EUROPEAN
COMMISSION

Brussels, 11.8.2022
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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

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

Whereas:

1. THE PROJECT

1.1. Description of the project

(1) The EemsEnergy Terminal B.V. ("EET") intends to operate a temporary liquefied natural gas ("LNG")[2] facility (the "Terminal") in the Wilhelminahaven part of the Eemshaven port in the province of Groningen, the Netherlands.

(2) The Terminal will consist of two floating storage and regasification units ("FSRUs"), which EET has leased for a period of five years, from September 2022 until September 2027. The FSRUs, which will be moored at Wilhelminahaven, will allow the transport of LNG by sea to Eemshaven, where the plant will return the LNG to a gaseous state, to be then fed into the national gas transmission network. To facilitate that process, the infrastructure will also include a heat pipeline, an electricity connection and a 2 km long pipeline to connect the Terminal to the national gas transmission network, operated by Gasunie Transport Services B.V. ("GTS").

(3) The two FSRUs will be operated by EET as one terminal. The services EET intends to provide comprise the following: (i) unloading of ships containing LNG; (ii) temporary storage of LNG to ensure the steady output of natural gas and (iii) pressurisation and evaporation (regasification) of LNG to feed it into the national gas transport system.

(4) The Netherlands expects the maximum import capacity at the Terminal to ultimately amount to a total of 12 billion cubic meters (bcm) of natural gas per year, provided that the throughput at the facility can be fully optimised. As a first step EET chose to market 8 bcm as firm capacity. The capacity was calculated assuming that 86 ships with a standard cargo size of 160 000 m^3 LNG could unload and re-gasify LNG at the

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

[2] LNG is natural gas cooled down to minus 162 degrees Celsius. Due to the cooling and thus the transformation into a liquid state of aggregation, natural gas loses significant volume and can therefore be transported in large quantities over longer distances by ship (LNG tankers). Thus, the transport of LNG represents an alternative to the transport of natural gas via long-distance pipelines. It is commercially attractive especially for long distances, and it is technically the only possibility to transport natural gas to Europe from certain regions (*e.g.*, North America).

Terminal each year. The capacity of the Terminal could be further increased to 9 bcm if larger LNG ships of 180 000 m^3 would use the Terminal. The current contracts foresee the possibility for customers to ask to bring larger cargos to the Terminal, but EET is not obliged to honour such requests. EET intends to explore whether the capacity can be further increased to nearly 10 bcm at the beginning of 2023 by shortening the slot duration for cargoes. The operational permit applications submitted are based on an annual capacity of 10 bcm. Beyond these volumes a new permit would be required and port logistics are expected to become more challenging. Heat supply would be a limiting factor that would need to be overcome and the capacity in the gas network would approach its limits. Under an ideal scenario, the Netherlands considers that a capacity of 12 bcm may be reached, but potentially significant investments may be required.

(5) The first FSRU has a storage capacity of 25 000 cubic meters and a maximum regasification capacity of approximately 600 000 cubic meters gas per hour. The second FSRU has a storage capacity of 170 000 cubic meters and a maximum regasification capacity of over 900 000 cubic meters gas per hour. EET submitted that the investment amounts to a total of approximately EUR 620 million.

(6) The Terminal is expected to be operational on 15 September 2022.

(7) The Terminal is temporary. In the future, it is likely to be turned into a permanent LNG import facility serving also green energy carriers such as hydrogen combined with ammonia in the same location.

(8) EET is a wholly owned (100%) subsidiary of Gasunie LNG Holding B.V., which, in turn, is a wholly owned (100%) subsidiary of the Dutch company N.V. Nederlandse Gasunie ("Gasunie"), 100% held by the Dutch State.

1.2. Rationale of the temporary nature of the project

(9) The urge to set up the Terminal as a temporary facility is particularly driven by the Russian invasion of Ukraine, following which, the Dutch government decided to phase-out Russian gas by the end of 2022.

(10) This echoes the *REPowerEU: Joint European Action for more affordable, secure and sustainable energy* Communication (COM(2022) 108 final) in which the Commission expressed the objective of rapidly phasing-out Russian gas and stressed the importance of diversification notably via LNG terminals to ensure Europe's security of supply. This was also endorsed by EU Heads of State and of Government at the Versailles European Council[3].

(11) At this moment, Russia has interrupted fully or partially deliveries of gas to several Member States, including the Netherlands. The current geopolitical situation shows that Russia is no longer a reliable source of gas supply.

(12) It is in this context of exceptional geopolitical turmoil and consequently insecure gas supplies from Russia that the current project is being developed and aimed at starting operations already on 15 September 2022.

[3] 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

2. NATIONAL PROCEDURE

(13) By letter dated 16 May 2022, EET requested an exemption from third party access requirements and tariff regulation for a period of six years after the beginning of operations of the Terminal. According to the applicable Dutch legislation[4], the competent authority for issuing exemptions is the Dutch Minister for Climate and Energy Policy ('MCE'), upon delegation of powers by the Dutch Ministry of Economic Affairs and Climate Policy. Moreover, according to the Dutch Gas Act, prior to issuing its exemption decision, the MCE has to consult the Dutch Authority for Consumers and Markets ('ACM'). The ACM must issue an opinion on the exemption request no later than at the time of publication of the MCE exemption decision.

(14) From 25 April 2022 to 13 May 2022, EET called for expressions of interest to gauge market interest for 8 bcm of its capacity ("initially marketed capacity"). EET indicated that it intends to market the additional capacity of 4 bcm once sufficient operational capacity has been gained ("additional capacity"). Nineteen undertakings expressed an interest in booking capacity at the Terminal in the course of the market test, with a combined demand of four times the envisaged capacity[5].

(15) On 6 May 2022, EET invited parties to submit binding bids by 10 June 2022 to book capacity of up to 8 bcm for a duration of 5 years. EET received two unconditional and binding bids, one from Shell (for 4 bcm) and another from ČEZ (for approximately 3 bcm).

(16) On 16 May 2022, EET submitted an exemption request to MCE and on 23 May 2022, the MCE informed the European Commission of EET's request for exemption.

