



- Ruling Chamber 7 -

non-confidential version

Decision

Ref: BK7-22-140-final

In the administrative proceedings

concerning: application for exemption from regulation

for German LNG Terminal GmbH, Elbehafen, 25541 Brunsbüttel, legally represented by its management board,

applicant,

- Legal representatives: Clifford Chance Partnerschaft mit beschränkter Berufshaftung,
Königsallee 59, 40215 Düsseldorf -

Ruling Chamber 7 of the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, Tulpenfeld 4, 53113 Bonn, legally represented by its President Klaus Müller,

represented by

its Chair	Anne Zeidler
its Vice Chair	Dr Antje Peters
and its Vice Chair	Dr Werner Schaller

decided on 19 June 2023:

1. The decision in the administrative proceedings BK7-22-140 of 15 March 2023 (BK7-22-140) is revoked and amended in accordance with the European Commission Decision of 2 June 2023 (C(2023) 3743 final) and reissued as follows.

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2. The capacity created at the liquefied natural gas (LNG) facility at the Brunsbüttel site, Elbehafen, 25541 Brunsbüttel, is exempted from the application of sections 20 to 26(1) of the German Energy Industry Act (EnWG) and the Ordinance on a regulatory framework for LNG facilities (LNGV) issued on the basis of section 118a EnWG in favour of the applicant in accordance with the following:
 - a) The exemption applies to an annual throughput capacity of 10 billion cubic metres (bn m³/a) for the importation, offloading, temporary storage and regasification of LNG within the meaning of section 3 para 26 EnWG.
 - b) Capacity created by significant increases of capacity is not exempt.
3. The exemption is limited to a period of 15 years from the start of commercial operation.
4. The applicant is required to levy tariffs on users of the exempt infrastructure.
5. The applicant is required to apply a non-discriminatory and transparent procedure for the long-term allocation of capacity. At least the following requirements shall be observed and agreed in the capacity contracts:
 - a) Booking requirements for long-term bookers
 - (1) All potential users must first register with the applicant.
 - (2) The minimum booking amount shall be at most 1bn m³ of natural gas per year of throughput capacity.
 - (3) The minimum booking duration shall be at most 10 years.
 - (4) The booking year is the calendar year.
 - b) Long-term initial allocation of capacity
 - (1) A period of at least 10 working days shall be allowed for the submission of booking requests for the long-term initial allocation of capacity. All requests received within this booking period shall be considered as having been received at the same time. The start of the initial allocation shall be made known, drawing attention to the requirement for registration, at least 10 working days in advance. The registered users shall be provided with all the allocation rules before the start of the booking window.

- (2) In the event of excess demand, the capacity for allocation shall be allocated on a pro-rata basis. In derogation of this, the allocation may be undertaken taking account of the respective booking duration and the booking volume of the booker. Booking requests for a longer booking duration and a larger booking volume may be given priority in the allocation.
 - c) Long-term allocation of the free capacity remaining after the initial allocation
 - (1) A premium on the tariff applied in the initial allocation (base tariff) is permitted for the long-term allocation of the free capacity remaining after the initial allocation. The premium may not exceed 10%.
 - (2) The allocation mechanism for the long-term allocation of the free capacity remaining after the initial allocation shall be designed in a transparent and non-discriminatory manner. No other requirements are determined.
6. The applicant is required to set aside a reserve quota equal to least 10% of the annual throughput capacity for a short-term allocation of capacity. At least the following requirements shall apply to the short-term allocation of the capacity set aside as the reserve quota:
- a) All potential users must first register with the applicant.
 - b) The capacity for the short-term allocation shall be allocated in the form of slots that must be spread as evenly as possible over the booking year.
 - c) Each slot must allow the slot owner to unload at least 150,000m³ of LNG.
 - d) At least eight slots per year shall be provided for the short-term allocation.
 - e) The slots shall be allocated annually for the following booking year on a recurring date to be published.
 - f) The slots shall be allocated once a year in an ascending clock auction or another non-discriminatory, transparent, multi-stage auction procedure. If not all the capacity is allocated in the annual auction, the non-yearly short-term allocation of capacity set aside shall be carried out (see operative part 6. k)). The start of the annual auction shall be announced publicly four weeks in advance.
 - g) The slot product description shall be published no later than two weeks before the annual auction starts and shall include at least the following information:
 - (1) date for the unloading slot

- (2) arrival window
 - (3) amount of LNG in m³ that can be unloaded securely
 - (4) available regasification capacity; at least 196 m³ LNG/h
 - (5) regasification period
 - (6) starting price for the slot (see operative part 6. h))
 - (7) price step (see operative part 6. i)).
- h) The starting price for a slot may be supplemented by a premium equal to a maximum of 10% of the base tariff for a particular annual throughput capacity. The maximum starting price shall be determined using the following formula:

$$\text{max. start price}_{K\text{-slot}} = \text{base tariff} \times \frac{\dot{V}_{\text{Slot}}}{\dot{V}_{\text{annual throughput capacity}}} \times 1.1$$

The applicant can determine a starting price below the maximum price thus determined for a slot.

- i) In the event of excess demand, a further auction round shall be conducted in each case. Participation in this auction round is only open to those users that have participated in the previous auction round. The starting price shall be increased in each case by a premium to be previously determined by the applicant ("price step"). The ruling chamber shall be notified of the price step in advance and the price step shall be made known to the participants in advance of the auction.
- j) Should, in the event of excess demand, all auction participants exit the auction at the next price step (first-time undersell), the slot shall be allocated among the auction participants that participated in the last auction round preceding the undersell in a non-discriminatory and transparent allocation procedure to be determined and made known in advance by the applicant.
- k) Participation in the first auction shall be restricted to registered users not yet having long-term capacity. Slots that have not been allocated in the auction with restricted participation shall be subsequently offered in a second auction to all registered users. Should slots still not be allocated after this auction, the slots shall be offered by the applicant on a non-yearly basis to all registered users in accordance with the first come, first served (FCFS) principle (non-yearly short-term allocation of capacity set aside).

- l) Should technical facility restrictions require, the non-yearly allocation of slots may deviate from the requirements for the slot product as follows:
 - (1) The fixed minimum unloading amount of LNG for a non-yearly slot may be smaller in individual cases in derogation of operative part 6. c). The applicant shall keep any required reduction in the fixed minimum unloading amount as small as necessary.
 - (2) Furthermore, by way of derogation to the requirement in operative part 6 g) (4), the regasification capacity for a non-yearly slot shall be at least 300 m³ LNG/h.
 - m) Any additional costs incurred by the applicant through the allocation of capacity set aside is considered to be compensated for by the premium pursuant to operative part 6. h). Further fees or costs (such as a handling fee) must not be charged.
 - n) The principle of borrowing and lending shall apply to amounts injected into storage in connection with slots acquired on a short-term basis beginning no later than the time when the amount starts to be injected and ending when the amount withdrawn from storage corresponds to the amount injected in connection with the acquired slot.
 - o) In the event that capacity has not been marketed in the procedure for the non-yearly short-term allocation of capacity set aside, the applicant is required to report in each case to the ruling chamber by 31 March of the following year on the amount of capacity not marketed in the procedure for the non-yearly short-term allocation of capacity set aside. The applicant shall state the reasons why capacity has not been marketed in the non-yearly short-term allocation of capacity set aside.
7. The applicant is required to include special congestion management rules in its capacity contracts. These rules must in particular entitle all users to trade their contracted capacity on the secondary market. At least the following requirements shall be observed and agreed in the capacity contracts:
- a) Capacity holders may transfer all or part of their capacity to other registered users.
 - b) The capacity holder shall inform the applicant of the volume and timing of the trading on the secondary market in good time before the trading on the secondary market. The applicant shall inform all market participants registered with it without undue delay about the scope and timing of trading on the secondary market that is due to take place. This is without prejudice to further rules and transparency requirements from other legal acts, to the extent that they apply to LNG facilities that are exempt from regulation.

- c) The transfer requires the applicant's agreement, which may only be denied for good cause.
 - d) Where capacity has been transferred successfully, the original capacity holder shall be freed from the relevant rights and obligations arising from the capacity contract vis-à-vis the applicant. In other cases, in particular in which the transfer is only temporary, the applicant may make other arrangements.
 - e) A user's right to trade its contracted capacity on the secondary market may be exercised up to 20 days before the date of the unloading slot. The user shall inform the applicant no later than 20 days before the date of the unloading slot whether and to which registered user an unused slot has been transferred. Thereafter, the use it or lose it (UIOLI) procedure in accordance with operative part 8. shall apply.
8. The applicant is required to include special congestion management rules in its capacity contracts that allow unused capacity to be offered on the market in accordance with the UIOLI procedure. At least the following requirements shall be observed and agreed in the capacity contracts:
- (a) The UIOLI procedure shall apply if a user states no later than 20 days before the date of a particular unloading slot that they will not use the unloading slot and does not name another registered user to whom the unloading slot has been transferred. No trading on the secondary market may take place for the duration of the UIOLI procedure.
 - b) The applicant shall identify the unloading slot no later than 19 days before the date of the unloading slot in order to enable all registered users to submit a booking request for the free slot from the 19th day preceding the date of the slot. Slots that have become free shall be allocated in a transparent and non-discriminatory procedure to be determined by the applicant.
 - c) Should the free slots be allocated successfully, the original capacity holder shall be freed from the relevant rights and obligations arising from the capacity contract vis-à-vis the applicant. Otherwise, the applicant shall return the unmarketable unloading slot to the original holder.
9. The applicant is required to notify the ruling chamber without undue delay during the exemption period any time that a market participant of the upstream and/or downstream German gas wholesale market (sellers' or buyers' side) intends to book or acquire capacity that would mean the market participant in question would acquire at least 65% of the annual

throughput capacity of the LNG facility intended for long-term bookings for at least five years, including both bookings of primary and secondary capacity.

10. The applicant is required to ensure during the exemption period that bookings that have to be notified under operative part 9. and the acquisition of capacity that has to be notified under operative part 9. are ruled out or are adjusted before conclusion of the binding booking process in accordance with the rules imposed by the ruling chamber if
 - a) the market share, to be determined, of the undertaking on the upstream or downstream German gas wholesale market in Germany is at least 30% at that time and
 - b) an analysis shows that the booking that has to be notified or the acquisition of capacity that has to be notified under operative part 9. could have detrimental effects on competition, in particular if the booking that has to be notified or the acquisition of capacity that has to be notified under operative part 9. would lead to a risk that an undertaking gains or expands a dominant position on the upstream or downstream German wholesale market in Germany.

The applicant is required to ensure that the booking process for bookings that have to be notified under operative part 9. and the acquisition of capacity that has to be notified under operative part 9. is only concluded in a binding manner once the applicant has been informed by the ruling chamber.

11. The applicant shall inform the ruling chamber without undue delay of any circumstances that may require a reassessment of the exemption prerequisites set out in section 28a(1) paras 1 to 5 EnWG, in particular if they may result in compliance with the prerequisites laid down in section 28a(1) paras 1 to 5 EnWG or the conditions laid down in operative parts 4. to 8. being affected.
12. The exemption decision may have further secondary provisions and conditions attached to it subsequently or may be amended, supplemented or revoked in full or in part; the secondary provisions in operative parts 3. to 10. may be revoked, amended or supplemented in full or in part, where
 - a) a change in actual circumstances requires a reassessment of the exemption prerequisites set out in section 28a(1) paras 1 to 5 EnWG; or
 - b) the applicant fails to meet one or more of the conditions in operative parts 4. to 10.; or

- c) the applicant is not separate from the system operation of Gasunie Deutschland Transport Services GmbH or that of a third-party system operator in whose system the infrastructure is built as required by sections 8 to 10e EnWG after the Brunsbüttel LNG facility has been put into operation; or
 - d) the European Commission Decision of 2 June 2023 (C(2023) 3743 final) issued on this exemption is amended, revoked or becomes ineffective.
13. The ruling chamber shall notify the European Commission of the amendment, supplement or revocation of the exemption decision pursuant to Article 36 of Directive 2009/73/EC. The European Commission may in this event require the changed decision to be amended or revoked.
14. The exemption applies subject to the condition that construction on the LNG facility is started no later than two years after the European Commission Decision is issued, ie no later than 2 June 2025, and the LNG facility is put into commercial operation no later than five years after the European Commission Decision is issued, ie no later than 2 June 2028, unless the European Commission decides in accordance with Article 36(9) of Directive 2009/73/EC that any delay is due to major obstacles beyond control of the applicant. The applicant shall notify the date of the start of construction and the date of the start of commercial operation in writing to the ruling chamber.
15. The exemption also applies in the event that ownership of the Brunsbüttel LNG facility is transferred in full or in part, in the event that operation is transferred to a third party and in the event of changes in the applicant's ownership structure compared with the situation described in the application provided that:
- a) the ruling chamber is notified of the intended transfer or change in good time before the agreed transfer of rights;
 - b) the third party, where taking over operation, commits to complying with the requirements arising from this exemption; and
 - c) the ruling chamber does not withdraw the exemption within three months of receipt of the notification. The withdrawal shall be subject to the condition that the transfer or change takes place.
16. In other respects, the application is rejected.
17. The right to order payment of costs is reserved.

Rationale

I.

