THIRD-PARTY ACCESS AND INVESTMENTS IN LNG TERMINALS

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ABSTRACT

When it comes to new gas infrastructure projects, how can the right balance be struck between regulating third-party access and encouraging investment?

Detailed sector-specific regulations at the European level and the national level have been developed for third-party access. The aim is to guarantee objective, transparent and non-discriminatory access to the gas infrastructure. However, the regulation of third-party access has to be restricted to new liquefied natural gas terminals and other new energy infrastructure projects, since undertakings must be allowed to make a reasonable return on their investments. Too much regulatory intervention may deter potential investors and threaten security of supply.

This paper explains the role of third-party access in the context of EC competition law, and examines how third-party access is regulated under European law and implemented in the Netherlands under the current and future regulatory framework. To illustrate the practical implementation of regulation of third-party access in relation to investments in new gas infrastructure projects, special attention is given to the Balgzand to Bacton gas pipeline between the UK and the Netherlands and the consultation document on the future regulation of liquefied natural gas terminals in the Netherlands.
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§1. INTRODUCTION

For many decades, the distribution of gas in the Netherlands was the preserve of national monopolies. Companies that were generally owned by public shareholders like municipalities, provinces and the central government were responsible for both the transmission and supply of gas. In the 1990s the European Commission issued the first gas directive (Directive 98/30/EC), which served as a springboard for the opening up of the gas market in the EU. Since then, this directive has been replaced by the second gas directive (Directive 2003/55/EC) (“Gas Directive”).1 These directives launched a process of liberalisation aimed at opening up the gas market in the European Union and creating an internal market for liquefied natural gas (“LNG”). Amongst other things, liberalisation required a repositioning of the gas infrastructure in the market. This was necessary because in order to widen the scope for market forces and to facilitate new entrants into the gas market, it was essential that parties wishing to supply gas be able to use the existing networks.

Accordingly, the Gas Directive requires Member States to ensure the implementation of a system of third-party access (“TPA”) to gas transmission, distribution networks and LNG facilities - an access based on published tariffs applied objectively and without discrimination. These tariffs (or at least the calculation methodologies) are subject to ex ante approval by the relevant regulatory authorities. A regime with these features is often described as regulated TPA. With regard to gas storage facilities, Member States are allowed to implement a system based on negotiated TPA.

§2. TPA AND COMPETITION

It is a generally accepted principle that building new gas transmission networks that run parallel to existing networks is inefficient. This principle, in combination with the fact that the existing networks are owned by a limited number of companies, has led to the creation of “natural monopolies”. If other market players are to make use of the networks of these natural monopolies, it is important first and foremost to ensure that these networks function independently. To do this, it was necessary to transfer ownership of the networks to separate companies and to designate independent network operators to run the networks. This process is called “unbundling”.2 The companies that were designated the network operators were then obliged to make TPA available.

2 This obligation was already laid down in the first gas directive.
The theory of TPA is rooted in EC competition law, and more particularly in the "essential facilities doctrine". A gas network is considered to be an "essential facility". Under this doctrine, a company is abusing its dominant economic position when it has a dominant position with regard to the performance of an essential service and uses that service itself through a facility or infrastructure without which competitors would not be able to provide a service to their customers, and refuses without good reason to give other companies access to that facility or only allows access under less favourable conditions. The judgment of the European Court of Justice which is usually cited in this respect is the Bronner judgment.

The application of this doctrine alone, however, is not sufficient to guarantee TPA to these networks. Gas distribution is regularly faced with shortages in capacity. In ordinary circumstances, a capacity shortage would justify a refusal of TPA to the existing infrastructure. At the same time, TPA restrictions may be necessary for companies to make a reasonable return on their investments in new gas infrastructure.

Accordingly, detailed sector-specific rules have been developed at both national and European levels for TPA in the gas sector. The aim of these rules is to guarantee objective, transparent and non-discriminatory access to the gas infrastructure. Where these sector-specific rules fall short of offering the necessary legal protection for implementation of TPA, EC competition law (in particular the prohibition on abuse of a dominant position) provides a safety net.