(17) On 1 June 2022, the MCE notified the draft exemption decision to the ACM and asked for its opinion. The ACM issued a positive opinion on 17 June 2022, suggesting that the MCE attaches certain requirements to the exemption decision. In June 2022, the MCE conducted a consultation with the relevant regulatory authorities in Germany, Belgium and France pursuant to Article 36 (3) of Directive 2009/73/EC. More specifically, on 16 June 2022, MCE shared the draft exemption decision with the Bundesnetzagentur ("BNetzA"), the Belgian Commission for Electricity and Gas Regulation ("CREG") and the Commission de Régulation de l'énergie ("CRE"). On 21 June 2022, BNetzA stated that it had no comments on the draft exemption decision. On 22 June 2022, CRE confirmed that it had no objections to the project and that a positive effect is to be expected on security of supply as a result of the additional import capacity in the Netherlands. CRE also noted that the conditions attached to the draft exemption decision were in line with the principles of transparency and non-discrimination. On 23 June 2022, CREG confirmed that it had no objections to the project, insofar as the capacity would be allocated and sold in a transparent and non-discriminatory manner and that the project costs would be recouped exclusively through compensation for the services the LNG Terminal would provide to its users, without affecting the tariffs at the cross-border interconnection points.

(18) On 8 July 2022, all interested parties were invited to make an unconditional binding bid for the 1 bcm that were not marketed by the Terminal in the first call for binding

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

[5] Gasunie, Second floating LNG facility contracted for Eemshaven, 10 May 2022, https://www.gasunie.nl/en/news/second-floating-lng-facility-contracted-for-eemshaven.

offers. The 1 bcm capacity was offered to Engie SA for the period 1 January 2023 until 1 September 2027[6].

3. THE NOTIFIED EXEMPTION DECISION

(19) On 30 June 2022, the MCE adopted an exemption decision subject to further amendments pending a Commission decision, granting the requested exemption from third party access and tariff regulation requirements. The exemption is granted for a period of 6 years following commencement of operations at the Terminal (currently expected on 15 September 2022) and for an annual capacity of 12 bcm, subject to a number of conditions.

(20) On 1 July 2022, the MCE notified the Commission of the exemption decision (the "notified exemption decision"). On 8 July 2022, the Commission requested additional information on the project and received answers on 13 July, 14 July, 18 July, 20 July and 22 July 2022.

(21) On 7 July 2022, 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[7] in English.

(22) The third party access rules and the tariff requirements that apply under the exemption are summarised in the following section 3.1.. It also provides an overview of a number of conditions set by MCE.

3.1. Third party access

(23) Under the notified exemption decision unused capacity shall be offered to the market and all potential users of the Terminal shall be given the opportunity to express their interest before the allocation of capacity in the Terminal, including for own use.

3.1.1. Primary capacity allocation

(24) Primary capacity is allocated as follows.

- First primary capacity allocation:

(25) Following the first call for binding offers, capacity was allocated in accordance with the following the criteria:

– Priority was given to interested parties indicating that their LNG is of non-Russian origin;

– Next, capacity was allocated to interested parties wishing to contract between 1.5 and 2 bcm per year. If that allocation had not been sufficient to cover the total available capacity, the remaining capacity would have been allocated to any interested parties willing to contract more than 2 bcm per year. If total demand by interested parties willing to contract 2 bcm per year or more would not have reached the total available capacity, remaining capacity would have been allocated to interested parties willing to contract less than 2 bcm per year.

6 Gasunie, EemsEnergyTerminal in Eemshaven completely 'sold out': ENGIE becoming its new shipper, 1 August 2022, https://www.eemsenergyterminal.nl/en/latest-news/eemsenergyterminal-in-eemshaven-completely-sold-out-engie-becoming-its-new-shipper.

7 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/2012.

Among those, priority would have been given to the interested parties willing to contract the highest capacities;

– If total demand would still have been less than the available capacity, capacity would have been allocated to interested parties indicating that their LNG is of Russian origin;

– If total demand by interested parties able to contract between 1.5 and 2 bcm per year would have been higher than the available capacity, EET developed a scoring system, according to which parties would be ranked by reference to two parameters, namely the minimum utilisation rate they would commit to achieve at the Terminal and a mark-up price they would be willing to pay in addition to the applicable tariff.

(26) As mentioned in recital (15), following the first call for binding offers, Shell and ČEZ booked 7 bcm out of the initially marketed capacity of 8 bcm.

- Second primary capacity allocation:

(27) To allocate the 0.936 bcm that were marketed in the second call for binding offers EET applied the following criteria:

– Priority is given to an interested party, whose LNG is of non-Russian origin and who wishes to contract the full remaining capacity of 0.936 bcm.

– If multiple interested parties wish to contract the remaining capacity of 0.936 bcm, such capacity will be allocated according to a scoring system taking into account two parameters, namely the minimum utilisation rate they would commit to achieve at the LNG Terminal and a mark-up price they would be willing to pay in addition to the applicable tariff.

- Primary allocation for up to 12 bcm

(28) As mentioned in recital (4), the Terminal capacity may be expanded to 12 bcm per annum following the optimisation of the operations. There are no rules yet to allocate that remaining capacity. The MCE indicates that it expects future allocation rules to be transparent and non-discriminatory. The additional firm capacity may first be offered in a transparent and non-discriminatory way to existing Terminal users. Any remaining capacity would be offered in a transparent and non-discriminatory way to new Terminal users, most likely via an open season style process.

3.1.2. Secondary capacity allocation

(29) The notified exemption provides that primary capacity holders have the right to sell their capacity on the secondary market and EET is required to establish a procedure for the provision of unused capacity on the secondary market, as well as a use-it-or-lose-it system. The rules shall also include a procedure for the release of unused capacity for sale on the secondary market, at least once a month and prior to the scheduled start of the regasification process. The capacity allocation rules shall be included in each agreement between EET and respective Terminal users (the so-called Terminal Use Agreement) and submitted to the MCE and the ACM.

(30) The operator of the Terminal has submitted a set of rules for the allocation of secondary capacity to the Commission. It includes rules for in-tank transfers, principles for transfer of services, full and partial services transfer, cargo cancellation and use-it-or-loose-it ("UIOLI") provisions.

