

Ministry of Economic Affairs
Mr Mark Frequin
Director-general
P.O. Box 20101
Bezuidenhoutseweg 30
NL – 2500 EC Den Haag
The Netherlands

Subject: Exemption decision concerning Eemshaven LNG-terminal

Dear Mr Frequin,

I am writing to you in relation to the decision of the Minister of Economic Affairs to exempt the Eemshaven LNG-terminal from specific provisions of the Directive for the internal market for gas (Directive 2003/55/EC), of which the Commission was notified on 19 February 2009.

The Commission has now analysed the decision and the additional information. The conclusion of this analysis is that the Commission asks for an amendment of the exemption decision. Further details can be found in the annex to this letter.

Yours sincerely,

for the Commission,

Andris Piebalgs

Annex

Procedure

1. The Dutch Minister of Economic Affairs gave notice in a letter received by the Commission on 19 February 2009 of its decision to exempt Eemshaven LNG terminal from Articles 13, 14a and 15 of the Dutch Gas Law, that implement the rules for third party access to LNG-terminals 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 (hereinafter "the Gas Directive").
2. This decision was presented to the Commission for approval in accordance with Article 22 of the Gas Directive. The exemption is valid for a period of 20 years for the full capacity (maximum 12 bcm/year) of the Eemshaven LNG terminal.
3. The Commission asked the Ministry of Economic Affairs a number of additional questions. The answers were received on 29 April 2009 and are included in the analysis.
4. It should be noted that on 23 July 2007 the European Commission already received a letter from the Dutch Ministry for Economic Affairs that granted an exemption in the framework of Article 22 of the Gas Directive for the Eemshaven LNG Terminal BV, which at that time was being developed by a joint venture of Essent NV and ConocoPhillips Company. However, before the Commission could decide on this exemption it was withdrawn due to the withdrawal of ConocoPhillips from the project.

Description of the project, the parties and the market

5. Eemshaven LNG Terminal B.V. is an indirect subsidiary company of Essent N.V. (50%), Royal Vopak BV (25%), and NV Dutch Gasunie (25%). Gasunie is a Dutch state-owned corporation that owns Gas Transport Services, the Dutch Transmission System Operator. Vopak is a worldwide tank terminal operator, quoted on the Euronext Amsterdam Stock Exchange, that is specialised in the storage and transfer of chemicals and oil products in liquid and gas form.
6. Essent is a supply and distribution company owned by regional and local authorities which is mainly active in the Dutch market, with a share of approximately 25% in the Dutch end-consumer market for gas. The German undertaking RWE AG ("RWE") announced its intention to acquire control of Essent, and the proposed transaction was notified to the Commission under the EC Merger Regulation on 29 April 2009.
7. The maximum physical capacity of the Eemshaven LNG terminal is 12 bcm/year, which is also the capacity for which the exemption was requested. Eemshaven LNG Terminal indicates in its answer of 22 October 2008 to questions by the Ministry of Economic Affairs that, in case Eemshaven LNG makes contracts with multiple customers with multiple types of ships, the storage capacity is not sufficient and the real capacity will be only 10 bcm/year. Eemshaven LNG Terminal may in that case construct an additional storage tank to increase the capacity of the terminal.