- 1 In the present administrative proceedings the applicant is seeking a resumption of proceedings BK7-18-063 and an exemption from regulation in accordance with section 28a EnWG for the planned Brunsbüttel LNG facility that the applicant intends to set up and operate as a combined importation and LNG facility at the Brunsbüttel site.
- 2 The site of the planned Brunsbüttel LNG facility is the Elbehafen port in Brunsbüttel. The address of the Brunsbüttel LNG facility is: Otto-Hahn Str. 4, 25541 Brunsbüttel.
- 3 The applicant plans for the Brunsbüttel LNG facility to have an annual throughput capacity of 10 bn m³ of natural gas.
- 4 The applicant originally applied in July 2018 for an exemption for the construction of an LNG facility in Brunsbüttel with an annual throughput capacity totalling 8bn m³/a, based on the capacity demand situation at the time and with the aim of avoiding possible hoarding of capacity beyond the demand level that had been determined. The ruling chamber granted the exemption for an annual throughput capacity of 8bn m³/a on 21 June 2021 under the reference BK7-18-063-final.
- 5 Recent geopolitical developments relating to the Russian invasion of Ukraine have changed the market conditions, giving rise to greater demand for capacity at the Brunsbüttel LNG facility. Consequently, the applicant is now planning for 2bn m³/a more throughput capacity than originally planned, bringing the total to 10bn m³/a for the Brunsbüttel LNG facility.
- 6 The planned LNG facility will have two LNG tanks with a combined capacity of 330,000 m³ (each tank will have a volume of 165,000 m³), a regasification unit and a T-shaped jetty with two berths designed for ships ranging from barges to the largest Q-Max carriers (265,000 m³). Users of the facility will be offered different services. The basic service including ancillary services includes the importation of LNG, offloading of LNG vessels, regasification and injection into the network. The dispatch service enables further distribution and transportation of the LNG by loading it onto ships or road or rail tankers.
- 7 The Brunsbüttel LNG facility is to be converted into a green (ammonia) energy import terminal in 2041 in line with the applicant's intent to consider the construction of suitable infrastructure for the importation of green hydrogen derivatives in parallel to the facilities for the importation of LNG.
- 8 The applicant is a limited liability company (GmbH) under German law and was founded on 24 January 2018. It was originally a joint venture with equal shares held by Gasunie LNG Holding B.V. (Gasunie), Oiltanking GmbH (OilTanking) and Vopak LNG Holding B.V. (Vopak). In 2022, the applicant's ownership structure changed. The previous partners OilTanking and

Vopak pulled out of the joint venture and their shares were initially transferred fully to Gasunie, which is currently the sole owner of the applicant. In a second step, it is planned for the development bank Kreditanstalt für Wiederaufbau AöR (KfW) to take a 50% stake and GBV Zweiunddreißigste Gesellschaft zur Beteiligungsverwaltung mbH (RWE) to take a 10% stake. Gasunie will be left with a 40% stake. The parties signed the contracts governing this intended transaction on 1 September 2021. However, not all the closing conditions had been fulfilled at the time the application was submitted for these proceedings. The planned transaction is subject to approval under state aid rules, for example. This approval had not yet been received at the time the application was made. Gasunie was therefore still the sole owner of the applicant at the time of the exemption request. Once the new partners have joined, the applicant will be a joint venture of Gasunie, KfW and RWE.

- 9 Gasunie LNG Holding B.V. is a subsidiary of N.V. Nederlandse Gasunie, which is a European gas infrastructure company that transports natural gas and biogas in the Netherlands, Germany and the UK through its subsidiaries Gasunie Transport Services B.V. and BBL V.O.F. in the Netherlands and Gasunie Deutschland Transport Services GmbH in Germany. N.V. Nederlandse Gasunie also operates a natural gas storage facility, an LNG facility and a storage facility at the Port of Rotterdam. Gasunie has taken the role of lead project developer in the project management for the Brunsbüttel LNG facility.
- 10 KfW, a development bank of the Federal Republic of Germany and the federal states, is to finance the project as part of its stake in the business.
- 11 RWE is a wholly owned subsidiary of RWE AG, one of the world's largest listed energy producers, which is also active in energy trading and offers customer solutions. Another wholly owned subsidiary of RWE AG, RWE Supply & Trading GmbH (RWEST), will be one of the first "anchor" clients of the planned LNG facility in Brunsbüttel.
- 12 The planned LNG facility in Brunsbüttel will be owned and operated by the applicant. The applicant's headquarters are at Elbehafen, 25541 Brunsbüttel. The LNG facility is currently due to start operation [REDACTED]
- 13 In a letter of 15 December 2022 and another letter providing more detail of 8 February 2023, the applicant requested the resumption of proceedings BK7-18-063 under section 51(1) para 1 of the Administrative Procedure Act (VwVfG), the revocation of the exemption granted with the reference BK7-18-063-final and an exemption from regulation pursuant to section 28a(1) and (3) EnWG in conjunction with Article 36 of Directive 2009/73/EC for an annual throughput capacity of 10bn m³/a. The applicant submitted extensive documentation in connection with its application. The documentation included in particular information describing the project, the project planning and financing, the corporate structures and the facility's services. The applicant

further submitted an analysis of competition and security of supply and an analysis of the investment risks.

- 14 The applicant stated that it met all the requirements for an exemption from regulation, as these had already been determined by the Bundesnetzagentur in the decision of 21 June 2021 (BK7-18-063-final) with regards to an annual throughput capacity of 8bn m³/a. The fact that the current application related to an annual throughput capacity of 10bn m³/a did not change this, according to the applicant. The applicant in particular stated that competition and security of supply would be enhanced, that the planned LNG facility constituted major new infrastructure with a high investment risk, and that the LNG facility would be owned by the applicant and thus by a company that was separate from a system operator. The applicant also stated that tariffs would be levied on users of the facility and that there would be no detriment to competition or to the effective functioning of the internal market in natural gas.
- 15 The application submitted by the applicant was initially incomplete. The applicant was therefore requested to submit missing documents and information in emails and letters, in particular on 20 December 2022, 16 January 2023, 23 January 2023 and 6 February 2023 and in telephone calls of 26 January 2023 and 6 February 2023. The applicant met these requests, in particular in emails and letters dated 4 January 2023, 19 January 2023, 27 January 2023 and 8 February 2023.
- 16 The applicant requested
 1. the revocation of the exemption granted under the reference BK7-18-063-final and the resumption of the underlying proceedings pursuant to section 51(1) para 1 VwVfG and, on the basis of section 28a(1) and (3) EnWG in conjunction with Article 36 of Directive 2009/73/EC, exemption from the application of sections 20 to 26(1) EnWG and the LNGV issued on the basis of section 118a EnWG for the capacity created at the Brunsbüttel LNG facility at Elbehafen, 25541 Brunsbüttel, with an annual throughput capacity of 10bn m³/a.
 2. that the exemption be granted for a limited period of 20 years from the start of commercial operation.
- 17 The Bundeskartellamt and the regulatory authority of Schleswig-Holstein were notified by email of the opening of proceedings on 15 December 2022.
- 18 The ruling chamber, having checked the documents for completeness, sent the application documents to the European Commission on 30 January 2023.
- 19 On 3 February 2023 the ruling chamber sent the applicant a written draft of rules and mechanisms for the management and allocation of capacity for the purpose of consultation. These included in particular requirements for the non-discriminatory long-term initial allocation,

the short-term allocation of capacity on the basis of a reserve quota, trading on the secondary market, and a UIOLI procedure.

- 20 It had to be taken into account that the applicant had carried out an expression of interest procedure from mid-July to mid-August 2022, before submitting this application, on the basis of the existing rules and mechanisms from the original exemption decision (BK7-18-063-final). It did so with the aim of speeding up the proceedings and in line with other exemption proceedings in which a similar course of action was taken (see European Commission Decision of 11 August 2022, C(2022) 5947 final, paras 14-15 and 52, on the exemption for the EemsEnergy Terminal B.V. in Eemshaven). The applicant had previously carried out an expression of interest procedure under the rules and mechanisms of the original exemption proceedings BK7-18-063 in 2019. Specifically:
- 21 The applicant conducted an informal open season procedure in 2018 in order to determine the market interest and identify potential customers. This was followed by an (initial) formal expression of interest procedure in October/November 2019 on the basis of the rules and mechanisms for the management and allocation of capacity determined by the ruling chamber in the course of the BK7-18-063 proceedings. Three potential customers expressed their interest in long-term bookings.
- 22 Following intense market demand, the applicant voluntarily conducted a second expression of interest procedure from 22 July to 19 August 2022 on the long-term allocation of an additional 1.8bn m³/a (2bn m³/a including a 10% reserve quota for non-yearly marketing). It shared the above-mentioned rules and mechanisms with potential customers and also included them as part of its general rules and conditions. Five potential customers expressed interest.
- 23 On the basis of the final and binding exemption decision of 21 June 2021 (BK7-18-063 final), the applicant concluded firm contractual agreements in summer 2022 with three customers, ConocoPhillips, INEOS and RWEST, for long-term capacity bookings [REDACTED]
[REDACTED]
- 24 The second expression of interest procedure led to the conclusion of a further long-term booking by ConocoPhillips on 15 September 2022 [REDACTED]
[REDACTED].
- 25 The applicant presented the results of the expression of interest procedures in 2019 and 2022 to the ruling chamber along with its application documents (see application of 15 December 2022 and letter of 27 January 2023). They show the following booking situation for the Brunsbüttel LNG facility:

Undertaking	2019 expression of interest procedure		2022 expression of interest procedure	
	Capacity [bn m ³ /a]	Contract duration	Capacity [bn m ³ /a]	Contract duration

- 33 The decision produced in agreement with the Bundeskartellamt was sent to the European Commission together with all the documents from the proceedings on 15 March 2023 for comment and the final decision. On 15 March 2023, the ruling chamber revoked the exemption decision of 21 June 2021 (BK7-18-063), issued the exemption for an annual throughput capacity of 10bn m³ with secondary provisions and, on the same day, transmitted it to the European Commission in accordance with Article 36(9) of Directive 2009/73/EC.
- 34 On 3 April 2023, the European Commission sent a number of questions to the ruling chamber and informed it that the questions required the deadline for the case to be processed to be extended by two months from receipt of the complete response pursuant to Article 36(9) of Directive 2009/73/EC. The ruling chamber and the applicant sent complete responses to the questions on 4 April and 5 April 2023. The applicant wrote to the European Commission on 22 May 2023 stating that it considered an exemption period of 15 years sufficient in view of consistency with the European Commission's decision on state aid, which was also outstanding.
- 35 On 2 June 2023, the European Commission issued its decision on the decision of 15 March 2023 (European Commission Decision of 2 June 2023, C(2023) 3743 final). This was received by the ruling chamber on 5 June 2023. The Commission ordered the ruling chamber to amend and attach further conditions to the exemption decision. The ruling chamber was required to shorten the duration of the exemption from the original period of 20 years to 15 years. In addition, in order to prevent a detrimental effect on competition throughout the long exemption period, the ruling chamber was required, as part of a special notification and assessment procedure, to rule out capacity bookings of at least 65% in total of the capacity for long-term allocation, where necessary through special retrospective safeguards or booking limitations, if these would be detrimental to competition.
- 36 For further details reference is made to the files.

II.

- 37 The application for resumption of proceedings BK7-18-063 was admissible and founded. The decision of 15 March 2023 (BK7-18-063-final) was thus revoked in the decision of 15 March 2023 (BK7-22-140). The application for the issue of an exemption of the Brunsbüttel LNG facility with an annual throughput capacity of 10bn m³/a from the application of sections 20 to 26(1) EnWG and the LNGV issued on the basis of section 118a EnWG is admissible and, in the scope approved here, founded. The prerequisites for granting an exemption are met with respect to the LNG facility. The exemption was issued with the exercise of due discretionary powers and conditions and secondary provisions were attached.
- 38 Owing to the amount of information to be presented, the reasons for the decision are preceded by a structural overview:

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1. Legal basis

- 39 The legal basis for the resumption of proceedings BK7-18-063 and the revocation of the decision of 21 June 2021 (BK7-18-063-final) in the decision of 15 March 2023 (BK7-22-140) is section 51 VwVfG.
- 40 The legal basis for granting an exemption from regulation is section 28a(1) and (3) EnWG in conjunction with Article 36(6) to (9) of Directive 2009/73/EC.
- 41 With regard to the examination and the procedure, section 28a(3) EnWG refers to Article 36(3) to (9) of Directive 2009/73/EC. Article 36 of Directive 2009/73/EC was last amended by Article 1 of the amending Directive (EU) 2019/692 of 17 April 2019 (OJ L 117, page 1). The amending Directive was transposed into German law on 12 December 2019 by the Act amending the Energy Industry Act to implement Directive (EU) 2019/692 of the European Parliament and of the Council concerning common rules for the internal market in natural gas (Federal Law Gazette I No 45 (11 December 2019)). References to section 28a EnWG/Article 36 of Directive 2009/73/EC are to this version.

2. Resumption of proceedings

- 42 The application for resumption of proceedings BK7-18-063 was admissible and founded in accordance with section 51 VwVfG. The applicant credibly demonstrated that the prerequisites for proceedings to be resumed and for the binding exemption decision of 21 June 2021 (BK7-18-063-final) to be revoked and amended under section 51 VwVfG were met. The proceedings (BK7-18-063) therefore had to be resumed pursuant to section 51 VwVfG, the final exemption decision of 21 June 2021 (BK7-18-063-final) had to be revoked in the decision of 15 March 2023 and the exemption applied for with regard to an annual throughput capacity of 10bn m³/a had to be issued.
- 43 (1) Under section 51 VwVfG, upon application by the party concerned, it must be decided on the revocation or amendment of an incontestable administrative act when the material situation underlying the administrative act has subsequently changed to favour the party concerned and the party concerned was, without grave fault, unable to enforce the grounds for resumption in earlier proceedings (see section 51(1) para 1 and (2) VwVfG).
- 44 The material situation underlying the exemption of 21 June 2021 (BK7-18-063-final) has changed to favour the applicant within the meaning of section 51(1) para 1 VwVfG.
- 45 The current geopolitical situation and the resulting urgent need to replace Russian gas supplies with other sources and import routes has led to a significant rise in demand for LNG and LNG facility capacity in Germany and north-west Europe. Consequently, the applicant conducted a second expression of interest procedure in 2022. This procedure indicated binding demand for

an additional 2bn m³/a of annual throughput capacity including a reserve quota of 10% for yearly or non-yearly short-term marketing on top of the planned 8bn m³/a already included in the binding exemption.

