

POMOC PAŃSTWA – LITWA**Pomoc państwa SA.44678 (2022/C) (ex 2018/N) – Zmiana pomocy dla terminalu LNG na Litwie****Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej****(Tekst mający znaczenie dla EOG)**

(2023/C 52/03)

Pismem z dnia 1 grudnia 2022 r., zamieszczonym w autentycznej wersji językowej na stronach następujących po streszczeniu, Komisja powiadomiła Litwę o swojej decyzji o wszczęciu postępowania określonego w art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej (TFUE) dotyczącego wyżej wspomnianej pomocy / wyżej wspomnianego środka.

Komisja postanowiła nie zgłaszać zastrzeżeń do pewnych pozostałych środków, jak to opisano w piśmie następującym po niniejszym streszczeniu.

Zainteresowane strony mogą zgłaszać uwagi na temat pomocy/środka, w odniesieniu do których Komisja wszczyna postępowanie, w terminie jednego miesiąca od daty publikacji niniejszego streszczenia i towarzyszącego mu pisma na następujący adres lub numer faksu:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Bruxelles/Brussel
BELGIQUE/BELGIË
Faks: + 32 2 296 12 42
Stateaidgreffe@ec.europa.eu

Otrzymane uwagi zostaną przekazane władzom Litwy. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie klauzulą poufności ich tożsamości lub fragmentów zgłaszanych uwag.

PROCEDURA

W dniu 20 listopada 2013 r. Komisja zatwierdziła program pomocy mający na celu wsparcie budowy i eksploatacji terminalu skroplonego gazu ziemnego (LNG) w Kłajpedzie („decyzja z 2013 r.”).

W dniu 31 października 2018 r. Komisja zatwierdziła dwie zmiany programu pomocy zatwierdzonego w decyzji z 2013 r.: zmiany z 2016 r. obejmujące lata 2016–2018 oraz zmiany z 2019 r. obejmujące lata 2019–2024 („decyzja z 2018 r.”).

W dniu 8 września 2021 r. Sąd Unii Europejskiej w sprawie T-193/19 – *Achema AB i Achema Gas Trade UAB przeciwko Komisji* (ECLI:EU:T:2021:558) – stwierdził częściową nieważność decyzji z 2018 r. Sąd uznał, że w zakresie zmian wprowadzonych w 2016 r. Komisja powinna była mieć wątpliwości co do zgodności środka z rynkiem wewnętrznym i powinna była wszcząć formalne postępowanie wyjaśniające zgodnie z art. 108 ust. 2 TFUE. Sąd oddalił skargę w pozostałym zakresie, w szczególności na decyzję z 2018 r. w zakresie, w jakim Komisja postanowiła nie wnosić zastrzeżeń w odniesieniu do pomocy państwa wynikającej ze zmian z 2019 r.

Aby zastosować się do wyroku Sądu, Komisja ponownie zbadała zmiany z 2016 r. i podjęła decyzję o wszczęciu formalnego postępowania wyjaśniającego zgodnie z art. 108 ust. 2 TFUE.

Wdrożenie zmian z 2016 r. należy uznać za niezgodne z prawem w następstwie stwierdzenia częściowej nieważności decyzji z 2018 r.

OPIS ŚRODKA, W ODNIESIENIU DO KTÓREGO KOMISJA WSZCZYNA POSTĘPOWANIE

Środki zatwierdzone decyzją z 2013 r. miały na celu wsparcie budowy i eksploatacji terminalu LNG w porcie morskim w Kłajpedzie na Litwie. W decyzji z 2013 r. zatwierdzono w szczególności obowiązek zakupu, którego celem było zapewnienie minimalnej technicznej objętości LNG niezbędnej do utrzymania stałej operacyjności terminalu LNG („obowiązkowa ilość LNG”). Zobowiązani nabywcy musieli kupować od wyznaczonego dostawcy całą obowiązkową ilość LNG, co zapewniałoby techniczną zdolność do utrzymania stałej operacyjności terminalu LNG.

W dniu 10 lutego 2014 r. w drodze przetargu litewskie ministerstwo energii wyznaczyło spółkę publiczną Litgas UAB („Litgas”) na wyznaczonego dostawcę.

W 2016 r. władze litewskie postanowiły zmienić program zatwierdzony decyzją z 2013 r., poprzez powierzenie przedsiębiorstwu Litgas świadczenia usług w ogólnym interesie gospodarczym (UOIG) w zakresie dostarczania obowiązkowej ilości LNG oraz wprowadzanie pobieranej od wszystkich odbiorców gazu opłaty od LNG na rzecz Litgas.

Nowe środki na rzecz Litgas zostały wprowadzone w dwóch etapach.

W zmianach z 2016 r., obejmujących lata 2016–2018, wprowadzono UOIG rekompensowaną opłatą pobieraną na rzecz wyznaczonego dostawcy za dostawę obowiązkowej ilości LNG.

W zmianach z 2019 r., obejmujących lata 2019–2024, zniesiono obowiązek zakupu i wprowadzono nową metodykę obliczania rekompensaty z tytułu świadczenia UOIG powierzonej wyznaczonemu dostawcy. Zgodnie z tą nową metodyką koszty związane z parowaniem i bilansowaniem były w pełni rekompensowane w ramach zmian z 2016 r., z kolei w ramach zmian z 2019 r. koszty związane z parowaniem były rekompensowane tylko częściowo, a te związane z bilansowaniem nie były rekompensowane wcale.

Litwa wskazała ustawę o energii i ustawę o terminalu skroplonego gazu ziemnego („ustawa o terminalu LNG”), wraz ze zmianami, jako krajową podstawę prawną zmian z 2016 r. Całkowity budżet tego środka w latach 2016–2018 wyniósł 78 631 120 EUR.

OCENA ŚRODKA

Komisja ponownie zbadała zgodność zmian z 2016 r. z rynkiem wewnętrznym w oparciu o warunki określone w zasadach ramowych dotyczących rekompensaty z tytułu świadczenia usług publicznych z 2012 r. (Dz.U. C 8 z 11.1.2012, s. 15). Komisja doszła do wstępnego wniosku, że powierzono Litgas faktyczną UOIG oraz że większość wymogów zasad ramowych dotyczących rekompensaty z tytułu świadczenia usług publicznych z 2012 r. wydaje się być przestrzegana.

Niemniej jednak Komisja zwraca się o wyjaśnienia i przedstawienie uwag w kwestii wysokości rekompensaty w ramach zmian z 2016 r., a w szczególności rekompensaty całości następujących kosztów:

- a) Koszty związane z parowaniem: czy całość kosztów związanych z parowaniem można uznać za ekonomicznie uzasadnione i rzeczywiście poniesione w latach 2016–2018 koszty związane z UOIG; czy rekompensata całości kosztów związanych z parowaniem na podstawie zmian z 2016 r. była „niezbędna” do świadczenia UOIG; czy obowiązek zakupu w jakikolwiek sposób wpłynął na wysokość kosztów związanych z parowaniem poniesionych przez Litgas w ramach świadczenia UOIG;
- b) Koszty bilansowania: czy całość kosztów związanych z bilansowaniem można uznać za „ekonomicznie uzasadnione” i rzeczywiście poniesione w latach 2016–2018 koszty związane z UOIG; czy rekompensata całości kosztów związanych z bilansowaniem na podstawie zmian z 2016 r. była „niezbędna” do świadczenia UOIG; czy obowiązek zakupu w jakikolwiek sposób wpłynął na wysokość kosztów związanych z bilansowaniem poniesionych przez Litgas w ramach świadczenia UOIG.

Zgodnie z art. 16 rozporządzenia Rady (UE) 2015/1589⁽¹⁾ wszelka niezgodna z prawem pomoc może podlegać odzyskaniu od beneficjenta.

⁽¹⁾ Rozporządzenie Rady (UE) 2015/1589 z dnia 13 lipca 2015 r. ustanawiające szczegółowe zasady stosowania art. 108 Traktatu o funkcjonowaniu Unii Europejskiej (Dz.U. L 248 z 24.9.2015, s. 9).

PISMO

The Commission wishes to inform Lithuania that, following the judgment of the General Court of 8 September 2021 in case T-193/19 — *Achema AB and Achema Gas Trade UAB v Commission* ⁽¹⁾ ('the GC judgment'), it has re-examined the information supplied by your authorities on the measure referred to above.

After re-examination of the notification, the Commission has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU).

1. PROCEDURE

- (1) On 20 November 2013, the Commission adopted Decision C(2013) 7884 final in which aid measures for the construction and operation of a liquefied natural gas terminal ('the LNG Terminal') in the Klaipėda Seaport were declared compatible with the internal market ('the 2013 Decision') ⁽²⁾.
- (2) On 26 February 2016, the Lithuanian authorities pre-notified amendments to the aid measures approved in the 2013 Decision ('the 2016 Amendments'). Those amendments entered into force on 1 January 2016.
- (3) On 7 July 2016, Achema and Achemos Grupė ('the complainants') lodged a complaint with the Commission against the Republic of Lithuania, alleging that the 2016 Amendments amounted to unlawful State aid incompatible with the internal market ('the complaint').
- (4) In January 2018, the Lithuanian authorities informed the Commission of their intention to modify the 2016 Amendments as of 1 January 2019 ('the 2019 Amendments').
- (5) On 9 July 2018, the Lithuanian authorities notified to the Commission, in accordance with Article 108(3) TFEU, the 2016 Amendments and the 2019 Amendments.
- (6) On 31 October 2018, the Commission adopted Decision C(2018) 7141 final in which State aid SA.44678 (2018/N) relating to modification of the aid for the LNG terminal in Lithuania was declared compatible with the internal market ('the 2018 Decision') ⁽³⁾.
- (7) On 8 September 2021, following Achema AB's and Achema Gas Trade UAB's ('the applicants') action for annulment, the General Court partially annulled the 2018 Decision, in so far as the Commission decided not to raise objections to the State aid resulting from the 2016 Amendments.
- (8) In summary, the General Court considered that, as regards the 2016 Amendments, based on the particularly long duration of the administrative procedure, the circumstances surrounding the adoption of the 2018 Decision and the incomplete, insufficient and inconsistent examination as regards the compensation for the entirety of boil-off costs and balancing costs of Litgas, the Commission should have had doubts as to the compatibility of the measure with the internal market, which should have led it to initiate the procedure referred to in Article 108(2) TFEU. That latter factor carried significant weight in the overall assessment, in so far as those costs represent a significant part of Litgas's total costs and, therefore, significantly affect the amount of compensation during the period from 2016 to 2018.
- (9) The General Court dismissed the action as to the remainder and rejected, in particular, the action against the 2018 Decision insofar as the Commission decided not to raise objections to the State aid resulting from the 2019 Amendments.
- (10) In order to comply with the GC judgment, the Commission re-examined the 2016 Amendments, and decided to initiate the formal investigation proceedings under Article 108(2) TFEU.
- (11) By letter dated 3 October 2022, Lithuania agreed to waive its rights deriving from Article 342 TFEU in conjunction with Article 3 of Regulation 1/1958 ⁽⁴⁾ and to have the present decision adopted and notified in English.