8. Capacity of 6 bcm/year will be booked in a contract with Essent Trading, and the rest of the capacity will be made available for other parties and will be offered by means of an open season procedure. However, the exemption decision imposes an obligation that in case demand for capacity as expressed in the open season procedure is larger than the new terminal's capacity, a "first come first served" rule will apply. The investors aim to take the final investment decision in 2010, after which the terminal could be operational in 2014.
9. Eemshaven LNG terminal asks for an exemption from regulated access for third parties within the meaning of Articles 18 and 25(2), (3) and (4) of the Gas Directive, because the investment is only possible based on guaranteed long-term contracts with guaranteed conditions for the full capacity of the terminal.
10. The Minister for Economic Affairs has granted an exemption for the full capacity of 12 bcm/year. The exemption was granted subject to the following conditions:
 - The exemption has a duration of 20 years, in contrast to the period of 25 years which was requested by the applicants;
 - The holder of the exemption applies a use-it-or-lose-it system that is efficient, transparent and non-discriminatory, and that releases the capacity for sale on the secondary market if it is not used at least one month before the planned start of the regasification;
 - The holder of the exemption includes the use-it-or-lose-it system in every Throughput Agreement to be made;
 - The holder of the exemption establishes a procedure that provides the opportunity to all market parties to express interest in contracting capacity in an open and transparent process;
 - The holder of the exemption uses a First Come, First Served allocation mechanism;
 - The holder of the exemption cannot allocate more than 66% of the primary capacity to a party with an economic dominant position on the gas market. For the purposes of this exemption, 'gas market' means: the Dutch gas market consisting of the wholesale market with respect to gas as meant in Article 1, first paragraph, part b, of the Gaslaw;
 - Substantial changes compared to the information provided in the exemption request and the information used in the exemption decision must be reported to the Minister of Economic Affairs without delay.

These conditions are the same as those imposed on two other LNG Terminals situated in the Netherlands, namely the Gate LNG Terminal and the Liongas LNG Terminal, except for the last-but-one condition which is adapted as a result of the changing market circumstances due to several planned and/or constructed LNG-terminals.

11. Total investment costs are estimated at [BUSINESS SECRET], and the yearly operation costs are estimated at [BUSINESS SECRET] of the total investment costs. The expected revenues from throughput contracts amount to approximately [BUSINESS SECRET] per year. Based on an [BUSINESS SECRET] the investment has a payback period of [BUSINESS SECRET].

12. Gasunie and Vopak are together the developers and major stakeholders in Gate LNG Terminal that is currently being developed. Gate LNG Terminal has an exemption pursuant to article 22 of Directive 2003/55/EC for 20 years for the maximum capacity of 16 bcm/year. The capacity in the Gate LNG terminal is booked by Dong Energy, Essent, E.ON Ruhrgas and EconGas OMV (each 3 bcm/year). The terminal is currently under construction but it is possible that the capacity may still be increased.
13. In the Dutch market there is another LNG terminal that has received an Article 22 exemption, to which the Commission did not object, namely Liongas LNG terminal for a maximum capacity of 18 bcm/year. At the moment several parties have concluded initial throughput agreements with a total capacity of 6 bcm/year (EnbW, Eneco and Delta) but as far as the Commission knows construction has not yet started.
14. GasTerra is the dominant party at the Dutch gas wholesale market, with a share of approximately 80%. The degree of concentration of the wholesale market in the Netherlands is however expected to be reduced overall further to the entry into operation of the Gate LNG terminal currently under construction and the planned Liongas LNG terminal which has been granted an exemption. The effect of these terminals on the Dutch gas market is analysed in the report "The effect of an exemption for the Eemshaven LNG Terminal on competition" that is enclosed with the exemption request.

Review of exemption criteria of Article 22(1)

15. Eemshaven LNG terminal is a major project, both in terms of costs and volumes it will handle, considering that the annual gas consumption of the Netherlands is around 40 bcm/year. It therefore qualifies as a "major new infrastructure" within the meaning of Article 22(1) of Directive 2003/55/EC.
16. In relation to the specific conditions of Article 22(1) points (a) to (e) the Commission has taken the following considerations into account.

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

- Enhance Security of Supply:

The project is beneficial to security of supply because it enables the supply of new sources of gas to the Dutch market. Moreover, an LNG-terminal is normally good for security of supply because it creates the possibility to import gas from a wide variety of sources and suppliers, due to the flexibility of LNG.

- Enhance competition in the Dutch gas wholesale market:

According to the plans of Eemshaven LNG Terminal 6 bcm/year will be booked by Essent Trading. This party has no dominant position on the Dutch gas wholesale market and therefore this capacity booking will enhance competition. Since RWE is only a small player on the Dutch market its takeover of Essent has no influence on this analysis.