§3. REGULATION OF TPA IN THE GAS SECTOR

TPA System

The regulation of network access provided for in the Gas Directive relates to access to the gas transmission and distribution system, LNG facilities and upstream pipeline.

4 When the text of the 2nd Gas Directive was drafted in the co-decision procedure, the Council and Parliament explicitly included the importance of investment in LNG terminals. After first reading, amendment 120 was inserted that contained the following wording in the justification section: “At the same time, as for LNG importation terminals, a requirement for compulsory regulated access (and tariff determination) may discourage new investment in LNG facilities which will play a major role in ensuring the EU's security of gas supplies. It is therefore proposed to amend the definition of storage to include references to LNG storage whilst omitting other references to the regulation of LNG facilities (redefined to mean importation terminals only).” See also: Goeteijn & A. Ramas, "Access to Energy Networks: the combination of directives and competition policy", Utilities Law Review 12 (2001/2002) 6, p. 149 et seq.
5 Art. 18, Gas Directive
networks.\textsuperscript{6} The system of regulated network access is set out in the Gas Directive. The Member States must ensure the implementation of a system of TPA to the transmission and distribution networks.\textsuperscript{7} The system must be based on published tariffs which are applied objectively and without discrimination.\textsuperscript{8} The tariffs and/or the methodologies underlying their calculation require the approval of a regulatory authority prior to their entry into force.\textsuperscript{9} The tariffs or their methodologies must be published prior to their entry into force.\textsuperscript{10} The regulatory authority must be wholly independent from the interests of the electricity and gas sectors.\textsuperscript{11} A network operator may refuse access only if it lacks the necessary capacity.\textsuperscript{12}

The regulatory authorities in the Member States have the authority to require transmission and distribution system operators, if necessary, to modify their terms and conditions, tariffs, rules, mechanisms and methodologies and to ensure that they are proportionate and applied in a non-discriminatory manner. In addition to this \textit{ex-ante} tariff supervision, the regulatory authority also has an \textit{ex-post} function with regard to TPA. Any party having a complaint about a network operator with respect to the tariffs, terms and conditions, and the methodologies, amongst other things, may refer the complaint to the regulatory authority, which will act as a dispute resolution authority and issue a decision within two months after receipt of the complaint.\textsuperscript{13}

By requiring the establishment of an independent regulatory authority that approves the tariffs or methodology before they enter into force and is also able to intervene in this respect, the second gas directive granted more powers than the first gas directive.\textsuperscript{14} Naturally, this benefits the objective of TPA regulation.

In the Netherlands, the Gas Directive has been implemented in the Gas Act (\textit{Gaswet}). The Gas Act obliges network operators to do the following for anyone submitting a

\begin{itemize}
  \item \textsuperscript{6} Art. 20, Gas Directive. This relates to the pipeline network connected to gas extraction projects. This network is referred to in the Dutch Gas Act (\textit{Gaswet}) as the gas production network. TPA to this network is implemented in the Gas Act by declaring art. 17 of the Gas Act applicable to gas transmission with the aid of a gas production network on the part of the continental shelf under the North Sea.
  \item \textsuperscript{7} Art. 18, Gas Directive
  \item \textsuperscript{8} Ibid.
  \item \textsuperscript{9} Ibid.
  \item \textsuperscript{10} Ibid.
  \item \textsuperscript{11} Art. 25, Gas Directive
  \item \textsuperscript{12} Art. 21, Gas Directive
  \item \textsuperscript{13} Art. 26(6), Gas Directive
  \item \textsuperscript{14} See also: M. de Rijke & I.M. Schong, “Harmonising the Liberalisation of the Natural Gas and Electricity Markets”, \textit{Utilities Law Review} 12 (2001) 1, p. 5 et seq.
\end{itemize}
corresponding request: (1) provide a connection to the network operated by it at non-discriminatory tariffs; and (2) make an offer for the transmission of gas at non-discriminatory tariffs on behalf of the applicant using its network. The transmission obligation does not apply if the network operator does not reasonably have the necessary capacity for the requested transmission.

