exemptions that would enable the access to critical infrastructure to be limited to a small number of market participants for example, could have a negative impact on security of supply in the Union. In theory, certain specific exemption conditions could also be to the detriment of security of supply, for instance if an exemption decision prevented investors from increasing interconnection to other Member States.

(76) Several observations should be made regarding the impact of the exemption on the security of supply in the Dutch market and in the Union.

(77) As regards the primary capacity allocation Gate states that bids will only be considered from market participants who have declared that their planned LNG volumes are of non-Russian origin.

(78) Until early 2022, around 40% of Dutch pipeline imports came from Russia. Since the Russian invasion of Ukraine, the share of Russian gas as a proportion of total imports has fallen dramatically (to around 9-10%) at the end of 2022. More imports of non-Russian gas are therefore necessary.

(79) In line with the Commission's REPowerEU Communication, which expresses the objective of phasing out Russian gas and stresses the importance of diversification

via LNG terminals to ensure Europe's security of supply, the Dutch government announced it would end all dependence on Russian fossil fuel by the end of 2022[9].

(80) As a result of the limited expansion potential for alternative pipeline imports to the Union, it is crucial to expand LNG imports to the Union. Extending the LNG terminal increases the scope for gas imports from countries not connected to the Union by pipelines. That will increase supply in the gas market.

(81) There are no indications that security of supply would be negatively impacted by the exemption either in the Netherlands nor in the Union. The transparent and non-discriminatory primary and secondary allocation procedures, including an adequate UIOLI arrangement that prevents hoarding, will enable access for a diverse group of market operators and the scope to import to the Union from multiple sources.

(82) In conclusion, the investment enhances security of supply and the exemption is not detrimental to security of supply of natural gas in the Union.

5.6. Principle of solidarity

(83) As set out in the judgment of the General Court in case T-883/16[10] and confirmed by the Court of Justice in case C-848/19 P[11], the principle of solidarity also entails a general obligation on the part of the Union and the Member States, in exercising their respective powers, to take into account the interests of the other stakeholders. In particular, Member States, in exercising their powers in the field of energy policy, must endeavour to avoid adopting measures likely to affect the interests of the Union and its Member States as regards security of supply, their economic and political viability, the diversification of supply or of sources of supply, and to do so to take account of their interdependence and *de facto* solidarity.

(84) In the notified exemption decision, the MCE analysed whether the exemption is likely to affect the interests of other Member States.

(85) The MCE argued that the extension would make an important contribution to diversifying sources for the import and supply of natural gas in the interest of Dutch and Union security of supply and delivery. Given the transparent and non-discriminatory primary and secondary allocation procedures, including an adequate UIOLI arrangement, described in Sections 3.1.1 and 3.1.2 the exemption is not likely to negatively impact the security of supply in the Netherlands or other Member States.

(86) As described in Section 2.3, the MCE also consulted the national regulatory authorities of Germany, France and Belgium. CRE considers that an exemption for this period will contribute positively to security of supply in the Union and is consistent with exemptions already granted, both for Gate and for LNG terminals in neighbouring countries. The Commission is also not aware of any Member State or competitor voicing concerns about the project in question.

(87) Therefore, there is no indication that the planned extension or the notified exemption decision would negatively impact the security of supply or the economic or political viability of the Union or its Member States. On the contrary, the creation of

[9] Ministerie van Economische Zaken en Klimaat (MEZ) - Kamerbrief over de onafhankelijkheid van Russische olie, kolen en gas met behoud leveringszekerheid, 22 April 2022.

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

[11] Judgment of the Court of Justice of 15 July 2021 in Case C-848/19-P Germany v European Commission, point 71.

additional regasification capacity positively contributes to security of supply for the Netherlands and the Union.

(88) Therefore, the requirements set out by the Court of Justice, based on Article 194 TFEU have been met.

5.7. The investment must enhance competition and the exemption must not be detrimental to competition

(89) Article 36(1), points (a) and (e) of Directive 2009/73/EC requires the investment project to enhance competition in gas supply and the exemption not to be detrimental to competition in the markets likely to be affected by the investment.

(90) To analyse the impact of the extension and the exemption on competition, the relevant gas markets, and in particular the question of whether the investment creates or strengthens a dominant market position, should be considered.