⁽¹⁾ ECLI:EU:T:2021:558

⁽²⁾ Commission Decision C(2013) 7884 final of 20 November 2013 on case SA.36740 (2013/NN) Aid to Klaipėdos Nafta — LNG Terminal, Lithuania, JOCE C/161/2016.

⁽³⁾ Commission Decision C(2018) 7141 final on case SA.44678 (2018/N) Modification of aid for LNG Terminal in Lithuania (OJ 2019 C 14, p. 1).

⁽⁴⁾ Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385).

2. DESCRIPTION OF THE MEASURE

2.1. The 2013 Decision

- (12) The measures approved by the 2013 Decision aimed to support the construction and operation of the LNG Terminal in the Klaipėda Seaport in Lithuania.
- (13) The LNG Terminal project was developed by Lithuania with the objective to diversify gas sources, increase security of supply and introduce more competition in the Lithuanian gas market.
- (14) Before the LNG Terminal, Lithuania was fully dependent on Russian gas. Russian natural gas undertaking OAO Gazprom ('Gazprom') was the only gas supplier.
- (15) The complete dependence of Lithuania on Russian gas resulted from the isolated nature of the Lithuanian gas market in view of the limited options for cross-border natural gas flows to Lithuania. The natural gas system of Lithuania was connected only to the natural gas systems of the Republic of Belarus ('Belarus'), the Republic of Latvia ('Latvia') and the Kaliningrad region of the Russian Federation ('Kaliningrad'). Before the LNG Terminal was built, Lithuania was supplied gas only from Russia — for internal consumption and as a transit from Belarus to Kaliningrad. In some cases, Lithuania received Russian gas from Latvia.
- (16) Under the 2013 Decision, the approved State aid measures consisted of the following:
- (a) First, the 2013 Decision approved investment and operating aid to the owner and operator of the LNG Terminal — AB Klaipėdos Nafta ('KN'). The investment aid covered the part of KN's installation costs that could not be financed through other means whereas the operating aid covered the fixed operating costs of the LNG Terminal. Both aids were financed through the so-called LNG Supplement — a levy imposed as a supplement to the natural gas transmission price and collected by the Lithuanian transmission system operator for natural gas⁽⁵⁾ ('the TSO') from gas users on the basis of their actual gas consumption, for a duration of 55 years.
- (b) Second, it approved State guarantees to KN, covering 100 % of the value of the loans the terminal operator needed for the construction of the LNG Terminal.
- (c) Third, the 2013 Decision also approved a purchase obligation, which had the purpose of ensuring the technical minimum LNG volume⁽⁶⁾ necessary for the LNG Terminal to remain operational at all times ('the LNG Mandatory Quantity') and was approved for a period of 10 years subject to periodical reviews ('the Purchase Obligation').
- (17) The Purchase Obligation was imposed on private and public undertakings operating in the regulated segment of electricity and heat generation ('the Obligated Purchasers'⁽⁷⁾). Together the Obligated Purchasers bought the minimum volume of LNG from a selected supplier ('the Designated Supplier'). Each Obligated Purchaser had an off-take quota established as a percentage of the LNG Mandatory Quantity. At the moment of the 2013 Decision, the overall quantity to be purchased by Obligated Purchasers amounted to 0,54 bcm of LNG per year, which was considered the technically minimum quantity necessary to keep the LNG terminal operational. The share of the LNG Mandatory Quantity each Obligated Purchaser had to buy was proportionate to its supply needs.
- (18) Based on the 2013 Decision the beneficiary of aid under the approved measures was the LNG terminal operator — KN.

2.2. Facts subsequent to the 2013 Decision

- (19) On 10 February 2014, following a call for tenders, the Lithuanian Ministry of Energy appointed the public company Litgas UAB ('Litgas') as the Designated Supplier.
- (20) On 21 August 2014, following a call for tenders, Litgas signed a 5-year contract for the supply of the minimal quantity of LNG (0,54 bcm/year) with Statoil.

⁽⁵⁾ AB Amber Grid.

⁽⁶⁾ The Lithuanian Government set the quantity upon declaration of KN of the LNG volume necessary to ensure stable operation of the LNG Terminal.

⁽⁷⁾ Those are electricity or heat producers assigned whose price of produced energy is regulated. This encompasses central heating and electricity (co-generation) plants.

- (21) To ensure the constant regasification at the LNG Terminal the contract provided for a fixed delivery schedule, whereby four LNG cargoes per year, once per quarter, were delivered on an even basis to the LNG Terminal.
- (22) The contract was concluded at the time when the Asian LNG markets were characterised by high prices which exerted upwards pressure on European LNG prices. Nonetheless, the Lithuanian authorities demonstrated that the contract concluded with Statoil was cheaper than other options received in the course of the tender procedure (see Figure 1 below). Even though the alternative bidders offered lower prices for the years 2017-2019, Statoil offered significantly lower prices for the first two years of the contract, so that in aggregate over the 5-year delivery period the selected bid was the most attractive.

Figure 1

Comparison of bid offers (EUR/MWh)

[...]*

Source: Lithuanian authorities

- (23) On 1 January 2015, the LNG terminal entered into commercial operation and Litgas began to supply LNG to the LNG terminal upstream and, downstream, gas to the Obligated Purchasers.

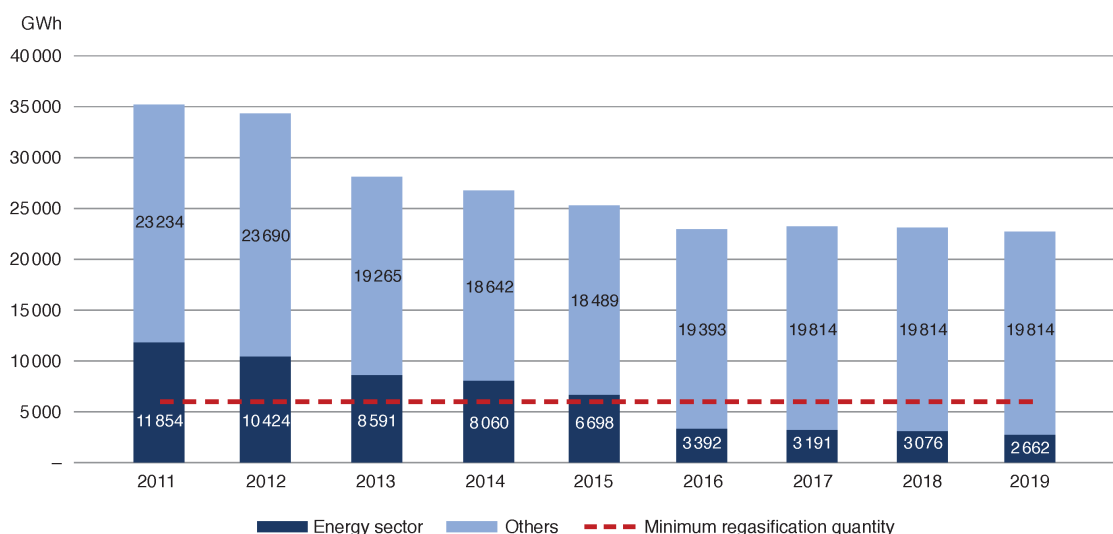
2.3. Notified modifications

2.3.1. Context of the modifications

- (24) Pursuant to the 2013 Decision, the Obligated Purchasers had to purchase from Litgas all the LNG Mandatory Quantity, which would ensure technical ability to maintain the LNG Terminal operational at all times. The price paid by the Obligated Purchasers for the LNG was regulated by the national regulatory authority ('the NRA') and included all costs incurred by Litgas in the delivery of the LNG Mandatory Quantity. This model intended to place all the additional costs of supplying the LNG Mandatory Quantity on the Obligated Purchasers, which subsequently would be able to pass-on such burden to the ultimate consumers of their products.
- (25) However, this model appeared to be inefficient, when demand for natural gas decreased dramatically and the costs of supplying the LNG Mandatory Quantity were distributed among the Obligated Purchasers in proportion to their declining demand for natural gas.
- (26) As shown in Figure 2, from 2011 to 2014, annual natural gas consumption in Lithuania dropped by 24 % (from 3,4 bcm in 2011 to 2,6 bcm in 2014) and a further reduction of demand was expected in the following years (*). The energy sector reflects the demand by the Obligated Purchasers and the red dotted line corresponds to the LNG Mandatory Quantity of 0,54 bcm of gas, as approved by the 2013 Decision.

Figure 2

Annual natural gas consumption in Lithuania



Source: Lithuanian authorities

(*) Confidential information
Data is based on NRA information and internal calculation of Litgas.

- (27) Demand for natural gas decreased dramatically and the costs to maintain the LNG Terminal operational had to be distributed among the Obligated Purchasers over a smaller quantity of gas purchased. In effect, due to the reduced demand for natural gas, the unit price for the Obligated Purchasers, covering the costs to maintain the LNG Terminal operational increased significantly. In this context, Lithuania realised that the burden of maintaining the LNG Terminal operational should be distributed on all consumers of the natural gas system which were benefiting from the security of supply guaranteed by the LNG Terminal.
- (28) In parallel, the Lithuanian authorities realised that the LNG terminal could be run not only on a steady regime but also on standby regime. The difference between these two regimes lies merely with the different technical means used to achieve the same purpose (i.e. to keep the LNG Terminal cooled down), which requires different minimum quantities of gas to ensure regasification. Following the regime change into a standby regime, the Lithuanian authorities could reduce to 0,37 bcm/year the LNG Mandatory Quantity that was needed to ensure the operation of the LNG Terminal.
- (29) In view of the above considerations, in particular since the cost for the Obligated Purchasers turned out to be unsustainable, the Lithuanian authorities decided to amend the scheme approved by the 2013 Decision by entrusting Litgas with a service of general economic interest ('SGEI') for the provision of the LNG Mandatory Quantity and by introducing a new LNG Supplement to the benefit of Litgas to be financed by all gas customers⁽⁸⁾.
- (30) The new measures in favour of Litgas were introduced in two steps:
- (a) covering the period from 2016-2018⁽⁹⁾ ('the 2016 Amendments'):
- Changes to the set-up of the Purchase Obligation involving a new pricing mechanism for the LNG Mandatory Quantity that the Obligated Purchasers had to buy;
 - Introduction of a SGEI compensated via a LNG Supplement payable to the Designated Supplier for the supply of the LNG Mandatory Quantity.
- (b) covering the period from 2019-2024⁽¹⁰⁾ ('the 2019 Amendments'):
- Abolition of the Purchase Obligation;
 - New methodology for calculating the compensation for the SGEI entrusted to the Designated Supplier.
- (31) A detailed description of the modifications is provided below in sections 2.3.6 and 2.3.7.
- 2.3.2. *National legal basis*
- (32) Lithuania indicated as national legal basis for the 2016 Amendments the Law on Energy⁽¹¹⁾ and the Law on Liquefied Natural Gas Terminal⁽¹²⁾ ('LNG Terminal Law'), as amended. In particular, Article 11 of the LNG Terminal Law provides that the Designated Supplier is entrusted with the obligation to deliver the LNG Mandatory Quantity to the LNG Terminal.
- (33) Furthermore, Lithuania indicated a list of implementing provisions:
- (a) Government Resolution of 7 November 2012 No 1354 'On the Order of Natural Gas supply diversification approval', amendment adopted on 2 December 2015 ('DivReg').
- (b) NRA Resolution No O3-650 approved on 15-12-2015 'Regarding approval of the Methodology for Setting Forecasted Natural Gas Reference Price' ('Methodology for setting gas reference price No O3-650').
- (c) The order of the Minister of Energy of 10 February 2014 No 1-20 'On UAB Litgas awarding as the Designated Supplier' ('Order awarding Litgas as the Designated Supplier').