The regulatory authority for the Dutch energy market is the Netherlands Competition Authority (Nederlandse Mededingingsautoriteit or "NMa"). Since 1 July 2005, the NMa has had the status of a fully independent entity. In addition, the NMa has since then merged with former energy regulator, the Office of Energy Regulation (Dienst uitvoering en toezicht Energie or "DTe"). The DTe is now a sub-directorate of the NMa, and all DTe tasks have been transferred to the executive board of the NMa.

**Tariffs and conditions**

In addition to adopting the Gas Directive, the European Council and the European Parliament also adopted EC Regulation 1775/2005 on conditions for access to the gas transmission networks ("EC Regulation") on 28 September 2005. To ensure the rules for access are non-discriminatory, the EC Regulation sets out basic principles for the tariffs for access to networks and also for capacity allocation mechanisms. The aim of the EC Regulation is to ensure the proper functioning of the internal gas market.

The EC Regulation has four main objectives. The first objective is to set out harmonised principles for tariffs (or calculation methodologies) for access to the network. The second objective is the establishment of TPA services and harmonised principles for capacity allocation and congestion management. Third, the determination of transparency requirements, balancing rules and imbalance charges is another objective. The fourth objective is to facilitate capacity trading.

The measures to implement these principles are included in the guidelines accompanying the EC Regulation. Member States are required to implement sanction mechanisms for non-compliance. The EC Regulation, which will enter into force on 1

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15 Art. 14, Gas Act
16 Art. 15, Gas Act
17 Being an independent entity means no longer being under the formal direct control of the Minister of Economic Affairs. The Minister used to have formal control of the NMa, but this control was never exercised in practice.
July 2006, will not apply to new infrastructure projects (e.g. new interconnectors, new LNG terminals and new gas storage facilities).

In the Netherlands, the Gas Act regulates both the tariffs and the tariff calculation methodology. Under the current Gas Act, it is the NMa that determines the tariff structures and conditions after a joint proposal by the network operators. Each year the network operators submit a proposal for the maximum transmission tariffs to the NMa. The submissions are made before 1 October and in compliance with inter alia these tariff structures and conditions. The NMa then determines the tariffs for the next year. According to article 12 of the Gas Act, the rules for tariff structures and conditions are set out in a ministerial decree.

Additionally, the NMa determines several tariff components for each individual network operator, including an efficiency rebate ("the X factor") that provides an incentive to network operators to improve efficiency despite the lack of competition.

Once a year, and in compliance with the tariff structure, terms and conditions, and tariff components determined to this point, each network operator sends to the NMa a proposal on the maximum tariffs it intends to charge for the connections and transmission. The NMa then sets the tariffs. The tariffs may vary from one network operator to the next. They are non-discriminatory in the sense that the same tariff table applies to all the parties with a connection to the network of the same network operator. The tariffs are published in advance and may therefore be considered transparent in that sense.

Article 13 of the Gas Act confers powers to regulate LNG facilities by way of ministerial decree but to date this legislative process has not been completed. The regulation of tariffs and conditions for access to LNG facilities has recently been the subject of a consultation process involving the market parties (see below).

If a party disagrees with the manner in which a network operator is performing its role and using its powers, or meeting its obligations under the Gas Act, it may submit a

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20 In accordance with the procedure set out in art. 12(a)-(g), Gas Act
21 Art. 81(b) and (c), Gas Act
22 Ministerial Decree, Minister of Economic Affairs of 9 January 2005, no. WJZ 5001052, setting out rules for gas tariff structures and conditions (Regeling tariefstructuren en voorwaarden gas)
23 Art. 12 Gas Act et seq.
24 See “Informatie- en consultatiedocument reguleren en ontheffing LNG”, a publication of the Ministry of Economic Affairs and the NMa dated 9 February 2006. Interested parties had until 10 March 2006 to submit comments.
It is also possible to appeal against the binding decision of the NMa, according to the procedure set out in the General Administrative Law Act (Algemene wet bestuursrecht). It should be noted that these provisions do not affect a complainant's right to take recourse using other legal remedies. It is therefore conceivable that in the event of a dispute concerning TPA, for example, a complaint can also be made to the NMa on the basis of an abuse of a dominant economic position under article 24 of the Dutch Competition Act (Mededingingswet).

