EUROPEAN COMMISSION

Brussels, XXX
[…](2012) XXX draft

COMMISSION DECISION

of XXX

on the exemption of LNG Terminal in Porto Empedocle, Italy, from the internal market rules on third party access and of tariffs according to Article 36 of Directive 2009/73/EC.

(Only the Italian text is authentic)

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THE EUROPEAN COMMISSION,

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

Having regard to Directive 2009/73/EC[1], and in particular Article 36 thereof,

Whereas:

1. Procedure

(1) On 30 September 2011, the Ministry of Economic Development of Italy ("Ministry" or "notifying authority") adopted a Decree ("the Decree") granting Nuove Energie Srl (the "promoter"), a company jointly owned by Enel Trade SpA[2] (90%) and by Si Gas Srl[3] (10%), with headquarters in Porto Empedocle (Agrigento, Italy), a temporary exemption from the obligation to provide (regulated) third party access to a planned Liquefied Natural Gas Regasification Terminal ("LNG Terminal") facility at Porto Empedocle in accordance with Article 1, paragraph 17 of Law No. 239/2004 as amended by Article 33 comma 1 of Legislative Decree No. 93/2011, for 100% of the capacity and for 25 years starting from the effective date of the commissioning provided that at least 20% of the regasification capacity is made available to all interested parties via a public procedure that is adequately publicised internationally, in line with the procedures approved by the Regulatory authority and consistent with Article 17 of Regulation (EC) No 714/2009 [*sic*[4]]. The exemption Decree also covers the tariff regime.

(2) This Decree was notified to the European Commission by letter dated 28 November 2011 and received by the registry of the European Commission on 7 December 2011.

(3) On 12 December 2011, the Commission published a note informing the public of the notification and inviting third parties to send any observations they may have on this subject until 31 December 2011. No such observations were received.

(4) On 6 January 2012, the Commission asked the Ministry for additional information. On 25 January 2012, the Commission sent a further request for information to the Ministry. The Ministry responded by letter dated 22 February 2012 and received by the registry of the European Commission on 27 February 2012. This request for

[1] OJ L 211 of 14.8.2009, p.94.

[2] 100% ENEL Group.

[3] 100% Siderurgica Investimenti, which also owns Alfa Acciai group. The group operates a steel mill in Sicily.

[4] The correct reference should in fact be Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing regulation (EC) No 1775/2005, OJ L 211, 14.8.2009, p. 36–54.

information was supplemented by an email received by the Commission services on 9 March 2012.

(5) On 13 February 2012, the Commission services held a meeting with the Ministry and the promoter to discuss the case.

2. Description of the project

(6) The planned Porto Empedocle LNG Terminal will be located in Italy, in the Sicily Region, cadastral area of Porto Empedocle, for which the promoter received a thirty-year concession. It will cost approximately [**Business secret**] and will consist of:

– two underground storage tanks of 160.000 of m^3 of capacity each,

– vaporiser pumps and other treatment facilities required to process LNG and

– a breakwater with mooring jetty and unloading arms.

(7) The LNG Terminal at Porto Empedocle will offer:

– a nominal yearly regasification capacity of 8 billion m^3;

– will be able to receive LNG tankers up to 155.000 m^3 of capacity.

(8) The LNG Terminal will be able to inject the gas at the standard grid pressure (around 70 bar) and will be connected to the transmission system operated by SnamReteGas by means of a pipeline section specifically built by SnamReteGas pursuant to the connection contract signed with the promoter.

(9) Construction works are planned to start [**Business secret**].

(10) The LNG Terminal will be owned by Nuove Energie srl, a joint stock company with its registered office at via Gioeni 63, 92013 Porto Empedocle (AG), Italy[5]. As said above, Nuove Energie's share capital is jointly owned by Enel Trade SpA (90%) and by Si Gas Srl (10%).