⁽⁸⁾ Lithuania initially also notified some technical changes related to the operation of the LNG Terminal by KN. The amendments concerned in particular changing the technological regime of the LNG Terminal from steady to stand-by regime. Following several information exchanges with the Lithuanian authorities, it became apparent that the modifications related to KN did not substantially amend the initial scheme approved by the 2013 Decision and therefore no notification in this respect was needed.

⁽⁹⁾ From 1 January 2016 to 31 December 2018.

⁽¹⁰⁾ From 1 January 2019 to 31 December 2024.

⁽¹¹⁾ Law on Energy of the Republic of Lithuania No. IX-884 adopted on 16-05-2002; Official Gazette Valstybės žinios, 2002, 56-2224.

⁽¹²⁾ Law on Liquefied Natural Gas Terminal No. XI-2053 adopted on 12-06-2012. Publication: Official Gazette Valstybės žinios, 2012, 68-3466.

(d) The National Control Commission for Prices and Energy Resolution No O3-367 of 13 September 2013 'On the approval of methodology of fixing State-regulated prices in the natural gas sector' amendments adopted on 18 December 2015 ('NRA Methodology No O3-367'). The NRA Methodology No O3-367 details the parameters for calculating the compensation to the Designated Supplier.

- (34) Lithuania indicated, as national legal basis for the 2019 Amendments, the LNG Terminal Law, which was amended accordingly, and the NRA Methodology No O3-367, which was amended after the adoption of the 2019 Amendments so as to reflect the same principles.

2.3.3. Objective

- (35) The objective of the modifications was to maintain the LNG Terminal operational in order to achieve diversification of gas supply. Supply diversification in itself would contribute to increased security of supply levels and greater energy independence of Lithuania.

2.3.4. Budget

- (36) The total budget for the scheme is EUR 276 703 731 covering the period 2016 to 2024.
- (37) The total budget for the measure during the period 2016-2018 scheme was EUR 78 631 120, allocated as shown in Table 1 below.

Table 1

Budget for the measure during the period 2016-2018

	2016	2017	2018	Total
Aid in EUR	23 562 675	30 968 445	24 100 000	78 631 120

Source: Lithuanian authorities

- (38) The total budget for the measure during the period 2019-2024 is EUR 198 072 611, allocated as shown in Table 2 below.

Table 2

Budget for the measure during the period 2019-2024

	2019	2020	2021	2022	2023	2024	Total
Aid in EUR	34 551 588	34 520 933	33 856 268	31 714 607	31 714 607	31 714 607	198 072 611

Source: Lithuanian authorities

2.3.5. Beneficiary

- (39) The beneficiary under the notified modifications is the Designated Supplier –Litgas, the recipient of the new LNG Supplement ⁽¹³⁾.
- (40) Litgas was founded in December 2012 by KN. In October 2016 the State-owned energy company Lietuvos Energija became the sole shareholder of Litgas with a share ownership of 100 %.
- (41) The Lithuanian authorities informed the Commission about the planned structural reorganisation of Litgas by way of merging Litgas into UAB Lietuvos duju tiekimas ('LDT'), which is also controlled by Lietuvos Energija. That means that as of 1 January 2019 Litgas ceased to exist and its functions of the Designated Supplier and its status of beneficiary were taken over by LDT.

⁽¹³⁾ Based on Article 11(2) of the LNG Terminal Law, the Designated Supplier is recognized as an entity of strategic importance for national security.

2.3.6. The 2016 amendments

- (42) Pursuant to the 2016 Amendments⁽¹⁴⁾, the Purchase Obligation was amended as follows:
- a) Litgas, as the Designated Supplier, was entrusted with an SGEI, consisting of an obligation to provide the LNG Mandatory Quantity to the LNG terminal; the SGEI would be financed by a new component of the LNG supplement in favour of Litgas, the purpose of which was to compensate Litgas for the costs it incurred in connection with the SGEI which were not entirely covered by the revenue generated by the resale downstream of gas at a regulated price; that new component of the LNG supplement in favour of Litgas would be added to the LNG supplement in favour of KN referred to in recital (16)(a);
 - b) the methodology for calculating the regulated price paid by the Obligated Purchasers to Litgas for the purchase of the LNG Mandatory Quantity was changed; that price was now calculated by the NRA by reference to the market price, on the basis of the average gas market prices, taking into account data relating to contracts for the supply of gas traded on the Lithuanian gas exchange and on a bilateral basis;
 - c) the LNG Mandatory Quantity was reduced from 0,54 bcm per year to 0,37 bcm per year;
 - d) the quantity of gas that each Obligated Purchaser had to purchase from Litgas was now determined only on the basis of its individual demand for gas; if the gas demand from all the Obligated Purchasers taken together was less than the LNG Mandatory Quantity, Litgas was to sell the quantities not resold to Obligated Purchasers on the national or international market.
- (43) On 18 February 2016, following renegotiation of the LNG supply contract, Litgas and Statoil signed an amended contract, according to which, first, the annual quantity of LNG supplied by Statoil to Litgas was reduced to 0,37 bcm per year, second, the duration of the contract was extended until 2024 and, third, the LNG price was reduced.

2.3.6.1. Determination of the regulated price by the NRA

- (44) Based on the pricing mechanism introduced by the 2016 Amendments the LNG purchased by the Obligated Purchasers from Litgas was sold at a new regulated price, calculated on the basis of the projected natural gas market prices for the Lithuanian market.
- (45) The NRA set the regulated natural gas price using an approved 'Methodology for Setting Forecasted Natural Gas Reference Price' (the Methodology).
- (46) The Methodology was based on several principles. According to the Methodology, the price projections on which the regulated natural gas price was based were calculated by taking into account the prices and the volumes of natural gas quantities imported to Lithuania in the course of the last 12 months. For that purpose, data from gas supply contracts traded on the Lithuanian gas exchange and on a bilateral basis (both on wholesale and retail markets) as well as projected prices of each company importing natural gas on the basis of their contractual conditions were taken into account. Furthermore, the respective weighted average prices were calculated taking into account any correlation effects as well as any additional gas suppliers' expenses and profits.
- (47) The regulated natural gas price was updated once a year. In case of a major change in any of the main input parameters for the calculation of the natural gas price the latter could be updated on a more frequent basis — once every three or six months. A major change was defined as a sudden increase or decrease in the market price of natural gas of more than 10 %. In that case, the new regulated natural gas price would have been revised up or down by a maximum of 10 %. Since the middle of 2017 the regulated natural gas price was updated once per quarter.
- (48) According to the Lithuanian authorities, the new price setting mechanism did not pose any serious risks of distorting downstream markets. That is due to the fact that the Obligated Purchasers⁽¹⁵⁾, who bought natural gas at the new regulated price operated on regulated markets and sold electricity and gas at regulated prices. Lithuania confirmed that under the amended set-up of the Purchase Obligation the Obligated Purchasers continued to be subject to the requirements of separation of accounts if they engaged in any non-regulated activities.
- (49) The provisions of the LNG Terminal Law foresaw that quantities of natural gas not sold to the Obligated Purchasers would be auctioned on the market. The auctions were organised by the market operator (GET Baltic), as defined in the Law of the Republic of Lithuania on Natural Gas. In case the surplus natural gas quantities were not fully realised through the auctions, the remaining quantities had to be realised by the Designated Supplier through the gas exchange or by concluding bilateral trade agreements.

⁽¹⁴⁾ The above mentioned principles are established in Articles 11(1), 11(5), 11(6), 11(7) and 11(9) of LNG Terminal Law.

⁽¹⁵⁾ Price of natural gas distributed by the Designated Supplier subject to Purchase Obligation is regulated by the State (Art. 24 of the DivReg). Costs incurred by the Obligated Purchasers in purchasing such obligatory volumes of natural gas from the Designated Supplier are included into their regulated energy prices (Art. 20 of DivReg).

- (50) The Lithuanian authorities explained that the amended pricing mechanism did not entail any extra profit for the Obligated Purchasers. Any positive financial effects of the changes described above were fully passed on to final consumers in the form of lower regulated prices of heat and electricity.

2.3.6.2. SGEI Compensation to Litgas

- (51) Article 5(2) of the LNG Terminal Law dealt with cost compensation via the LNG Supplement.
- (52) The compensation to Litgas took into account Litgas's revenues resulting from the LNG sold at regulated prices to the Obligated Purchasers and on the market, all Litgas's costs stemming from its activities as the Designated Supplier and a regulated profit margin. The compensation notably covered the difference between the LNG price paid, upstream, by Litgas to Statoil and the price at which Litgas sold, downstream, to the obligated purchasers and to the free market. The introduction of the LNG Supplement for Litgas was a direct consequence of the new pricing mechanism for calculating the price of the LNG Mandatory Quantity purchased by the Obligated Purchasers.
- (53) Based on the 2016 Amendments, Litgas received a fixed profit margin approved by the NRA of 0,24 EUR/MWh on the sale of the LNG Mandatory Quantity to the Obligated Purchasers.
- (54) A different mechanism was applicable for sales of the LNG Mandatory Quantity on the market. Litgas was entitled to keep half the profit from such sales, yet such profit in all cases could not exceed the average profit margin earned by natural gas companies in Lithuania. In the years 2016-2018, the profit margin earned by Litgas was in the range of [0-5 %].
- (55) Pursuant to the requirements of the Law on Natural Gas applicable to the Lithuanian gas sector, all undertakings, including Litgas, were obliged to submit to the NRA annual reports on costs as well as the annual audited reports. The mentioned provision also imposed the requirement of separation of accounts. In line with these requirements Litgas was obliged to maintain separate accounts for its regulated activities as a Designated Supplier and for its non-regulated activities.
- (56) The new LNG Supplement paid to Litgas was designed to compensate Litgas for the costs associated with the activities of the Designated Supplier. Under the LNG Terminal Law the costs associated with the activities of the Designated Supplier providing the SGEI and covered by the new component of the LNG Supplement had to be 'justified costs' — i.e. the costs associated with the SGEI of the Designated Supplier had to be incurred in an 'efficient manner'.
- (57) The NRA Methodology No O3-367 contained a mechanism for the SGEI provider to perform assigned obligations efficiently. For a certain number of operating expenses (repairs, maintenance, personnel, insurances, marketing and administrative costs, etc.), the NRA established a ceiling for the price of the regulated service. Costs going beyond that limit were not compensated. In addition, since 2017 the regulated companies had an additional incentive to further reduce OPEX. A company, which reduced its costs more than required by the NRA in a given period of time, could keep part of such savings. Moreover, the costs that were taken into account for setting the LNG Supplement and the compensation were increased only by half of the inflation coefficient and not more than 3 %.
- (58) The LNG Supplement covered costs such as gas acquisition costs, labour costs, administration costs, amortization costs, costs for repairs, marketing and sales costs as well as financial costs. Furthermore, as explained in recital (21), under the LNG supply contract with Statoil the delivery schedule was fixed and four LNG cargoes per year were delivered once per quarter on an even basis to the LNG Terminal. This type of long-term contract with a fixed delivery schedule gives rise to some costs, namely boil-off costs, balancing costs and long-term guarantee costs. In 2017 these specific costs constituted more than two thirds of the total Designated Supplier's costs ⁽¹⁶⁾.
- (59) For the purposes of determining the justified costs, Litgas submitted to the NRA monthly reports with data on the quantities of LNG bought and sold as well as on all expenses and revenues resulting from buying and selling LNG. The NRA evaluated the actual and the forecasted costs of Litgas's activities as Designated Supplier as well as the way in which they were incurred and established the eligible costs which could be covered by the LNG Supplement.