Grounds for refusal

A natural gas company may refuse TPA to the gas network in one of three situations. Access may be refused in the event of a lack of capacity or if it cannot reasonably be demanded that the entire capacity be provided. Access may also be refused to third parties if it would prevent the company meeting its public-service obligations (“PSO”). Access may also be refused on the grounds of serious economic and financial difficulties with regard to "take-or-pay obligations" ("ToP").

In the Netherlands, the second ground for refusal described above (i.e. PSO) applies both to gas network operators and operators of LNG facilities and their affiliated undertakings. PSO is also applicable to the exclusive obligation of Gas Transport Services ("GTS") (which operates the national gas transmission network) to buy at market prices all gas produced from the so-called "small fields" (i.e. all fields other than the Groningen field at Slochteren, the largest gas field in the Netherlands).

The third ground for refusal (ToP) was only included in the Gas Act with respect to the ToP obligations held by GTS. These obligations specify that even if GTS does not buy the gas produced from the above-mentioned fields, it is still contractually required to pay for it. If a concrete request for TPA submitted to GTS means that GTS will suffer or

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25 Art. 19, Gas Act. It is the NMa that considers complaints of this kind.
26 An example in relation to the electricity market is the complaint which Norsk Hydro Energy B.V. lodged with the NMa on 27 April 1998 against SEP in connection with SEP's refusal to make Norsk Hydro an offer for the transmission of electricity on its behalf. SEP had set the condition that Norsk Hydro should demonstrate beyond all doubt that the import of such electricity would not be accompanied by the supply to third parties of electricity that was intended for public use. The NMa concluded that there was evidence of a refusal to supply and fined SEP NLG 14 million. This fine was reduced to €3,500,000 on appeal to the Court of Rotterdam.
27 This obligation arises from the Dutch government’s "small field policy", which is intended to give priority to the exploitation of gas from the small fields in order to conserve the Groningen gas as a strategic reserve for as long as possible.
be threatened with serious economic or financial difficulties in connection with ToP contracts, GTS may ask the NMa for an exemption from its TPA obligation.26

Gas storage

In a liberalised market, gas storage facilities have an important function. They are used for seasonal storage, for example. They also play a role in "peak shaving", the balancing of the flow of gas on a daily and hourly basis. By using gas storage facilities, market players can respond to fluctuations in the demand for gas. As is also the case with gas networks, existing facilities for gas storage are owned by a limited number of companies.

The Gas Directive sets out a specific TPA scheme for gas storage.29 According to the definitions in the Gas Directive, the TPA obligation applies to gas storage facilities, but not that part of the facility used for gas production and facilities that are exclusively for the use of the network operator of the national gas transmission network in the performance of its tasks.30 In practice, it is often difficult to establish precisely which part of the gas storage facilities the network operator actually needs to perform its tasks. According to a note to the Gas Directive, the gas storage capacity available for TPA must be determined on the basis of information from the gas network operators. This information must be as accurate as possible, including for example the historical data on which it is decided what storage facilities the gas network operators must reserve for their exclusive use in order to be able to perform their tasks. The government has an important monitoring role to play in this respect. Any part of this capacity reserved for the exclusive use of the gas network operator, but then remaining unused, must be made available in certain conditions.31

The Gas Directive allows the Member States to choose between negotiated and regulated TPA. The Dutch legislature has opted for negotiated access. The Gas Act designates a number of gas storage companies with a dominant economic position. These gas storage companies are obliged to publish once a year a guide on tariffs and conditions, which forms the basis for negotiations about gas storage and the

26 Art. 16, Gas Act.
29 Art. 19, Gas Directive.
31 Note of DG Energy & Transport on Dir. 2003/54/EC and 2003/55/EC on the internal market in electricity and natural gas: Third party access to storage facilities, 16 Jan 2004.
performance of support services on behalf of third parties.\textsuperscript{32} This guide on tariffs and conditions must be in compliance with a ministerial regulation (which to date has not yet been drafted).\textsuperscript{33} Disputes concerning TPA to gas storage are submitted to the NMa.\textsuperscript{34} The NMa resolves disputes in compliance with the Gas Act and in accordance with the procedural rules set out in the Competition Act. No concrete dispute with regard to access to gas storage has to date been resolved by the NMa under the Gas Act.