- 46 The applicant, through no fault of its own, was unable to enforce the grounds for resumption in earlier proceedings because the material situation only significantly changed after the exemption of 21 June 2021 (BK7-18-063-final) became binding. The demand for another 2bn m³/a of annual throughput capacity at the LNG facility only became known when the second expression of interest procedure was carried out in 2022 because of the changed market conditions. The applicant could not, in the course of the closed exemption proceedings, have claimed future demand that was still theoretical at the time of the proceedings in 2021, because it is only possible to issue exemptions under section 28a EnWG in conjunction with Article 36 of Directive 2009/73/EC for specifically planned capacity for which there is demand. Exemptions are not granted to have "in reserve" for theoretically possible future capital increases. Now that there is specific higher demand and related plans for a capacity increase, it is possible to issue an exemption for an LNG facility with an annual throughput capacity totalling 10bn m³/a (on the conditions for an exemption, see sections 3. and 4.).
- 47 (2) The application was made on 15 December 2022, which is within the deadline set out in section 51(3) VwVfG. Under this provision, the application for resumption must be made within three months beginning from the day on which the party concerned learnt of the grounds for resumption.
- 48 The applicant has stated that, as a result of the second expression of interest procedure, it concluded a long-term capacity booking with ConocoPhillips on 15 September 2022 and this was the first time it had sufficient clarity about the reliable demand for additional capacity.
- 49 (3) As the application is admissible and founded in accordance with section 51 VwVfG, the proceedings BK7-18-063 had to be resumed by initiating proceedings BK7-22-140. The ruling chamber thus had no discretion in this regard. The initiated proceedings are a new, independent administrative procedure in which the prerequisites for the granting of an exemption under section 28a EnWG in conjunction with Article 36 of Directive 2009/73/EC to an LNG facility with an annual throughput capacity of 10bn m³/a have to be fully examined again. The basis for this is thus the material and legal situation at the time the new exemption decision is issued.
- 50 (4) As the prerequisites for the issue of the exemption newly applied for by the applicant under section 28a EnWG in conjunction with Article 36 of Directive 2009/73/EC for an annual throughput capacity of 10bn m³/a are met, the binding exemption of 21 June 2021 (BK7-18-063-final) had to be revoked under section 51 VwVfG in a decision of 15 March 2023 (BK7-22-140) and the exemption newly applied for had to be issued.

3. Formal legality

51 Regarding the formal legality of this decision, the legal provisions governing the procedure, in particular concerning the competence (see section 3.1. below), the required involvement of other authorities (see section 3.3. below) and the legal right to a hearing (see section 3.4. below), have been adhered to. In its role as the operator of the LNG facility, the applicant in particular also has the right to make an application (see section 3.5. below.).

3.1. Competence

52 The competence of the Bundesnetzagentur for the decision based on section 51 VwVfG and section 28a(1) and (3) EnWG in conjunction with Article 36 of Directive 2009/73/EC is derived from section 54(1) half-sentence 1 EnWG and the competence of the ruling chamber is derived from section 59(1) sentence 1 EnWG.

3.2. Procedure

53 The provisions governing the procedure have been adhered to.

54 In particular, the ruling chamber, in accordance with section 28a(3) sentence 2 EnWG in conjunction with the third subparagraph of Article 36(6) of Directive 2009/73/EC, laid down the rules and mechanisms for the management and allocation of capacity in writing on 13 February 2022 before granting the exemption. The ruling chamber included in the congestion management rules, among other things, the obligation to offer unused capacity on the market (UIOLI procedure) and the requirement for users of the infrastructure to be entitled to trade their capacities on the secondary market (see third subparagraph of Article 36(6) of Directive 2009/73/EC).

55 The applicant conducted two expression of interest procedures as required by the third subparagraph of Article 36(6) of Directive 2009/73/EC in accordance with the rules and mechanisms for capacity management and allocation laid down by the ruling chamber in the BK7-18-063 proceedings: one in 2019 and one in 2022. These allowed all potential users of the infrastructure to indicate their interest in contracting capacity before capacity allocation in the new infrastructure took place. The applicant notified the ruling chamber of the results of these procedures in the application of 15 December 2022 and a a letter of 27 January 2023.

56 The ruling chamber took account of the results of the expression of interest procedures required by the third subparagraph of Article 36(6) of Directive 2009/73/EC in its assessment of the

criteria referred to in section 28a(1) EnWG, in particular para 1 (the infrastructure must enhance competition in gas supply and enhance security of supply), para 2 (investment risk) and para 5 (the exemption must not be detrimental to competition in the relevant markets which are likely to be affected by the investment, to the efficient functioning of the internal market in natural gas, or to the efficient functioning of the regulated systems affected or to security of supply of natural gas in the European Union).

3.3. Involvement of other authorities

- 57 The regulatory authority of the federal state, in this instance Schleswig-Holstein, was notified of the opening of proceedings in accordance with section 55(1) sentence 2 EnWG.
- 58 In addition, the ruling chamber sent the complete application documents to the European Commission without delay. It was to be noted in this connection that the applicant did not produce the complete application documentation until after the opening of the proceedings.
- 59 The participation of the regulatory authority of Schleswig-Holstein under section 58(1) sentence 2 EnWG was not necessary in this instance since the applicant, as the future operator of the LNG facility, is not a system operator (section 3 para 27 EnWG).
- 60 A consultation of Member States likely to be affected was carried out in accordance with section 28a(3) sentence 2 EnWG in conjunction with Article 36(3) subparagraph 2(a) of Directive 2009/73/EC from 30 January 2023 to 10 February 2023. This gave the regulatory authorities of the Member States of the European Union and the regulatory authorities of the UK and Norway the opportunity to respond. No responses dealt with the content of the project.
- 61 A consultation of the relevant authorities of third countries under section 28a(3) sentence 2 EnWG in conjunction with Article 36(3) subparagraph 2(b) of Directive 2009/73/EC, on the other hand, was not necessary as the infrastructure in question is not connected with the Union network under the jurisdiction of a Member State, and originates from or ends in one or more third countries.
- 62 The ruling chamber submitted the draft decision to the Bundeskartellamt in accordance with section 58(1) sentences 1 and 2 EnWG, giving the Bundeskartellamt the opportunity to provide a statement and with a view to obtaining the Bundeskartellamt's agreement. The Bundeskartellamt gave its agreement in an email of 3 March 2023.
- 63 The European Commission was properly involved pursuant to section 28a(3) EnWG in conjunction with Article 36(8) and (9) of Directive 2009/73/EC. In accordance with these provisions, the exemption decision is subject to the scrutiny of the European Commission, which may, in accordance with section 28a(3) sentence 2 EnWG in conjunction with Article 36(8) and

(9) of Directive 2009/73/EC, require the regulatory authority to amend or revoke the national decision to grant an exemption. The decision produced in agreement with the Bundeskartellamt was sent to the European Commission together with all the documents from the proceedings on 15 March 2023 for comment and the final decision.

- 64 On 2 June 2023, the European Commission issued its Decision (C(2023) 3743 final) on the original exemption, which was received by the ruling chamber on 5 June 2023. The European Commission required the ruling chamber to amend the exemption and attach additional secondary provisions.
- 65 Pursuant to section 28a(3) EnWG in conjunction with the third subparagraph of Article 36(9) of Directive 2009/73/EC, the request for amendment from the European Commission was complied with by the relevant regulatory authority within a period of one month. This decision implements the request fully and in a timely manner.
- 66 For further details, reference is made to content of the files and the Commission Decision of 2 June 2023 (C(2023) 3743 final).

3.4. Hearing

- 67 The applicant was given full opportunity to state its views in the course of the proceedings in accordance with section 67(1) EnWG.

3.5. Right to apply

- 68 The applicant has the right to submit an application under section 28a(3) sentence 1 EnWG. The "gas supply company concerned" within the meaning of this provision is solely the operator of the planned infrastructure; mere owners or investors do not have the right to submit an application (see Ruling Chamber 7, Decision BK7-07-013 of 27 August 2007). The applicant will have the role of operator of the planned LNG facility in future. Thus the applicant was correctly entitled to apply for an exemption from regulation in accordance with section 28a EnWG.

3.6. Interest in a decision being reached

- 69 The applicant would still have an interest in a decision being reached even if, for instance, construction of the facility was not sufficiently likely. The absence of an interest in a decision being reached could be assumed, however, if the applicant's request for exemption was pointless because there were already planning or approval-related obstacles preventing the project. At present, however, it is not clear to the ruling chamber whether this is the case. The

fact that the applicant is seriously pursuing the approval procedure is sufficient for there to be an interest in a decision being reached and the applicant has satisfied the ruling chamber that this is the case.

- 70 However, it is not necessary to wait for the approvals before deciding on the exemption in accordance with section 28a EnWG. If it were, this would lead to additional timescale and economic risks for projects for which an exemption was sought.

4. Substantive legality

- 71 The revocation of the original exemption decision of 15 March 2023, its amendment and the new version in accordance with the European Commission Decision of 2 June 2023 (C(2023) 3743 final) is also substantively lawful. The prerequisites for exemption pursuant to section 28a(1) EnWG in conjunction with Article 36(1) of Directive 2009/73/EC have been met with regard to the amendment and re-issue of the exemption decision for the Brunsbüttel LNG facility.
- 72 The decision is also substantively lawful, because the prerequisites for exemption are met in the case of the Brunsbüttel LNG facility. The planned facility in Brunsbüttel is to be classified as an LNG facility within the meaning of section 28a(1) EnWG in conjunction with Article 36(1) of Directive 2009/73/EC (see section 4.1 below). The other prerequisites for exemption are also met in the case of the Brunsbüttel LNG facility. The LNG facility will enhance competition in gas supply and security of supply (see section 4.2. below). The facility constitutes a major new infrastructure (see section 4.3. below). The investment risk is such that the investment would not take place unless an exemption was granted (see section 4.4 below). The special unbundling requirement – for the LNG facility operator to be separate from the system operator in whose system the infrastructure will be built – in accordance with sections 8 to 10e EnWG is satisfied (see section 4.5 below). The requirement for tariffs to be levied is fulfilled (see section 4.6 below). The exemption is not found to be detrimental to competition in the relevant markets which are likely to be affected by the investment, to the efficient functioning of the internal market in natural gas or the efficient functioning of the regulated systems concerned or to security of supply of natural gas in the EU (see section 4.7 below). In addition, rules and mechanisms for capacity management and allocation were defined before the exemption was granted (see section 4.8 below).
- 73 Where the prerequisites for exemption are met in the case of the LNG facility, the decision on granting an exemption lies at the discretion of the ruling chamber. Having weighed up all the aspects, the ruling chamber decided to grant the exemption subject to secondary provisions (see section 4.8. below). The amendments to the original exemption decision of 15 March 2023

implement the European Commission Decision of 2 June 2023 (C(2023) 3743 final) in full in accordance with section 28a(3) EnWG and the third subparagraph of Article 36(9) of Directive 2009/73/EC.

4.1. Subject of the application

- 74 Under section 28a EnWG, LNG facilities, as major new infrastructure, can be exempted from regulation for a limited period of time. The facility in Brunsbüttel that is planned by the applicant constitutes an LNG facility within the meaning of section 28a(1) EnWG (see sections 4.1.1. and 4.1.2. below; re classification as major new infrastructure see section 4.3.).
- 75 The planned facility is a stationary, onshore facility for the liquefaction of natural gas or the importation, offloading, and regasification of LNG, including ancillary services and temporary storage necessary for the regasification process and subsequent delivery to the transmission system (see application of 15 December 2022, page 6).
- 76 The Brunsbüttel LNG facility, a combined importation and LNG facility, will have an annual throughput capacity of 10 bn m³/a of natural gas. It will have two LNG tanks expected to have a combined capacity of 330,000 m³ (each tank will have a volume of 165,000 m³), a regasification unit and a T-shaped jetty with two berths designed for ships ranging from barges to the largest Q-Max carriers (265,000 m³). The use or redistribution of the LNG in the combined facility may include regasification and delivery to the transmission system as well as loading onto and transport on ships, tankers and trains (large-scale and small-scale area). The use of residual heat in cooperation with nearby industry will further ensure sustainable synergies in the energy-intensive regasification process. The same goes for the use of the boil-off gas continually produced during the process. Synergies with local industry thus relate to the use of residual heat and cold and permit the construction of a "zero emissions" facility. The applicant intends to convert the planned LNG facility into a green (ammonia) energy import terminal in 2041 (see application of 15 December 2022, pages 6-7 and annex 1 to the application).
- 77 According to the applicant's documentation, the services planned for users of the LNG facility are to be distinguished as follows: the basic service, the dispatch services, and the ancillary services. The basic service includes the importation of LNG, offloading of LNG vessels, regasification and delivery to the system. Dispatch services comprise loading the LNG onto ships, road tankers and possibly rail tankers for onward transportation. The ancillary services are operationally necessary services performed by the applicant and comprise cooling and filling up with gas, pumping from the storage tank and services relating to the storage tank (see the application of 15 December 2022, page 7 for a description of these services).