(31) The UIOLI provisions state that no later than thirty days prior to the start of the scheduled arrival window for the relevant scheduled unloading slot, the user shall provide a notice to the operator if it will not use its scheduled unloading slot. In such a case, the user may specify another user who has agreed to acquire the unused unloading slot or the operator will publish the unused unloading slot on the Terminal Information Website .

3.2. Tariffs and further conditions imposed by the notified exemption decision

(32) With regard to tariffs, EET stressed the importance of charging (market-based) tariffs to the users of the Terminal. Both the MCE and the ACM assume that charges will therefore be charged to EET's customers and the ACM will be monitoring this obligation once the Terminal is operational.

(33) Specific tariff rules for the initial call for binding offers of up to 8 bcm were set in a transparent and non-discriminatory manner. Tariff rules were made accessible in advance to all interested parties.

(34) The MCE has informed the Commission that tariffs' rules for capacity above 8 bcm have not yet been set. Nonetheless, the MCE states that future rules shall be non-discriminatory towards existing Terminal users, that they shall provide sufficient incentive for the Terminal operator to make the capacity available and for existing Terminal users to ensure that more capacity can be entirely offered.

(35) For secondary capacity the price of the unused unloading slot is agreed between the transferring Terminal user and the acquiring user and in order to facilitate anti-hoarding practices, the unused unloading slot shall be offered to the acquiring user under reasonable conditions.

(36) The notified exemption decision furthermore provides that EET shall ensure that ownership at the LNG facility will be and remain independent from Gasunie Transport Systems B.V. during the exemption period. In terms of its legal structure, EET shall be separate and act independently from Gasunie Transport Systems B.V. None of Gasunie Transport Systems B.V. employees will also be working for EET, including the Managing Director, who is yet to be appointed.

(37) EET shall allocate no more than 50% of primary capacity to a party with a dominant position on the gas market.

(38) In the event of material changes in relation to the exemption request or exemption decision, EET shall immediately report them to the MCE and the ACM.

4. PROCEDURE AT THE COMMISSION

(39) On 1 July 2022, the MCE submitted the notified exemption decision to the Commission.

(40) On 5 July 2022, the Commission published a notice on its website, inviting stakeholders for comments within two weeks. No comments were received.

(41) On 8 July 2022, the Commission sent questions to the MCE. The MCE provided responses to these questions on 13 July, 14 July, 18 July, 20 July and 22 July 2022.

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

5.1. Legal basis

(42) According 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, 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.

(43) Article 36 of Directive 2009/73/EC furthermore specifies a number of procedural steps that need to be respected by the national authorities and the applicant in the context of an exemption:

(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 (3));

(b) all potential users of the infrastructure have 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)).

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

5.2. Major new gas infrastructure

(45) Article 36 (1) 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 has to be determined whether the Terminal qualifies both as an LNG facility and as a major new gas infrastructure.

(46) Article 2 (11) of Directive 2009/73/EC defines the term LNG facility as follows: '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 recital (2), the Terminal would return LNG to a gaseous state, to feed it into the national gas transmission network. It, therefore, qualifies as an LNG facility in accordance within the meaning of Article 2 (11) of Directive 2009/73/EC.

(47) The investment can also be considered as major within the meaning of Article 36 of Directive 2009/73/EC. Whereas there is no exact minimum threshold, the planned investment of EUR 620 million is clearly sufficiently significant for the infrastructure to qualify as major. Furthermore, the overall capacity of the Terminal is significant, considering that (i) it raises the existing import capacity in the Netherlands from 12 bcm to more than 20 bcm, amounting to an increase of 66% and (ii) it represents more than 20% of the annual Dutch consumption of natural gas.

(48) The infrastructure must furthermore be new. Article 2 (33) of Directive 2009/73/EC defines new infrastructure as *" an infrastructure not completed by 4 August 2003"*. As the Terminal is expected to start operations on 15 September 2022, it is to be considered new infrastructure within the meaning of Directive 2009/73/EC.

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

5.3. Procedural requirements

(50) Article 36 of Directive 2009/73/EC contains procedural requirements, which include a market test and the consultation of authorities of the Member States the markets of which are likely to be affected.

(51) Article 36 (6) of Directive 2009/73/EC requires the conduct of a market test. 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.

(52) As described in recital (14), EET conducted a market test from 25 April 2022 to 13 May 2022. As explained, nineteen undertakings expressed an interest in booking capacity at the Terminal, with a combined demand of four times the capacity that was expected to be marketed in the first binding offer phase.

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

(54) As explained in recital (17), the MCE conducted a consultation of the German, Belgian and French regulatory authorities.

(55) Therefore, it is concluded that the procedural obligations contained in Article 36 (3) and (6) of Directive 2009/73/EC were respected by the applicant and the competent regulatory authority.

5.4. Security of supply

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

(57) Firstly, the Commission notes that 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.

(58) The Commission notes that the Terminal 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 Terminal could replace other existing infrastructure or push other facilities out of the market.

(59) Secondly, the specific situation of the Netherlands should also be taken into account for the security of supply analysis.

(60) In 2020, the total consumption of natural gas in the Netherlands amounted to approximately 41.8 bcm. On the supply side, the Netherlands are currently the largest producer of natural gas in the EU. Historically, production has been predominantly based on the Groningen gas field. However, between 2015 and 2020, domestic production of natural gas fell continuously from about 52.1 bcm to 22.8 bcm. This decline resulted from a limit on gas production imposed on the Groningen gas field and was further impacted by the decision of the Dutch government to close it down by the end of 2022.[8] As a result, the Netherlands has turned into a gas importer in 2018 and import demand is expected to further increase from approximately 19 bcm in 2020 to 23 bcm in 2030.[9]

(61) The Terminal is, therefore, also expected to contribute to making up for the domestic production losses and the requirement for additional imports, thus contributing to security of supply in the Netherlands and the interconnected European markets.

(62) Thirdly, the MCE also carried out several modelling exercises to assess the impact of the Terminal on security of supply, where it has compared the situation with the Terminal to the situation without the Terminal. Indicators used are the (i) N-1 standard, which assesses whether peak consumption is covered if the largest infrastructure of a market defaults, (ii) the Residual Supply Index that measures the dependence of a market on the largest supplier and (iii) the System Adequacy Index looking at the remaining buffer at peak consumption times. The modelling shows that the Terminal would increase the Netherlands's security of supply and thus also the security of supply of the interconnected European markets.