\textit{New infrastructure}

The Gas Directive (as well as the new EC Regulation 1775/2005 on conditions for access to the gas transmission networks) allows major new gas infrastructure projects, e.g. new gas pipelines between Member States, new LNG facilities and new storage facilities,\textsuperscript{35} to be exempted from the TPA regulation.

In the Netherlands this exemption has been incorporated into the Gas Act. The Gas Act gives the Minister of Economic Affairs (“Minister”) the power to grant a requested exemption after considering the advisory opinion of the NMa.\textsuperscript{36} Notice of an exemption from the TPA regulation must also be given to the European Commission, which may block the exemption within a period of three months.

A good example of an infrastructure-related exemption from the TPA regulations in the Netherlands is the new gas pipeline between Balgzand (NL) and Bacton (UK) (“BBL”). The BBL gas pipeline is being constructed on behalf of Gas Transport Services.

In 2005, the NMa issued an advisory opinion to the Minister after a joint consultation of the market conducted in cooperation with the British regulator, the Office of Gas and Electricity Markets. The Minister agreed with the NMa’s advisory opinion that a full

\textsuperscript{32} Article 18(a)-(c), Gas Act. There are three underground gas storage facilities in the Netherlands. They are located at Norg, Grijpskerk and Alkmaar. The companies responsible for operating these facilities are N.V. Gasunie, the Nederlandse Aardolie Maatschappij (NAM) and BP, respectively.

\textsuperscript{33} Whereas previously the DTe published guidelines on tariffs for gas storage (\textit{Guidelines on tariffs for gas storage for the year 2003, The Hague, 30 August 2002}), since July 2004 the Gas Act has provided that rules in this respect may be laid down in a ministerial regulation. At the time of the completion of this article, no ministerial regulation had yet been published. As a consequence, the existing guidelines to tariffs and conditions for gas storage are still relevant.

\textsuperscript{34} Art. 18(e), Gas Act.

\textsuperscript{35} Art. 22, Gas Directive, and Art. 16 (b), EC Regulation 1775/2005.

\textsuperscript{36} Art. 18(h), Gas Act.
exemption should be granted to GTS, but for no more than 16 years and subject to a number of conditions.

One condition is that GTS must make timely investments in the GTS network that are necessary to cope with the timely throughput of gas to the BBL, without this affecting the security of supply and competition in the Netherlands. Another condition is that GTS is to inform the Minister of any changes in its investment plans. A third condition is that GTS must evaluate the use-it-or-lose-it regime ("UIOLI") and adapt it if it is not working properly. Fourthly, upon the completion of the construction of the BBL, the BBL company is required to prove that it has full ownership of the infrastructure in relation to which the exemption is granted.

After the expiry of the exemption, a regulated TPA regime in which timely consultations are held with the parties involved will go into effect.\(^\text{37}\)

\section*{§4. DUTCH TPA REGULATION AND INVESTMENTS IN LNG TERMINALS}

\subsection*{i. Consultation document on the proposed regulatory regime for LNG terminals}

Currently, the regulation of TPA to LNG terminals is a hot topic in the Netherlands.\(^\text{38}\) On 9 February 2006, the Ministry of Economic Affairs ("Ministry") and the NMa published a consultation document on the regulation of TPA to LNG terminals.\(^\text{39}\) It is expected that a draft ministerial decree on regulated TPA to LNG terminals, and the possible conditions for an exemption from this obligation, will be published in the summer of 2006.

The consultation document provides some insight into the future regulation of LNG terminals in the Netherlands. The approach taken in the document may apply to other investments in the new energy infrastructure. The proposal addresses five aspects: (1) TPA to initial capacity; (2) secondary market; (3) short-term capacity; (4) tariffs; and (5) the provision of information.

\section*{(1) TPA to initial capacity}


\(^{38}\) It is a striking fact that the Dutch government is developing a TPA regulation for LNG facilities, whereas the Federal Energy Regulatory Commission in the United States terminated open access requirements for LNG import terminals in an attempt to encourage more LNG site development as of October 2002 ("Hackberry Decision").