3. The relevant applicable rules

(11) The national legislation implementing Directive 2009/73/EC is Decree-Law n. 93 of 1 June 2011 which inter alia amends Article 17 of Law n. 239 of 23 August 2004.

(12) Decree of 11 April 2006 by the Minister of Productive Activities sets forth the procedure for granting exemption from Third Party Access provisions; namely Article 6(3) contains a blanket use-it-or-lose it (UIOLI) provision. The rules for the practical implementation of such provision are stated by AEEG resolution n. 168/06 of 31 July 2006 and n. ARC/gas 2/10 of 21 January 2010.

(13) Decree of 28 April 2006 by the Minister of Productive Activities sets forth rules and conditions for access to national natural gas infrastructures. Inter alia the longest allowed regasification contract is of five years for most users, including electricity generators and of ten years for specific cases.

4. The notified decision

(14) The notified decision issued on 30 September 2011 (hereinafter also "the exemption decision") grants Nuove Energie srl an exemption from third party access and from rules on tarification for 25 years and for 100% of the capacity under the following conditions:

[5] Company Registration Number and Tax Identification Number: 04002520874.

(15) that at least 20% of the regasification capacity is made available to all interested parties via a public procedure that is adequately publicised internationally, in line with procedures approved by the Regulatory Authority and consistent with Article 17 of Regulation (EC) No 714/2009 [sic[6]];

(16) that a minimum fee is set for access to the capacity that is subject to the allocation procedures open to all interested parties;

(17) and that any revenue above and beyond this fee is invested in measures to reduce the cost of gas for final customers.

(18) The exemption decision does not prevent the promoter from participating in the allocation procedure for the non-fully exempted 20% of the terminal's capacity on equal terms with other third parties. It makes an explicit reference to the use-it-or-lose-it ("UIOLI") provisions included in the above mentioned Decree of 11 April 2006, imposing on the promoter a specific obligation to incorporate them into its regasification code which shall be approved by AEEG so as to ensure that third parties can, efficiently and under transparent and non-discriminatory conditions, have access to unused capacity.

(19) According to the Italian legislation the so-called sunset clause applies, according to which the exemption shall become null and void if work on the site does not commence within two years of the date of the exemption and if the regasification terminal is not operational within five years of the same date. The exemption may be extended, following approval from the European Commission, if any delay is due to significant obstacles outside the control of the promoter.

(20) The Ministry clarified that the exemption provided by the Decree also covers the tariff regime.

5. Market outlook

(21) Italy's consumption of natural gas is about 80 billion m³ (hereinafter also "bcm") per year. It grew steadily for the last twenty years, but the trend was disrupted by the economic crisis (2008: 85 billion m³; 2009: 78 billion m³; 2010: 83 billion m³; 2011: 78 billion m³)[7].

(22) Future natural gas consumption is expected to be stable until 2014 and then grow again to reach 95 bcm in 2020 but this will depend from the robustness of economic recovery.

(23) In 2010, natural gas was imported from Algeria (37.1%), Russia (29.9%), Libya (12.5%), Qatar (9.4%), the Netherlands (5.5%), Norway (4.9%) and others (0.8%). Imports (75.5 bcm in 2010) were supplemented by indigenous production (8.3 billion m³ in 2010); major importers have been the ENI Group with 28.5 billion m³, followed by the Edison Group with 13.5 billion m³.[8] ENEL imported around 10 billion m³ but only through LNG and pipeline infrastructures of the incumbent ENI. Contrary to ENI and Edison, ENEL has no own import facilities.

(24) The AEEG reports that in 2010, import capacity grew by about 5 bcm/year following ENI's improvements to the gas pipelines for imports from Austria (TAG) and Libya

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6 The correct reference should in fact be Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing regulation (EC) No 1775/2005, OJ L 211, 14.8.2009, p. 36–54.