(63) Whilst it can, therefore, be concluded that the infrastructure as such contributes to security of supply, Article 36 (1), point (e) of Directive 2009/73/EC specifies that the exemption as such must not be detrimental to security of supply of natural gas in the Union either. Contrary to the requirement in Article 36 (1), point (a) of Directive 2009/73/EC, the requirement in point (e) of that paragraph does not focus on the impact of the investment as such, but on the impact of the exemption decision. Exemptions, which would allow to limit the access to critical infrastructure in the hands of a small number of market participants, could bring negative impacts on security of supply in the Union for example. In theory, 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.

(64) Several observations need to be made with regard to the impact of the exemption on security of supply.

(65) First, the capacity allocation rules applied in the context of the exemption give a preference to non-Russian gas. Gas imports from Russia accounted for approximately 6 bcm or 15% of the total Dutch gas consumption last year. The current geopolitical crisis is expected to lead to a significant reduction (or total disruption) of such imports. On 31 May 2022 for example Gazprom stopped delivering gas to the Dutch gas wholesaler GasTerra. Without gas from alternative sources, the Netherlands (and the

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8 The timing of the closure of the Groningen field may change due to the current geopolitical conditions.

9 Frontier Economics, Economic Report, *Impact of an LNG-Facility in Eemshaven on security of supply and competition in the Gas Market (*16 May 2022), page 27.

interconnected markets) may face severe repercussions in the upcoming heating season.

(66) Considering these exceptional circumstances and in line with the Commission's REPowerEU Communication[10], 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 Russian fossil fuel dependence by the end of 2022[11].

(67) Against that backdrop, the Terminal becomes of crucial importance for the security of supply not only for the Netherlands, but also for interconnected European markets. With its initially marketed capacity of 8 bcm, the Terminal will not only provide sufficient capacity to replace the Russian gas imports into the Netherlands (6 bcm), but will also be in a position to supply neighbouring countries with its surplus, thereby contributing to their independence from Russian gas imports.

(68) Second, EET will enter into five years contracts with the Terminal users. Thus, any lock-in effects due to a potential dependence on a small number of individual suppliers who could take decisions that would negatively impact security of supply are unlikely to arise. The successive marketing of additional capacity is expected over the coming years giving a chance to additional market players to book capacity. Moreover, the capacity management and allocation rules contain the possibility to market secondary capacity, as well as anti-hoarding UIOLI provisions ensuring that the undertakings booking capacity market unused capacity to other market players. These rules are expected to provide access to diverse sources of supply via different suppliers. Increasing the number of access points to the Union gas network for new or smaller suppliers contributes to security of supply.

(69) The capacity management and allocation rules can, therefore, reduce the dependence on individual suppliers. As dependence on a single or a small number of suppliers can allow such supplier(s) to take decisions which negatively impact security of supply, reducing dependence on such suppliers therefore not only improves competition but also contributes to security of supply.

(70) Thus, it can be concluded that the investment enhances security of supply and that the exemption is not detrimental to security of supply of natural gas in the Union.

5.5. Principle of solidarity

(71) As set out in the judgment of the General Court in case T-883/16[12] and confirmed by the Court of Justice in case C-848/19 P[13], the principle of solidarity also entails a general obligation on the part of the Union and the Member States, in the exercise of their respective competences, to take into account the interests of the other stakeholders. Notably, Member States shall endeavour, in the exercise of their powers in the field of energy policy, to avoid adopting measures likely to affect the interests of the Union and the Member States as regards security of supply, its economic and

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10 REPowerEU: Joint European Action for more affordable, secure and sustainable energy (COM(2022) 108 final).

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

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

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

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.

(72) In the notified exemption decision, the MCE analysed whether the exemption is likely to affect the interests of other Member States. The MCE argues that the notified exemption decision improves security of supply in the Netherlands, its neighbouring countries and ultimately the Union. Furthermore, the notified exemption decision argues that imports to the Terminal are unlikely to reduce available supplies for other Member States. As the Terminal capacity of up to 12 bcm represents a very small share of the worldwide LNG market (485 bcm was traded globally in 2019), the added demand via the Terminal would have a negligible impact on terminals in other Member States. The MCE finally considers it unlikely that infrastructure which is essential for security of supply of other Member States will be abandoned due to the construction of the Terminal.

(73) As described in recital (17), the MCE also consulted the national regulatory authorities of Germany, France and Belgium. The French regulator CRE explicitly stated that a positive effect is to be expected on security of supply as a result of the additional import capacity in the Netherlands, whilst the Belgian regulator CREG was supportive provided that the project should not impact tariffs at cross-border interconnection points. There is no cross financing foreseen by cross-border interconnection tariffs, as a result of the exemption the Terminal is completely separate from the regulated regime. Also, the ACM has indicated that, if anything, the Terminal is expected to have positive material effects on the network in the form of decreases of the applicable charge. The Commission is also not aware of any Member State or competitor voicing concerns as regard the project in question.

(74) There is, therefore, no indication that the planned project would negatively impact the security of supply and the economic or political viability of the Union or Member States. To the contrary, the creation of additional regasification capacity positively contributes to security of supply for the Netherlands and the Union.

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

5.6. Impact on competition

(76) Article 36 (1), points (a) and (e) of Directive 2009/73/EC requires that the investment project enhances competition in gas supply and that the exemption is not detrimental to competition in the relevant markets which are likely to be affected by the investment. While these two requirements are not identical, they both imply that the project must enhance competition to the benefit of the consumers[14].

(77) The Commission notes that in order to analyse the competitive effect of the Terminal and the exemption, the relevant gas markets, and in particular the question whether the investment leads to the creation or strengthening of a dominant market position, need to be considered.

(78) 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 relevant

[14] 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 – New Infrastructure Exemptions, paragraph 30.

market. The Terminal 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[15]. Independently of whether the relevant geographical market is defined as the Netherlands market or the North-West-European market, the addition of further import routes and sources from the liquid and global LNG market is expected to enhance competition.