According to the same plans the remaining capacity of maximum 6 bcm/year will be marketed by Eemshaven LNG Terminal to interested parties (see above). If the

plans of Eemshaven LNG Terminal materialise this new capacity will also enhance competition on the Dutch gas wholesale market.

This remaining capacity will be marketed through an open-season procedure, where all interested parties will be given the possibility to express their interest.

At the moment GasTerra is the major supplier to the Dutch gas wholesale market, either through direct sales through (major industrial) consumers or through resales to suppliers to the retail market. The maximum capacity that a player with a dominant position in the Dutch gas wholesale market (currently GasTerra) can book in the Eemshaven LNG terminal is set by the Dutch exemption decision to a maximum of 66% of the total capacity. According to the Dutch Minister, with reference to a report by The Brattle Group attached to the request for exemption (the "Brattle report"), this is the maximum capacity for which the construction of the LNG-terminal still contributes to the reinforcement of competition. The Brattle report arrived at this conclusion through analysing modifications of the Herfindahl Hirschman index ("HHI")¹ compared to a hypothetical alternative in which the Eemshaven LNG terminal would not be built at all.

The capacity limit must be seen together with the decision regarding the capacity limit in the exemption decision for the Gate LNG terminal. In that exemption decision a condition was imposed that maximum 50% of the primary capacity can be contracted by a party with a dominant position in the Dutch gas market. Moreover, the practical maximum due to already contracted capacity can be not more than 25%. For the Liogas LNG Terminal the exemption decision was granted with the condition that if a dominant party wants to book capacity, the Dutch Minister will impose a limit.²

However, even if the Gate LNG terminal and the Liogas LNG terminal will be built and no capacity in those terminals will be contracted by a dominant party, there will still be one dominant party in the Dutch gas market, namely GasTerra. It is very unlikely that the share of this dominant party in the Dutch wholesale gas market will be less than 50% even if all planned LNG-regasification capacity will be built. Therefore, a limit of 66% does not seem sufficient to limit the position of a dominant party to such an extent as to ensure that the new investment in the Eemshaven LNG Terminal would enhance competition in the Dutch gas wholesale market.

In particular, the decrease in HHI expected in the situation where GasTerra could book an important share of the terminal capacity is very small; moreover, the analysis is based on certain facts and assumptions that may vary before 2014 and during the following 20 years.

Furthermore, the question whether or not a new infrastructure will enhance competition cannot be analysed by referring to HHI modifications alone. Even if under a scenario in which GasTerra acquires up to 66% of the new terminal's

¹ The Herfindahl Hirschman index is a measure of the concentration level in a certain market, relating the size of companies to the size of the market.

² Liogas has presented a list with potential customers to the Ministry of Economic Affairs, and the condition for the Minister to grant the exemption was that, in case a contract will be signed with a company that is not on the list, she will still be able to impose a maximum.

capacity, the HHI should still mathematically indicate a positive effect on competition, it cannot be excluded that in such a scenario, GasTerra's dominance would remain unchanged or even be reinforced. Second, under this scenario, the chances for new entrants to acquire import capacity for LNG and, hence, bring more gas or gas from diversified sources into the Dutch wholesale market would be significantly limited.

If however GasTerra should not be considered dominant any more (for example as a consequence of the construction of other planned LNG terminals such as Gate or Liongas), any condition attached to the exemption decision that would prevent a dominant player to acquire more than 50% of the new terminal's capacity would obviously not apply to GasTerra any more.

In addition, for the allocation of the new terminal's primary capacity, the exemption decision provides for a "first come first served" principle in case demand for capacity exceeds the new terminal's planned capacity. This does not appear to be in line with a transparent and non-discriminatory open season procedure. In case the new terminal's capacity does not match demand, the capacity sold to third parties (after capacity bookings by the project sponsors) should be allocated according to a procedure that guarantees non-discrimination of participants to the open season, within any reasonable deadlines set by Eemshaven LNG Terminal.