⁽¹⁶⁾ The total Designated Supplier's costs included boil-off costs, balancing costs, bank guarantee costs, financing costs, OPEX and costs of regasification and capacity booking.

Boil-off costs

- (60) The Designated Supplier must keep its LNG in tanks at the LNG Terminal and regasify LNG at the minimum output rate to keep the LNG Terminal operational (rather than releasing LNG to the natural gas system immediately) even though such slow regasification causes high natural losses of LNG due to evaporation (boil-off gas). Boil-off gas is a natural loss of LNG, which occurs in the period from injection of LNG into tanks until its release to the natural gas system. As a general rule, the less time LNG is kept in a tank, the less natural loss of LNG is incurred by the specific user of the LNG Terminal.
- (61) Lithuania indicated that boil-off gas costs accounted for a significant proportion of the Designated Supplier's costs incurred in connection with the supply of the LNG Mandatory Quantity (in 2017 boil-off gas costs amounted to ca. 55 % of the total costs incurred by the Designated Supplier) and were incurred mainly during the winter period (December to March). As shown in Figure 3 below, this can be explained by the fact that the volume of boil-off gas is higher in winter⁽¹⁷⁾ and that during this period, Litgas is generally the only user at the LNG Terminal⁽¹⁸⁾. During the summer period, the volume of boil-off gas is lower and part of the boil-off costs are allocated to other users of the LNG Terminal⁽¹⁹⁾. The graph below illustrates fluctuations of the boil-off gas costs at the LNG Terminal throughout the year.

*Figure 3***Monthly fluctuation of boil-off gas in 2017 at the LNG Terminal.**

[...]

Source: Lithuanian authorities

- (62) The Lithuanian authorities provided evidence that for the entire year 2017 the Designated Supplier lost [5-15 %] of its LNG due to boil-off, while other suppliers lost only 1.23 % of their LNG. According to the Lithuanian authorities, such differences are explained by the fact that unlike the Designated Supplier other suppliers generally do not use the LNG Terminal in the winter period and that other suppliers can regasify LNG at a much faster pace than the Designated Supplier. Lithuania underlined that only actual boil-off gas costs which were attributable to the Designated Supplier were included in the calculation of Litgas's compensation.

Balancing costs

- (63) Lithuania explained that the Designated Supplier incurred significant balancing costs. In 2017 these costs were EUR 900 000 which represented approximately [5-15 %] of the total Designated Supplier's costs.
- (64) To ensure stable operation of the LNG Terminal, the Designated Supplier must release its LNG into the natural gas system at a stable output rate throughout the year. Therefore, the Designated Supplier's delivery schedule does not correspond to projected demand of natural gas from its consumers. For example, in the winter period when the demand is higher the Designated Supplier cannot release immediately natural gas from tanks as this would leave the LNG Terminal empty until the next delivery of LNG, whereas requesting to deliver a LNG cargo earlier (if agreed by Statoil) would impair the delivery schedule for the entire year.
- (65) Lithuania noted that in view of these considerations the Designated Supplier is in a different situation from other market participants. In particular, the import profile of pipeline gas suppliers mirrors the demand for natural gas throughout the year. Thanks to flexible gas contracts other suppliers of natural gas incurred minimal balancing costs.
- (66) Nonetheless, whilst keeping its obligations towards the LNG Terminal, the Designated Supplier must also meet the demand of its customers. To meet the demand of its customers and to ensure the steady operation of the LNG Terminal the Designated Supplier can have recourse to two instruments:
- a) Swap contracts — including agreement on lending (in the summer period) or borrowing (in the winter period, when the Designated Supplier is short of gas or when the use of the LNG terminal is impossible, e.g. due to maintenance) of natural gas.

⁽¹⁷⁾ Lithuania explained that this is due to the way the LNG Terminal performs regasification. The closed loop system — the mode of operation during cold season, causes several times higher boil-off volumes than the open loop system — the mode of operation during warm season.

⁽¹⁸⁾ Due to increased demand (ex. increased energy consumption such as heat and electricity), LNG is more expensive in winter. As a result all the users of the LNG terminal buy LNG in the summer period when it is cheaper. Litgas is the only user in winter of the LNG terminal as it is bound by its SGEI obligation to regasify constantly and receive cargoes of LNG based on fixed schedule.

⁽¹⁹⁾ The actual LNG Terminal's boil-off costs are allocated to the terminal users in proportion to the amount of gas virtually stored in the terminal in line with the LNG terminal rules approved by the NRA.

b) Inčukalns storage site in Latvia — provides a physical underground storage solution when the Designated Supplier has surplus of natural gas (mostly in summer period) and can be retrieved when Designated Supplier has a shortage of natural gas. During the period 2016-2018, the storage was used by the Designated Supplier for balancing purposes in 2018 only.

(67) The cost of such swap and storage contracts was also compensated as part of the balancing costs.

Long-term guarantee

(68) Lastly, Lithuania also considered that the Designated Supplier should be compensated for costs of the long-term guarantee. To secure the long-term contract with Statoil, the Designated Supplier had to issue a performance guarantee for Statoil to cover a commitment until 2024. The cost related to the guarantee is EUR 300 000 per year. Lithuania explained that the cost is specific to the long-term nature of the contract with Statoil and that other market participants do not bear such a cost.

2.3.7. The 2019 Amendments

(69) Lithuania closely monitored the LNG Terminal's operation and development of the natural gas market in the country. Due to positive changes in 2018 the Lithuanian authorities decided to introduce as of 1 January 2019 a number of changes to the scheme under the 2016 Amendments.

(70) As a result Lithuania changed the model for the calculation of the SGEI compensation paid to Litgas and introduced more competition in the natural gas market from 1 January 2019. The Purchase Obligation was abolished and Litgas can sell the LNG Mandatory Quantity freely on the market.

2.3.7.1. Abolition of the Purchase Obligation

(71) The Lithuanian authorities continued to regard it as necessary to secure regular supplies of LNG to the LNG Terminal via the long-term supply contract with Statoil. Lithuania explained that plausibly cheaper gas purchasing options as annual or spot capacity bookings could not guarantee achieving this objective. First, annual capacity bookings allow for redirecting cargoes to another destination (subject to penalties). Second, spot bookings are not sufficiently reliable since the LNG Terminal's operations must be planned in advance.

(72) Therefore, as of 1 January 2019, the Purchase Obligation was transformed into a delivery obligation placed on Litgas. Litgas remains bound to deliver the LNG Mandatory Quantity, which is needed to keep the LNG Terminal operational irrespective of market conditions ('the Delivery Obligation'). The Delivery Obligation applies for the same period and on the same conditions, which applied to the Purchase Obligation, namely until 2024 and for an LNG Mandatory Quantity of 0,37 bcm/year.

(73) Simultaneously, as of 1 January 2019 the obligation to purchase such quantities of natural gas from Litgas originally placed on the Obligated Purchasers was abolished.

(74) As a result, Litgas is exposed to full market risks in selling the LNG Mandatory Quantity in the market. The Obligated Purchasers buy gas on the market at a market price determined by market conditions without any intervention of the NRA and based entirely on their needs.

2.3.7.2. SGEI Compensation to Litgas

(75) Pursuant to the 2019 Amendments, Litgas continues to receive compensation from the LNG Supplement.

(76) According to the Article 11 of the LNG Terminal Law the following costs are compensated to Litgas:

a) Difference between the import price of the LNG Mandatory Quantity supplied by the Designated Supplier under the contract with Statoil and a monthly factual average weighted import price of natural gas imported into Lithuania calculated by the NRA;

b) Boil-off gas costs: (a) all factual boil-off costs experienced by the Designated Supplier during the periods when Litgas is the only user of the LNG terminal; and (b) difference between the actual boil-off costs experienced by Litgas and average of boil-off costs experienced by other LNG Terminal users during the periods when Litgas is not the only user of the LNG terminal;

c) Long-term guarantee financing costs.

- (77) Under the new compensation methodology, Litgas is no longer compensated for balancing costs.
- (78) Furthermore, Litgas sells LNG directly on the market and its marginal profit is no longer regulated by the NRA. Therefore, the Designated Supplier's profit margin earned by selling the LNG Mandatory Quantity on the market solely depends on its efficiency and market conditions.

2.3.8. *Transparency*

- (79) The Lithuanian authorities informed the Commission that the outcome of public discussions on the necessity of the Designated Supplier, scope and duration of the SGEI entrusted to the Designated Supplier are available in various legislative acts and documents of parliamentary discussions, which are published in the central register of laws available at <https://www.e-tar.lt/>.
- (80) Furthermore, the information regarding the amounts of compensation granted to Litgas each year is available on the website of the NRA: www.regula.lt.
- (81) Finally, the Lithuanian competition authority is responsible for publishing such information on the state aid transparency portal: <https://webgate.ec.europa.eu/competition/transparency/public/>.