(79) Also, the ownership structure of the Terminal is not expected to negatively affect the diversification potential, as its only shareholder, Gasunie, is not a player in gas production or supply sectors.

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

(81) It is also necessary to verify whether the exemption, as opposed to the investment as such, could be detrimental to competition pursuant to Article 36 (1), point (e) of Directive 2009/73/EC. The impact of the exemption from third party access rules and tariff regulation on competition in the markets likely to be affected will, therefore, also be examined in the next recitals. It must be noted at this stage that the capacity management and allocation rules applied to the terminal (see recitals (24) to (31)) aim at ensuring that access is granted in a non-discriminatory and transparent manner. The initial capacity of 8 bcm was allocated in accordance with transparent criteria, following a call for binding proposals. The rules for the allocation of further capacities in future are not yet set, and their impact on competition is not considered to be significant as most of the capacity had already been allocated. As mentioned in recital (28), EET indicated that additional firm capacity may first be offered on a transparent and non-discriminatory way to existing terminal users. Any remaining capacity would be offered in a transparent and non-discriminatory way to new terminal users, most likely via an open season style process. In order to ensure that the capacity allocation rules do not have a negative impact on competition and ensure access to the widest range of market players, the Commission considers that firm capacity marketed beyond the 8 bcm should not be offered first to existing terminal users and subsequently to new users. The MCE should therefore specify that all firm capacity shall be offered to all potential users on a non-discrimination basis through market-based arrangements, indicatively auctions or open season.

(82) The possibility for market capacity on the secondary market, as well as the UIOLI provisions are expected to allow additional market players to book capacity at the Terminal and positively impact competition.

(83) Whilst the rules attached to the exemption therefore aim at ensuring fair competition, the potential impact of an exemption from third party access rules and tariff regulation specifically will be further assessed in recitals (84) and ff..

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

(84) Third party access seeks to ensure that all competitors in a given market have non-discriminatory access to the infrastructure and can compete on equal terms.

(85) EET requested an exemption from third party access rules for the entire planned capacity at the Terminal for a duration of 5 years. In view of that exemption request, it is necessary to assess whether and to what extent the capacity holders would have the

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

ability and the incentive to foreclose competitors on relevant markets adjacent to the Terminal.

(86) Foreclosure occurs when actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the capacity allocation at the Terminal, thereby reducing those companies' ability and incentive to compete. Such foreclosure may discourage entry or expansion of rivals or encourage their exit. 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 led to compete less effectively.

(87) The incentives to foreclose mainly emanate from the protection of capacity holder profits for their activities on adjacent markets, such as the downstream wholesale and retail gas markets.

(88) To assess whether capacity holders would have the ability and the incentive to foreclose competitors it needs to be examined whether the exemption would enable them to acquire or strengthen their dominant position on the market. Assuming that new market entrants or small market participants book the capacity, there is no doubt that newly created capacity would enhance competition.

(89) Prior to the exemption request, EET had asked for a study to be conducted to assess the impact of the Terminal on competition. The study was carried out based on assumptions assessing the potential negative effects to competition from the exemption in two worst-case scenarios.

Assumed relevant product market: upstream wholesale gas market

(90) In the first scenario the biggest supplier of LNG (QatarEnergy) on the North-West-European market books the available capacity at the Terminal. In the alternative scenario, all LNG volumes in Eemshaven were supplied by the largest market player (Equinor/Petoro). The expected impact on competition was assessed for 2023 (the first full year after the planned commissioning of the project in September 2022) and 2027 (the last full year of the exemption for the project). Both scenarios assumed the phase-out of Russian gas with two variables, a phase-out by 2025 and a phase-out by 2030. In the first scenario, the impact on competition on the North-West-European market was expected to be neutral. In the second scenario, the market concentration was expected to increase, but the share in the North-West-European market of Equinor/Petoro was not expected to raise much above 30%. It was thus not expected likely to be in a position to foreclose market access to competitors and have negative impacts on competition, as the Commission consider dominance unlikely if the market share is less than 40 %[16].

(91) No scenario with Gazprom bookings was considered, as very unlikely to materialise, given capacity allocation rules applied in the context of the exemption, which prioritise interested parties indicating that their LNG to be regasified at the Terminal is of non-Russian origin.

(92) In the meantime, it became known that the total capacity at the Terminal were booked by ČEZ, Shell (see recital (15)) and Engie (see recital (18)) and the worst-case

[16] Commission (2009/C 45/02) (Communication from the Commission - Explanation of the Commission's priorities for the application of Art. 82 of the EC Treaty to exclusionary conduct by dominant undertakings), para. 14.

scenarios described above have not materialised[17]. ČEZ is a new market entrant both on the Dutch and the North-West-European markets. As mentioned in recital (88), the entry into the market of new market players is in principle assumed to have a positive impact on competition.

(93) With regard to Shell, the study estimates that Shell had a market share of [redacted]% in the Dutch upstream wholesale market, based on a total consumption of [redacted] TWh in 2020, which was sourced [redacted]% from domestic production from the Groningen field and [redacted]% from imports. Shell holds a [redacted]% in GasTerra which exploits the Groningen field and thus [redacted]% of the gas extracted there was allocated to Shell to determine its market share. In view of the closing of the Groningen field, Shell's market shares were expected to go down considerably until 2023 and 2027, that are the two snapshot years where expected impact on competition was assessed, as mentioned in recital (90). Whilst domestic gas production amounted to 27 bcm in 2020, ENTSO-G's Ten-Year-Network-Development-Plan (TYNDP) 2022 expects a decrease by around 17 bcm/a to approximately 10 bcm/a in 2025. Due to the phase-out of domestic production Shell is expected to lose a bit more than 4 bcm/a of gas production in the Netherlands (i.e. 25% of 17 bcm). Shell's booking of 4 bcm/a of capacity in the LNG facility in Eemshaven can be seen as an attempt to replace its share in the declining domestic production. Even without taking into consideration the losses at the Groningen field, Shell's market share would increase to less than [redacted]% of the Dutch upstream wholesale market - remaining below concerning market shares in absence of indications to the contrary. In the North-West-European market, Shell's market share was expected to remain below [redacted]%. At these levels the capacity booking of Shell is unlikely to have a negative impact on competition.