5.7.1. Impact of the investment on competition

(91) Investments which enable gas supplies from new sources tend to improve competition in the wholesale and subsequently also the retail market for gas, unless those sources are controlled by undertakings with a strong or dominant position on the market concerned. The extension is not directly linked to a specific upstream source; therefore, upstream supply can come from the worldwide market for LNG supply. LNG imports can constitute a direct competitive constraint for imports of natural gas via pipelines[12]. Independently of whether the relevant geographic market is defined as the Netherlands or North-Western Europe, the addition of further import routes and sources from the liquid and global LNG market is expected to enhance competition in the wholesale and subsequently the retail market for gas.

(92) The construction of the extension as such is thus expected to enhance competition in gas supply in accordance with Article 36(1), point (a) of Directive 2009/73/EC.

5.7.2. Impact of the exemption from third party access rules on competition

(93) Regarding Article 36(1), point (e), of Directive 2009/73/EC, it should be ascertained whether the exemption could be detrimental to competition in the markets likely to be affected by the investment.

(94) To determine the impact of the notified exemption decision on competition, it is necessary to analyse the relevant gas markets to establish whether the exemption could create or strengthen a dominant market position, which could allow for market foreclosure. This must be assessed on a case-by-case basis.

(95) Foreclosure could occur if actual or potential rival undertakings' access to supplies or markets is hampered or eliminated because of the capacity allocation at the Gate extension, thereby reducing those undertakings’ ability and/or incentive to compete. Such foreclosure may discourage the entry or expansion of rivals or encourage them to exit the market. Foreclosure thus can be found even if the foreclosed rivals are not forced to exit the market. It is sufficient that the rivals are disadvantaged and consequently caused to compete less effectively.

(96) The impact of the notified exemption decision on competition in the markets likely to be affected will be analysed in this section and sections 5.7.3. and 5.7.4. For the purpose of this decision, the Commission considers that the product market affected

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12 See e.g. COMP/M.6477 BP/Chevron/ENI/Sonangol/Total/JB of 16 May 2012, para 18.

by the notified exemption decision is the upstream wholesale market for gas, which includes development, production, and supply of natural gas to large importers/wholesalers. This decision also looks at the downstream wholesale market and the retail market for gas. The relevant geographic market is defined as being at least the Netherlands.

(97) In the current case, it is known that two market players, namely BP and Petro China, have booked all the available capacity of 4 bcm at the extension.

(98) Together with the exemption request, Gate submitted two reports prepared on its own initiative ('the reports') which assessed the impact of the extension as such and its exemption on competition[13]. These reports concluded that the exemption will not be detrimental to competition in the relevant markets nor to the effective functioning of the internal market in natural gas.

(99) In the notified exemption decision, the MCE, based on the information supplied by Gate also concluded that the exemption will not be detrimental to competition in the relevant markets in the Netherland and the Union and the effective functioning of the internal market in natural gas.

(100) The analysis conducted for the different product markets in the two reports will be described in more detail in Sections 5.7.2.1. and 5.7.2.2

5.7.2.1. Upstream wholesale gas market

(101) Under the first scenario, the reports assessed the effect of an exemption on competition in the gas market in North-Western Europe, without considering the confirmed bookings for the extension, compared against a counterfactual scenario.

(102) As explained in more detail in section 5.8. the level of risk is such that the investment would not be made without an exemption granted. According to the reports, the counterfactual scenario is a situation where the investment is note made without an exemption and therefore the extension would not exist. The relevant question is therefore whether exempting the allocation of usage rights (for a capacity extension of 4 bcm) for the LNG facility extension can deteriorate competition in the relevant markets, compared against a situation without the extension.

(103) A quantitative analysis was carried out based on the Hirschmann-Herfindahl Index (HHI). The HHI is one of the most commonly used tools to measure market concentration and it takes into account the market shares of all market participants. It is generally assumed that HHIs below the value of 1,000 points indicate markets where competition concerns are not typically present (i.e. there is high competition). If the HHI value is between 1 000 and 2 000, but the change is less than 250 points, competition concerns will also typically not arise.