78 In these proceedings, it was necessary to determine how the individual services were to be classified in regulatory terms in order to define the possible scope of the exemption. The applicant conclusively demonstrated that the planned basic service and ancillary services are to be classified as attributable to an LNG facility and thus subject to the provisions of the EnWG (see section 4.1.1. below). By contrast, the dispatch services (see 4.1.2. below) are not subject to regulation and are therefore not covered by the exemption. Specifically:

4.1.1. LNG facility

79 According to section 3 para 26 EnWG, "LNG facility" means a terminal which is used for the liquefaction of natural gas or the importation, offloading, and regasification of LNG, and includes ancillary services and temporary storage necessary for the regasification process and subsequent delivery to the transmission system, but does not include any part of LNG terminals used for storage.

80 The definition in section 3 para 26 EnWG is identical to the definition in Article 2 point 11 of Directive 2009/73/EC.

81 LNG stands for liquefied natural gas; the physical state of LNG changes in the LNG facility by being either cooled and liquefied or heated and regasified (see Schex, in: Kment, EnWG, 2nd ed 2019, section 3, margin no 71).

82 The applicant's planned facility in Brunsbüttel meets the criteria set out above. The facility constitutes a terminal for the importation, offloading and regasification of LNG and for the delivery of the (re)gasified natural gas to the transmission system. The ancillary services and the temporary storage necessary for the regasification process and subsequent delivery to the transmission system are therefore attributable by definition to the LNG facility within the meaning of section 3 para 26 EnWG.

83 In this instance, the fact that the applicant has stated that it plans to offer both basic and dispatch services and to use parts of the facility for various of the services mentioned above – for example, to use the jetties and the storage tanks for both basic and dispatch services for the redistribution of LNG – is not an argument against classifying the facility as an LNG facility within the meaning of section 3 para 26 EnWG

84 It follows directly from the wording of section 3 para 26 EnWG that a facility can indeed be used for various storage functions. How the facility is legally classified depends on the storage purpose. Section 3 para 26 EnWG explicitly provides for a distinction in the first instance from a storage facility as defined in section 3 para 19c EnWG. Parts of an LNG terminal used for storage are attributable to a storage facility as defined in section 3 para 19c EnWG and not to an LNG facility as defined in section 3 para 26 EnWG. In addition, the purpose enables a

distinction to be made from any storage functions and services that do not fall within the scope of the EnWG.

- 85 If the same storage tank is used for different storage purposes, it is decisive that a distinction can be made between the tank's different uses in order to enable the tank to be attributed to, for example, an LNG facility, a storage facility or the non-regulated large-scale or the small-scale area.
- 86 The services and associated storage purposes planned by the applicant and described above are either attributable to the LNG facility or, as dispatch services, are not subject to regulation, as explained below.

4.1.2. Definition of the large-scale/small-scale area

- 87 The storage of LNG for the purpose of redistribution in liquid form to the large-scale/small-scale area is not subject to regulation and is therefore not covered by the exemption. This conclusion is based on the following considerations.
- 88 LNG has various possible uses. In addition to regasification and subsequent delivery to the transmission system, LNG can also be used for applications in the mobility sector. For instance, LNG is becoming increasingly important as a fuel for heavy goods vehicles and is also used as a shipping fuel. The use of LNG directly – in liquid form – as an end product by final consumers or for industrial applications is referred to as the large-scale and/or small-scale area(s).
- 89 The applicant also intends to use the planned combined importation and LNG facility to offer such services, known as dispatch services. It has explained that it will offer its users, in addition to basic services (including auxiliary services), dispatch services in which, for example, ships or road tankers are loaded with LNG for redistribution (see application of 15 December 2022, page 7 and letter from the applicant of 8 February 2023, page 2). If it is necessary to store the LNG put into the tank(s), this temporary storage will be for the purposes of redistribution by, for example, ship or road tanker.
- 90 Any temporary storage for the purpose of redistribution to the large-scale/small-scale area does not constitute storage as covered by the regulatory provisions of the EnWG. This is because storage tanks in the large-scale/small-scale area that are not connected to a regulated LNG facility within the meaning of section 3 para 26 EnWG or another gas supply network within the meaning of section 3 para 20 EnWG are in themselves not subject to regulation under the EnWG due to the fact that there is no pipeline connection. If integrated use is made of the storage tank of an LNG facility according to section 3 para 26 EnWG, as is planned in this instance, for example for large-scale/small-scale services, a pipeline connection and therefore the applicability of the EnWG can initially be assumed (see Legislative purpose, section 1(1)

EnWG). Ultimately, however, it may be concluded that the regulatory provisions of the EnWG do not also apply to such storage tanks for the large-scale/small-scale area that are connected to a gas supply network because of the storage purpose.

- 91 This is supported by the wording of section 3 para 26 and para 19c EnWG: the distinction between an LNG facility and a storage facility is explicitly based on the storage purpose. Temporary storage that is necessary for the regasification process and subsequent delivery to the transmission system is attributable to an LNG facility as defined in section 3 para 26 EnWG. A storage tank that is solely used for "storage" (re the legislative wording "storage": for example Hellermann, in: Britz/Hellermann/Hermes: Energiewirtschaftsgesetz, 3rd ed 2015, section 3, margin no 52) is attributable to a regulated storage facility within the meaning of section 3 para 19c EnWG. If the (temporary) storage of LNG is for the purpose of redistribution by ships, road tankers or rail tankers, as in this instance, the large-scale/small-scale area is attributable to neither a regulated LNG facility as defined in section 3 para 26 EnWG nor a regulated storage facility within the meaning of section 3 para 19c EnWG. Thus, in the absence of statutory arrangements, the large-scale/small-scale area here is not subject to regulation under the EnWG.
- 92 This is also supported by systematic deliberations as it provides for a clearly defined and distinguishable scope of application for parts used for storage within the meaning of section 3 para 26 and para 19c EnWG and rules out inconsistencies in assessment.
- 93 Equally, a historical and teleological interpretation does not produce any other indications. Rather, the aim and purpose of the EnWG also provide for a distinction based on the storage purpose. The aim and purpose of the EnWG is to ensure a network-based supply of electricity, gas and hydrogen for the general public that is as secure, low-priced, consumer-friendly, efficient and environmentally compatible as possible (see section 1(1) EnWG). However, the storage of LNG for redistribution in the large-scale/small-scale area by road tankers, rail tankers or ships specifically serves the non-network-based transport of LNG by these vehicles and not network-based supply.
- 94 This understanding is also supported by the concept of a consistent application of the law (principle of non-discrimination), for it is not evident why, in this instance, the identical use (storage for the large-scale/small-scale area) of storage tanks not connected to a regulated LNG facility within the meaning of section 3 para 26 EnWG or another gas supply network within the meaning of section 3 para 20 EnWG that can be clearly classed from the outset as not relevant for regulation because the storage tank has no pipeline connection should be subject to regulation in this instance just because of the combined/integrated use of the storage tank of an LNG facility. In this case as well, storage still serves the purpose of redistribution of LNG by ships and tankers, etc and not network-based supply for the general public.

- 95 The wording of the European legislation in Article 2 point 11 of Directive 2009/73/EC, which is identical to section 3 para 26 EnWG, does not lead to a different conclusion either.
- 96 Finally, an argument against such an understanding could at most be difficulties in distinguishing between regulated and non-regulated services in terms of the risk of cross-subsidisation as this could be detrimental to network-based supply for the general public. However, the applicant has stated plausibly that it intends to maintain separate financial accounts for the use of regulated and non-regulated services – including in the event that the facility is used in future to import green hydrogen or other hydrogen derivatives – in order to avoid cross-subsidisation (see applicant's letter of 27 January 2023, page 2). The applicant is prepared, on the basis of this separate accounting, to inform the Bundesnetzagentur and the Bundeskartellamt which capacity, based on actual use, is used for non-regulated services for redistribution of LNG (or hydrogen). The applicant is also prepared to make the separate financial accounts available to the Bundesnetzagentur each year as part of the reporting and monitoring (see letter from the applicant of 27 January 2023, page 2). There is therefore no evidence in this instance of the risk of cross-subsidisation as described above.
- 97 In conclusion, the use of LNG in the large-scale/small-scale area is not subject to regulation under the EnWG.
- 98 The applicant has further explained its intention to use synergies with nearby industry – in this case residual heat and cold – with the aim of achieving a "zero emissions" facility. The ruling chamber understands this to constitute a standard synergy of LNG facilities with local industrial undertakings and a use comparable with the services in the large-scale and small-scale area, ie without the character of a network and thus not coming under the regulatory scope of the EnWG.

4.2. Enhancement of competition and security of supply

- 99 In accordance with section 28a(1) para 1 EnWG the investment must enhance competition in gas supply and security of supply. In addition, in accordance with section 28a(1) para 5 EnWG the exemption must not be detrimental to competition in the relevant markets which are likely to be affected by the investment. The analysis of the latter is set out in section 4.7.
- 100 The applicant satisfied the ruling chamber of compliance with all the criteria through the submission of the Frontier Economics report "Economic report in the context of the application for exemption for the planned LNG terminal in Brunsbüttel" (Frontier Economics, economic report) of 15 December 2022. As well as the security of supply analysis and the competition analysis for the upstream wholesale market, the economic report includes the competitive analysis and assessment of the downstream market levels. In other exemption proceedings,

the European Commission considered it necessary to look at the whole downstream market in order to permit an assessment of the competitive situation as a whole.

- 101 The ruling chamber checked the sources provided by Frontier Economics and assessed the plausibility of the calculations made. On this basis, it came to the conclusion that the competitive and security of supply effects presented by Frontier Economics in its report were understandable. In its analysis of competition and security of supply, the ruling chamber has thus based its argument on the analyses and calculations carried out by Frontier Economics. It deals with these issues in more detail below. The supply security and competition analyses in the report are restricted to the delivery of natural gas to the natural gas network.
- 102 In carrying out the analyses, Frontier Economics focused on the current situation on the north-west European and on the German market (a classification of the relevant product market may be found in section 4.2.1.2) and made forecasts. In general, it may be said that the development of the gas market depends on a multitude of factors, including economic and political changes with a view to the supply and demand of natural gas. Forecasts about the development of the gas market are thus subject to considerable risks (see Frontier Economics, economic report, page 30).
- 103 On the demand side, the report made the assumptions summarised below for the north-west European market, which are largely equally relevant for the German market. It is assumed that gas consumption will reduce in the medium to long-term. This assumption is partly based on climate targets and the exploiting of energy efficiency measures, which at the European level are anchored in, for example, the Fit for 55 package (see <https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/>, accessed on 3 February 2023) At national level, too, legislators have already instigated huge savings targets for the energy supply with natural gas. The large price rises for natural gas last winter are likely to have acted as a motivating factor for the implementation of energy efficiency measures. The aim of becoming independent of Russian gas imports is supposed to lead to a long-term reduction in natural gas consumption (see Frontier Economics, economic report, pages 33 and 37). Moreover, the current damage to the Nord Stream and Nord Stream 2 pipelines, along with Russia's decision to stop deliveries via the undamaged pipeline systems as well, mean there is no longer any direct supply to the German market.
- 104 Considerable changes in the provider structure of natural gas may be observed. Domestic gas production will reduce drastically, both in the north-west European and German markets. Conventional domestic production in north-west Europe will fall by nearly 90% and in Germany by about 70% by 2030 (see Frontier Economics, economic report, pages 32 and 37). The reduction in north-west Europe is partly due to the reduction of natural gas production in the Netherlands. The end to the use of the Groningen gas field, which is currently planned for 2023

or 2024, will mean that the Netherlands will in future produce less gas than the country needs to meet national demand. The decline in gas production in the UK as the gas fields there are increasingly depleted is a further reason for the decline in regional natural gas production (Frontier Economics, economic report, page 32). As far the German market is concerned, it is in particular the reduction/cessation of gas production in the Netherlands that is leading to the loss of a source of gas that has been important in the past. It is therefore to be expected that the German market will see lower imports from the Netherlands to Germany. The calculations and analyses of security of supply and competition are therefore based on a complete end to exports from the Netherlands by 2030 (see Frontier Economics, economic report, page 37).

- 105 The calculations and analyses for suppliers of pipeline gas to north-west Europe are subject to further restrictions. For example, it is assumed that in the short term, Norwegian gas will make a significant contribution to supplying north-west Europe, including Germany. However, after a rapid, 10% rise in Norwegian gas exports to Europe, official statements indicate that a further increase from existing production fields will not be possible. In the medium term, gas volumes from Norway are expected to decline. This is partly due to the increasingly depleted fields, but also to a reduction in demand (see Frontier Economics, economic report, page 33). According to press reports, production and pipelines are currently at full capacity and cannot be increased with the existing fields (see <https://www.dw.com/de/norwegen-sichert-deutschland-gaslieferungen-zu-und-st%C3%B6%C3%9Ft-an-grenzen/a-62816704>; accessed on 3 February 2023). The economic report was thus based on a forecast of the Norwegian Petroleum Directorate up to 2026 and after that the scenario report 2022, "min" scenario, which assumes falling imports from Norway (see Frontier Economics, economic report, pages 33 and 37).
- 106 According to the REPowerEU communication (a Joint European Action for more affordable, secure and sustainable energy; Communication from the Commission to the European Parliament, the European Council, the Council, the Economic and Social Committee and the Committee of the Regions of 8 March 2022, COM/2022/108 final; "REPowerEU"), the EU intends to become completely independent of natural gas imports from Russia. Natural gas imports from Russia to the EU were supposed to fall 30% by the end of 2022. The geopolitical developments in summer 2022 – the reduction/cessation of volumes from Russia and sabotage on the Nord Stream and Nord Stream 2 pipelines – have led Frontier Economics to assume that in [REDACTED] when the Brunsbüttel LNG facility is taken into operation, and beyond, no more Russian pipeline gas will flow to Germany or north-west Europe. According to the report, this assumption is bolstered by the political objectives set in the core countries of the north-west European gas market (Frontier Economics, economic report, page 33). Owing to the high level of uncertainty, Russian gas imports were not included at all in the analysis years 2027 and 2034 for the security of supply analyses (see Frontier Economics, economic report, page 39).