Assumed relevant product market: Downstream wholesale gas market

(94) Overall it should be noted that the Dutch wholesale market is one of the most liquid and competitive in Europe. The Dutch trading hub TTF is amongst the two most mature gas market hub in Europe and offers the most differentiated trading products. It has the most active participants of all European gas hubs (225 according to OIES, 142 of which have agreed to be published by the Dutch gas TSO GTS). Total volumes traded at the TTF are more than twice the sum of volumes traded at all other European hub markets and the gross churn rate is at 60 compared to 11.2 at the next liquid hub with is the UK's NBP[18].

(95) The Commission notes that it is not aware of any facts that would indicate the existence of a dominant market player on the wholesale downstream market for gas (liquefied natural gas and/or natural gas) both on an assumed North-West European market and on an assumed national market of the Netherlands.

(96) On the basis of the above, the Commission has no grounds for concern as regards the impact on competition on the wholesale downstream market.

Assumed relevant product market: Retail gas market

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17 It is not expected that significant capacity transfers to other undertakings take place during the duration of the exemption decision to the extent that negative risks to competition may arise, given the relatively short timeframe of the duration of the exemption

18 The Oxford Institute for Energy Studies (OIES), European Gas Hubs, German hubs about to merge, OIES Paper NG 170 and ACER/CEER Annual Report on the Results of Monitoring the Electricity and Natural Gas Markets in 2021, July 2022.

(97) The Dutch gas retail market is also very diverse. The gas retail market is the market where natural gas is sold and supplied by regional and local gas companies to end-users including households. Firstly, it is worth noting that both on a national and on a regional level, there are no competition concerns regarding the current status of gas retail markets. The Netherlands belong to the most competitive gas retail markets in Europe measured by the HHI market concentration index[19]. Also, the IEA states in its energy policy review for the Netherlands, that the country "has an open and competitive retail gas market with numerous gas suppliers" and "is among the countries with the highest retail switching rates in Europe"[20].

(98) According to the information provided by the Dutch authorities, Shell announced to enter the Dutch market in the second half of 2021[21]. Shell has only recently entered the Dutch gas retail market, and the Dutch authorities estimate the Shell market share not to exceed 5%. The Dutch authorities report that ČEZ is only active in the retail gas market in the Czech Republic, and they identified no activity of ČEZ in the gas retail markets of the North-West-European region. With regards to ENGIE, the Dutch authorities have no indication of a substantial market share in the retail market of the North-West-European region or of the Netherlands[22]. Therefore it can be concluded that the capacity holders at the Terminal do not seem to bring any negative effect in the concerned retail markets.

(99) The study conducted a hypothetical analysis of the retail to industrial customers under the most conservative assumption, i.e. ENGIE selling the entire 50.8 TWh[23] of gas to the Netherlands, and the results demonstrated that this amount would cover less than 12 % of the Dutch gas demand in 2020 (431 TWh[24]), and 2% of the gas demand in North-West Europe (2480 TWh[25]). ENGIE's capacity booking of 1 bcm/a at Eemshaven can be seen as attempt to replace a part of ENGIE's reducing imports from Gazprom, which have made up around [redacted]% (or [redacted] bcm/a) of ENGIE's overall gas sales and consumption worldwide.

(100) Regarding other possibly affected product markets, there is no indication that the construction of the Terminal under the conditions of the notified exemption would have a negative effect. Notably, there is no indication that the exemption would result in the market exit or foreclosure of other, existing terminals. On the contrary, additional LNG Terminal capacity is planned, notably in neighbouring Germany and France. Where the addition of one terminal does not result in the market exit or foreclosure of other terminals, but merely creates competitive pressure on those other terminals, this is as such a positive effect on competition in the internal market.

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19 ACER (2021) - Report on the results of monitoring the internal electricity and natural gas markets in 2020.

20 IEA (2020) – The Netherlands 2020.Energy Policy Review, p.181.

21 https://www.smart-energy.com/industry-sectors/business/shell-to-enter-energy-supply-business-in-netherlands/.

22 In the Netherlands, the three largest suppliers in the Dutch gas retail market – Essent (E.on), Vattenfall (Nuon) and Eneco – accounted for more than 70% of retail gas sales in 2018. Source: *IEA (2020) – The Netherlands 2020.Energy Policy Review, p.181*

23 According to ENGIE's databook FY 2021 results (see figure 4), Engie sold 50.8 TWh of gas to business customers (B2B) in the "Rest of Europe" (i.e. Europe without France). Source: https://www.engie.com/sites/default/files/assets/documents/2022-02/ENGIE%20FY%202021%20Databook%20VDEF.pdf, page 26.

24 See Frontier Economics Competition and Supply Security report for EET, page 26, based on Statistics Netherlands.

25 See Frontier Economics Competition and Supply Security report for EET, page 21, based on Eurostat.

(101) The Commission has no grounds for concern as regards the impact on competition on possible other affected markets.

5.6.2. Impact on competition of the exemption from tariff regulation

(102) Since the tariffs charged by the Terminal will be non-discriminatory and will not discriminate between the different capacity holders, the notified exemption from tariff regulation is not detrimental to competition.

5.6.3. Conclusion

(103) Therefore, the Commission concludes that granting the exemption from third party access and regulated tariffs is not detrimental to competition in the relevant markets in the Netherlands or North-Western-Europe, provided firm capacity marketed beyond the 8 bcm is not offered first to existing terminal users and subsequently to new users. The MCE should specify that all firm capacity shall be offered to all potential users on a non-discrimination basis through market-based arrangements, indicatively auctions or open season.

5.7. The level of risk

(104) In accordance with Article 36 (1), point (b) of Directive 2009/73/EC the level of risk attached to the investment must be such that the investment would not take place unless the exemption is granted.

(105) Due to the timing restrictions and to allow for the Terminal to be operational in mid-September, a conditional investment decision was taken in June 2022. The investment decision to go ahead with the Terminal is conditional on the grant of an exemption by the MCE. So are the binding offers that EET received from Shell and ČEZ. Therefore it is necessary to assess whether the risk of the project is such that it could not have been realised without the exemption.