7 Provisional source: Ministero dello sviluppo economico - Dipartimento per l'Energia – DGSAIE.

8 AEEG 2011 annual report pages 122 and 127-128.

(Greenstream). The increased capacity at the LNG regasification terminal at Rovigo – which only began operating in May 2009 – was another contributing factor.

6. Relevant markets

(25) In line with the Commission's previous decision practice, it is possible to distinguish between the transport infrastructure related markets, such as gas transport services[9], on the one hand and the gas supply markets, on the other hand.

6.1 Gas transport infrastructure related markets in Italy

(26) The pipeline infrastructure for shipping gas into Italy consists of the following pipelines: TTPC/TMPC, Greenstream, TENP/Transitgas and TAG. In the antitrust ENI case[10] the Commission considered that ENI holds a dominant position on the market for the transport of natural gas to and into Italy by means of its ability to effectively control and influence the usage of all viable international pipelines for shipping gas into Italy and the Panigaglia LNG Terminal (with a nominal yearly capacity of 3.5 billion m³).[11] Notably, ENI controls (or jointly controls) all those viable network infrastructures and owns the transport companies holding significant capacity/use rights on those import pipelines. Pursuant to the Commission's investigation and ENI's commitments, ENI has recently divested its shareholding in companies related to the three international pipelines TAG, TENP and Transitgas; nonetheless it has retained significant transportation rights on these infrastructures and has also booked a substantial amount of available capacity on a long-term basis. According to the promoter, ENI controls in practice over 70% of the import capacity.

(27) As regards LNG terminal infrastructure in Italy, besides Panigaglia[12] (North-West of Italy), only the offshore LNG Terminal in Rovigo[13] (North-East of Italy) is in operation. The Rovigo LNG Terminal has a nominal yearly capacity of 8 billion m³, 80% of which is allocated to Edison Spa; it is owned by ExxonMobil (45%), Qatar Petroleum (45%) and Edison group (10%) and operated by Edison Group with a nominal yearly capacity of 8 billion m³.

(28) AEEG (the national regulatory authority, "NRA") annual report mentions a total of nine LNG Terminals, including the one under consideration, in different stages of authorisation and/or construction[14] for a total regasification capacity of 88.75 billion m³. A floating LNG Terminal offshore Livorno[15] promoted by the E.ON group should become operational by the end of 2012; the promoter of LNG Terminal in Brindisi[16] has recently withdrawn from the project.

Gas Supply Markets

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[9] See e.g. cases IV/493 – Tractebel/Distrigas II, paragraph 27 et seq.; COMP/M.3410 - Total/Gaz de France, paragraphs 15-16; COMP/M.3696 – E.ON/MOL, paragraph 97.

[10] Case COMP/39315 *ENI*. See IP/10/1197, 29.9.2010.

[11] Panigaglia is owned and operated by GNL Italia Spa, which holds all capacity rights. GNL Italia is wholly-owned by Snam Rete Gas Spa, which is controlled by ENI, holding 50.03% of its shares, the remaining ownership being dispersed. In 2007 the Terminal imported 2.4 bcm of gas into Italy corresponding to around 3% of national consumption.

[12] Panigaglia operates since 1971. Access and tariffs are regulated.

[13] Rovigo is exempted for 80% of the capacity for 25 years.

[14] The LNG Terminals in Rovigo, Livorno and Brindisi have been exempted the capacity and the duration required by the proponents. It has to be pointed out that until the implementation of the Third Energy Package in 2011, according to the Italian legislation exemption from the third party access could be granted for minimum 80% of the capacity and minimum 20 years.

[15] Livorno is exempted for 100% of the capacity for 20 years.

[16] Brindisi was granted an exemption for 80% of the capacity for 20 years.