(104) For the exemption in question, the quantitative analysis based on the HHI for North-Western Europe shows that competition would not be negatively impacted and that even in the most conservative scenario, with the biggest market operator (Equinor/Petoro in 2027 and Qatar Energy in 2034) booking the full capacity, the impact would at most be neutral with the HHI expected to increase by +64 to 1 125

[13] Impact of an extension of the Gate terminal on security of supply and competition in the gas market - Economic expert report commissioned by Gate terminal B.V. Frontier Economics, 12 October 2022;
Impact of an exemption from regulation of an extended Gate terminal on competition in the gas market – supplementary expert report for Gate terminal B.V. Frontier Economics, 12 April 2023.

in 2027 and by +35 to 942 for 2034 compared to the situation without the extension. This is significantly below the threshold of a 250-point change.

(105) Even when limiting the relevant geographic market to the Netherlands, there are no grounds to assume this would have a negative impact on competition, on the assumption that the biggest player in the market books no more than 50% of the new capacity. The HHI would increase by 172 to 1 386 in 2027 and by 246 to 1 264 in 2034 compared to the situation without the extension The increase is thus still below the threshold of a 250-point change. The reports also stress that narrowing the definition of the market in this way would only be justified if the North-Western European gas market were to become less integrated. MCE considers that this is not plausible.

(106) Under the second scenario, the reports included the positions of BP and Petro China in the upstream wholesale gas market, which confirm the above conclusion that the exemption would not give rise to any competition concerns. Both operators have so far had a limited (or very limited) position on the relevant market.

(107) According to the reports, BP only has a market share of less than 1% on both the North-Western European market and the Dutch market. BP currently has temporary LNG import capacity in the United Kingdom and is active in gas production in Norway. BP also has LNG production capacity outside Europe. The reports indicate that BP is expected to maintain a limited market share of the same magnitude in the future. This is confirmed, among other things, by the fact that BP is not expected to have capacity at any other LNG terminal in North-Western Europe when the extension of the LNG facility becomes operational.

(108) Petro China is currently not active in the upstream wholesale gas market in North-Western Europe. As to Gate's knowledge, Petro China has not booked import capacity at any other LNG terminal in North-Western Europe. Petro China does not currently have LNG production capacity and is not involved in the production of natural gas in North-Western Europe or in countries connected to North-Western Europe by pipeline either. Petro China is developing LNG production capacity in Canada, however. According to the reports, the final investment decision has already been taken for this project. In addition, Petro China entered portfolio contracts with major existing market operators, including Cheniere and Shell. Petro China is thus a new international market operator entering the relevant market in the Netherland and North-Western Europe.

(109) Overall, the reports therefore conclude that in the relevant North-Western European market the exemption would be competition-neutral even in the extremely conservative case in which the largest market player would book 100% of the capacity of the extension LNG-facility. As regards a hypothetically narrow geographic market limited to the Netherlands, the reports conclude that an exemption is not expected to have a negative effect on competition, provided that the largest market player does not control 50% or more of the additional capacity. The reports assess that limiting the geographic market to the Netherlands would not be justified and not relevant, given the level of gas market integration at Union level.

(110) The fact that all primary capacity of the extension to the LNG facility has been allocated to BP and Petro China has no impact on that conclusion.

(111) MCE finds the analysis submitted by Gate and supported through the reports credible and therefore believes that the exemption will not be detrimental to competition in

the relevant markets. MCE points out that ACM endorses that conclusion in its opinion.

(112) In view of the analysis of the upstream wholesale market in the reports, MCE nevertheless makes the notified exemption decision conditional on allocating no more than 50% of capacity to a dominant operator in the relevant geographic and/or product market(s) as part of the internal gas market as explained in recital (45). MCE extends this condition also to the secondary market as the capacities of the extension are fully tradeable on the secondary market. The application of cap is not limited to the upstream wholesale market but applies to all relevant geographic and/or product market(s).

5.7.2.2. Downstream wholesale gas market and retail gas market

(113) For the downstream wholesale gas market and the retail gas market MCE follows the argumentation presented in the reports, which conclude that the exemption for the extension is not expected to have a negative impact on competition; on the contrary it is expected to have a positive impact.

(114) More specifically, as regards the downstream wholesale market, neither of the two long-term capacity holders, which are BP and Petro China, is currently active in that market.

(115) The reports also point out that in North-Western Europe the downstream wholesale gas market is characterised by high liquidity and highly liquid gas hubs, including the Title Transfer Facility ('TTF'), a virtual trading point for natural gas in the Netherlands. To the extent that market participants purchase gas from BP or Petro China on the downstream wholesale gas market, the reports conclude that this does not result in any market power for BP or Petro China. According to the reports, the North-Western European downstream wholesale market, and particularly trading on the TTF in the Netherlands, is the most liquid market in the European Union. The reports consider that retailers, distributors and large end-customers have plenty of scope on the downstream wholesale gas market in the Netherlands and North-Western Europe to transact with alternative operators.