\(^{39}\) See footnote 24.
The Ministry and the NMa intend to allocate initial capacity\(^\text{40}\) to LNG terminals through an "open-season process".

There are two proposals: (a) the LNG company can choose to create extra capacity through a larger LNG terminal, or (b) the available capacity can be shared on a pro rata basis by the market parties.

Long term-contracts can be exempted for the duration of the period up to the break-even point ("investment horizon"), which the NMa assumes to be approximately 15 years.

\textit{(2) Secondary market}

To prevent the hoarding of capacity, unused capacity should be offered to third parties through a secondary market mechanism. The time that a certain slot needs to be released on the secondary market can be neither too far from nor too close to the time of use, because third parties need time to buy capacity. A booking period of two months is considered to be a reasonable time by the NMa and the Ministry. Therefore, the owner of the capacity should confirm the contracted capacity two months before the date of use. The NMa and the Ministry intend to require the application of a transparent UIOLI principle.

\textit{(3) Short-term capacity}

The Ministry and the NMa intend to require LNG terminal operators to reserve capacity for short-term contracts (i.e. contracts shorter than one year) to improve competition. Every year the LNG operator will be required to offer short-term capacity according to an open-season process. The operator can choose whether it wants to offer capacity to market parties on a pro-rata basis or through an auction mechanism.

According to the NMa, the share of reserved capacity for short-term contracts should be in a realistic proportion to long-term contracts, since otherwise investor security will be under pressure. Prices and demand on the short-term market is volatile and may have a negative influence on the investment climate.

\textit{(4) Tariffs}

\(^{40}\) "Initial capacity" means the initial allocation of long-term capacity to an LNG terminal that interested parties can subscribe to in an open-season process. Through the open-season process the capacity that will be realised by the open season will correspond to long-term market demand for capacity.
In accordance with article 13 of the Gas Act the method for tariff calculation for long-term contracts for the reservation of capacity will have to be submitted to the NMa for approval. However, at this time, the Ministry and the NMa do not see any reason to prescribe the method of tariff calculation.

Because of the higher risks involved in short-term contracts for the reservation of capacity a higher tariff is acceptable for these contracts. Assuming that a functioning market is in place, a capacity auction mechanism should yield market-based tariffs.

(5) Supply of information

The Ministry and the NMa intend to require LNG operators to publish the approved calculation method for the tariffs, the conditions and the tariffs themselves. In addition, LNG operators need to provide information on the availability of short-term capacity, long-term capacity and the availability of secondary capacity.

ii. Proposal for an exemption from regulated regime for new LNG infrastructure

The Gas Act allows LNG operators to apply for an exemption from regulated access for investments in new LNG infrastructure. An exemption can be granted by the Minister, after considering an advisory opinion by the NMa. Exemptions from regulation can be obtained for (1) TPA to capacity that has been allocated to the investors; and (2) tariffs and conditions for TPA.

The exemption is granted to the whole LNG facility (or part of it, in case of an expansion) and will be assessed on a case-by-case basis. All exemptions are subject to a time limitation and must fulfil the following five conditions.

(1) Investments in extra capacity will improve competition in relation to gas supplies and will increase security of supply.

The exemption is granted on the assumption that investments in extra capacity will improve competition in relation to gas supplies and will increase security of supply. To verify whether this assumption is valid, the impact of the investment on competition on the relevant market should be assessed. If the investment only leads to a negative effect on competition in a small segment of the market but the overall effect on competition is positive, an exemption can still be granted. In that respect the remaining capacity for third parties on the market is an important issue. The organisation of an open season and the existence of an effective UIOLI system will soften concerns about anti-competitive effects.
(2) The investment risk is so high that the investment will not go ahead if no exemption is granted.

The assessment of this criterion boils down to the level of regulatory risk. If the regulatory risk is at such a level that a normally commercially attractive investment will not go ahead, then an exemption from the regulation can be granted.

(3) The infrastructure must at least be legally unbundled from the TSO.

Unbundling is of importance to increase transparency and to limit the risk of cross-subsidisation and discrimination. An independent legal entity that controls the infrastructure should be created and is required to prove that it has ownership over the full infrastructure to which the exemption applies.

(4) The users of the infrastructure concerned will be charged with the tariffs.