2.4. **The complaint and comments from the Lithuanian authorities**

2.4.1. *The complaint*

- (82) In the complaint, the complainants put forward several allegations regarding the 2016 Amendments.
- (83) The complainants alleged in particular that the LNG Supplement paid to Litgas since 1 January 2016 constituted a direct grant, suggesting the presence of State aid as it provided an economic advantage to Litgas.
- (84) Furthermore, the complainants stated that the parameters of the compensation to Litgas were not objectively set and led to overcompensation of Litgas. The overcompensation resulted from the fact that the compensation of Litgas covered the difference between the price at which the Designated Supplier bought LNG and the price at which it sold LNG. The complainants also claimed that Litgas was guaranteed to be compensated even beyond the quota relating to the Purchase Obligation, since the compensation included additional cost elements.
- (85) The complainants also considered that the gas supply contract Litgas concluded with Statoil was based on a very high gas price and that the volume to be purchased by Litgas was excessive. In this context Litgas's costs were not comparable with those of a typical well-run undertaking.
- (86) Finally, the complainants alleged that Litgas had not been appointed the Designated Supplier in conformity with public procurement rules.

2.4.2. *Comments from the Lithuanian authorities*

- (87) On 7 September 2016 the Commission forwarded the complaint to the Lithuanian authorities requesting their comments on the issues raised. The Lithuanian authorities replied on 5 October 2016, 11 November 2016 and 27 January 2017.

Allegation on the presence of economic advantage

- (88) To the allegation regarding the existence of economic advantage bestowed by the LNG Supplement onto Litgas, the Lithuanian authorities responded that under the measure approved by the 2013 Decision, Litgas could not sell the LNG Mandatory Quantity on a commercial basis in retail markets. Initially, Litgas, as the Designated Supplier, operated only in the regulated market, i.e. Litgas had an obligation to sell LNG only to certain electricity and heat producers, which all operate on regulated markets of heat and electricity.
- (89) Furthermore, the Lithuanian authorities argued that the new set-up of the Purchase Obligation under the 2016 Amendments did not provide an economic advantage to Litgas as any sales which the Designated Supplier performed on the open gas market were monitored and regulated by the NRA, which prevented Litgas from retaining any profit which would make it better remunerated than the average gas supplier on the market.

Allegation on overcompensation

- (90) The Lithuanian authorities rebutted the allegations of the complainants related to overcompensation on the basis of the fact that the LNG sale price of the Designated Supplier was regulated by the NRA. Established rules took into account the actual costs of the Designated Supplier, which it had incurred by implementing the entrusted SGEI mission. These calculations were performed by the NRA. The NRA's assessment procedure was performed taking into account the return from the resale activity of the part of LNG Mandatory Quantity, which exceeded the volume purchased by the Obligated Purchasers. Such return was limited by law to the average return of gas suppliers operating on the Lithuanian gas market.

Allegations on Statoil contract

- (91) The Lithuanian authorities stressed that the contract concluded with Statoil was best priced compared to other options received in the course of tender procedure.

Allegations on appointment of Litgas

- (92) According to the Lithuanian authorities the selection of Litgas did not violate public procurement rules. The tender conditions were clearly laid out in the LNG Terminal Law.

3. ASSESSMENT OF THE MEASURE

- (93) As mentioned in recital (10), in order to comply with the GC judgment, the Commission re-examined the 2016 Amendments. The scope of this decision is therefore limited to the re-assessment of the 2016 Amendments and does not include a re-assessment of the 2019 Amendments. The Commission found in the 2018 Decision that the 2019 Amendments are compatible with the internal market and the General Court rejected the action for annulment as regards those amendments, thereby confirming the Commission's assessment in this respect.

3.1. Existence of aid

- (94) Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU") provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (95) In order to conclude whether State aid is present, the Commission must assess whether the cumulative criteria of Article 107(1) TFEU (i.e. transfer of State resources and imputability to the State, selective advantage, potential distortion of competition and affectation of intra-EU trade) are met for the measure under assessment.
- (96) In the 2013 Decision the Commission concluded that the LNG Supplement constituted State aid to KN.
- (97) Since by the 2016 Amendments Lithuania introduced the LNG Supplement to Litgas, the Commission has to assess whether the cumulative criteria of Article 107(1) TFEU are met for the LNG Supplement to Litgas to constitute State aid.

3.1.1. Transfer of State resources and imputability

- (98) As held by the Court ⁽²⁰⁾, State resources encompass both advantages which are granted directly by the State and those granted by a public or private body designed or established by the State. The Commission considers that the LNG Supplement constitute State resources imputable to the State for the following reasons.
- (99) First, the system for attribution and collection of the LNG Supplement was established by Lithuania. Based on the 2016 Amendments introduced to the LNG Terminal Law, Article 5(2) stipulated that the LNG Supplement would be collected, administered and paid out to Litgas by the TSO in accordance with procedures established by and under supervision of the NRA. The LNG Supplement is not a component of the transmission fee and does not finance the transmission services but it constitutes a separate surcharge.
- (100) Second, the State appointed the TSO as administrator of the LNG Supplement. The TSO is instructed by the State by means of legal acts and the supervision of the NRA. The NRA controls the entire process with regard to the administration and transfer to Litgas of the funds collected.
- (101) The Commission also notes that the TSO — AB 'Amber Grid' — is controlled by UAB 'EPSO-G', which is 100 %-owned by the Lithuanian Ministry of Energy.
- (102) On the basis of those elements, the Commission concludes that the LNG Supplement has been provided to Litgas by the State through State resources and is imputable to the State.

⁽²⁰⁾ Judgment of 22 March 1977, *Steinike & Weinling*, 76/78, EU:C:1977:52, paragraph 21; Judgment of 13 March 2001, *Preussen Elektra*, C-379/98, EU:C:2001:160, paragraph 58.

3.1.2. Economic advantage

- (103) The LNG Supplement provides an economic advantage to Litgas as it ensures certain cost coverage and positive net revenues which would not be achieved under the normal competitive conditions on the market.

3.1.3. Selectivity

- (104) The LNG Supplement is a selective advantage as it was granted solely to Litgas pursuant to a specific legal act — the LNG Terminal Law. Pursuant to the law other gas suppliers were not eligible to perform this function (See section 3.3.6).

3.1.4. Effect on trade and distortion of competition

- (105) The objective of the LNG Supplement as amended in 2016 was to ensure the continuous operation of the LNG Terminal. Gas is a product traded between Member States. Favouring a particular LNG supplier — Litgas through the LNG Supplement — is liable to affect the patterns of trade between Member States. In addition gas is used for electricity production. Electricity is another product traded across Member States. Therefore, the LNG Supplement distorts or threatens to distort competition and is likely to affect trade between Member States.

3.1.5. Conclusion on the existence of State aid

- (106) On the basis of the above-mentioned elements, the Commission concludes that the LNG Supplement as amended in 2016 involves State aid within the meaning of Article 107(1) TFEU.

3.2. Lawfulness of aid

- (107) Lithuania granted the LNG Supplement under the 2016 Amendments to Litgas before the adoption of the 2018 Decision authorising the scheme. Moreover, the latter decision was annulled by the General Court, in so far as it concerned these amendments. It must thus be regarded as unlawful ⁽²¹⁾.

3.3. Compatibility with the internal market

3.3.1. Legal basis for assessment

- (108) In accordance with the Commission notice on determination of the applicable rules for the assessment of unlawful State aid ⁽²²⁾, the Commission has assessed the compatibility of the measure with the internal market, in accordance with the rule applicable at the time when the aid was granted.
- (109) The procedure for adopting a new decision may be resumed at the very point at which the illegality occurred ⁽²³⁾.
- (110) On the basis of point 11 of the 2012 SGEI Framework ⁽²⁴⁾, the Commission considers that, '*At the current stage of development of the internal market, State aid falling outside the scope of Decision 2012/21/EU may be declared compatible with Article 106(2) TFEU if it is necessary for the operation of the SGEI concerned and does not affect the development of trade to such an extent as to be contrary to the interests of the Union*' ⁽²⁵⁾.
- (111) The 2012 SGEI Framework describes the conditions to be met to achieve such balance.
- (112) In the light of the General Court's conclusions (see recital (8)) that the Commission should have had doubts as to the compatibility with the internal market of certain aspects of the 2016 Amendments, the Commission revised its assessment and decided to initiate the formal investigation procedure. The Commission sets out hereafter its preliminary assessment of the compatibility of the 2016 Amendments with the internal market on the basis of the conditions established in the 2012 SGEI Framework.

⁽²¹⁾ See Article 108(3) TFEU and Judgment of 12 February 2008, *CELF*, C-199/06, EU:C:2008:79, paragraphs 61 and 64.

⁽²²⁾ Commission notice on determination of the applicable rules for the assessment of unlawful State aid (OJ C 119, 22.5.2002, p. 22).

⁽²³⁾ Judgment of 3 July 1986, *Council v Parliament*, 34/86, EU:C:1986:291, paragraph 47; Judgment of 12 November 1998, *Spain v Commission*, C-415/96, EU:C:1998:533, paragraph 31; and Judgment of 3 October 2000, *Industrie des poudres sphériques v Council*, C-458/98 P, EU:C:2000:531, paragraph 82.

⁽²⁴⁾ Communication from the Commission — European Union framework for State aid in the form of public service compensation (2011) 2012/C 8/03 (OJ C 8, 11.1.2012, p. 15), referred to herein as the '2012 SGEI Framework'.

⁽²⁵⁾ The present aid measure does not fall under the scope of Decision 2012/21/EU since the foreseen public service compensation does not fall within the categories of its Article 2(1).

3.3.2. *Genuine service of general economic interest as referred to in Article 106 TFEU*

- (113) As indicated in point 13 of the 2012 SGEI Framework, Member States have a wide margin of discretion regarding the nature of services that could be classified as being SGEI. The Commission's task is to ensure that the margin of discretion is applied without manifest error as regards the definition of SGEI. The Commission's competence in this respect is limited to checking whether the Member State has made a manifest error when defining the service as an SGEI and to assessing any State aid involved in the compensation.
- (114) However, as foreseen in point 46 of the 2012 SGEI Communication ⁽²⁶⁾, where specific Union rules exist, the Member States' discretion is bound by those rules, without prejudice to the Commission's duty to carry out an assessment of whether the SGEI has been correctly defined for the purpose of State aid control. Therefore, the measure would be incompatible with Article 106(2) TFEU if it infringes specific EU law provisions. In the case at hand, the relevant provisions are laid down in the Gas Directive ⁽²⁷⁾.
- (115) The entrustment of a particular public service task implies the supply of services which, if it were to consider its own commercial interest, an undertaking would not assume or would not assume to the same extent or under the same conditions. Applying a general interest criterion, Member States or the Union may attach specific obligations to such services.
- (116) The Commission notes that according to the Article 3(2) of the Gas Directive security of supply is an objective that might justify public service obligation.
- (117) As explained in recital 208 of the 2013 Decision, the mere construction of the LNG Terminal would not ensure security of supply in Lithuania. In order to meet this objective it would require maintaining the LNG Terminal operational.
- (118) The LNG Terminal Law obliged Litgas to provide the LNG Mandatory Quantity that would ensure the stable operation of the LNG Terminal. In order to keep the LNG Terminal operational (keep terminal 'cool'), certain quantities of LNG must be kept in tanks of the LNG Terminal and constantly released to the natural gas system operating.
- (119) Furthermore, the Commission notes that annual capacity bookings or spot bookings are not sufficient to ensure stable operation of the LNG Terminal. This is because first, deliveries under annual bookings can always be redirected to another delivery point if LNG prices justify it and second, LNG operations must be planned two weeks in advance so the terminal cannot rely on spot deliveries. Therefore, the Commission asserts that some LNG quantities must be delivered on an even basis throughout the year in accordance with a fixed schedule, including the periods when the demand for natural gas is low.
- (120) Therefore, the LNG Terminal Law imposes an obligation on Litgas to deliver the LNG Mandatory Quantity which is needed to maintain the LNG Terminal operational.
- (121) Pursuant to the 2016 Amendments such LNG Mandatory Quantity was reduced by 1/3 due to the change of the operating regime into the standby regime (see recital (28)). In order to implement such legislative changes Litgas renegotiated its contract with Statoil in 2016 ⁽²⁸⁾. Therefore, Litgas's SGEI obligation is directly linked to this Statoil agreement as it ensures fulfilment of its SGEI obligation.
- (122) In the light of the assessment above, the Commission reaches the preliminary conclusion that Litgas's obligation to keep the LNG Terminal operational by delivering the LNG Mandatory Quantity to the LNG Terminal constitutes a genuine SGEI as referred to in Article 106 TFEU. This conclusion was confirmed by the General Court in its judgment ⁽²⁹⁾.