(116) According to the reports, the arrival of BP and Petro China has in fact a positive impact, because they challenge existing market operators.

(117) As regards the retail gas market, according to the reports, BP and Petro China are not active in that market. This finding is based, among other things, on Petro China's annual report and the fact that those operators do not have a licence from ACM to supply to small consumers in the Netherlands.

(118) MCE agrees to the analysis that the exemption will not have a negative impact on the wholesale downstream market or on the retail market.

5.7.3. Impact on competition of the exemption from tariff regulation

(119) In the bidding conditions made available to all interested market participants, Gate indicates that it will charge EUR 12.5 million per bcm for the additional capacity. This is the same price that Gate already charges for the existing LNG facility.

(120) The tariffs charged by the extension will thus be non-discriminatory and will not differentiate between the capacity holders. Therefore, the notified exemption from tariff regulation is not detrimental to competition.

(121) As regards the impact of the exemption from tariff regulation on competition with other LNG facilities, Gate explains that it competes with other LNG facilities and providers of pipeline import capacity. Gate will only be able to compete on the market if it obtains an exemption and thus can give users a sufficient degree of certainty.

(122) Gate is also in competition with the regulated terminal in Zeebrugge. The MCE considers that there is no reason to assume that an exemption for the extension of the LNG facility will have a negative impact on the regulated terminal in Zeebrugge for two reasons.

(123) First, Gate's existing LNG facility, for which it already has an exemption, and the regulated terminal in Zeebrugge have been operating successfully for many years alongside each other without the LNG facility having any negative impact on the Zeebrugge terminal.

(124) Second, the MCE points out that the Commission did not assume any such negative impact in the exemption decisions taken on the Eemshaven Energy Terminal in Groningen[14] or on the new LNG terminals in Germany[15].

5.7.4. Commission assessment and conclusion

(125) As regards the *impact of the exemption from third party access* on competition in the different relevant markets the Commission makes the following observations and draws the following conclusions.

(126) As regards the impact on the wholesale upstream market, the Commission notes MCE's observations that the two undertakings that booked the full capacity at the extension, namely BP and Petro China, have very limited market shares on that relevant market. In addition, even in a scenario with the two biggest players booking the full capacity of the extension the impact on competition would remain below the critical threshold as measured by the HHI. In this context the Commission notes that the MCE attached a condition to the exemption that Gate may allocate no more than 50% of capacity to a dominant operator in the relevant market.

(127) As regards the wholesale downstream market and the retail market, the Commission notes MCE's observations that neither of the two long-term capacity holders, namely BP and Petro China, is currently active on these markets.

(128) Moreover, as regards the wholesale downstream market for gas (liquefied natural gas and/or natural gas), the Commission is not aware of any facts that would indicate the existence of a dominant market player in that market both on an assumed North-Western European market and on an assumed national market of the Netherlands.

(129) In addition, the rules for the primary capacity allocation and secondary capacity allocation at the Gate extension, referred to in sections 3.1.1 and 3.1.2 comply with

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14 Commission decision of 11.8.2022 on the exemption of EemsEnergy Terminal B.V. from certain provisions of Directive 2009/73/EC pursuant to Article 36 of the Directive; available here: 2022_eemsenergy_decision_en.pdf (europa.eu)

15 Commission decision of 2.6.2023 on the exemption of the German LNG Terminal in Brunsbüttel, Germany, from the requirements regarding third party access and tariff regulation; available here: 2023_german_lng_decision_en.pdf (europa.eu)
Commission decision of 20.12.2022 on the exemption of Deutsche ReGas GmbH & Co. KGaA LNG Terminal in Lubmin (Germany) from certain provisions of Directive 2009/73/EC pursuant to Article 36 of that Directive; available here: 2022_deutsche_regas_decision_en.pdf (europa.eu)

the principles of transparent and non-discriminatory access under Article 32 of the Directive 2009/73/EC and do not grant privileged access to any market participant.

(130) Based on the foregoing, the Commission has no grounds for concern as regards the impact on competition on the wholesale upstream market, the wholesale downstream market or the retail market

(131) The Commission also notes that according to information submitted by the Dutch authorities Petro China has not booked any long-term capacity at any LNG terminal in North-Western Europe.