- 107 The reduction of piped gas imports makes it necessary to roll out LNG infrastructure to cover national demand for gas. As well as the LNG infrastructure projects from the private sector, the German federal government has commissioned five non-fixed, floating LNG facilities in the country. Germany currently has two LNG facilities. The first floating LNG facility was opened in Wilhelmshaven in December 2022 (see <https://www.merkur.de/wirtschaft/erstes-gas-an-Ing-terminal-wilhelmshaven-in-netz-eingespeist-zr-91988049.html>, accessed on 3 February 2023). The first privately operated LNG facility, belonging to Deutsche ReGas GmbH & Co. KGaA, was opened in Lubmin in January 2023 (see <https://www.bundesregierung.de/breg-de/themen/klimaschutz/Ing-terminal-eroeffnet-2157792>, accessed on 3 February 2022). There are other projects in the planning or implementation stages in the short or medium term: four more non-fixed, floating LNG facilities (see <https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2022/05/20220505-bund-und-niedersachsen-unterzeichnen-vereinbarung-zum-ausbau-der-Ing-und-greengas-importinfrastruktur-niedersachsen.html> and <https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2022/09/20220901-bwmk-sichert-sich-fuenftes-schwimmendes-fluessigerdgasterminal-plus-anlandung-gruener-wasserstoff.html>, both accessed on 3 February 2022), a fixed, onshore LNG facility in Stade (see Frontier Economics, economic report, page 38) and a fixed, onshore LNG facility in Wilhelmshaven. The economic report thus takes account of corresponding assumptions on the expansion of LNG infrastructure and imports of LNG in its calculations.
- 108 The temporal focus of the competition analysis is on [REDACTED] the first full year after the planned commissioning of the LNG facility [REDACTED]. In addition, a closer look is taken at the year 2034 to take account of the effects of future developments on results (see Frontier Economics, economic report, page 55). The period from 2022 to 2033 and the effect of the LNG facility [REDACTED] are considered in the report with regard to security of supply. This is the time for which the highest validity of the data may be assumed for the analyses carried out (see Frontier Economics, economic report, page 42).
- 109 The report essentially bases the forecast on the network development plans available at the time the report was drawn up – the NDPs developed by the German transmission system operators (Gas NDP 2022, interim report) and the Ten-Year Network Development Plan (TYNDP 2022 (2021)) developed by the European Network of Transmission System Operators for Gas (ENTSOG). Frontier Economics comes to the conclusion that a perspective of much more than 10 years into the future, from today, does not make sense, as it would be of limited reliability due to the lack of certainty about the development of other parameters affecting security of supply that would have to be taken into account (see Frontier Economics, economic report, page 42). Conversely, the periods/years under consideration by Frontier Economics offer the most useful data.

- 110 It is true that an assessment of the whole period of the exemption may be relevant, both to the analysis of the effect on competition and the security of supply, but, as stated above, forecasts of market developments over a longer period are highly uncertain (see Frontier Economics, economic report, page 42 and page 55). The ruling chamber shares this view.
- 111 The report's basic differentiation criterion in its market analysis as regards the geographic market definition was, apart from the availability of transport capacity, price correlation. Similarly to market analyses previously carried out for comparable proceedings, Frontier Economics decided not to include the French market as part of the relevant market for the purposes of the study (see Frontier Economics, economic report, page 28). The ruling chamber can follow the logic of this decision, even though it has identified a very high level of integration of the French market with the German one in its analysis of price correlation in recent years (see also the more detailed explanation under section 4.2.1.3).
- 112 The analysis of competition enhancement is to be based on the investment project subject to the framework conditions of the exemption (see section 4.2.1 below.). The Brunsbüttel LNG facility will also enhance security of supply. Firstly, it will facilitate access to new sources of gas worldwide and thus replace Russian gas deliveries. Secondly, it will create redundancies with respect to existing import routes by opening up a large number of new transport routes. Last but not least, it will increase the flexibility of gas supply by facilitating access to a large number of transport routes connecting a wide range of sources of gas worldwide. The applicant confirmed this finding with various comparative and quantitative analyses of supply security with and without the specific LNG facility (counterfactual scenario) (see section 4.2.2 below).

4.2.1. Enhancement of competition in gas supply

- 113 The Brunsbüttel LNG facility will enhance competition in gas supply. This is proven by the Frontier Economics report submitted by the applicant, which makes a detailed analysis of the markets concerned, the expected market developments and competition effects.

4.2.1.1. General principles

- 114 One prerequisite for an exemption from regulation is that competition in gas supply will be enhanced. What is meant by this can be derived neither from the legislative history of the EnWG nor from Article 36 of Directive 2009/73/EC (previously Article 22 of Directive 2003/55/EC), whose wording is transposed literally in the EnWG, and must therefore be derived on the basis of a systematic interpretation in compliance with European law of a practical application.

- 115 In contrast to the terminology otherwise commonly used, neither Directive 2009/73/EC nor section 28a EnWG make reference to the "relevant market" or an otherwise specified market, although Directive 2009/73/EC makes reference in other provisions to markets that are specified in more detail. There are equally few details about when competition on a particular market is enhanced.
- 116 The European Commission, in its working document on the application of Article 22 of Directive 2003/55/EC (see Commission staff working document on Article 22 of Directive 2003/55/EC concerning common rules for the internal market in natural gas and Article 7 of Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity – New Infrastructure Exemptions of 6 May 2009, SEC(2009)642 final), assumes that the enhancement of competition test in Article 22 of Directive 2003/55/EC is a *sui generis* test, although the principles of general anti-trust law ("*to have regard to*", *loc cit*, para 31) and relevant analytical techniques should be applied ("*should apply analytical techniques that are consistent with those applied in competition cases at national and European level*", *loc cit*, para 36). Here, not every negative effect is to be seen as detrimental to the exemption; instead, positive and negative effects must be weighed up against each other and balanced:
- 117 "The enhancement of competition test in these provisions is a *sui generis* test. However, in the application of the test it is relevant to have regard to the principles developed under Articles 81 and Article 82 of the EC Treaty and the EC Merger Regulation. This implies that likely negative effects and likely positive effects must be assessed and balanced." (*loc cit*, paragraph 31).
- 118 Whether or not competition is enhanced, therefore, does not necessarily depend on whether there is just a neutral effect or even a deterioration on one of the relevant markets to be analysed. Rather, what is decisive is a weighing up of the possible negative and possible positive effects.
- 119 According to the wording of section 28a(1) para 1 EnWG the decisive factor is whether the investment enhances competition. By contrast, according to section 28a(1) para 5 EnWG, the exemption must not be detrimental to competition in the relevant markets which are likely to be affected. The two provisions firstly have criteria with different levels of stringency (enhancement/lack of detriment) and secondly refer to different objects (investment/exemption).
- 120 The ruling chamber takes the view that the term "investment" refers to the investment project on which the request for exemption is based. In order to determine whether the investment enhances competition, a comparative (counterfactual) scenario is required; in the case of section 28a(1) para 1 EnWG this scenario must be a situation without the investment.

- 121 With respect to the criterion in section 28a(1) para 5 EnWG, the situation with an investment project for which an exemption has been granted must be compared with the competitive situation that would exist if the exemption was not granted. Since the exemption may only be granted if the investment would not take place unless an exemption was granted (section 28a(1) para 2 EnWG), a scenario in which the LNG facility is constructed but is subject to regulation is not a relevant comparative scenario. Thus the comparative scenario in the case of section 28a(1) para 5 EnWG is also a situation without an investment project.
- 122 In both cases, therefore, the competitive conditions without the new infrastructure must be compared with the competitive conditions with the construction of the exempted investment project infrastructure. The difference – in addition to the criterion (enhancement or lack of deterioration) – is that section 28a(1) para 1 EnWG relates to the infrastructure in the form of the exemption request while section 28a(1) para 5 EnWG relates to the exemption itself.
- 123 The definition of the relevant market is a tool that enables a systematic analysis of the boundaries of competition between companies (in both product and geographic terms). The analysis should look at those markets on which the infrastructure for which an exemption is requested is likely to have a significant effect and examine "those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure" (see Commission Notice on the definition of relevant market for the purposes of Community competition law, 97/C 372/03 of 9 December 1997, point 2). The analysis takes account of general principles of competition law, both product and geographic dimensions, and demand substitutability. To this end, the relevant product and geographic markets on which the planned investment could have an effect are identified.
- 124 "A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use" (see Commission Notice of 9 December 1997, point 7).
- 125 "The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas" (see loc cit, point 8).
- 126 The provision of infrastructure for the importation of LNG has an effect above all on the market that would include the importation of LNG and the conversion of LNG into natural gas. The relevant market should be defined as the natural gas supply – comprising imports of pipelined

natural gas and LNG and domestic production – in north-west Europe (Germany, the Benelux countries, Denmark, France and the UK).

4.2.1.2. Relevant product market

- 127 The relevant product market is defined on the basis of the principle of substitutability. Products are identified that can reasonably substitute the products concerned. Two products can only be attributed to the same market if they are mutually substitutable to a sufficient extent. Switching from one product to the other should be possible in a relatively short time frame and without significant costs (see Frontier Economics, economic report, page 58).
- 128 At the Brunsbüttel LNG facility, LNG will be imported for the main purpose of regasification and subsequent delivery to the existing pipeline system. The regasified LNG must meet the gas quality requirements set by the DVGW (Deutscher Verein des Gas- und Wasserfachs e. V.) for delivery to the pipeline system; thus its product characteristics cannot be seen to be different from those of other natural gas that is transported in the same pipeline system. LNG is therefore fully substitutable with, for example, natural gas imported by pipeline, and vice versa. The European Commission also considers there to be direct competition between LNG and pipelined natural gas, stating:
- 129 "The Commission found that, in countries where import infrastructures for LNG are present, LNG would constitute a direct competitive constraint to gas imported via pipelines". (See Case No COMP/M.6477 – BP/Chevron/ENI/Sonangol/Total/JV of 16 May 2021, paragraph 18 with reference to Case No COMP/M.4545 – Equinor/Hydro of 3 May 2007).
- 130 Another substitute is locally produced natural gas, so it can be assumed that traders on the wholesale market can respond to price signals and switch at short notice between LNG, pipelined natural gas and locally produced natural gas, which also includes the production of biomethane.
- 131 The relevant product market should therefore be identified as the tradeable volume of natural gas. This comprises LNG, pipelined natural gas imports and local production. The market players on the supply side comprise natural gas and LNG producers, while those on the demand side comprise import companies as well as smaller players that directly or indirectly acquire volumes of gas marketed by producers via wholesale markets. It is perfectly possible for market players to be active on both the supply and the demand side.

4.2.1.3. Relevant geographic market

- 132 The definition of the geographic market needs to take account of the extent to which consumers or suppliers would shift their activities to a different area when justified by relevant price signals. As with the definition of the relevant product market, substitution should be possible within a relatively short time frame (at the most one year) and without significant costs.
- 133 In this instance, the planned Brunsbüttel LNG facility is located in the single German market area (THE); the relevant market for the gas imported to Brunsbüttel therefore initially comprises the entire territory of the Federal Republic of Germany. Whether customers or suppliers shift to adjacent market areas if there are changes in prices depends (among other things) on the transport options that can be used between the market areas concerned and on the pricing of these options. For example, supplying a consumer in Germany with gas acquired in the Netherlands is only lucrative if the commodity price payable in the Netherlands is low enough to overcompensate for the additional transport costs. Transport costs are regulated at European level and it is not possible to offer costs that are lower than the level set by regulation even if demand is very low. By contrast, it is possible to add a premium on the regulated tariff if transport capacity availability is low. An absence of such premiums therefore indicates that transport capacity availability is not low. An analysis made by the ruling chamber of all bundled capacity auctions carried out on the PRISMA platform in 2019 showed that prices were marked up in only 0.074% of the auctions. The current geopolitical events and subsequent changes in market conditions have led to individual auctions being held with premiums in locally limited areas. The ruling chamber sees these premiums particularly in the light of the current geopolitical situation and the associated, short-term changes to desired import sources and does not consider that they will be of great significance in the medium term. Moreover, the ruling chamber expects that, from a structural perspective, the transport capacity will adjust to meet the changed demand. The network operators have already started planning for this and the first LNG facilities have been connected to the transmission system. The floating LNG facility in Wilhelmshaven, for example, has been connected (see <https://oge.net/de/pressemitteilungen/2022/wilhelmshavener-anbindungsleitung-mit-letzter-schweissnaht-fertiggestellt-lng-kann-jetzt-kommen-in-zukunft-auch-wasserstoff>; accessed on 4 February 2023). In addition, on 1 June 2022 a law to speed up planning approvals with the aim of securing the energy supply entered into force (LNG Acceleration Act, LGG) and is expected to further contribute to the rapid rollout of LNG infrastructure in Germany. The current geopolitical situation does not provide a reason to call the developments of recent years and the increasing market integration into question, far less to assume that these developments would be reversed. The ruling chamber thus considers it unlikely that current events will lead to permanent transport restrictions from adjacent market areas. It takes the view that the findings of the evaluation in 2019 can still be used.