(29) Within the gas supply markets, it is possible to distinguish between markets for gas sales to wholesalers and to final customers. In line with previous practice, the wholesale market concerns sales to suppliers who intend to resell gas to others wholesalers or downstream suppliers. Within the market for final customers, three separate markets can be distinguished, namely supplies of natural gas to power plants, to (large) industrial customers and to small customers (households and commercial customers).[17]

(30) Competition in the wholesale trade markets in Italy is intensifying, albeit slowly, as witnessed by the progressive reduction in the share held by the three largest companies (ENI, ENEL Trade and Edison), who together covered 42% of total demand in 2010, compared to 49% in 2009[18]. . This trend is expected to continue in particular also because in December 2010 a (virtual) gas exchange started to operate in Italy and gas can now be traded both on a day-ahead (MGP-GAS) and intraday (MI-GAS) basis. Nonetheless, ENI continues to maintain a strong market position in these markets. In the ENI case, the Commission concluded that gas wholesale suppliers in Italy do not have the ability and economic incentives to exercise an effective competitive pressure on ENI, as they do not have access to a sufficient degree of independent gas imports or domestic production.

(31) At the retail level, by January 2011 there were 390 licensed suppliers, 338 of them were active. This high number is due to the fact that utilities drew licenses to supply their local population. In 2010 the 20 largest suppliers together sold 72 billion m³ to final consumers with ENI Group holding the strongest position (24.7%) followed by ENEL (13.2%), Edison (10%) and GdF Suez (6.2%). 30.4% of total gas supplies went to domestic customers, 8.2% to commerce, 30.2% to industrial users and 30.7% for electricity generation.

7. Assessment of the conditions for an exemption

(32) Given that, as of the date the present decision is adopted, Directive 2003/55/EC has been repealed, the Commission services must apply the substantive provisions of Article 36 of Directive 2009/73/EC. This is irrespective of the fact that the promoter submitted its application to the Italian authorities in October 2010, i.e. before the transposition date foreseen by Directive 2009/73/EC and before the national measure implementing that Directive was adopted on 1 June 2011, and irrespective of the fact that the national exemption procedure was conducted and brought to an end under the regime of Directive 2003/55/EC.

(33) The Commission has therefore reviewed the notified decision as well as all supplementary documents and information submitted by the notifying authority in light of the provisions of Article 36 of Directive 2009/73/EC, the Commission staff working document on New Infrastructure Exemptions (SEC(2009)642 final) as well as the decision making practice of the Commission in relation to relevant legal basis.

7.1 Application of Article 36 to Porto Empedocle

(34) The planned new LNG regasification terminal at Porto Empedocle qualifies as a major new gas facility within the meaning of Article 36 (1) of Directive 2009/73/EC given that it will offer a nominal yearly regasification capacity of 8 bcm and will cost [**Business secret**].

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17 See e.g. cases COMP/M.3440 - EDP/GDP/ENI, COMP/M.3696 - E.ON/MOL and COMP/M.3868 - DONG/Elsam/Energi E2.

18 Source: AEEG.

7.2 Conditions for an Exemption according to Article 36

7.2.1 The investment must enhance competition in gas supply and enhance security of gas supply - Article 36 (1) (a) of Directive 2009/73/EC

(a) Enhancement of competition

(35) According to Article 36 (1) (a) of Directive 2009/73/EC the investment must enhance competition in gas supply. For the analysis of this condition, the likely positive and negative effects of the investment on competition need to be analysed and balanced. Only if the positive effects of the investment outweigh the negative effects, an exemption under Article 36 can be granted.

(36) The notified decision concludes that the construction of Porto Empedocle LNG Terminal will overall enhance competition as it will encourage the development of competition on the Italian gas market and the European internal gas market. The notifying authority considers that this new point of entry for LNG in Italy, besides Panigaglia and Rovigo, and in addition to the Livorno LNG Terminal under construction, will increase the flexibility and security of operation of the Italian natural gas system and will increase the availability of gas not only in Italy but, due to interconnection of the Italian gas transport network with other EU Member States' gas transport networks, in Europe as a whole[19].