(132) BP in a joint venture with Sonatrach have booked 4.4 bcm regasification capacity at Grain LNG terminal in the United Kingdom. That booking amounts to less than 5% of the total regasification capacity currently available in North-Western Europe. The BP/Sonatrach contract will run out in 2025 and their capacity has been awarded to Qatar Energy for the period 2025-2050. By the time the extension will become operational, BP will thus not hold any long-term capacity at another LNG facility in North-Western Europe.

(133) The Commission agrees with MCE’s conclusion that the exemption from third party access is not detrimental to competition in the relevant markets in the Netherlands or North-Western Europe.

(134) As regards the *impact on competition of the exemption from tariff regulation*, since the tariffs charged by the extension will be non-discriminatory and will not differentiate between the capacity holders, the notified exemption from tariff regulation is not detrimental to competition.

(135) The Commission also supports the conclusion by the MCE that the exemption from tariff regulation will not be detrimental to competition among LNG terminals.

(136) Therefore, the Commission, based on the information provided in the notified exemption decision and by the Dutch authorities that granting the exemption from third party access and regulated tariffs is not detrimental to competition on the relevant markets in the Netherlands or in North-Western Europe.

5.8. The level of risk must be such that the investment would not take place without an exemption

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

(138) Under a typical regulated access system, the owner of the infrastructure has a high degree of revenue certainty and protection from volume or construction risks, as the revenue is guaranteed through regulated tariffs to be paid by the users of the infrastructure. No such revenue certainty is currently provided for Gate as the extension is a purely commercial initiative.

(139) The cost of investing in the extension is significant and cannot be reversed. The most recent estimate is that it would amount to EUR [redacted].

(140) The relevant Guidance[16] issued by the Commission stresses that two main aspects should be considered when assessing the risk of an investment: the risk of non-use of the infrastructure and the risk of future change in cost and revenue.

(141) For a positive investment decision, Gate should have sufficient prospects of recouping the investment. The project must have a positive net present value over the term of the investment. To that end, there should be sufficient revenue to cover the costs and to justify the risks associated with the investment. Gate must conclude sufficient binding contracts with users of the new capacity for there to be a prospect of sufficient revenues, which should include tariff agreements with users for the duration of the terms of the contracts. Before entering into the agreement, users in turn also require clarity regarding the obligations they are entering into towards Gate, including clarity on tariffs for the booked capacity over the entire period.

(142) The regulated regime prescribed by the Dutch Gas Act would govern the extension without an exemption. The regime would be a limiting factor for having sufficient prospect of recouping the investment. The reason for that is that, during the pay-back period for the LNG facility, the regulated regime prescribes an annual government review of prices and contract conditions, with corresponding regulation risks. This would create uncertainty about income and revenue and a risk of change to cost and revenue, impeding an investment decision.

(143) This risk is exacerbated by the fact that the clarity needed cannot be provided under the regulated regime prescribed by the Dutch Gas Act because binding contracts and prices would need to be agreed at short notice under the regulated regime. The bids that Gate received in March 2023 have been accepted on condition that the exemption is granted. The failure to obtain an exemption would make these contracts void.

(144) In addition, multiple projects are ongoing to build and expand LNG facilities in North-Western Europe, including the Netherlands and Germany. Gate is therefore in competition not only with other existing LNG facilities, which may expand or still have spare capacity, but also with new facilities. Most LNG facilities with which Gate competes are exempt from tariff regulation. One exception is the LNG terminal in Zeebrugge, which is regulated.

(145) According to Gate and as acknowledged by the MCE in the notified exemption decision, North-Western Europe is competing to contract gas flows with growing and emerging markets in countries including the United States, India, and China. It is not a foregone conclusion, therefore, that gas flows will come to Europe. The investment climate, together with the regulation regime for LNG facilities, also plays a role in the competition. The current market is a sellers' market in which suppliers can choose to whom they will sell their LNG. Gas sellers want maximum certainty regarding tariffs and conditions.

(146) The Commission notes that applying a regulated regime to the Gate extension would thus increase the risk of non-use of the infrastructure.