The party applying for the exemption is required to prove that all users of the infrastructure will be charged the booked capacity. In addition, the applicant needs to make it transparent how it will apply the UIOLI principle and in relation to the settlement of any capacity that has been traded on the secondary market to the NMa.

(5) The exemption will not have detrimental effects on competition or the efficient functioning of the Internal market for natural gas; neither should it have negative effects on the regulatory system to which the infrastructure is connected.

In the assessment on whether this criterion has been fulfilled, attention is primarily given to the negative effects on competition and the operational consequences of the investment on the functioning of the gas market (or segments of this market) in general.

(iii) Market parties’ response

Most parties are of the opinion that for initial long-term capacity, an open season is the best option. A pro-rata-based open season is not the favoured mechanism because it does not address market demand for initial capacity in LNG terminals.

Most market parties do not see the advantage of short-term capacity reservation because the high risks connected to it could endanger the willingness to invest in LNG infrastructure. Because there is no guaranteed income for short-term contracts, the risk entailed in the project is higher and therefore the cost to finance the project is also higher. According to most of the respondents, long-term capacity contracts provide the best guarantee for security of supply.
However, in relation to the secondary market, efficient anti-hoarding mechanisms such as UIOLI or UIORI ("use-it-or-release-it") should be put in place. Combined with an effective notice period for available capacity and information transparency, these measures should be sufficient to grant an exemption from TPA for new LNG infrastructure. This should keep the right balance between security of supply through investment and competition.

According to some respondents long-term contracts should be exempted for the period up to the break-even point ("investment horizon"), which is assumed by the NMa and the Ministry to be approximately 15 years. However, according to some respondents the exemption period may be too short because investment horizons may differ in relation to each project. In some circumstances, it could even be as long as 20 to 25 years.41

§5. CONCLUDING REMARKS

Regulation of TPA for the energy infrastructure is manifestly an indispensable instrument for the liberalisation of the energy sector in the Netherlands and within the EU. Although TPA to essential facilities is rooted in EC competition law, it is clear that TPA is increasingly regulated by sector-specific rules. EC competition law can act as a safety net in this regard.

Currently, TPA is regulated in a fragmentary manner in European and national legislation. This fragmentation combined with the increase in sector-specific regulation means that miscellaneous European and national bodies are involved in both ex-ante and ex-post regulation of TPA. (In the case of the Netherlands these bodies are, for example, the European Commission, the Minister of Economic Affairs and the NMa).42

41 A long period of 20-25 years is in line with a Commission Notice in relation the Viking Cable, which involved a similar new infrastructure project (Notice pursuant to Article 19 (3) of Reg. No 17 (old) in case COMP/E-3/37.921, Viking Cable). In this Notice (a so-called "Carslberg Notice") the Commission indicated that it intended to accept a 25-year exclusivity period due to the investments to be made and the fact that the construction of new capacity would be more likely to increase competition rather than restrict it. However, the parties withdrew the application prior to the Commission issuing a final decision. In addition the UK regulator, OFGEM, also allowed for a 25-year exemption in relation to the application by South Hook LNG Terminal (OFGEM final views, November 2004) and by Grain LNG (OFGEM final views, December 2004 273/04).

This would not appear to be in the interests of the users of the European energy infrastructure, nor of investors in new infrastructure who benefit from transparent TPA regulation. In the current situation, market players have to live with fragmented TPA regulation.

The EC Regulation aims to create a more transparent regulatory playing field after its entry into force on 1 July 2006. It remains to be seen whether this EC Regulation will live up to expectations.

Judging by the consultation report of the Dutch Ministry and the NMa, it seems reasonable to expect that the Minister of Economic Affairs is willing to listen to investors about their concerns in relation to the overregulation of TPA to LNG terminals. Whether he will do so will become clear after the draft ministerial decree on TPA access to LNG Terminals is published.

One advantage of TPA regulation in general (and the exemption system in particular) is that it may grant legal certainty to investors in relation to regulatory risks. A disadvantage is that TPA regulation is applicable to new gas infrastructure without a prior examination to determine whether the specific infrastructure (e.g. LNG terminals) should be considered an essential facility.