



Brussels, 16.5.2013
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COMMISSION DECISION

of 16.5.2013

on a prolongation of the effects of the exemption decision of NABUCCO Gas Pipeline International GmbH from third party access and tariff regulation granted under Directive 2003/55/EC

(Text with EEA relevance)

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

Whereas:

- (1) NABUCCO Gas Pipeline International GmbH (hereinafter, "NIC") was set up on 24 June 2004 to develop, construct and operate the Nabucco pipeline. On 23 February 2007, NIC requested exemptions from regulated third party access, as defined in Article 18 of Directive 2003/55/EC (current Article 32 of Directive 2009/73/EC) and from regulated tariffs as described in Article 25 (2), (3) and (4) of the Directive 2003/55/EC (current Article 41 (6), (8) and (10)) pursuant to Article 22 of Directive 2003/55/EC in each of the Member States the Nabucco pipeline crosses and is connected to national transmission networks.
- (2) On 24 October 2007, E-Control adopted a decision to exempt the Austrian section of the Nabucco pipeline for 25 years from regulated third party access and from tariff regulation. This draft exemption decision was notified to the Commission in line with Article 22 of Directive 2003/55/EC. The Commission took a decision on 8 February 2008 requesting E-Control, besides other items, to change the resolute condition laid down in the exemption decision with regard to the operation date. The Commission asked the operation date to be not later than five years after the last exemption decision in any of the Member States concerned had become effective, but not later than 31 December 2014. On 9 April 2008, E-Control amended its original exemption decision to reflect the Commission's request.
- (3) On 28 May 2008, NIC requested to change the condition with regard to the operation date due to the fact that the Shah Deniz consortium had announced a delay in the exploration of the gas field. On 16 July 2008, E-Control modified its exemption decision of 9 April 2008 by changing the date of operation to be no later than the end of 2016 and no later than seven years after the last exemption decision in any of the Member States concerned had become effective. This modification decision was notified to the Commission on 22 July 2008. On 22 October 2008, the Commission took a decision accepting the change of the operation date. Subsequently, E-Control

¹ OJ L 211, 14.09.2009, p. 94.

amended its exemption decision of 9 April 2008 by the decision of 26 November 2008.

- (4) Consequently, the condition imposed on NIC read: "The Austrian section of the Nabucco natural gas pipeline has to be put into operation no later than seven years after the last exemption decision in any of the Member States concerned has become effective, i.e. after the Commission's approval of the respective decision. In any event, it shall be put into operation no later than on 31 December 2016."
- (5) On 14 March 2013 NIC requested E-Control to amend its exemption decision again by changing the date by which the Austrian section of the Nabucco natural gas pipeline has to be put into operation. Subsequently E-Control modified its exemption decision of 26 November 2008 by changing the date of operation to be no later than 1st January 2021. This modification decision was notified to the Commission on 25 April 2013.
- (6) On 3 March 2011 Directive 2003/55/EC has been repealed and replaced by Directive 2009/73/EC. New Article 36 (9) of Directive 2009/73/EC provides that *'The Commission approval of an exemption decision shall lose its effect two years from its adoption in the event that construction of the infrastructure has not yet 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'*.
- (7) Directive 2009/73/EC does not explicitly consider whether or not Article 36(9) of Directive 2009/73/EC applies in the context of exemptions granted under Directive 2003/55/EC. However, notwithstanding the repeal of Directive 2003/55/EC by Directive 2009/73/EC, it is clear that exemptions granted under Directive 2003/55/EC are grandfathered into the new regime. In particular in the recitals to Directive 2009/73/EC a clear indication can be found that its provisions should not affect exemptions already granted under Article 22 of Directive 2003/55/EC and that the continuity of the exemption as decided in the exemption decision should be preserved. In recital 35, final sentence, the EU legislator confirmed that: *"(35) (...) Exemptions granted under Article 22 of Directive 2003/55/EC continue to apply until the scheduled expiry date as decided in the granted decision."* Therefore, the exemption granted towards NIC under Article 22 of Directive 2003/55/EC continues to apply under the new Directive, in particular as the exemption has been granted for 25 years.
- (8) Therefore, despite the repeal of Directive 2003/55/EC by Directive 2009/73/EC as of 3rd March 2011, in order not to prejudice the full effect of exemptions granted under Directive 2003/55/EC, which the above recital seeks to ensure, the Commission should always be in a position to express itself on circumstances, which have occurred after it has given its position in the context of an exemption procedure conducted pursuant to Article 22 of Directive 2003/54/EC, as well as to indicate if in its view its already granted approval of the exemption decisions taken by a national regulatory authority would be still valid in case technical modifications of the exemption decision, such as, the date by which the pipeline should become operations should be made.
- (9) In this respect, NIC submits in its application to E-Control that the start of operations of the Nabucco pipeline relies heavily on the start of the exploration of the Shah Deniz II (hereafter 'SD II') gas field in Azerbaijan, which is to be the first source of natural gas available for the Southern corridor. At the conference of the political Nabucco Committee on 8 October 2012 it was confirmed during the presentation of the Republic of Azerbaijan that with respect to the present status of the development of