(37) The notifying authority considers that the project's dimension is adapted to market demand. In the context of an assessment of the market interest in the sense of Article 36 (6) 3rd subparagraph of Directive 2009/73/EC, the notifying authority has estimated that this new Terminal would sufficiently meet market demand by an examination of the degree of use in the last three years of the regasification terminals already in operation in Italy (i.e. the "GNL Italia" in Panigaglia and the offshore "Adriatic LNG" in Rovigo) and by taking into consideration the actual dimensions of the future terminal. With regard to the former point, at the Panigaglia Terminal, around 40% of the annual available firm regasification capacity has not been allocated for the 2012/2013 gas year while at the Rovigo Terminal around 25% of the non-exempted capacity (amounting to 0.4 bcm) has not been allocated for the 2011/2012 gas year.

(38) As regards the proper sizing of the Porto Empedocle terminal, the notifying authority submits that the size of the facility could not have been bigger due to environmental reasons, to the size of the available ground and to logistic reasons related to port infrastructure. The notifying authority sees little risk of non-allocation of regasification capacity to third interested parties and is confident that any interested company would find sufficient regasification capacity as long as some of the projects currently being planned or built (see above Section 6.1.) will become operational[20].

(39) In principle, the Commission agrees with the notifying authority that the construction of Porto Empedocle will likely have a positive effect on the Italian gas markets. Based on the information provided by the notifying authority, ENEL Group, the parent company of Nuove Energie srl, is not a dominant undertaking in any of the Italian gas markets and currently does not own or operate any LNG regasification terminal or

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19 According to Snam 2012-2015 strategic plan (SNAM is the holding controlling SnamReteGas, the Italian TSO) reverse flow on the TENP and Transitgas pipelines will be available by 2015, allowing to export up to 13 million m³/day from Italy to Switzerland and France and Germany, while TAG pipeline will allow exporting up to 13 million m³/day from Italy to Austria and Central EU.

20 In this regard, however, it should be noted that at least one of those projects, i.e. the Brindisi LNG, has already been dropped.

natural gas import facility in Italy. Including the capacity of the planned Porto Empedocle LNG terminal, the market share of Nuove Energie srl would remain below 10% of total Italian gas imports, while Enel's share [**Business secret**], which does not as such raise competition concerns. Moreover, the construction will help ENEL to secure its own import infrastructure for gas and ENEL will therefore be able to compete more effectively with the incumbent ENI. Due to strong correlation between wholesale and retail gas prices in Italy, an improvement of the competitive structure at the wholesale level will most likely also have positive effects downstream at the retail level.

(40) As regards the destination of the imported gas, the notifying authority assumes that ENEL will maintain its current distribution of imported gas once Porto Empedocle becomes operational. [**Business secret**].

(41) However, the investment is likely to spur competition at the gas wholesale trade and retail level in Italy only as long as the exemption ensures that it will not favour players with a significant degree of market power, e.g. through the possibility for those undertakings to receive regasification capacity on a long term basis.[21] In this regard, the exemption Decree does not foresee any provision limiting the amount of exempted capacity that any undertaking with a significant degree of market power can negotiate with Nuove Energie or the amount of capacity that any such undertaking can book through the market allocation procedure that is foreseen with respect to 20% of the Terminal's capacity[22].

(42) In the present case, the Commission considers that the positive effects on competition expected from the investment would be reduced in case an undertaking with a significant degree of market power would reserve a substantial part of the long-term regasification capacity. It is, therefore, necessary to limit the access of such companies, and any affiliated companies, so that they cannot reserve on the long-term basis (i.e. through contracts with duration exceeding one year) a capacity surpassing 0.4 billion m^3/year (i.e. about 5% of the terminal's total capacity, corresponding to 25% of the capacity made available to third parties under the planned public allocation procedure). This restriction should also apply to any undertaking with a market share of more than 40% of the capacity for bringing gas to or into Italy, or in any of the Italian wholesale and retail markets.