(147) Gate also states and MCE acknowledged that applying a regulated regime entails asymmetric income risks. While income regulation limits opportunities for increases, regulation provides no protection against the risks of incoming falling in the absence

[16] 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.

of ‘fixed’ customers. For example, there is no guaranteed minimum revenue in the event of low use of the LNG facility, making it uncertain whether the costs incurred can be recouped.

(148) Consequently, as an investor, with the application of a regulated regime that restricts the setting of tariffs and conditions in contracts, Gate would incur asymmetric risks that could result in the actual anticipated return falling below the capital costs.

(149) Gate submitted a risk assessment report for the planned extension prepared by a consultant as a basis for Gate’s analysis[17]. The report includes an analysis of the profitability of the Gate extension using the internal rate of return over the period 2023-2046 using different assumption for the share of booked capacity in total capacity (4 bcm), provided by Gate. The analysis shows that the internal rate of return (IRR) is extremely sensitive to booking utilisation. While the IRR is [redacted] in a scenario with full utilisation, the IRR drops significantly as utilisation decreases. If booking utilisation falls below around [redacted], the IRR becomes negative.

(150) Finally, ACM in its opinion referred to in recital (12) stresses that Gate competes with LNG facilities in the vicinity, including facilities in Belgium and Germany. Most of those facilities are exempt from regulation. ACM considers it plausible that this competition has a disciplining effect on Gate and requires Gate to apply market-based rates and conditions.

(151) In the notified exemption decision, the MCE agrees with the analysis presented by Gate and considers it meets the criterion laid down in Article 36(1), point (b), of Directive 2009/73/EC according to which the risk of the investment required for the extension is such that the extension will not take place unless an exemption is granted.

(152) The assessment of the criteria related to the level of risk laid down in Article 36(1), point (b), of Directive 2009/73/EC requires assessing whether the duration of the exemption is justified in view of the risks related to the project.

(153) For such an assessment the relevant Guidance referred to in recital (140) specify that contractual arrangements should be considered, and that the duration of the exemption should be equal to or less than the expected period to recover the cost of the new infrastructure. As regards the contractual arrangements this means that contracts that will be concluded (and their term) should be considered and be viewed in conjunction with other LNG projects with which Gate competes and the regime that applies to them.

(154) The MCE is of the opinion that Gate has sufficiently substantiated the need for the requested exemption period of 20 years.

(155) The exemption is requested for a period of 20 years, from 1 October 2026 to 30 September 2046. According to Gate an exemption for a period of less than 20 years would entail too many risks, with the result that no positive investment decision could be taken.

(156) Gate has received and accepted bids by BP and Petro China for the full duration of 20 years, for which the exemption is requested. Both bids are conditional on the granting of the exemption.

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17 Risk assessment for the planned extension of the Gate terminal - Economic analysis commissioned by Gate terminal B.V., Frontier Economics, 14 NOVEMBER 2022.

(157) Gate stresses that it competes with neighbouring terminals, particularly in Germany, for which exemptions have also recently been granted for periods of 20 years. If Gate were granted an exemption for a shorter period, there is a risk that customers wishing to book that capacity for a long period would switch to another terminal. According to Gate, the increasing number of LNG projects in Europe increases the likelihood of this risk materialising.

(158) As regards the second aspect, namely the duration of the exemption should be related to the expected payback period of the new infrastructure, according to Gate the positive business case for extending the LNG terminal is based on a 20-year term and on certainty for that whole period on tariffs.

(159) As pointed out in recital (149), the IRR depends to a very great extent on the use of the booked capacity over the total planned duration of 20 years. The maximum forecast IRR would be [redacted]. If the capacity utilisation rate falls below [redacted], the IRR turns negative. The contracts that Gate has concluded with customers to the extension of the LNG facility have a term of 20 years.

(160) Based on the foregoing, it should be considered that the level of risk attached to the investment is such that the investment would not take place unless the exemption is granted.

5.9. Separation of the new infrastructure from the system operator ('Unbundling requirement')

(161) 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 operators in whose systems that infrastructure will be built.

(162) The extension of the LNG facility will be connected to the national gas transport system. This national gas transport system is owned by GTS, the national gas transport operator.

(163) As pointed out in recital (1), Gate is a joint venture of Vopak (50% shareholder) and Gasunie (50% shareholder).

(164) While GTS is a 100% subsidiary of Gasunie, GTS does not own the LNG facility.