Therefore, it is not established that the planned Eemshaven LNG terminal will enhance competition in the Dutch gas wholesale market, unless a player with a dominant position in this market is not allowed to acquire more than 50% of the terminal's capacity, and capacity not booked by the project sponsors is allocated according to a procedure that guarantees the non-discrimination of all third parties participating to the open season.

– validity of the exemption decision for investments to the benefit of competition:

The agreed legislation that will replace the current Gas Directive, as agreed by the European Parliament on 22 April 2009, will establish maximum terms for the validity of exemption decisions. In case a project has not started construction after two years, and is not operational after five years, the exemption decision is annulled.³ This proposal aims to prevent projects that will not be built from retaining their exemption and thereby hindering competing projects. In exemption decisions that the Commission has received since the publication of its proposals it has always guaranteed that the exemption decision includes such a maximum duration of validity.⁴

The exemption decision of the Minister for Eemshaven LNG does not impose a maximum term for the terminal to be operational. The Commission asked the Ministry about this in its letter of 30 March. The Ministry of Economic Affairs answered that such a condition was not imposed for the Liongas LNG Terminal and the Gate LNG Terminal and therefore was not imposed for Eemshaven LNG either.

³ See COM(2007)0529: http://ec.europa.eu/energy/gas_electricity/third_legislative_package_en.htm

⁴ See the following webpage for more information on these decisions: http://ec.europa.eu/energy/infrastructure/infrastructure/gas/gas_exemptions_en.htm

The Commission notes in this respect that the current competitive situation is different from the one existing when the exemption decisions for Liongas and Gate LNG Terminals were taken. Indeed, this exemption decision will be the third for an LNG terminal in the Netherlands. The risk that it will not be built increases as substantial demand for LNG capacity is met already by the other terminal(s). Locations for LNG-terminals at the same time become scarcer and therefore sufficient guarantees are needed so that the exemption decision itself will not block other investors.

The Commission has not made known any objections to the Liongas exemption decision and such a condition has not been expressly imposed. Mr Ruete, Director-General for Energy and Transport, stated however in his letter to the Ministry of Economic Affairs that this assumes that the exemption will cease to apply if the project is not operational within a certain period. In the case of GATE, such a condition has not been imposed but this terminal is currently already being built. The Commission is therefore of the opinion that such a condition does not discriminate against other exemptions granted in the Netherlands if the same period between the exemption decision and realisation of the investment is imposed on Eemshaven LNG Terminal.⁵

Based on the arguments above condition (a) is not fully met.

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

Three criteria are important in assessing the level of risk:

- The time needed to amortise the investment costs:

Financial analysis attached to the exemption request shows that the period for Eemshaven LNG Terminal to earn back the investment is [BUSINESS SECRET], with the ex ante estimated [BUSINESS SECRET].

- Spreading of risk and upstream contracts for supply of LNG:

The regulatory regime as defined in the Dutch Gaslaw prescribes that there is a regular control of the contract terms and conditions for all regulated infrastructure. Such regular control takes place at intervals that are shorter than the period within which the Eemshaven LNG Terminal earns back the investment.

The risks of the project can, as far as Essent is concerned, be shared with the supply subsidiary that contracts the capacity and markets the imported LNG. This does not apply to the other investors, and revenues from the capacity throughput are the only revenues for those parties.

Therefore, these investors will need long-term contracts for the capacity of the Eemshaven LNG Terminal to ensure a guaranteed income for the operation of the terminal. Such guarantee on future revenues is also needed to attract external financing.

⁵ The exemption decision for Liongas was taken in 2007 and in the letter from Mr Ruete to the Ministry of Economic Affairs it is assumed that the decision will cease to apply if the terminal is not operational in 2015.

The customers of the terminal need long-term throughput contracts for the capacity to make long-term supply contracts. Without long-term throughput contracts for the capacity in the terminal that provide certainty with respect to the access conditions, the producers will not make long-term supply contracts because they need this certainty of a possibility to market the gas and of the conditions attached to it before they will invest in LNG-production capacity.