(43) As regards the size of the terminal, the Commission has no concerns that the terminal is undersized in view of evidence submitted by the notifying authority and its lacking physical expansion potential. The Commission has no grounds to assume that Porto Empedocle could make competing infrastructure projects less likely. Potential third-party users of the Terminal will be able to indicate their interest in contracting capacity in a transparent and non-discriminatory procedure to be approved and monitored by AEEG with respect to the 20% of the LNG Terminal capacity that will be made available to interested parties.

(b) Enhancement of Security of Supply

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21 Commission Staff Working Paper on exemption of new infrastructures of 6.5.2009, SEC(2009)642 final, paragraph 34.

22 In this latter regard, the notifying authority clarified that the procedure for the allocation of the regasification capacity reserved to third parties would also allow for long-term allocations, including for periods longer than 5 years (which is currently the maximum regulatory period of capacity allocation foreseen for TPA cases).

(44) The notifying authority submits that the availability of LNG from countries in the main gas production areas such as North Africa, West Africa and the Persian Gulf and the increased degree of diversification of the countries of origin of natural gas imported through the terminal will allow Italy to have new natural gas supply sources and thereby improve its security of supply, with benefits for Europe as a whole.

(45) As regards the origin of gas, the notifying authority submits [**Business secret**].

(46) In view of the above, the Commission considers that Porto Empedocle will enhance the security of supply. The terminal will be a new point of entry for LNG into Italy in addition to only two terminals currently in operation. Moreover, this will likely also have a positive impact on the Italian electricity markets which largely depends on natural gas for its production given that over 50% of total electricity generation in 2010 came from gas fired plants.

7.2.2 Exemption must be required in view of the risks involved in the investment - Article 36 (1) (b) of Directive 2009/73/EC

(47) According to the notifying authority, the level of risk associated with the investment is such that the investment would not take place unless an exemption was granted. The notifying authority indicates that the promoter is not solely an infrastructure operator but rather acts in downstream markets and therefore its business model requires the possibility to sign long term supply contracts with upstream suppliers to support both own consumption in CCGT power plants as well as its supply activity. [**Business secret**] the project must generate sufficient benefits and fit into the promoters' business strategy to compete with alternative gas suppliers in a financially constrained environment. It should also be noted that potential users of the Terminal would have to inject their gas into the national gas grid in Sicily, where the entry tariff is the highest[23] and therefore it is reasonable to expect that they will prefer other LNG terminals where spare capacity is available.

(48) Exemptions are designed to allow for investments where the level of risk attached to the investment is such that the investment would not take place unless an exemption is granted. If the investment in infrastructure for gas or electricity is a sunk cost, two main risks determine the assessment: the risk of non-use of the investment and the risk of a change in costs and/or revenues in the future[24].

(49) As regards the risk of non-use, the need to secure upstream supply from capacity users can be relevant in particular for LNG terminals if the upstream suppliers require from infrastructure developers long-term transportation and transmission contracts to conclude supply contracts[25]. However, it would be wrong to assume that long term contracts generally require the granting of an exemption as they may in principle also be concluded for "regulated" infrastructure[26].

(50) The Commission can agree that, in view of the circumstances explained by the notifying authority, there is a risk that without the exemption, it would be very difficult to ensure an optimal use of the full infrastructure capacity. In addition, signing long term supply contracts in Italy is limited by national legislation allowing

23 Porto Empedocle is between Mazara del Vallo, whose entry tariff is 2.989504 and Gela, where is 2.738260.

24 Commission Staff Working Paper on exemption of new infrastructures of 6.5.2009, SEC(2009)642 final, paragraph 41.

25 *Ibid.*, paragraph 42.