- 134 In summary, it can be said that despite the current geopolitical situation, the ruling chamber does not see any reason to question that there will be sufficient capacity for transport in the medium term between the market area to which LNG is imported and adjacent market areas and therefore the relevant geographic market should be defined more broadly than the original market area. In fact, the ruling chamber considers it necessary for the calculations on the competitive effects to be based on the existing integrated north-west European market in order for the analysis to be as realistic as possible. Looking at a hypothetically more narrowly defined, purely national market should, in the view of the ruling chamber, at most be used to validate and classify the results of the broader, north-west European market. Because transport restrictions increase as the distance from the original market increases, defining Europe as the relevant geographic market would be too wide an area.
- 135 A further criterion that should be looked at when defining the relevant geographic market is price correlation between markets. A high degree of price correlation means that price movements are generally parallel and there are no significant price differences. In economic terms, this is a strong indication of integrated markets: a sufficient number of market players apparently switch between substitutable trading hubs – they buy gas where the price is lowest (irrespective of national borders) and/or sell gas where the price is highest (irrespective of national borders). Converging prices show that such "arbitrage" is possible and is also put into practice. For competitively integrated markets it is then not at all necessary for every gas supplier and gas customer to market with a high degree of flexibility between trading points. As long as there are a sufficient number of traders that can act in such a way, the prices converge, and so a player in one national market is not able to act independently of the competitive situation in the other neighbouring countries (see Frontier Economics, economic report, pages 58-89). With respect to this, the Quo vadis study commissioned by the European Commission comes to the conclusion that the wholesale markets of Denmark, Belgium, the UK, the Netherlands and Germany create a single price zone (see EY/REKK: Quo vadis EU gas market regulatory framework – Study on a Gas Market Design for Europe, February 2018, page 5). A further study on price correlation was carried out by the Oxford Institute for Energy Studies (see Oxford Institute for Energy Studies (OIES): European traded gas hubs: an updated analysis on liquidity, maturity and barriers to market integration, May 2017). In 2017 it was concluded that in 2016 there was a very high degree of price correlation between the NCG, GASPOOL, Zeebrugge (Belgium) and PEG Nord (France) trading points ("*In North West Europe (TTF, NCG, Gaspool, ZEE, PEGN), price alignment and price level convergence continues to be strong: this region behaves as if it is a single-price area, i.e. a fully integrated trans-national market for gas*", loc cit, page 18). According to the study, the British NBP is usually also very well integrated, but not in the rare cases when physical flows on the interconnector are not possible (loc cit, page 19). As previously explained in the report, (see Frontier Economics, economic report, pages 28 and 69),

France is not viewed as part of the relevant market on the grounds that there is insufficient transport capacity at the sole cross-border interconnection point between France and Germany, which could be an obstacle to market integration, regardless of price correlation.

- 136 The ruling chamber, by contrast, identified a very high level of integration of the French and German markets in its analysis of price correlation. As already stated in other proceedings (see decisions BK7-18-063-final, BK7-20-107-final and BK7-22-086-final), the ruling chamber views the relevant geographic market as north-west Europe, comprised of Germany, France, the Benelux countries, Denmark and the UK. This view is supported by market players that were consulted by the European Commission in connection with the Gazprom/Wintershall/Target Companies merger probe and that identified in particular Germany, Belgium, the Netherlands and the UK as Member States forming part of a regional market (see Case No COMP/M6910 – Gazprom/Wintershall/Target Companies, paras 88 to 90).
- 137 The ruling chamber believes that the degree of market integration in north-west Europe described above will increase further given the aim of creating an internal market in natural gas in accordance with Directive 2009/73/EC. No conflicting trend is to be expected in particular during the period of validity of the exemption. In support of this argument, it is explained in the report that a future integration of the French market into the north-west European market is not unlikely owing to the recent increases in transportation capacity between Germany and France and the alignment in their supply structure that has been observed (see Frontier Economics, economic report, page 69).

As already stated, the statements made in section 4.7. of the economic report are based on a competition analysis of the relevant north-west European market without the inclusion of France. However, for comparison, the report also includes a comparative competition analysis of the relevant north-west European market including France for the year 2027. It concludes that this analysis including France (also) raises no competition concerns at all. However, Frontier Economics argues that the competitively more narrowly defined north-west European market (without France) represents a more conservative analysis. It bases this on the fact that, according to its calculations, greater (relative) effects of the new LNG infrastructure in Brunsbüttel on competition were found. Therefore possible negative effects of the LNG facility on the competitive scenario without France tended to be overestimated, it wrote (Frontier Economics, economic report, page 69). Nevertheless, the ruling chamber does not consider it necessary to carry out further calculations in the competition analysis, because, as far as the market definition is concerned, including France in the north-west European market would be an even more conservative assumption as it would mean an even lower market concentration on the supply side. It would therefore be even less likely that the exemption would have a negative effect.

4.2.1.4. Summary

138 With reference to the markets as defined above, the ruling chamber finds that competition is enhanced by the investment. As long as an investment in physical infrastructure facilitates access to additional sources or volumes of gas, the investment in itself enhances competition. Physical import capacity is provided that would not be available without the new infrastructure. The capacity can be used to import natural gas. Even without the specific importation, competition would be enhanced simply because of the existing potential for additional imports (see Frontier Economics, economic report, page 55). The ruling chamber does not see any possible negative effects on competition resulting from the existence of the Brunsbüttel LNG facility that would have to be weighed up against this positive effect. Potentially negative effects on competition resulting from the use of the new infrastructure given the exemption are looked at in section 4.7.

4.2.2. Enhancement of security of supply by the LNG facility

139 The Brunsbüttel LNG facility will lead to an enhancement of security of supply within the meaning of section 28a(1) para 1 EnWG in Germany and the EU in many respects.

140 According to section 28a(1) para 1 EnWG, an exemption can only be granted if the investment enhances the security of gas supply. It was therefore necessary to look at whether security of supply is enhanced by the integration of the Brunsbüttel LNG facility compared with the current situation (counterfactual scenario). Even though neither the requirement in section 28a(1) para 1 EnWG nor the identical requirement in Article 36(1)(a) of Directive 2009/73/EC makes reference to this, it is necessary from a geographic viewpoint to look at the effects both on Germany and on the EU, and in this case especially the relevant north-west European market (see section 4.2.1.3). From the product perspective, this is because it is ultimately a requirement laid down in European law relating to the European internal market. The systematic context also provides an argument in favour of this. Following a legal amendment, both section 28a(1) para 5 EnWG and the identical provision of Article 36(1)(e) of Directive 2009/73/EC now refer to the effects on the security of natural gas supply of the EU.

141 The Brunsbüttel LNG facility will diversify the gas supply by facilitating access to new sources. In the light of recent geopolitical events, the diversification of gas sources with LNG facilities and the substitution of Russian gas imports have become a central, urgent requirement to ensure security of supply in Germany and the EU (see section 4.2.2.2). The Brunsbüttel LNG facility will also open up new transport routes (see section 4.2.2.3). The additional capacity will strengthen the resilience (see section 4.2.2.4) of gas supply in Germany and the EU. In addition,

it will increase the flexibility of gas supply (see section 4.2.2.5) by facilitating access to a large number of new sources of gas as well as access to the Brunsbüttel LNG facility for new market players for the duration of the exemption (see section 4.2.2.6).

4.2.2.1. Term "security of supply"

- 142 The term "security of supply" in section 28a(1) para 1 EnWG corresponds to the "secure supply" mentioned as a legislative purpose in section 1(1) EnWG. No standard definition has so far become established at the national or international level (see Theobald, in: Theobald/Kühlung, *Energierrecht Kommentar*, 116th supplement, May 2022, section 1, margin no 17). The term security of supply must be read in the light of Article 194(1)(b) of the Treaty on the Functioning of the European Union (TFEU). This provision states that ensuring security of supply, as one of the four aims of EU energy policy, is focused on meeting energy demand in terms of quantity and reliability (see Hamer, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th ed 2015, TFEU Art. 194, margin no 15). Ultimately, the questions relevant to assessing security of supply are whether the gas supply infrastructure can still meet the demand for natural gas even in a crisis situation or at times of particularly high demand (peak load). Accordingly, the aspects relevant to determining and assessing security of supply include those listed in section 51(2) EnWG relating to the monitoring of security of supply. These include the supply and demand balance on the relevant market, the level of expected future demand, and the situation with respect to peak demand or failures of infrastructure or suppliers.
- 143 In geographic terms, it is necessary to look at the German and European gas market and the forecast development of the market in the next few years. The applicant understandably based its quantitative analyses on Germany because the effect of an infrastructure on security of supply will often be most relevant locally. As the forecast developments in north-west Europe are similar, this should not result in any major differences (see Frontier Economics, economic report, pages 41-42).
- 144 The fact should also be taken into account that an enhancement of supply security in Germany always has a positive effect on supply security in the EU, and especially in the north-west European neighbouring countries, as well. The Federal Republic of Germany is a transit country that is very important for security of supply within the EU, given its central location within the European gas transport system and numerous connections to other Member States at the transmission system level via cross-border interconnection points. According to the applicant's plans, the Brunsbüttel LNG facility will be connected to the German and thus also the European transmission system. An enhanced supply situation in Germany as a result of the addition of the Brunsbüttel LNG facility may therefore make it easier to deliver gas to other Member States in the event of a crisis.

- 145 The applicant's quantitative analyses rightly cover the period up to 2033. Limiting the analyses to the period up to 2033 is reasonable and adequate in order to be able to assess whether the LNG facility will contribute to enhancing security of supply, because of the lack of reliable data and because the further into the future that forecasts are made, the more uncertain the forecasts become (see section 4.2.).
- 146 According to the Commission staff working document on Article 22 of Directive 2003/55/EC (superseded by Article 36 of Directive 2009/73/EC), security of supply is enhanced by any diversification of supply, in particular when access to a new source of supply is facilitated or a new route of supply to the relevant markets is opened (see Commission staff working document, *loc cit*, para 25.1). Accordingly, the regulatory authority is required by Article 36(8) sentence 4 point (e) of Directive 2009/73/EC as part of the exemption procedure to provide the European Commission with information about the contribution of the infrastructure to the diversification of gas supply. In accordance with these requirements, the European Commission stated in various documents relating to exemption procedures that security of supply is enhanced if an investment provides a new route to the relevant market or connects new upstream sources of gas to the market (see European Commission Decision of 20 December 2022 on the Lubmin LNG facility, (C(2022) 9902 final, para 55 et seq); Commission Decision of 19 August 2022 on the Stade LNG facility (C(2022) 6098 final, para 48 et seq); Commission Decision of 11 August 2022 on the EemsEnergyTerminal (C(2022) 5947 final, para 57 et seq); Commission Decision of 21 June 2021 on the Brünsbuttel LNG terminal (C(2021) 3814 final, para 46 et seq); European Commission document of 8 February 2008 on the Nabucco pipeline (CAB D(2008)/142), para 41 et seq; re diversification of routes see: European Commission document of 22 May 2008 on the Poseidon pipeline (SG-Greffe(2007) D/203046, page 2); re diversification of sources of gas by an LNG facility see: Commission Decision of 8 December 2020 on the LNG Terminal South Hook, C(2020) 8948 final, para 35-36; Commission Decision of 25 November 2020 on the Alexandroupolis LNG Terminal, C(2020) 8377 final, para 28; Commission Decision of 4 June 2013 on the LNG facility on the Isle of Grain (C(2013) 3443 final), para 29). The relevant aspects enhancing security of supply are therefore a diversification of energy sources and also the creation of redundancies through additional transport opportunities (see Däuper, in: Theobald/Kühling, *Energierecht Kommentar*, 116th supplement, May 2022, section 28a EnWG, margin no 8; Arndt, in: Britz/Hellermann/Hermes: *Energiewirtschaftsgesetz*, 3rd ed 2015, section 28a, margin no 6).
- 147 With respect to LNG facilities, the Commission staff working document states that the more flexibility of supply an infrastructure project adds for bringing additional gas to a market in the event of an emergency, the more it enhances security of supply. As a result, the contribution to security of supply of LNG terminals, for example, could be greater as they provide a much wider choice of sources of gas worldwide (see Commission staff working document, *loc cit*, para 26).

148 The Commission also highlights the fact that effective anti-hoarding mechanisms or the reservation of part of the capacity for short-term contracts may increase flexibility of supply by bringing additional gas in the event of an emergency and thus enhance security of supply (see Commission staff working document, *loc cit*, para 26; see also Commission Decision of 8 December 2020 on the LNG Terminal South Hook, C(2020) 8948 final, para 39-40; Commission Decision of 25 November 2020 on the Alexandroupolis LNG Terminal, C(2020) 8377 final, para 27).

4.2.2.2. Diversification of sources of supply and the possibility of importing additional volumes to substitute for Russian gas imports

149 Recent developments have shown that Russia is no longer a reliable energy supplier. It is now urgently necessary for Germany and the EU to become independent of Russian gas imports, as shown by Russia's suspension of deliveries to European partner countries and various halts to gas supplies to available pipelines in the course of the year as well as, most recently, the stopping of gas deliveries to Germany in 2022 (see <https://www.dw.com/de/rusland-stoppt-gas-lieferungen-an-niederlande/a-61989218> and <https://www.tagesschau.de/ausland/europa/rusland-north-stream-103.html>, both accessed on 4 February 2023). Besides, the current massive damage to the Nord Stream pipeline and one line of Nord Stream 2 mean that it is not possible to restore the supply of natural gas through these pipelines quickly in the foreseeable future.

