



Brussels, **XXX**
[...] (2015) **XXX** draft

COMMISSION DECISION

of **XXX**

on waiver of the exemption from third party access and tariff provisions granted for an LNG terminal to OLT Offshore LNG Toscana S.p.A pursuant to Article 22 of Directive 2003/55/EC

Only the Italian 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 ("Directive 2009/73/EC")¹, and in particular Article 36(9) thereof,

Whereas:

1. PROCEDURE

1.1. The OLT Offshore LNG Toscana Terminal

- (1) The OLT Offshore LNG Toscana Terminal ("the LNG terminal") consists of the conversion of an LNG carrier into a floating regasification terminal which transforms the liquefied natural gas back to its normal gaseous state. The LNG terminal is permanently anchored to the seabed about 22 km off the coast between Livorno and Pisa, Italy.
- (2) The LNG terminal has a maximum authorized regasification capacity of 3.75 bcm/year, a maximum regasification capacity of 15 mcm/day, and a gross storage capacity of 137.500 cubic metres of LNG. It is linked to the mainland via a pipeline of 29.5 km length. The LNG terminal operation started on 20 December 2013. However, due to low demand on the Italian market, no deliveries by LNG tankers were made at the terminal between 20 December 2013 and 3 September 2014.²

1.2. Initial exemption procedure 2009

- (3) By Decree of 28 August 2009 ("the 2009 Decree") the Italian Ministry for Economic Development ("the Ministry") has decided to exempt an offshore LNG terminal to be established by OLT Offshore LNG Toscana S.p.A. ("OLT") from the rules for third party access and tariff regulation as defined in Articles 18 and 25(2), (3) and (4) of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC ("Directive 2003/55/EC") pursuant to Article 22 of Directive 2003/55/EC.
- (4) By letter of 11 December 2009, the Commission requested the Italian authorities to amend the exemption decision, requesting them to impose a condition to the

¹ OJ L 211, 14.8.2009, p. 94–136.

² Reply of the Ministry of economic development of 11 November 2014.

exemption that the exemption will lose validity in case that the terminal is not operational within five years from the Commission approval and no prolongation has been granted by the Commission ("the 2009 Commission request").³ This request was implemented by Decree of 21 December 2009.

1.3. Waiver procedure

- (5) By letter of 14 December 2012 to the Ministry, OLT set out a series of observations on the need for it to waive the exemption granted by the 2009 Decree. By letter of 12 July 2013, OLT then formally expressed its desire to waive the exemption granted by the 2009 Decree. In the same letter, OLT formally requested, pursuant to Article 2.2 of Decision 272/2013/R/gas of the Autorità per l'energia elettrica il gas e il sistema idrico ("AEEGSI"), that the Ministry acknowledges the terminal in question as being an infrastructure that is essential and indispensable for ensuring appropriate security, value for money and competition in energy supplies.
- (6) By Decision 4/2014/I/GAS of 16 January 2014, following the Ministry's request dated 17 December 2013, the AEEGSI expressed a favourable opinion on the request by OLT to waive the exemption granted in the 2009 Decree.
- (7) By Decree of 3 September 2014 ("the notified Decree"), the Ministry accepted the request to waive the exemption with effect from 20 December 2013, the date of entry into operation of the LNG terminal. This Decree was notified to the Commission on 17 September 2014.
- (8) The notified Decree provides that:

1. The request to waive the exemption for the OLT Offshore LNG Toscana SpA regasification terminal granted by the Decree of the Minister for Economic Development of 28 August 2009 is accepted with effect from 20 December 2013, the date of entry into operation of the regasification terminal, which has been identified as essential and indispensable infrastructure for the national gas system that is capable of contributing significantly to value for money and competition in natural gas supply.

2. This waiver must not give rise to undue costs for the natural gas system, as per the rules for similar cases laid down in Article 7 of the Ministerial Decree of 6 August 2010 referred to in the recitals. To this end, as part of its remit the Authority shall in particular verify the relevance of the costs incurred to construct the terminal and their eligibility, including with reference to similar infrastructure projects. In addition - in order to avoid situations of discrimination between the terminal in question and those that will potentially be designated as strategic infrastructure under the Prime Ministerial Decree referred to in Article 3 of Legislative Decree No 93/2011 pursuant to the National Energy Strategy - if the incentives provided for by those measures should, taken together, be less beneficial than what has been granted to the terminal in question, the level of regulatory protection granted to OLT Offshore LNG Toscana SpA shall be adjusted to the provisions made for those items of infrastructure designated in future as being strategic pursuant to the above-mentioned regulatory provisions

³ SG-Greffe (2009) D/11105,
http://ec.europa.eu/energy/infrastructure/exemptions/doc/doc/gas/2009_livorno_decision_it.pdf.
An English language working translation can be found under
http://ec.europa.eu/energy/infrastructure/exemptions/doc/doc/gas/2009_livorno_decision_en.pdf.