26 *Ibid.*, paragraph 42 (box).

allocating regasification capacity for a maximum duration of five years[27]. The Commission considers this to be especially true in light of the Rovigo precedent that was exempted under similar terms. Rovigo is almost barycentric for the gas flows coming from the various import infrastructures and close to a high consumption area, while Porto Empedocle is peripheral, and in an area where entry tariffs in the national transmission grid are at the highest level. The Commission can agree to an exemption for 100% of the Terminal's capacity under the condition that 20% of Terminal's capacity will be offered to interested third parties, given that practically this will equal to an 80% exemption and will in effect be largely similar to the conditions under which the other LNG terminals in Italy (Rovigo and Brindisi) were exempted (especially as the promoter will in any event submit tariffs and re-gasification code to AEEG for approval, according to the notified decision).

(51) As regards the duration of the exemption, the Commission can exceptionally agree to a 25 years exemption, subject to the conditions mentioned below. The Commission understands that the terminal will be built on a piece of land belonging to the public Maritime Domain, on the basis of a thirty-year concession granted by the State to Nuove Energie. Upon expiry of the concession, the land will revert to the State, who could also decide that the site be restored to the status quo ante (the Italian Authorities indicated that this appears rather unlikely). Therefore, taking into account five years to actually build the infrastructure, the planned 25-year exemption enables project promoters to base their business plan on the assumption that for the remaining 25 years of duration of the concession, conditions for operation of the infrastructure will remain unchanged.

(52) In this regard, the Italian Authorities have clarified that Nuove Energie has been granted (in May 2010) a temporary act authorizing it to "occupy" the land for 30 years. Under Italian law, such temporary act will have to be converted into a formal act of permanent concession. However, such conversion could take several years and in the interim period, the proponent could ask for a different duration of the concession and, after carrying out a procedural investigation, the Italian Authorities could agree with such different duration when issuing the final concession act.

(53) The Commission considers that in case the duration of the concession would be extended beyond 30 years, the time constraint for recovering the investment costs would be significantly loosened. In fact, in such case Nuove Energie could be able to de facto operate the plant beyond 25 years and recover the costs even after the exemption expires. For this reason, the Commission agrees to a 25 year exemption subject to the condition that the above mentioned concession would not be extended during the conversion procedure beyond 30 years. Otherwise, the exemption shall automatically be reduced to 20 years.

7.2.3 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; Article 36 (1) (c) of Directive 2009/73/EC

(54) The Porto Empedocle LNG Terminal will be owned by a legal person who is distinct from the Italian gas Transmission System Operator, SnamReteGas, which has no relation with the promoter Nuove Energie. The Commission therefore agrees with the notifying authority that the requirements of Article 36(1)(c), under which the infrastructure must be owned by a natural or legal person which is separate at least in

[27] AEEG Resolution n. 167 on 1 August 2005 (amended) – 10 years in some very special cases which do not include generation companies.

terms of its legal form from the system operators in whose systems that infrastructure will be built, are fulfilled.

7.2.4 Charges must be levied on users of the infrastructure; Article 36 (1) (d) of Directive 2009/73/EC

(55) According to the notifying authority, the promoter will charge a negotiated tariff for the exempted share of capacity and a regulated tariff for the 20% of Terminal's capacity that will be made available to third parties. Indeed the exemption decision specifies that:

– a minimum fee be set for access to the capacity that is subject to the allocation procedures open to all interested parties; and

– any revenue above and beyond this fee be invested in measures to reduce the cost of gas for final customers.

(56) Thus charges will be levied on the users of the infrastructure and will allow the promoter to recover the capital and operating costs of the terminal.

(57) In light of this, the requirement of Article 36 (1) (d) of Directive 2009/73/EC is fulfilled.

7.2.5 The exemption must not be detrimental to competition or the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected. Article 36 (1) (e) of Directive 2009/73/EC

(58) The notifying authority indicates that the exemption for Porto Empedocle LNG terminal is not detrimental to competition or the effective functioning of the regulated system to which it will be connected as it will provide an additional entry point to the Italian system.