⁽²⁶⁾ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4).

⁽²⁷⁾ 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 (OJ L 211, 14.8.2009, p. 94).

⁽²⁸⁾ <http://www.Litgas.lt/en/Litgas-and-statoil-have-signed-the-amended-baseload-supply-agreement>

⁽²⁹⁾ Judgment of 8 September 2021, Achema AB and Achema Gas Trade UAB v Commission, T-193/19, EU:T:2021:558, paragraphs 97-124.

3.3.3. *Need for an entrustment act specifying the SGEI and the methods of calculating compensation*

- (123) As indicated in section 2.3 of the 2012 SGEI Framework, the concept of SGEI within the meaning of Article 106 TFEU means that the undertaking or undertakings in question have been entrusted with the operation of the service of general economic interest by way of one or more official acts.
- (124) These acts must specify, in particular i) the precise content of the SGEI and its duration; ii) the undertakings concerned and territory concerned; (iii) the nature of any exclusive rights assigned to the undertakings concerned; (iv) the parameters for calculating, controlling and reviewing the compensation; and (v) the arrangements for avoiding and recovering any overcompensation.
- (125) The Commission notes that the precise nature of the SGEI is determined in Article 11 of the LNG Terminal Law. Namely, the provision states that the Designated Supplier is entrusted with the obligation to deliver the LNG Mandatory Quantity to the LNG Terminal (see recital (32)).
- (126) Furthermore, the Commission takes note that by Order of the Minister of Energy No 1-20 of 10 February 2014, Litgas was appointed as Designated Supplier on the Lithuanian territory (see recital (33)(c)).
- (127) As regards the parameters for calculating the compensation, the Commission notes that Article 11 of the LNG Terminal Law established the principles for calculating the compensation to the Designated Supplier. The detailed parameters were clearly defined in the relevant implementing regulation — NRA Methodology No O3-367 complementing the LNG Terminal Law (see recital (33)(d)).
- (128) Therefore, it can be concluded that the entrustment act contained the parameters for calculating the compensation.
- (129) The Commission considers on a preliminary basis that the allegations of the complainants that the parameters of the compensation to Litgas for the period from 1 January 2016 until 31 December 2018 were not objectively set and that Litgas was guaranteed to be compensated even beyond the quota relating to the Purchase Obligation (see recital (84)) seem to be unfounded.
- (130) As it is already stated above, the Commission takes note of the fact that the legal acts such as the LNG Terminal Law and the NRA methodology No O3-367 established a clear model for calculating the compensation. The parameters of this compensation paid to Litgas were set by the NRA.
- (131) The NRA Methodology No O3-367 provides the formula by which the NRA calculated the compensation to be paid to Litgas. The Commission notes that the formula includes all the costs for which Litgas was compensated. The list of costs seems to be clearly defined and no other costs are included into the compensation model.
- (132) Moreover, the Commission notes that Litgas's profit was strictly limited to a fixed profit margin approved by the NRA of 0,24 Eur/MWh and that its profit from sales in all cases could not exceed the average profit margin earned by natural gas companies in Lithuania.
- (133) Based on the LNG Terminal Law the compensation was limited only to the LNG Mandatory Quantity.
- (134) Finally, Litgas had to submit to the NRA regular reports on costs and revenues in order to ensure that any overcompensation was detected in a timely manner and was subsequently eliminated.
- (135) By clearly defining the eligible costs, subjecting the Designated Supplier to regular reporting requirements and limiting its profits to the average profit observed on the market (see recitals (53) and (54)) the entrustment act and its implementing regulations seem to provide the necessary arrangements to calculate, control, review and avoid overcompensation.
- (136) In light of the above, the Commission reaches the preliminary conclusion that the entrustment act complies with the requirements of section 2.3 of the 2012 SGEI Framework.

3.3.4. *Duration of the period of entrustment*

- (137) As indicated in section 2.4 of the 2012 SGEI Framework, “the duration of the period of entrustment should be justified by reference to objective criteria such as the need to amortise non-transferable fixed assets. In principle, the duration of the period of entrustment should not exceed the period required for the depreciation of the most significant assets required to provide the SGEI.”

(138) Article 11 of the LNG Terminal Law stipulates that the duration of the SGEI is limited to 10 years and is revised yearly by the NRA. The Commission notes that the duration of the entrustment seems to be justified as it is linked to the duration of the contract with Statoil for the supply of the LNG Mandatory Quantity, which will expire in 2024.

3.3.5. Compliance with Directive 2006/111/EC⁽³⁰⁾

(139) According to point 18 of the 2012 SGEI Framework: “Aid will be considered compatible with the Internal Market on the basis of Article 106(2) TFEU only where the undertaking complies, where applicable, with Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings”.

(140) Under Article 2(d) of Directive 2006/111/EC, any undertaking that is entrusted with the operation of an SGEI pursuant to Article 106(2) TFEU, that receives public service compensation in any form whatsoever in relation to such service and that carries out other activities, is an undertaking required to maintain separate accounts.

(141) The account separation and transparency requirements for public undertakings established in the Directive 2006/111/EC are fulfilled by implementing acts — Resolution of the Government of the Republic of Lithuania No 768 dated 14 July 2005 and Amending Resolution No 1333 dated 12 December 2007.

(142) As detailed in recital (55), Litgas is obliged to maintain separate accounts for its regulated activities as a Designated Supplier and for its non-regulated activities.

(143) Based on the above, the Commission considers that the requirements of Directive 2006/111/EC are complied with.

3.3.6. Public procurement requirements

(144) Point 19 of the 2012 SGEI Framework requires that the responsible authority entrusts the provision of the service in question in compliance with the applicable Union rules in the area of public procurement.

(145) The entrustment of Litgas with the SGEI as the Designated Supplier took place in 2014 before the adoption of the 2016 Amendments constituting the State aid under the Commission’s assessment. Nevertheless, the Commission will assess below the claims made by the complainants with regard to the alleged non-compliance of the aid with point 19 of the 2012 SGEI Framework.

(146) The complainants claim that Litgas’s appointment process violated public procurement requirements (see recital (86)).

(147) The Commission considers that the contract would in principle fall within the material scope of Directive 2004/18/EC⁽³¹⁾.

(148) However, as was stated in the 2013 Decision (recitals (229)-(236)), the LNG Terminal project is a project of major importance for Lithuania and the appointment of AB Klaipėdos Nafta as the operator of the LNG Terminal by the Lithuanian government is exempted from the public procurement rules on grounds of protection of the essential interests of a Member State as provided by Article 14 of the Directive 2004/18/EC.

(149) The Commission considers that the appointment of Litgas as the Designated Supplier is subject to the same principles as the appointment of AB Klaipėdos Nafta in this respect. As in the case of AB Klaipėdos Nafta, the contract by which Litgas was appointed as the Designated Supplier is therefore also covered by the exemption provided in Article 14 of the Directive 2004/18/EC.

(150) This is due to the fact that the task of keeping the LNG Terminal operational through deliveries of the LNG Mandatory Quantity must be also considered as essential for Lithuania’s security of gas supply. Any disruption in the delivery of the LNG Mandatory Quantity would jeopardise the operation of the LNG Terminal and thus the supply of LNG into the Lithuanian gas market and thus ultimately Lithuania’s security of supply. In particular, given the structure of the Lithuanian gas supply market an entrustment of the Designated Supplier’s tasks via a public procurement procedure pursuant to Directive 2004/18/EC would risk to confer the genuine SGEI to an undertaking linked to the former single gas supplier. In addition, an undertaking selected through the procedure under Directive 2004/18/EC without being controlled by the State could have (at the time of the tender or later) developed ties with the former single supplier that would allow the latter to influence its market behaviour in a way that could negatively affect the fulfilment of its SGEI mission.

⁽³⁰⁾ Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17.

⁽³¹⁾ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

- (151) In the Commission's view thus adopting a different approach towards the Designated Supplier than the operator of the LNG Terminal (AB Klaipeda Nafta) would jeopardise the essential interests invoked in the 2013 Decision. Therefore, the appointment of Litgas as the Designated Supplier by the Ministry of Energy should be exempted from the public procurement rules on grounds of protection of the essential interests of a Member State as provided by Article 14 of the Directive 2004/18/EC.
- (152) In this context the Commission also notes that, irrespective of the applicability of the Article 14 exemption, in 2014 Lithuania conducted a selection process for the appointment of the Designated Supplier. The selection criteria were approved by the Ministry of Energy on 3 January 2014 and made public⁽³²⁾. The tender evaluation criteria were established in the secondary legislation, i.e. Section 49 DivReg. In line with the above security concerns, participation in this tendering procedure was only open to undertakings meeting the following selection criteria:
- a) 2/3 votes of the shareholders general meeting should be held directly or indirectly by the State; and
 - b) the Designated Supplier should not be involved in activities related to the transmission and (or) distribution of gas.
- (153) Litgas took part in the call for tender and was selected the winner. Consequently, by the order of the Minister of Energy of 10 February 2014 No 1-20 "On UAB LITGAS awarding as the Designated Supplier", Litgas was appointed as the Designated Supplier.
- (154) Based on the above and as confirmed by the General Court in its judgment⁽³³⁾, the Commission considers that point 19 of 2012 SGEI was complied with.