3. *This Decree is without prejudice to the actions taken by OLT Offshore LNG Toscana SpA for the purpose of operation under the regulated regime prior to 20 December 2013 and to the decisions taken as regards supply of the peak shaving service by the terminal in question.*

This Decree shall be formally notified to OLT Offshore LNG Toscana SpA and the Authority, as well as to the European Commission pursuant to Article 36 of Directive 2009/73/EC, together with all relevant information.

- (9) By letter of 28 October 2014, the Commission has requested additional information from the Ministry, noting that this resulted in the prolongation of the procedural deadline according to Article 36 (9) Directive 2009/73/EC. The reply to this request for additional information was received on 11 November 2014.

2. COMMISSION'S ASSESSMENT OF THE WAIVER OF THE EXEMPTION UNDER ARTICLE 36 OF DIRECTIVE 2009/73/EC

- (10) As expressly confirmed by the Ministry⁴, the acceptance of the waiver in this case results in the exemption being withdrawn in its full scope and the LNG terminal being fully and irrevocably subject to the regulated system. While the notified Decree does not explicitly provide for the repeal of the 2009 Decree, the Ministry has expressly confirmed that the acceptance of the waiver does, for all intents and purposes, render the 2009 Decree invalid.⁵ Therefore, the national exemption decision can be considered fully withdrawn.
- (11) According to Article 36(9) of Directive 2009/73/EC, the Commission may take a decision requiring the regulatory authority to amend or withdraw the decision to grant an exemption based on its assessment of the criteria listed in Article 36(1). Directive 2009/73/EC does not contain express provisions on the procedure and requirements for withdrawal of exemptions by the national authorities based on accepting a waiver request by the beneficiary of the exemption.
- (12) The termination of the legal effects of a national exemption decision due to a waiver request by the beneficiary of the exemption in principle has no impact on the legal validity of a Commission decision regarding the exemption. To ensure legal certainty and in view of the principle of congruent forms, it appears appropriate to withdraw the previous Commission decision by a new Commission decision. The Commission underlines that fully integrating a previously exempted infrastructure into the regulated system by withdrawing the exemption, in its entire scope and irrevocably, is in principle beneficial for the effective functioning of the internal gas market.
- (13) However, in certain cases, the waiver of an existing exemption may lead to results which differ significantly from the situation of infrastructures directly built and operated under the regulated system, for example by abusively circumventing or violating regulatory rules or seeking to place an excessive burden created by the use of the exemption on the regulated system. It is therefore necessary, before withdrawing a Commission decision on an exemption, to ascertain that the waiver of the exemption does not risk undermining the effective functioning of the internal market by abusing the exemption regime. In particular, the waiver of an exemption may not have as a consequence a shift of an excessive burden created by previously exempted infrastructure to the regulated system.

⁴ Reply of the Ministry of economic development of 11 November 2014, questions 3 to 5 and 8.

⁵ Reply of the Ministry of economic development of 11 November 2014, question 2.

- (14) This risk is also recognized in the notified Decree, which expressly states in its second paragraph that "*This waiver must not give rise to undue costs for the natural gas system, as per the rules for similar cases laid down in Article 7 of the Ministerial Decree of 6 August 2010 referred to in the recitals. To this end, as part of its remit the Authority shall in particular verify the relevance of the costs incurred to construct the terminal and their eligibility, including with reference to similar infrastructure projects.*"
- (15) The Ministry has in its reply to the Commission's request for information⁶ confirmed that AEEGSI will proceed to the same assessment as for other regulated infrastructure, verifying in particular that the costs incurred are actually relevant to the construction and operation of the installation. The Commission understands that thus as a maximum only such costs which would have also been recognized for LNG terminals directly operated as part of the regulated system will be recognized in the calculation of compensation for the LNG terminal. The Commission asks the national authorities to pay particular attention to avoid any overcompensation which could create undue incentives for other infrastructures to initially request an exemption and later request its waiver. The Commission notes in this context that AEEGSI Decision No 272/2013/R/gas excludes previously exempted infrastructure from additional remuneration provided under the regulated system to encourage investments in new LNG terminals.
- (16) Taking into account the above, the Commission finds that no risk for abusing the exemption regime arises from the waiver of the exemption.

3. CONCLUSION

- (17) In light of the above, and having regard to Article 36 of Directive 2009/73/EC, the Commission does not raise objections to the full and irrevocable acceptance by Decree of 3 September 2014 of a waiver request of OLT Offshore LNG Toscana S.p.A, resulting in the invalidity of the Decree of 28 August 2009 granting an exemption for an LNG terminal to OLT Offshore LNG Toscana S.p.A pursuant to Article 22 of Directive 2003/55/EC.

HAS ADOPTED THIS DECISION:

Article 1

Commission request SG-Greffe (2009) D/11105 of 11 December 2009 on the exemption from third party access provisions granted for a new LNG terminal to Olt Offshore LNG Toscana S.p.A. pursuant to Article 22 of Directive 2003/55/EC is hereby withdrawn.

Article 2

This Decision is addressed to the Ministry for Economic Development, Via Molise 2, 00187 Rome, Italy.

⁶ Reply of the Ministry of economic development of 11 November 2014, question 6.

Done at Brussels,

For the Commission

Member of the Commission