(59) The Commission agrees with this assessment. In view of the size of the Italian gas supply and import infrastructure markets, the exempted capacity of the Porto Empedocle LNG Terminal is such that neither Nuove Energie nor its parent companies can achieve a dominant position on any relevant market. The submitted documents assume that [**Business secret**]. Moreover, with regard to new gas infrastructures under TPA exemption the national legislative and regulatory framework, in particular the Decree of 11 April 2006, foresees a Use It Or Lose It (UIOLI) principle. According to the notified decision, the promoter will submit re-gasification code to AEEG for approval. The 80% reserved capacity will also be subject to a sunset clause[28] for the duration of the exemption in line with Article 36 (9) of Directive 2009/73/EC.

(60) As to the functioning of the internal market, the Commission does not anticipate any negative effects of the exemption on the overall energy network in the EU or a cross-border trade in gas or electricity.

(61) As regards the regulated system, SnamReteGas already planned an upgrade of its North-South backbone pipeline and the specific connection agreement between the Italian TSO and the promoter has been signed in December 2008. In view of this, the Commission considers that the users of the regulated system will not be faced with substantially increased higher network tariffs as a result of the exemption.

(62) In light of the above, the Commission is confident that the exemption will not be detrimental to competition or the effective functioning of the internal market, and

[28] [**Business secret**].

believes that the requirement that the exemption is not detrimental to the efficient functioning of the regulated system to which the infrastructure is connected is fulfilled.

7.3 Conclusion

(63) In view of the above the Commission requests that the notifying authority amend the exemption decision as follows:

(64) the condition required in paragraph 2, first indent of the Decree: "that at least 20% of the regasification capacity be made available to all interested parties via a public procedure that is adequately publicised internationally, in line with procedures approved by the Regulatory Authority and consistent with Article 17 of Regulation (EC)" is amended in order to prevent any undertaking (and its affiliated companies) with a market share of more than 40% of the capacity for bringing gas to or into Italy, or in any of the Italian wholesale and retail markets, from reserving on the long-term basis (i.e. exceeding one year) a capacity surpassing 0.4 billion m^3/year of gas (i.e. about 5% of the terminal's total capacity, corresponding to 25% of the capacity made available to third parties under the planned public procedure).

(65) the 25 year exemption duration set out in paragraph 1 of the Decree should take into account the duration of the land concession so that in case the duration of the latter is extended beyond 30 years, the exemption shall automatically be reduced to 20 years.

HAS ADOPTED THIS DECISION:

Article 1

The Commission requests the Ministry of Economic Development of Italy to modify according to Article 36 of Directive 2009/73/EC the decision of 30 September 2011, notified to the European Commission on 7 December 2011 as set out in the subsequent articles.

Article2

A condition shall be imposed so that in case the duration of the concession is extended beyond 30 years, the TPA exemption shall automatically be reduced to 20 years.

Article 3

An additional condition shall be imposed on the addressee of the exemption decision to safeguard competition on the Italian gas market which stipulates that the addressee (including its parent companies and subsidiaries) shall not sell more than 0.4 billion m^3/year of its capacity in long-term contracts (i.e. contracts with a duration of more than one year) to any undertaking (or its affiliated companies) with a market share of more than 40% of the capacity for bringing gas to or into Italy, or in any of the Italian wholesale and retail markets.

Article 4

In line with Article 36 (9) of Directive 2009/73/EC, the Commission's approval shall lose its effect two years from its adoption in the event that construction of the infrastructure has not started and five years from its adoption in the event that the infrastructure has not become operational unless the Commission decides that any delay is due to major obstacles beyond control of the person to whom the exemption has been granted.

Article 5

The Ministry of Economic Development of Italy shall amend the above mentioned Decision within one month from the day the present decision is notified to Italy in accordance with Article 36 of Directive 2009/73/EC; in addition it shall provide the Commission with a copy of the amended Decision.

Article 6

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

Done at Brussels,

For the Commission
Cecilia Malmström
Member of the Commission