(165) To ensure that the unbundling requirement is fulfilled throughout the exemption period, the notified exemption decision also contains the following two conditions:

(a) Gate shall ensure that ownership of the extension of the LNG facility is and remains independent of GTS during the exemption period;

(b) in terms of its legal structure, Gate should be separate from and also act independently in all other respects from GTS.

(166) The unbundling requirement laid down in Article 36 (1), point (c) of Directive 2009/73/EC is therefore met.

5.10. Charges must be levied on users of the infrastructure

(167) Article 36(1), point (d) of Directive 2009/73/EC specifies that charges must be levied on users of the infrastructure.

(168) In the exemption request, Gate stressed that it is essential for Gate that charges can be levied on customers for the services provided. Gate already levies charges at its existing LNG terminal. In addition, the notified exemption decision contains a

condition that Gate must charge tariffs from all users of the extension of the LNG facility.

(169) Gate further explains the commercial process which, according to Gate, will result in charges and conditions in line with the market. In particular, Gate points to the bidding conditions and the throughput agreement to which customers have to commit. Those bidding conditions, which are attached to the exemption request, state that Gate will charge EUR 12.5 million per bcm for the additional capacity. This is the same as the price that Gate already charges for the LNG facility.[18]

(170) Therefore, the requirement to levy charges as set out by Article 36 (1), point (d) of Directive 2009/73/EC is fulfilled.

5.11. Impact on the internal market and the regulated system to which the infrastructure is connected

(171) Article 36 (1), point (e) of Directive 2009/73/EC states 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.

(172) The extension will improve the functioning of the internal gas market and contribute to the diversification of gas imports as it makes new capacity available, which enables new market actors to access the Union gas market.

(173) Furthermore, the extension should not compromise the regulated system to which it is connected.

(174) The LNG facility is already connected to the GTS gas transport system. Correspondence between Gate and GTS from November 2022 shows that Gate has informed GTS of the intention to expand the capacity by 4 bcm per year. GTS indicates that relatively limited investments will be made so that as much entry capacity as possible is made available as quickly as possible in the regions concerned.

(175) MCE concludes that the extension can in principle be accommodated by GTS through optimal use of transport capacity and relatively limited investments. Consequently, MCE sees no reason to assume that the extension of the LNG facility will be detrimental to the effective functioning of the gas transport system.

(176) The ACM endorses that conclusion in its opinion referred to in recital (12) and assumes that investments by GTS are likely to be relatively limited. Therefore, the risk of unnecessarily high tariffs for other users of the national gas network is small.

(177) It can therefore be concluded that the exemption is not detrimental to the effective functioning of the internal gas market, or the efficient functioning of the regulated systems concerned. The two sub-criteria listed in Article 36(1), point (e), of Directive 2009/73/EC are thus fulfilled.

5.12. Application of State aid rules and competition law

(178) Any plan to grant State aid through public funds, including Union structural funds, to the extension is subject to the notification requirements set out in Article 108 of the Treaty.

(179) 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

[18] www.gateterminal.com/en/commercial/tariff/.

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 and the exemption under Article 36(1), points (a) and (e), of Directive 2009/73/EC are not necessarily identical to the criteria used to make an assessment under Article 101 or 102 of the Treaty or Council Regulation (EC) No 139/2004[19].

6. CONCLUSION

(180) In the light of the foregoing an exemption should be granted to Gate in accordance with Article 36 (9) of Directive 2009/73/EC. The MCE shall inform the Commission about the final exemption decision pursuant to Article 36 (9) Directive 2009/73/EC.

HAS ADOPTED THIS DECISION:

Article 1

Subject to the second paragraph, the exemption decision issued by the Dutch Minister for Climate and Energy Policy to Gate on the extension of its LNG terminal and notified to the Commission on 17 May 2023 is approved.

The notified exemption decision shall contain an expiry date taking proper account of Article 36(9), fifth subparagraph, of Directive 2009/73/EC.

Article 2

This Decision is addressed to the Dutch Minister for Climate and Energy Policy, Postbus 20401, 2500 EK Den Haag, the Netherlands.

Done at Brussels, 17.7.2023

For the Commission
Kadri SIMSON
Member of the Commission

CERTIFIED COPY
For the Secretary-General

Martine DEPREZ
Director
Decision-making & Collegiality
EUROPEAN COMMISSION

[19] Council Regulation (EC) No (OJ L 24, 29.1.2004, p.1).