the natural gas fields of the SD II project, any gas supply is not to be expected before the end of 2018. Neither NIC, nor its shareholders are able to influence the date the first natural gas will be supplied by the SD II project.

- (10) On 18 January 2013, NIC, its shareholders and the SD II consortium concluded a cooperation agreement regarding the realisation of the Nabucco Project. This cooperation agreement arranges for a putting into operation of the Nabucco natural gas pipeline within a window period of 24 month starting on 1 January 2019 which is provided for in the standard transportation contract.
- (11) On the base of above, NIC proposed the following change as regards the starting of the operations: 'Nabucco natural gas pipeline shall be put into operation within an initial window period of 24 month starting no later than on 1 January 2019. Three (3) months after an unconditional Nabucco final investment decision and the Shah Deniz final investment decision, this window period will be reduced to twelve (12) months. The window period will subsequently be further narrowed down stepwise, all pursuant to the terms of the standard transportation contract.'
- (12) E-Control agrees with NIC's assessment that the change of the starting date of the operation is beyond their control and therefore changed the date of operation set out in the resolute condition of the exemption decision to be no later than 1st January 2021.
- (13) The Commission notes that the date by which the Nabucco pipeline can be put into operation is inter-linked with the date the first natural gas will be supplied by the SD II project. It depends solely on the SD II Consortium, on which NIC has no influence, how the development of SD II field will be pursued and when the necessary infrastructure and pipelines to deliver gas from Azerbaijan through Georgia to Turkey will be completed. Neither NIC nor its shareholders have any influence on these events and, consequently, the Commission considers that in case such decisions are not taken, or taken too late to allow for timely deliveries of gas, they can be considered as major obstacles beyond the control of NIC.
- (14) Thus the delay in the start of the operation of the Austrian part of the Nabucco natural gas pipeline project results from facts beyond the control of NIC. The Commission also notes that the presently known delay of SD II to start the delivery of gas at the earliest as of 1 January 2019 surfaced after the previous request of NIC to E-Control to change the condition with regard to the date of operation, and to which subsequently E-Control and the Commission issued their Decisions (in 2008). The fact that this information was not known at the time of the last changes to the exemption decision provides further grounds to take into account the new information that SD II will start gas deliveries later for an amendment of the required starting date of operation of the Nabucco pipeline.
- (15) In light of the above, the Commission considers that its approval of the exemption decision, taken in 2008 pursuant to Directive 2003/55/EC is still valid and furthermore, in light of the circumstances discussed above, an amendment of the date by which the pipeline has to be put into operation is justified.
- (16) Accordingly, E-Control's exemption decision of 26 November 2008 shall be amended by changing the starting date of operation of the Austrian section of the Nabucco natural gas pipeline from 31 December 2016 to 1 January 2019 and changing the condition of its validity which was related to the seven years elapsing time after the last exemption decision in any of the Member States concerned has become effective,

to: 'not later than six years after the last prolongation decision in any of the Member States concerned has become effective'.

HAS ADOPTED THIS DECISION:

Article 1

The Commission approval of 22 October 2008 of the E-control exemption decision remains valid also in regard to a condition that the Austrian section of the Nabucco natural gas pipeline shall be put into operation not later than six years after the last prolongation decision in any of the Member States concerned has become effective, unless the Commission decides that any further delay is due to major obstacles beyond control of the person to whom the exemption has been granted.

In any event, the Austrian section of the Nabucco natural gas pipeline shall be put into operation no later than on 1 January 2019.

This Decision is addressed to Energie-Control Austria, Rudolfsplatz 13a, 1010 Vienna Austria.

Done at Brussels, 16.5.2013

For the Commission
Siim KALLAS
Vice-President