(106) Under a typical regulated access system, the owner of the infrastructure enjoys a large degree of revenue certainty and protection from volume or construction risks, as the revenues are guaranteed through regulated tariffs to be paid by the users of the infrastructure. No such revenue certainty is currently provided for EET as the Terminal is a purely commercial initiative.

(107) The cost of the Terminal investment is significant. The most recent estimate is that it would amount to EUR 620 million, and no socialisation element exists for this cost.

(108) The relevant Guidance[26] issued by the Commission stresses that two main aspects need to be taken into account when assessing the risk of an investment: the risk of non-use of the infrastructure and the risk of a change in costs and revenues in the future.

(109) As mentioned in recital (9) ff., this temporary project is materialised by way of reaction to the current exceptional geopolitical conditions and represents an effort to secure sufficient gas supplies to the Netherlands and the Union in general. EET explained that, in these circumstances, where in addition to the general uncertainty in the gas markets, LNG is itself a scarce commodity, potential customers would only enter into Terminal Use Agreements if they had sufficient clarity on the applicable tariffs for the use of the booked capacity over the entire contract period. Considering

[26] 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.

that the Terminal is scheduled to commence operations on 15 September 2022, the MCE explained that such tariffs could not have possibly been set or approved on time under a regulated regime. This is because, according to national law, a designated LNG company needs to submit a proposal for a calculation method for tariffs and conditions before 1 July preceding the calendar year of application. Hence, even if EET would have submitted a calculation method by 1 July 2022, the relevant tariffs would apply to the next year, that is to say 2023. Such tariffs would then be under review and approval on an annual basis, which would, in turn, add further uncertainty to the potential customers' decision to enter into a contract with EET.

(110) Thus, the binding bids that EET received from Shell and ČEZ were conditional on EET obtaining an exemption.

(111) This demonstrates that under a regulated regime the Terminal could not be used in 2022 and the risk of non-use of the capacity of the Terminal beyond that date would be considerable.

(112) Furthermore, securing upstream supply for capacity users is relevant when assessing the risk of non-use of LNG terminals. The development of the international supply and demand of LNG for the duration of the requested exemption is not certain. Whilst there was significant free capacity at other European terminals just one year ago, this no longer holds true because of the latest geopolitical developments which have led to a fall in imported pipeline gas and a surge in LNG imports. It is very difficult at this stage to foresee the outcome of these geopolitical developments and the long-term demand for LNG capacity at European terminals. Even if in a more global context both significant liquefaction and regasification capacity is coming onto the market, the direction of trade flows is also difficult to predict.

(113) Moreover, the Terminal is unlikely to enjoy an unchallenged position with respect to the provision of the services it provides, because it will compete for volumes with other terminals in the North-West-European market. It should also be noted that there are currently plans for additional LNG capacity in the region, either by way of expanding existing capacity (e.g., the GATE terminal in the Netherlands) or by constructing new LNG infrastructure (e.g., LNG terminals in Brunsbüttel, Wilhemshaven and Stade). The competing projects also increase the risk of non-use of the Terminal.

(114) With regard to the risk of a change in costs and revenues in the future it should be remarked that revenues are uncertain to a large extent, as the binding capacity bookings that have taken place so far are conditional on EET securing the exemption. In addition, future regulatory changes or market developments may require the Terminal to adapt to importing other types of gases than natural gas, for example for hydrogen, which could require significant further investments.

(115) Subsidies, which would be granted to the investors can considerably reduce the investment risk. The parallel granting of an exemption and of subsidies is not excluded per se, but the granting of subsidies can require limiting the exemption, for example to a part of the capacity or to a shorter duration, as exemptions should be limited to what is necessary. In the present case, EET explained that it was initially supposed to receive two guarantees from the Dutch State at market terms, but that these have now been cancelled. EET will therefore not benefit from them.

(116) To demonstrate the risk EET has also submitted the expected returns of the project. If terminal users booked capacity between 8 and 10 bcm per year for a period of five

years, this would yield an internal rate of return of approximately between [redacted]% and [redacted]%. Any additional capacity booked by terminal users would yield higher internal rates of return. The bandwidth of return expectations shows that in view of the risks the level of profitability of the project is uncertain.

(117) EET has not demonstrated however that the returns for the entire capacity of 12 bcm/a is required to sufficiently alleviate the risk of the project so that EET would feel comfortable to take the investment decision. It appears that the expansion of the capacity from 10 bcm/a to 12 bcm/a is a possibility at this point, subject to a number of uncertainties. Additional permits would be required, the feasibility would have to be assessed and possible further investments may be necessary. EET's investment decision is based on the assumption that they will be able to market 10 bcm in the foreseeable future and they contend that the consequence of not granting an exemption for 12 bcm is considered to be minor. As the exemption should be limited to what is necessary for the project to go ahead, the Commission is of the view that the exemption should be granted for no more than 10 bcm/a. This does not mean that the Terminal cannot expand its capacity to 12 bcm at a later stage, it just means that it would not fall under the present exemption. Therefore, the MCE should update the exemption decision accordingly.

(118) Another question, which needs to be assessed is whether the duration of the exemption is justified in view of the risks related to the project. For such an assessment the relevant Guidelines[27] specify that contractual arrangements should be taken into account and that the duration of the exemption duration should be equal to or less than the expected period for cost recovery of the new infrastructure.

(119) The exemption is requested for 6 years. EET explained that a 6-year exemption is necessary to ensure that the exempted period covers the duration of the FSRU lease contracts (ending 1 September 2027) and any potential prolongation thereof as well as any potential interim period between the cease of operations at the Terminal and the commencement of operations at a permanent LNG infrastructure, which is yet to be constructed. On that basis, the MCE granted the exemption for 6 years following commencement of operations at the Terminal. The MCE further pointed out that the exemption period in question is much shorter compared to that granted for other LNG projects with which the Terminal will be competing.

(120) The Commission notes that the FSRUs have been leased for a 5-year period, ending on 1 September 2027. Equally, the Terminal Use Agreements to be entered into between the terminal users and EET will also have a duration of approximately 5 years. As mentioned in recital (118), contractual arrangements, most notably the length of capacity-booking contracts, are also an indicator used to determine the appropriate duration of an exemption. Moreover, the MCE confirmed that the investment will be recouped in 5 years.