The regular control of the contract terms and conditions and the possibility that they are changed during the period of the throughput contract therefore create a risk that prevents the conclusion of long-term throughput contracts.

Without long-term throughput-contracts that guarantee certainty on access terms and conditions the Eemshaven LNG Terminal will not be built.

Based on these criteria condition (b) is met.

- (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*

Essent, Gasunie and Vopak establish together, indirectly via 100% affiliated companies, a new company called Eemshaven LNG Terminal B.V. The network operator of the system in which the terminal will be built is Gas Transport Services, a 100% affiliate of Gasunie, that is however legally separated from Eemshaven LNG Terminal B.V. and the affiliated company of Gasunie participating in it (namely Gasunie LNG Holding B.V.). Therefore condition (c) is met.

- (d) *charges are levied on the users of the infrastructure*

Eemshaven LNG Terminal is a separate company with its own profit and loss account, and has its only revenues from payment for the use of the services of the terminal. In its request Eemshaven LNG states that it will conclude 'throughput agreements' with all parties and that it will fix tariffs in the negotiations with potential customers, that will consequently apply to all. Condition (d) is therefore met.

- (e) *the exemption is not detrimental to the effective functioning of the internal gas market or the efficient functioning of the regulated system to which the infrastructure is connected*

The exemption will not be detrimental to competition or the efficient functioning of the gas market, because the exemption will not distort competition between different terminals, and because the exemption ensures that through long-term throughput contracts the costs of non-use of the terminal are covered by parties that are active in the competitive gas market. Moreover, a Use-It-Or-Lose-It system is put in place to prevent hoarding of the terminal capacity to hinder competition.

Besides that, the exemption will not be detrimental to the effective functioning of the Dutch gas transmission network. The infrastructure does not compete with the regulated infrastructure regarding the transport of gas and will therefore not lead to a reduction in the use of the regulated infrastructure. The increase in use of the regulated infrastructure due to a new route of supply and possible throughput to other countries can lead to higher tariff costs, but this possible increase in tariffs is to

the benefit of competition and security of supply for the Dutch consumer because the Dutch transmission system is based on a transport system where entry and exit capacity are booked separately and all the gas that arrives in the Netherlands can therefore be supplied anywhere in the Netherlands, as also stated in the letter from the Minister of Economic Affairs to the Dutch Parliament of 29 March 2007.

Based on the evaluation above condition (e) is met.

Conclusion

17. For the reasons stated above the Commission is of the opinion that the decision to grant Eemshaven LNG terminal an exemption from Articles 18 and 25(2), (3) and (4), needs to be amended with a view to imposing (a) a condition ensuring that a player with a dominant position in the Dutch gas wholesale market may not acquire more than 50% of the terminal's capacity, (b) a condition that capacity not booked by the project sponsors should be allocated according to a procedure that guarantees the non-discrimination of all third parties participating in the open season and (c) a condition with respect to the maximum duration of the validity of the exemption.
18. The Minister of Economic Affairs is therefore requested to include the following condition in her exemption decision:
 - (a) The holder of the exemption shall not allocate more than 50% of the primary capacity to a party with a dominant position on the Dutch wholesale gas market;
 - (b) The capacity not booked by the project sponsors shall be allocated according to a procedure that guarantees the non-discrimination of all third parties participating in the open season. The allocation shall take place within any reasonable deadlines set by Eemshaven LNG Terminal.
 - (c) The exemption will be annulled if Eemshaven LNG Terminal is not operational in 2014. In case Eemshaven LNG Terminal is not operational within this period, it can be extended by the Commission, if it decides that delay is due to major obstacles beyond the control of Eemshaven LNG terminal.

Based on Article 22(4), subparagraph 3, of Directive 2003/55/EC, the Commission hereby requests the Ministry of Economic Affairs to amend its exemption decision according to this paragraph and inform the Commission thereof, within four weeks of receipt of this letter.