150 In 2021 imported Russian gas met 55% of German and 40% of European demand. According to the REPowerEU communication, as explained in section 4.2., the EU intends to become completely independent of natural gas imports from Russia. Natural gas imports from Russia to the EU were supposed to fall 30% by the end of 2022. They are to be replaced by more imports of LNG via existing and new LNG facilities as well as by pipeline imports from Norway, the expansion of renewable energies and energy efficiency measures (see REPowerEU). The Brunsbüttel LNG facility, with its annual import capacity of about 10bn m³ (from ██████), will be able to cover about 11% of German demand for natural gas (based on total demand for 2021, see Frontier Economics, economic report, page 41). On 1 June 2022 a law to speed up planning approvals for the construction of LNG infrastructure with the aim of securing the energy supply entered into force (LNG Acceleration Act, LGG). It acknowledges that the rapid creation of LNG infrastructure is essential for security of supply in Germany. The swift implementation of the projects mentioned in the law, including this one in Brunsbüttel, are in the overriding public interest and in the interest of public safety due to their contribution to securing the energy supply. Owing to the urgent need to meet national gas demand, the German government last year chartered five floating LNG terminals, one of which is already in operation, while the rest are to

replace deliveries of pipelined gas in the short to medium term (see <https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2022/09/20220901-bwmk-sichert-sich-fuenftes-schwimmendes-fluessigerdgasterminal-plus-anlandung-gruener-wasserstoff.html>, accessed on 3 February 2023).

- 151 In accordance with the above, the Brunsbüttel LNG facility will strengthen security of supply in Germany and the EU by facilitating access to gas from sources worldwide that were previously not directly available to the German supply area for gas supply in Germany without transiting neighbouring countries. The natural gas, when cooled and liquefied, has a significantly smaller volume, allowing large quantities of the gas in its liquid form to be transported over longer distances by ship. This facilitates the use of sources located far away, for example in North America, Qatar and Australia, to supply Germany and north-west Europe with gas that can technically only be transported to Europe by ship.
- 152 In conclusion, it may be said that the Brunsbüttel LNG facility will make an important contribution to guaranteeing security of supply in Germany and the EU in the face of the absence of Russian gas imports by opening up new sources of gas and the possibility of additional imports after its commissioning in [REDACTED]

4.2.2.3. Redundancy through diversification of transport routes

- 153 The Brunsbüttel LNG facility will enhance security of supply in Germany by opening new routes for the direct transport of LNG to Germany. It will enable the direct importation of LNG into Germany without the need for importation via LNG facilities in neighbouring countries such as the Netherlands, Belgium and France. It will therefore offer an alternative to transporting natural gas by pipeline or other LNG facilities. This increases the redundancy of gas supply in the event of an emergency because it would be possible to import any gas needed via the Brunsbüttel LNG facility in the event that a transport route, such as an import pipeline or an LNG facility, could not be used. The larger the number of routes for the transport of additional volumes of gas to Germany and Europe, the higher the security of supply. This is all the more relevant in the light of recent events and the efforts to replace Russian gas imports.
- 154 The applicant also provided conclusive empirical proof of this finding in independent quantitative analyses (see Frontier Economics, economic report, page 40 et seq). The situation with the Brunsbüttel LNG facility was compared with the situation without the facility (counterfactual scenario). Various indicators were used to assess the diversification of supply and the resilience of the system. The applicant used data from the Gas NDP 2022 database for the analyses. Additionally, data from the Federal Ministry for Economic Affairs and Climate action (BMWK) regarding the state-chartered FSRUs and the 2022 scenario report Global Ambition for

biomethane and the development of demand were used (see Frontier Economics, economic report, pages 43-44). All the analyses show that the Brunsbüttel LNG facility will contribute to enhancing security of supply in Germany.

- 155 The import route diversification (IRD) indicator measures the diversification of gas import routes. A high level of concentration indicates a high level of dependency on one or a small number of routes, while a low level of concentration indicates a high level of diversification of routes. The lower the value, the higher the security of supply. The calculations in the report showed a relatively good level of diversification for the import routes into Germany (from 2023), with values constantly below 0.2 on a scale from 0 to 1. The additional technical capacity of the Brunsbüttel LNG facility improved the diversification of routes in the analysis. In 2027, the index with the Brunsbüttel LNG facility is 4% below the counterfactual scenario. In comparison with the counterfactual scenario, the difference increases to 12% by 2030 and then remains constant. This is based on the premise that the floating, non-fixed LNG facilities chartered by the government are no longer available (Frontier Economics, economic report, pages 45-46).
- 156 The applicant thus provided conclusive proof that the additional technical capacity provided by the Brunsbüttel LNG facility will result in a decrease in the level of dependency on current import routes. It will also allow additional gas volumes to be imported and thus compensate for the Russian gas imports not being provided.

4.2.2.4. Increase in the resilience of the gas supply infrastructure

- 157 The applicant provided conclusive proof using the N-1, residual supply index (RSI) and system adequacy index (SAI) indicators that the Brunsbüttel LNG facility will enhance the resilience and therefore the security of gas supply in Germany and thus ultimately the EU (see Frontier Economics, economic report, page 46 et seq).
- 158 The N-1 indicator measures whether the daily peak demand can still be met in the hypothetical event of disruption of the single largest infrastructure that directly or indirectly contributes to the supply of gas on the market. The applicant's calculations (see Frontier Economics, economic report, pages 46-47) took account of the entry capacity from domestic conventional, biogas and hydrogen production and storage facilities in addition to the import capacity. The applicant based the daily peak demand on the peak day demand in the Best Estimate scenario in the ENTSOG TYNDP 2022. The single largest infrastructure was defined as the cross-border interconnection point/border with the largest entry capacity into Germany. The calculations provided showed import capacity from Norway at the Dornum cross-border interconnection point as the biggest import route. According to ENTSOG, for the single largest infrastructure the sum of the cross-border interconnection points from a non-EU supplying country are regarded

as one import route, because it is assumed that they could go out of use simultaneously. In this case, there are various pipelines connecting Germany to Norway. The expert report thus takes a different approach to the one recommended by ENTSOG, but it also seems conceivable and suitable as the failure of the single largest infrastructure is measured for the N-1 criterion. It does not in fact matter which approach is taken, as they both lead to the same result. In both cases – that is, in the event of a halt to imports via the Dornum cross-border interconnection point or in the event of an end to all imports from Norway – the Brunsbüttel LNG facility would improve security of supply in Germany (see Frontier Economics, economic report, pages 47-48).

- 159 A value of exactly 100 for the N-1 criterion means that the capacity without the single largest infrastructure is just enough to meet daily peak demand. A value of 200, by contrast, means that twice the daily peak demand can be met without the single largest infrastructure.
- 160 The applicant's calculations showed that in the short term, Germany is heavily dependent on its largest infrastructure. As shown in section 4.2., if Russian import points are left out of the analysis, the N-1 criterion for 2022 is barely over 110. This value does rise more or less continually in the following years, even without the Brunsbüttel LNG facility, which is the subject of these proceedings. In the counterfactual scenario, it rises to 140 in 2033, ie the peak demand can then theoretically be met 1.4 times even without the single largest infrastructure. As the Brunsbüttel LNG facility is not itself the largest infrastructure, it would be available to provide additional capacity to meet demand, at least in the N-1 case assumed. At the end of the analysis period in 2023, the value of the N-1 criterion in the counterfactual scenario rises from about 142 to 148 in the scenario including the Brunsbüttel LNG facility (see Frontier Economics, economic report, page 48).
- 161 The applicant also used the RSI to calculate the level of dependency of gas supply in Germany on the largest supplier (see Frontier Economics, economic report, page 48 et seq). This indicator measures the degree to which the system can still meet the daily peak demand in the event that the largest supplier (via one or more infrastructure(s)) cannot supply gas. The analysis used Equinor/Petoro as the largest supplier of natural gas to Germany (not including capacity for Russian gas), even though it must be noted that capacity may be booked by other parties or the gas may be controlled by other parties before crossing the border to Germany, so that this capacity would not be available anymore in the event of disruption and the corresponding transport capacity could not be provided. The calculations show that it would still be possible to meet the peak demand even without the largest supplier figure (value > 100). This level actually rises over time since it is assumed that the peak demand will fall due to falling demand (see section 4.2.) and additional (non-Norwegian) capacity (see Frontier Economics, economic report, page 48 et seq).

- 162 The calculations using the RSI indicator for the scenario with the Brunsbüttel LNG facility showed a further decrease in the level of dependency of gas supply on the largest supplier as a result of the additional capacity of the LNG facility and therefore a further enhancement of security of supply in Germany and thus the EU. The scenario with the Brunsbüttel LNG facility resulted in an RSI of 137 for 2027, with a lower value of 135 in the counterfactual scenario. The report assumes a growing significance for the Brunsbüttel LNG facility in the subsequent years as the floating, non-fixed LNG terminals chartered by the government will be only be available for a limited period of time (see Frontier Economics, economic report, page 49).
- 163 The calculations using the SAI (see Frontier Economics, economic report, pages 50-51) also showed that the Brunsbüttel LNG facility would have a positive effect on security of supply in Germany. The SAI gives an indication of the size of the remaining gas supply buffer on peak days. The applicant's calculations in the counterfactual scenario showed a further improvement in the balance between capacity and peak demand as a result of the addition of the Brunsbüttel LNG facility. While 0.25 times the peak demand could already be covered in 2022, in 2033 this figure is more than 0.55. This can be traced back to the end of imports from Russia and the increase in capacity between 2022 and 2033, on the one hand, with the simultaneous decline in peak demand on the other. As stated above, the Brunsbüttel will have a positive effect on security of supply. In ██████ for example, the SAI would rise from 0.49 in the counterfactual scenario to 0.52 in the scenario with the Brunsbüttel LNG facility (see Frontier Economics, economic report, page 51).
- 164 In conclusion, the calculations in the report presented by the applicant using the different indicators (N-1, RSI and SAI) show an enhancement of the resilience and therefore security of gas supply in Germany and thus the EU as a result of the addition of the Brunsbüttel LNG facility.

4.2.2.5. Increase in the flexibility of gas supply

- 165 The Brunsbüttel LNG facility will also increase the flexibility and thus the security of gas supply in Germany and the EU.
- 166 The European Commission has pointed out that the more flexibility of supply an infrastructure project adds for bringing additional gas to a market in the event of an emergency, the more it enhances security of supply. As a result, the contribution to security of supply of LNG terminals, for example, could be greater as they provide a much wider choice of sources of gas worldwide (see Commission staff working document, loc cit, para 26).
- 167 This is the case in this instance. It is true that the flexibility of an LNG facility can be restricted by long-term contractual commitments along the value-added chain of liquefaction, transport

and regasification, depending on capacity allocation. In this case, however, flexibility of supply by the Brunsbüttel LNG facility is ultimately guaranteed by, for example, the requirement for a reserve quota equal to 10% of the annual throughput capacity, the UIOLI procedure and secondary marketing. This ensures that 10% of the annual throughput capacity will be available to third parties each year irrespective of any existing long-term supply commitments.

168 The Brunsbüttel LNG facility will therefore contribute to flexibility and an enhancement of the security of gas supply in Germany and the EU.

4.2.2.6. Short-term marketing rules to enhance the contribution to security of supply

169 The rules imposed on the applicant in operative parts 5. to 8. to guarantee transparent and non-discriminatory access for third parties for the whole duration of the exemption will enhance the flexibility of gas supply and thus contribute to security of supply in Germany and the EU.

170 Effective anti-hoarding mechanisms or the reservation of part of the capacity for short-term marketing can increase flexibility of supply by bringing additional gas in the event of an emergency and thus enhance security of supply (see Commission staff working document, loc cit, para 26).

171 The ruling chamber has imposed effective rules on the applicant that guarantee that 10% of the Brunsbüttel LNG facility's annual throughput capacity can be marketed on a short-term – yearly or non-yearly – basis. In addition, the ruling chamber provided for a right of secondary marketing and a UIOLI procedure that enables capacity not used by the primary capacity holders to be used effectively on a yearly or non-yearly basis. These rules ensure that as many potential customers as possible have access to the Brunsbüttel LNG facility on a yearly basis. This prevents the possible foreclosure of the Brunsbüttel LNG facility through long-term capacity contracts over the whole duration of the exemption and enhances the flexibility and security of gas supply.

172 The European Commission also stressed in these exemption proceedings for the Brunsbüttel LNG facility (see Commission Decision of 2 June 2023, C(2023) 3743 final, paras 64-65) the importance of the provisions for the non-discriminatory, transparent initial allocation of long-term capacity and the provisions to prevent capacity hoarding (operative parts 5. to 8.) in particular to ensure permanent, secure access for a large number of new market participants (short-term marketing permitted by the reserve quota) to the improvement of security of supply. This is particularly significant given the long duration of the exemption (Commission Decision of 25 May 2021, C(2021) 3814 final, para 58). Long exemption periods which monopolise access to critical infrastructure in the hands of a small number of market participants could bring negative impacts on security of supply (Commission Decision of 25 May 2021, C(2021) 3814

final, para 57). The European Commission considers that one element of security of supply is having access to different sources of supply, including via different suppliers (Commission Decision of 25 May 2021, C(2021) 3814 final, para 59). The aforementioned provisions for non-discriminatory allocation of long-term capacity and to prevent capacity hoarding are suitable to ensure access to the LNG facility for new market participants and thus to reduce dependence on individual market participants, which could enhance security of supply (Commission Decision of 2 June 2023, C(2023) 3743 final, para 64-65).