(121) Therefore the Commission considers that the exemption should not be granted for more than 5 years following the commencement of operations at the LNG Terminal, as this would be sufficient for the project to go ahead.

(122) Considering the risks of non-use, as well as uncertainties around the future costs and revenues described in recitals (114) and ff. the Commission concludes that the risk

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27 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.

criterion within the meaning of Article 36 (1), point (b) of Directive 2009/73/EC is met, provided that the capacity for which the exemption is granted and the relevant period the exemption covers are modified by the MCE. As explained, the Commission considers that the exemption is only required for 10 bcm/a and for a duration of 5 years following commencement of operations at the Terminal.

5.8. Unbundling requirement

(123) 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.

(124) As explained in recital (2) above, the Terminal will consist of the two FSRUs and the necessary infrastructure on land. The MCE submitted that EET will have exclusive use rights of the FSRUs.

(125) The transmission network to which the Terminal will be connected is owned and operated by GTS.

(126) While the ultimate sole shareholder of GTS and EET is Gasunie, EET is a separate legal entity from GTS.

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

(a) EET shall ensure that ownership at the LNG facility will be and remain independent from GTS during the exemption period;

(b) In terms of its legal structure, EET shall be separate from and also act independently from GTS. GTS employees will not be allowed to work for EET and GTS at the same time.

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

5.9. Charges

(129) Article 36 (1), point (d) of Directive 2009/73/EC specifies that charges must be levied on users of the infrastructure at hand. In the exemption request, EET stressed the importance of charging (market-based) tariffs to the users of the Terminal. It is known that a tariff is charged for the first 8 bcm of firm capacity that the Terminal marketed and both the MCE and the ACM assume that charges will therefore be charged to all of EET's customers. The ACM will be monitoring this obligation once the Terminal is operational. To enhance legal clarity, the MCE should clarify in its exemption decision that charges must be levied on users of the Terminal. The requirement to levy charges set out by Article 36 (1), point (d) of Directive 2009/73/EC is therefore to be considered fulfilled if such additional clarity is provided in the exemption decision.

5.10. Impact on the internal market and regulated systems

(130) 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.

(131) The Terminal will improve the functioning of the internal gas market and contribute to the diversification of gas imports as it offers new capacity enabling new market actors to access the European gas market.

(132) Furthermore, the Terminal should not compromise the regulated system to which it is connected. In the context of the consultation described in recital (17), the Belgian regulator CREG highlighted that the project should not impact tariffs at cross-border interconnection points. It should be noted that no cross financing by cross-border interconnection tariffs is foreseen. As a result of the exemption the Terminal is completely separate from the regulated regime. Also, the ACM has indicated that, if anything, the Terminal is expected to have positive material effects on the network in the form of decreases of the applicable charges.

(133) Also, to ensure the overall optimisation of the energy network and the availability of sufficient feed-in capacity when the Terminal will start operating, EET reached out to the operator of the relevant transmission grid (GTS). EET confirmed that the new entry point to the Dutch transmission grid, which is to be constructed in the northern part of the Netherlands, will not have a negative impact on the grid as there is sufficient capacity. This is also due to the phasing-out of gas extraction activities at the Groningen gas field.

(134) On 4 May 2022, as required by Dutch law, GTS informed the ACM about EET's request for a new entry point to the Dutch transmission grid and asked the ACM to evaluate any material effects. On 13 May 2022, the ACM published the evaluation on its website, indicating that the additional capacity that is expected to be contracted as a result of the Terminal shall, if anything, have positive material effects on the network in the form of decreases of the applicable charges.

(135) 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 and that the two criteria listed in Article 36 (1), point (e) of Directive 2009/73/EC are thus fulfilled.

5.11. Other matters

5.11.1. State aid and application of competition law

(136) Any plan to grant State aid through public funds, including Union Structural funds, to the Terminal project is subject to the notification requirements to the Commission pursuant to Article 108 of the TFEU.

(137) This Decision is without prejudice to the application of the rules on competition and State aid rules of Union law. In particular, the criteria and the methodology used to 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 under Article 36 of Directive 2009/73/EC are not necessarily identical to those used to perform an assessment under Article 101 or 102 TFEU or Council Regulation (EC) No 139/2004[28].

6. CONCLUSION

(138) In light of what has been stated and provided that the notified exemption decision is amended in accordance with this Decision and that the MCE takes due account of this Decision when taking decisions addressed to EET the Commission takes the view that an exemption should be granted to EET in accordance with Article 36 (9) of Directive 2009/73/EC. The Commission should be informed about the final decision pursuant to Article 36 (9) Directive 2009/73/EC.

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

HAS ADOPTED THIS DECISION:

Article 1

The Dutch Minister for Climate and Energy Policy shall amend, in accordance with Article 36(9) of Directive 2009/73/EC, its exemption decision No DGKE-E / 22219730 of 30 June 2022 notified to the Commission on 1 July 2022, to safeguard full compliance with the conditions set out in Article 36(1) of Directive 2009/73/EC by:

1. clarifying that the exemption is granted for 10 bcm/a and for a duration of 5 years following the commencement of operations at the Terminal;
2. offering all firm capacity beyond 8 bcm to all potential users on a non-discrimination basis through market-based arrangements, indicatively auctions or open season;
3. Clarifying that charges need to be levied on the users of the Terminal.

Article 2

The Dutch Minister for Climate and Energy Policy shall monitor and, at the request of the Commission, report on the implementation of the conditions set out in this Decision.

Article 3

This Decision shall lose its effect:

(a) two years from its adoption in the event that construction of the terminal has not yet started;

(b) five years from its adoption in the event that the Terminal has not become operational.

However, points (a) and (b) shall not apply where the Commission decides that any delay is due to major obstacles beyond control of EemsEnergy Terminal B.V.

The notified exemption decision shall contain an expiry date and take proper account of this Article.

Article 4

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

Done at Brussels, 11.8.2022

For the Commission
Věra JOUROVÁ
Vice-President

CERTIFIED COPY
For the Secretary-General

Martine DEPREZ
Director
Decision-making & Collegiality
EUROPEAN COMMISSION