3.3.7. Amount of compensation

- (155) Point 21 of the 2012 SGEI Framework states that "(...) *the amount of the compensation must not exceed what is necessary to cover the cost of discharging the PSOs, including a reasonable profit*". The amount of compensation can be established on the basis of either the expected costs and revenues or the costs and revenues actually incurred or a combination of the two (point 22 of the 2012 SGEI Framework). Where the compensation is based, in whole or in part, on expected costs and revenues, they must be specified in the entrustment act. They must be based on plausible and observable parameters concerning the economic environment in which the SGEI is being provided and rely, where appropriate, on the expertise of sector regulators or of other entities independent from the undertaking. Member States must indicate the sources on which these expectations are based (point 23 of the 2012 SGEI Framework).
- (156) The net costs necessary, or expected to be necessary, should be calculated using the net avoided cost methodology where required or possible, or use alternative methods such as the cost allocation methodology (points 24 and 27 of the 2012 SGEI Framework).
- (157) Considering the fact that the LNG Terminal was the first LNG terminal in Lithuania and that there was no developed market expertise in LNG procurement and trading, the Commission considers, on a preliminary basis, that the application of the net avoided cost methodology does not seem appropriate for the assessment of the 2016 Amendments. Where duly justified, the Commission can accept alternative methods for calculating the net cost necessary to discharge the SGEI, such as the methodology based on cost allocation (point 27 of the 2012 SGEI Framework).
- (158) Under the cost allocation methodology, the maximum amount of compensation should be calculated as the difference between revenues and costs from fulfilling the SGEI obligation, including a reasonable profit.
- (159) Under the 2016 Amendments, the compensation granted to Litgas for the SGEI, financed by the new component of the LNG supplement, was calculated, in essence, on the basis of the following three factors: (i) the difference between the LNG price paid, upstream, by Litgas to Statoil and the price at which Litgas sold, downstream, to the obligated purchasers and to the free market; plus (ii) compensation for the "justified" costs incurred in connection with the SGEI, namely the operating costs, boil-off costs, balancing costs and the costs of financing a long-term State guarantee; plus (iii) a regulated profit margin, determined by the NRA (see section 2.3.7.2).
- (160) Therefore, the Commission will assess whether all the requirements concerning the amount of compensation prescribed in 2012 SGEI Framework have been complied with.

⁽³²⁾ https://enmin.lrv.lt/uploads/enmin/documents/files/Konkursai/Kiti_konkursai/Archyvas/Konkursosalygos.pdf

⁽³³⁾ Judgment of 8 September 2021, Achema AB and Achema Gas Trade UAB v Commission, T-193/19, EU:T:2021:558, paragraphs 130-149.

- (161) The Commission also notes that the methodology was amended in 2019. According to the new methodology resulting from the 2019 amendments, the compensation granted to Litgas for the SGEI, which continued to be financed by the new component of the LNG supplement introduced in 2016, was calculated, in essence, on the basis of the following two factors: (i) the difference between the LNG price paid, upstream, by Litgas to Statoil, and the actual average price of gas imported into Lithuania, calculated by the NRA; to which was added, (ii) compensation for part of the boil-off costs and the costs of financing a long-term State guarantee.
- (162) It follows, in particular, that, while all the boil-off costs and balancing costs incurred by Litgas were included in the compensation for the SGEI during the period from 2016 to 2018, Litgas was compensated, under the 2019 amendments, for only part of the boil-off costs and not at all for the balancing costs that it incurred.
- (163) In view of this difference and in light of the GC judgment⁽³⁴⁾, the Commission will also assess the compliance of the amount of compensation for boil-off costs and for balancing costs during the period from 2016 to 2018 with the requirements of the 2012 SGEI Framework taking into account the changes in the amount of compensation of these two elements following the 2019 amendments.

3.3.7.1. Costs

- (164) As described in recital (58), in addition to operating costs, Litgas incurred the following specific costs 1) boil-off gas costs; 2) balancing costs; 3) long-term guarantee costs.

Boil-off costs

- (165) As explained in recitals (60)-(62), boil-off costs are costs caused by the evaporation of LNG which occurs when LNG is stored in the LNG terminal tanks before being released into the natural gas system. They are therefore essentially quantities of LNG lost as a result of evaporation. Those costs represented ca. 55 % of the total costs incurred by Litgas in connection with the SGEI in 2017.
- (166) The Commission notes that, according to the Lithuanian authorities, Litgas incurred higher boil-off costs than other users of the LNG Terminal because, due to the fixed delivery schedule, it had to keep LNG in the tanks of the terminal and regasify LNG at the minimum output rate to keep the LNG terminal operational. The Lithuanian authorities therefore conclude that, while other users could minimise their boil-off gas costs by releasing LNG to the natural gas system immediately Litgas had to continue slow regasification which causes high natural losses of LNG due to evaporation.
- (167) Furthermore, the Commission takes note that, following information provided by the Lithuanian authorities, boil-off gas costs were higher during the winter period when Litgas was the only user at the LNG Terminal and that they were lower in the summer period when several other users used the LNG Terminal. The Commission considers, on a preliminary basis, that because of its SGEI obligation, the Designated Supplier's boil-off gas costs were higher than the costs incurred by other users.
- (168) However, in light of the GC Judgment⁽³⁵⁾, the Commission has doubts on whether all the boil-off costs can be considered "economically justified" costs linked to the SGEI and incurred efficiently for the period from 2016 to 2018 and whether the compensation for the entirety of the boil-off costs under the 2016 amendments was "necessary" for the operation of the SGEI. Moreover, in light of the methodology for the calculation of the boil-off costs compensation in the 2019 Amendments described in recital (76) of this Decision, it is unclear whether the boil-off costs incurred during the periods when Litgas was not the sole user of the Terminal, should be compensated in full, as it has been, or whether, on the contrary, it was only necessary to compensate the costs incurred by Litgas which Litgas would not have incurred in the absence of the SGEI.
- (169) As detailed in recitals (71)-(74), the Commission notes that under the 2019 Amendments, the Purchase Obligation was abolished and replaced by a Delivery Obligation. In light of the GC judgment⁽³⁶⁾, the Commission considers it appropriate to seek clarification whether the difference in the compensation of the boil-off costs pre- and post-2019 may have been due to the existence of the Purchase Obligation during the period from 2016 to 2018 and to the abolition of that obligation in 2019; in other words, whether the Purchase Obligation determined, in any way whatsoever, the extent of the boil-off costs incurred by Litgas in the context of the SGEI.
- (170) The Commission invites views from the Lithuanian authorities and interested parties on all issues described in recitals (165) to (169) above.

⁽³⁴⁾ Judgment of 8 September 2021, Achema AB and Achema Gas Trade UAB v Commission, T-193/19, EU:T:2021:558, paragraphs 164-170.

⁽³⁵⁾ Judgment of 8 September 2021, Achema AB and Achema Gas Trade UAB v Commission, T-193/19, EU:T:2021:558, paragraphs 175-179.

⁽³⁶⁾ Judgment of 8 September 2021, Achema AB and Achema Gas Trade UAB v Commission, T-193/19, EU:T:2021:558, paragraphs 180-183.

Balancing costs

- (171) As detailed in recitals (63)-(67), balancing costs are those incurred, in particular, under swap contracts concluded by Litgas with other gas suppliers, in order to respond, on a specific basis, to fluctuations in demand. The Lithuanian authorities explain that the conclusion of such swap contracts is necessary because of the inflexibility of the schedule for the supply of gas upstream, as agreed in the contract between Litgas and Statoil, which does not correspond to downstream demand, which shows significant seasonal fluctuations. Thus, under those swap contracts, Litgas could either supply gas to other suppliers, when it had excess quantities of gas, or borrow gas, when it had insufficient quantities of gas. Those costs represented approximately 12 % of the total costs incurred by Litgas in connection with the SGEI in 2017. The balancing costs could also include costs incurred by Litgas to store LNG temporarily in a storage facility in Inčukalns (Latvia).
- (172) As explained in recital (65), the Commission notes that, according to the Lithuanian authorities, other suppliers of natural gas also incurred some balancing costs, but in a smaller proportion.
- (173) The Commission also notes that following the 2019 amendments, under a new compensation model, Litgas was no more compensated for balancing costs.
- (174) In light of these considerations and of the GC judgment ⁽³⁷⁾, the Commission has doubts on whether all the balancing costs can be considered “economically justified” costs linked to the SGEI and incurred efficiently for the period from 2016 to 2018 and whether the compensation for the entirety of the balancing costs under the 2016 Amendments was “necessary” for the operation of the SGEI. In particular, it is unclear whether the balancing costs should be compensated in full, as it has been, or whether, on the contrary, it would have only been necessary to compensate for the costs incurred by Litgas which it would not have incurred in the absence of the SGEI.
- (175) The Commission notes that under the 2019 Amendments the Purchase Obligation was abolished and Litgas sold the LNG Mandatory Quantity freely on the market. The Commission therefore considers that, in order to determine whether Litgas should have been compensated for all, for part or for none of the balancing costs during the 2016 to 2018 period, the impact of Purchase Obligation on the amount of balancing costs incurred needs to be further investigated. In light of the GC judgment ⁽³⁸⁾, the Commission considers it appropriate to seek clarification whether the Purchase Obligation determined, in any way whatsoever, the extent of the balancing costs incurred by Litgas in the context of the SGEI.
- (176) The Commission invites views from the Lithuanian authorities and interested parties on all issues described in recitals (171) to (175) above.

Long-term guarantee costs

- (177) As regards costs related to the long-term guarantee, the Commission notes that in order to secure long-term supply of LNG from Statoil, Litgas had to issue long-term contract performance guarantees for Statoil and incurred additional costs, which are not inherent in the activity of any other natural gas supplier (see recital (68)).
- (178) The Commission considers at this stage that these long-term guarantee costs are “justified” costs incurred in direct connection with the SGEI, as these costs are related to the long-term nature of the contract that Litgas concluded with Statoil to fulfil its SGEI mission.

3.3.7.2. Revenue

- (179) In accordance with point 32 of the 2012 SGEI Framework, the revenue to be taken into account must include at least the entire revenue earned from the SGEI.
- (180) Based on the 2016 Amendments first the revenues which Litgas received as a result of selling the LNG to the Obligated Purchasers at the established regulated price were taken into account. In addition, the revenues that Litgas obtained from selling on the market the part of the LNG Mandatory Quantity not purchased by the Obligated Purchasers were also considered. Thus, the Commission concludes, on a preliminary basis, that all possible revenues that Litgas could earn under the SGEI it has been entrusted with were covered (see recital (52)).

3.3.7.3. Reasonable profit

- (181) The 2012 SGEI Framework allows for the entity fulfilling the SGEI to achieve a reasonable profit. This is the rate of return on capital that would be required for a typical company considering whether or not to provide the SGEI for the whole duration of the entrustment act, taking into account the level of risk (points 33 and 35). Where duly justified, other profit level indicators can be used (point 34).

⁽³⁷⁾ Judgment of 8 September 2021, Achema AB and Achema Gas Trade UAB v Commission, T-193/19, EU:T:2021:558, paragraphs 190-192.

⁽³⁸⁾ Judgment of 8 September 2021, Achema AB and Achema Gas Trade UAB v Commission, T-193/19, EU:T:2021:558, paragraph 191.

- (182) In relation to the profit margin, the Commission notes that already according to the 2013 Decision Litgas was entitled to a reasonable profit margin. Under the 2016 Amendments, the NRA established a fixed profit margin for Litgas taking into account natural gas market conditions in Lithuania. Based on the NRA calculations Litgas was entitled to 1) a fixed profit margin of 0,24 EUR/MWh on the sale of the LNG Mandatory Quantity to the Obligated Purchasers and 2) Half of the profit on the sales of LNG on the market provided that the profit did not exceed the profit margin of a natural gas company operating on the market.
- (183) The Lithuanian authorities explained that the profit margin for sales of LNG on the market established by the 2016 Amendments was well below the average profit margin earned by suppliers active on the Lithuanian gas supply market which historically amounted to 3.2 %. For the period from 2016 to 2018, Litgas profit margin was in the range from 1.1 % to 1.5 %.
- (184) In addition, based on the NRA Methodology No O3-367 any extra profit beyond the observed average market profit was recouped from the beneficiary.
- (185) In view of the evidence provided that the profit margin of Litgas was market conform, the Commission considers at this stage that it corresponds to a reasonable profit as per the 2012 SGEI Framework.

3.3.7.4. Efficiency incentives

- (186) As regards the efficiency incentives, point 39 of the 2012 SGEI Framework, provides that “[i]n devising the method of compensation, Member States must introduce incentives for the efficient provision of SGEI at high standard, unless they can duly justify that it is not feasible or appropriate to do so”.
- (187) The efficiency mechanisms applicable to Litgas were established in the NRA Methodology No O3-367.
- (188) The NRA Methodology No O3-367 contained a mechanism for the SGEI provider to perform assigned obligations efficiently. For a certain number of operating expenses (repairs, maintenance, personnel, insurances, marketing and administrative costs, etc.), the NRA established a ceiling for the price of the regulated service. Costs going beyond that limit were not compensated. In addition, since 2017 the regulated companies had an additional incentive to further reduce OPEX. A company, which reduced its costs more than required by the NRA in a given period of time, could keep part of such savings (see recital (57)).
- (189) Moreover, incentives for efficient operation also related to the adjustment to inflation. The costs that were taken into account for setting the LNG Supplement and the compensation were increased only by half of the inflation coefficient and not more than 3 % (see recital (57)).
- (190) To conclude, the Commission considers at this stage that the 2016 Amendments introduced new mechanisms positively incentivising Litgas not only to maintain its efficiency but also to increase it. Based on the 2016 Amendments, Litgas had 1) the possibility to increase profitability by reducing OPEX exceeding the NRA established benchmark and 2) the possibility to keep part of the profit from the sale of surplus LNG Mandatory Quantity.

3.3.7.5. Control of overcompensation

- (191) Point 16(e) of the 2012 SGEI Framework requires that the act of entrustment includes arrangements for avoiding and recovering overcompensation. The latter should be understood as compensation that the undertaking receives in excess of the amount of aid as defined in point 21 of the 2012 SGEI Framework for the whole duration of the contract (point 47 of the 2012 SGEI Framework).
- (192) Point 49 of the 2012 SGEI Framework states that “Member States must ensure that the compensation granted for operating the SGEI meets the requirements set out in this Communication and in particular that undertakings are not receiving compensation in excess of the amount determined in accordance with the requirements set out in this section. They must provide evidence upon request from the Commission. They must carry out regular checks, or ensure that such checks are carried out, at the end of the period of entrustment and, in any event, at intervals of not more than three years. For aid granted by means other than a public procurement procedure with publication, checks should normally be made at least every two years”.
- (193) Litgas was obliged to submit to the NRA regular reports on costs and revenues in order to ensure that any overcompensation was detected in a timely manner and was subsequently eliminated (see recitals (55) and (59)).
- (194) In light of the foregoing the Commission considers at this stage that the measure includes arrangements for avoiding and recovering overcompensation.

3.3.8. Allegations by the complainants

- (195) The complainants put forward claims that Litgas failed to operate efficiently as a typical well-run undertaking. In particular, the complainants argued that under the contract with Statoil, Litgas had to purchase too large volumes at a very high gas price (see recitals (85)).
- (196) In view of the evidence submitted by the Lithuanian authorities in terms of global LNG prices and received bids (see recital (22)), the Commission considers, on a preliminary basis, the allegations of the complainants regarding the high price of the gas supply contract concluded by Litgas as unfounded. In particular, the Commission notes that even though in the course of the tender procedure other bidders offered lower prices for the years 2017 — 2019, Statoil offered significantly lower prices for the first two years of the contract (2015 — 2016), so that in aggregate over the five year delivery period the selected bid was the most attractive. Furthermore, the Commission takes note of the fact that the gas supply contract renegotiated in 2016 provides for a lowering of the initially contracted gas acquisition price and quantities of LNG.
- (197) The Commission also considers, on a preliminary basis, unfounded the allegations of the complainants regarding the too big volumes contracted under the supply agreement between Litgas and Statoil. The initially contracted volume equalled the LNG Mandatory Quantity that was necessary to keep the LNG Terminal operational in steady mode in its incipient stage when there were no other LNG Terminal's users. In view of that the Commission regards the initially contracted gas volume as necessary for Litgas to perform its obligations under the SGEI. The Commission also notes that following the renegotiation of the contract with Statoil the LNG Mandatory Quantity (see recital (43)) and the purchase price of natural gas were lowered. Therefore, the Commission notes at this stage that the difference in the LNG Mandatory Quantity seems to stem from different technological requirements for the operation of the LNG Terminal, which were based on the technical expertise provided to the Lithuanian authorities.
- (198) The Commission also considers at this stage that swap contracts and gas storage options were another way of minimising costs resulting from changes in seasonal demand (see recitals (65)-(67)). The promotion of such measures was enshrined in the applicable legal framework.
- (199) In view of the above the Commission considers at this stage that the complainants' allegations regarding the efficiency of Litgas are unfounded and that the requirements of the 2012 SGEI Framework regarding efficiency incentives are complied with.
- (200) In this regard, the General Court concluded in its judgment that the complainants had failed to show that the Commission should have had doubts as to whether the extension of the contract between Litgas and Statoil rendered the compensation for the SGEI disproportionate⁽³⁹⁾.

3.3.9. Provisions applicable to undertakings carrying out activities outside the scope of the SGEI

- (201) Although its activities as Designated Supplier represent the core of Litgas's business the company also performs a limited number of activities unrelated to the scope of the SGEI (see recital (55)).
- (202) According to point 44 of the 2012 SGEI Framework, where an undertaking carries out activities falling both inside and outside the scope of the SGEI, the internal accounts must show separately the costs and revenues associated with the SGEI and those of the other services.
- (203) The Commission notes that the Lithuanian authorities have demonstrated that Litgas is subject to full separation of accounts (see recital (55)).
- (204) The legal obligation to separate accounts of SGEI and non-SGEI activities is established in Article 44 of Law on Natural Gas. The detailed methodology for the separation of accounts, allocation of costs and revenues is regulated by the NRA Decision No O3-316 'Regarding the separation of accounts, costs of the natural gas undertakings'.
- (205) In this context the Commission considers at this stage that the requirements of point 44 of the 2012 SGEI Framework are satisfied.

⁽³⁹⁾ Judgment of 8 September 2021, *Achema AB and Achema Gas Trade UAB v Commission*, T-193/19, EU:T:2021:558, paragraphs 196-205.

3.3.10. *Additional requirements which may be necessary to ensure that the development of trade is not affected to an extent contrary to the interests of the Union*

- (206) The requirements set out in sections 2.1 to 2.8 of the SGEI Framework are usually sufficient to ensure that the aid does not distort competition in a way that is contrary to the interests of the Union. However, it is conceivable that in some exceptional circumstances serious competition distortions in the internal market could remain unaddressed and the aid could affect trade to such an extent as would be contrary to the interest of the Union (see points 51 and 52 of the 2012 SGEI Framework).
- (207) In this case, the Commission considers at this stage that no serious competition distortions in the internal market have remained unaddressed and that the aid cannot affect trade to such an extent as would be contrary to the interests of the Union. This view is confirmed by the GC judgment ⁽⁴⁰⁾.
- (208) The Commission considers that the potential negative effects on competition and trade will be minimal. Litgas is entrusted to deliver the LNG Mandatory Quantity that amounts to 0,37 bcm. As the total capacity of the LNG Terminal is 3,75 bcm, the LNG Terminal has capacity to provide access to other potential gas suppliers. For the year 2018 there were at least two other users of the LNG Terminal.
- (209) Furthermore, the notified 2016 Amendments were limited in time from 1 January 2016 until 1 January 2019 which ensures avoidance of long-term distortions of competition.

3.3.11. *Transparency*

- (210) Point 60 of the 2012 SGEI Framework provides that Member States must publish, for each SGEI compensation they grant: (i) the results of the public consultation, (ii) the content and duration of the SGEI, (iii) the undertakings and the territory concerned and (iv) the amounts of aid granted to the undertakings on a yearly basis.
- (211) In this case, the Lithuanian authorities published the above-mentioned information on a publicly accessible website (see recitals (79)-(81)).

4. CONCLUSION

- (212) On the basis of the currently available information and the elements described above, the Commission seeks clarification and solicits comments concerning the amount of compensation under the 2016 Amendments and in particular the compensation for the entirety of the following costs:
- (a) Boil-off costs: whether all the boil-off costs can be considered 'economically justified' costs linked to the SGEI and incurred efficiently for the period from 2016 to 2018; whether the compensation for the entirety of the boil-off costs under the 2016 Amendments was 'necessary' for the operation of the SGEI; whether the Purchase Obligation determined, in any way whatsoever, the extent of the boil-off costs incurred by Litgas in connection with the SGEI; and
- (b) Balancing costs: whether all the balancing costs can be considered 'economically justified' costs linked to the SGEI and incurred efficiently for the period from 2016 to 2018; whether the compensation for the entirety of the balancing costs under the 2016 Amendments was 'necessary' for the operation of the SGEI; whether the Purchase Obligation determined, in any way whatsoever, the extent of the balancing costs incurred by Litgas in connection with the SGEI.
- (213) In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the TFEU, requests Lithuania to submit its comments and to provide all such information as may help to assess the aid (measure applicable from 2016 to 2018), within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.
- (214) The Commission wishes to remind Lithuania that Article 108(3) of the TFEU has suspensory effect, and would draw your attention to Article 16 of Council Regulation (EU) 2015/1589, which provides that all unlawful aid may be recovered from the recipient.
- (215) The Commission warns Lithuania that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

⁽⁴⁰⁾ Judgment of 8 September 2021, Achema AB and Achema Gas Trade UAB v Commission, T-193/19, EU:T:2021:558, paragraphs 206-218.