4.2.2.7. Summary

- 173 The Brunsbüttel LNG facility will enable additional volumes of gas to be brought to Germany and the EU, replacing Russian imports. It will enhance security of supply in Germany and the EU by diversifying the gas supply with respect to both new sources of gas and new transport routes. The current political situation makes the Brunsbüttel LNG facility relevant to guarantee the energy supply in Germany and the EU.
- 174 In addition, the applicant proved by means of quantitative analyses (IRD indicator) that the Brunsbüttel LNG facility will increase the redundancy of gas supply in Germany. At the same time, the additional capacity provided by the Brunsbüttel LNG facility will strengthen the resilience of the gas supply. The applicant provided conclusive proof of this by means of independent calculations using various indicators (N-1, RSI and SAI). Moreover, the Brunsbüttel LNG facility will create more flexibility in the gas supply. Firstly, it will open up the possibility of accessing a wide range of sources of gas worldwide. Secondly, it will facilitate non-discriminatory access to the Brunsbüttel LNG facility for various importers, in particular for the whole duration of the exemption on a short-term basis. This is guaranteed by the capacity management and allocation rules laid down in operative parts 5. to 8.

4.3. Major new infrastructure

- 175 The Brunsbüttel LNG facility constitutes a major new infrastructure within the meaning of section 28a(1) para 2 EnWG in conjunction with Article 36(1) sentence 1 of Directive 2009/73/EC.
- 176 According to Article 2 point 33 of Directive 2009/73/EC, an infrastructure is new if it was not completed by 4 August 2003, while according to section 3 para 29a EnWG an infrastructure is new if it starts operation after 12 July 2005. As the Brunsbüttel LNG facility has not yet been completed and will start operation after 12 July 2005, it qualifies as a new infrastructure according to both definitions and the deviation between the deadlines does not need to be addressed here. Both criteria are met in this instance.

- 177 The Brunsbüttel LNG facility constitutes a "major" infrastructure within the meaning of section 28a(1) para 2 EnWG in conjunction with Article 36(1) of Directive 2009/73/EC. This criterion is hardly amenable to interpretation, however, because it remains unclear what serves as a comparison and how the difference in size is to be determined.
- 178 The applicant first states that the ruling chamber had already confirmed the existence of a major new infrastructure in the exemption decision BK7-18-063-final of 21 June 2021. It further points to the planned annual throughput capacity, which is now 2bn m³/a more than was originally planned for the LNG facility and totals 10bn m³/a, and the investment volume for the Brunsbüttel LNG facility, which has also risen (see application of 15 December 2022, page 13 and annex 9 to the application).
- 179 The ruling chamber takes the view that it is not necessary to examine here whether the decision BK7-18-063-final of 21 June 2021 can itself be used as a measure for the condition of a "major" infrastructure. Given the planned annual throughput capacity of 10bn m³/a and the comparison with the annual throughput capacities of other LNG facilities that have already been exempted from regulation, and in view of the costs ██████████ stated by the applicant for the construction and commissioning of the LNG facility, it may be assumed that the facility is of a certain size.
- 180 The ruling chamber does not doubt that the Brunsbüttel LNG facility is a major infrastructure, both in terms of investment and capacity volume.

4.4. Investment risk

- 181 The applicant proved to the ruling chamber's satisfaction that the investment risk for the Brunsbüttel LNG facility is such that the investment would not take place unless an exemption was granted, as required by section 28a(1) para 2 half-sentence 2 EnWG. This applies both to the level of the risk and to the causality between the risk and the investment decision, which – according to the findings made in the proceedings – had not yet been finally taken at the time of the exemption decision.

4.4.1. Relevant risks

- 182 As the risk must be such that the investment would not take place unless an exemption was granted, the risk must be in excess of the norm. The normal investment risks that can be taken into account in the regulation of tariffs by, for instance, determining a risk premium for the rate of return on equity, must therefore be distinguished from the risks relevant to an exemption decision. Not every risk can be classed as a relevant risk for the assessment within an

exemption decision but, for normative reasons, only those risks that are usually attached to an investment decision (see, for example, decision BK7-22-086-final of 12 January 2023, page 55 et seq; decision BK7-20-107-final of 19 September 2022, page 49 et seq; decision BK7-18-063-final of 21 June 2021, page 52 et seq).

- 183 The main risks are, on the one hand, a utilisation risk or risk of non-use of the investment and, on the other, the risk of a change in costs and/or revenues in the future (see Commission staff working document, para 41; European Commission Decision on the OPAL decision, C(2009) 4694, para 32; Thole, in: Säcker, Berliner Kommentar zum Energierecht, 4th ed 2019, section 28a EnWG, margin no 11; Arndt, in: Britz/Hellermann/Hermes, Energiewirtschaftsgesetz, 3rd ed 2015, section 28a, margin no 7). In particular, the assessment can take account of the costs of the project, the length of the payback period, consumption forecasts, other alternative competing investment projects or changes in global market conditions for primary fuels (see Commission staff working document, para 41; Däuper, in: Theobald/Kühling, Energierecht, 116th supplement, May 2022, section 28a EnWG, margin no 10).
- 184 In this respect, the applicant stated that, in its opinion, the main relevant risks in this instance were the risk of non-use of the investment and the risk of a change in costs and/or revenues in the future. The applicant also provided proof of this in the course of the administrative proceedings with a report (see Frontier Economics, analysis of investment risks of 15 December 2022; hereinafter referred to as "risk analysis").
- 185 (1) There is a risk of non-use of the investment or of a low level of use in this instance because investments for LNG facilities can frequently lead to sunk costs in the event of a low level of use or non-use. The costs are irreversible because the investment costs cannot be recovered once the facility has been constructed. In this instance, there is no way of using the facility for any purpose other than the one originally planned. In the case of project financing, as an established financial instrument in particular for capital-intensive assets such as pipelines or LNG facilities, this means that the assets of an LNG facility project as such can hardly be accepted as security for the required credit. In the case of project financing, any debt is paid back solely from the cashflow generated by the project during the operational phase; lenders therefore assess such a project on the basis of the risk factors that have a direct influence on the cashflow expected in the future. Any significant change that affects the cashflow of such a project has an effect on the conditions for financing and thus on the investment decision. In order to make an economically rational investment decision, it must be possible in principle to make a reliable forecast as to whether the LNG facility will be used to a sufficient extent during the payback period and it will be possible to levy tariffs for its use that enable refinancing. Long-term capacity

contracts are suitable to give investors the required planning certainty about capital recovery (see Commission staff working document, para 42).

186 The applicant conclusively demonstrated that securing long-term capacity contracts strongly depends on, among other things, the framework conditions for the use of capacity and the calculation of tariffs being predictable and reliable for potential customers throughout the payback period. (See application of 15 December 2023, page 13 et seq, letter of 27 January 2023 and Frontier Economics, risk analysis, pages 18-19). The risk of non-use or utilisation therefore decreases when, due to the exemption, the risk of a change in costs and/or revenues in the future decreases to such an extent that the applicant can create sufficient certainty about capital recovery for investors by securing long-term contracts. Thus without the exemption there would be a relevant risk of non-use or low level of use of the Brunsbüttel LNG facility.

187 (2) There is also a relevant risk in this instance that there will be a change in costs and revenues in the future.

This risk of a change in costs and/or revenues in the future can result from a planned use of the LNG facility not being realised (utilisation risk). In the past, as stated above, the level of use of existing north-west European LNG facilities has tended to be rather low. Overall, it may be said that the LNG is in a sustained phase of major change, partly due to the current geopolitical situation. While global LNG transport volumes fluctuated slightly around a level of about 330bn m³ in the period from 2011 to 2015, volumes increased at an average annual rate of about 9% from 2016 to 2018 (see <https://de.statista.com/statistik/daten/studie/28976/umfrage/lng-transport-weltweit-seit-1970/>, accessed on 3 November 2022). The European Commission expects volumes to increase further to 505bn m³ in the period up to 2023 (see https://germany.representation.ec.europa.eu/news/eu-usa-handel-einfuehren-von-flussigerdgas-lng-die-europaische-union-steigen-2018-08-09_de, accessed on 3 November 2022). In light of the large increase in liquefaction capacity (in 2019 projects with a total annual liquefaction capacity of 170bn m³ were approved, see IEA: Global Gas Security Review 2019) and large increases in regasification capacity in north-west Europe and Germany in particular, profound changes in the LNG market are also to be expected in the future (see IEA: Global Gas Security Review 2019). In such a situation, in particular, longer-term capacity contracts serve as security for financial contracts and reduce cashflow volatility. As stated above, concluding such contracts is therefore decisive for secure project financing.

188 The risk of a change in costs and revenues in the future can also result from a change in the legal framework. The applicant demonstrated to the ruling chamber's satisfaction that a guaranteed legal framework is decisive for its potential users that have concluded a long-term

capacity contract. For this reason, the regulation of access and tariffs as recently set out in more detail in the LNGV, was not suitable to safeguard against the investment risks, according to the applicant. The system prescribed in section 21 EnWG and the LNGV for the annual approval of tariffs did not provide enough security and predictability with regard to the tariffs that users would have to pay in future. The applicant further explained that the possibility of changes to or burdens on the fundamental regulatory framework for access to or tariffs for LNG facilities after the conclusion of long-term capacity contracts could not be ruled out in the regulated sector. This would result in uncertainty about capital recovery and the conditions for using the acquired capacity for both contracting parties, namely the applicant and potential existing users. The applicant also stated that any change in the provisions for network access or tariffs after the conclusion of long-term bookings would have an effect on the costs and revenues. It was therefore important for a stable regulatory framework to be in place for the duration of the binding, long-term capacity bookings. Sufficient certainty about tariffs and access conditions over the long period of validity of contractual commitments and the long payback period for the Brunsbüttel LNG facility is essential for long-term bookings to be made and to last. The priority for the contracting parties of the long-term booking contracts already concluded in a binding manner and subject to the granting of an exemption for the Brunsbüttel LNG facility is rather that an exemption continues and, in particular, is in place when deliveries begin and throughout the duration of the contract (see letter of 27 January 2023, page 3; application of 15 December 2022, page 13 et seq, and Frontier Economics, risk analysis, page 18 et seq).

- 189 (3) The war in Ukraine and its effect on the market environment are likely to have increased the utilisation risk and the risk of a change in costs and/or revenues in the medium to long term, even though especially in the short term, the need to diversify gas sources means that higher demand for regasification capacity may be expected. When assessing the investment risk necessary for an exemption, in particular the risk of a change in costs and/or revenues, a charge to the market situation, for example caused by falling demand, must be taken into account (see Commission staff working document, loc cit, para 41).
- 190 In light of the current situation, it is possible that demand for natural gas/LNG could drop more sharply and more quickly in future owing to greater legislative and price-driven energy efficiency measures and a much faster expansion of renewables. These processes have already got underway on a large scale, both at the European level (Fit for 55, REPowerEU) and at the national one. The recent considerable price rises for natural gas are also likely to create incentives for energy efficiency measures. Moreover, it does not seem completely ruled out that a political decision may be made to phase out energy supply using natural gas before 2050. The LGG envisages an end to the use of the LNG facilities coming under the law for the import of LNG by 2043 (section 5(2) LGG). These circumstances could lead to a shorter usage period

for the Brunsbüttel LNG terminal and justify a relevant risk of non-use of the investment and thus also a risk of change in costs and/or revenues in the future.

- 191 The German government is currently supporting a huge drive to get a series of other projects for LNG facilities underway in the country (see the LNGG, for example) in order to guarantee the security of supply in Germany and the EU and to replace Russian gas imports. The loss of Russian gas supplies may indeed lead to higher demand for regasification capacity at German LNG facilities in the short and medium term. On the other hand, while the regasification capacity in north-west Europe will in all likelihood become much greater, competition for liquefaction capacity from other customers, in particular from the Asian market, will remain in the global LNG market, due to the higher demand for LNG especially from Europe. The competing projects in Germany and north-west Europe raise the risk of non-use of the investment and the risk of a change in costs and/or revenues in the future for this project (on the increased utilisation risk from competing projects, see Commission staff working document, loc cit, para 43).
- 192 In light of the dynamic market situation caused by the geopolitical situation (increased demand for the creation of regasification capacity and supply chain issues), it seems possible that the overall investment costs could also rise in the course of the project. This would also lead to an increased risk of a change in costs and/or revenues (see Frontier Economics, risk analysis, page 7 et seq).
- 193 In sum, it may be said that the investment risks have risen considerably overall as a result of the current geopolitical situation and its influence on the market environment (possibly shorter usage period/falling demand for natural gas, competing projects, possible rise in overall investment costs and increased efforts to reduce energy consumption/expansion of renewable energy).

4.4.2. Causality

- 194 The applicant demonstrated to the ruling chamber's satisfaction that the exemption is necessary for the final investment decision in that the investment would not take place unless an exemption was granted.
- 195 There is no causality between the risk and the investment decision if the investment decision has already been taken without reservation or if a decision in favour of the investment is expected to be taken even in the event that the exemption is not granted. Section 28a EnWG does not serve to enable deadweight effects, thus the particular risk alone is not sufficient if the investor is still prepared to realise the project within a regulated framework regardless of the risk. The dependency of the investment decision on the granting of the exemption is a subjective criterion that must be met at the time the decision on exemption is made and must be proved

by the applicant. Of no relevance is whether the investor nevertheless decides to invest in the project in the light of new findings or a new assessment of the economic environment after the request for exemption has been refused.

- 196 The applicant credibly demonstrated that potential customers are only prepared to conclude and maintain a long-term contract with the applicant if an exemption has been granted and there is therefore certainty about stable conditions for the use of capacity and the calculation of tariffs. In the absence or cancellation of such long-term capacity bookings, however, there is no basis for the decision to invest in the Brunsbüttel LNG facility. The applicant has explained to the ruling chamber's satisfaction that it would not invest in the construction of the Brunsbüttel LNG facility in the absence of long-term capacity contracts (see letter of 27 January 2023, page 3; application of 15 December 2022, page 13 et seq and Frontier Economics, risk analysis, page 18 et seq).
- 197 The applicant also credibly declared that no final investment decision had yet been taken and that such a decision would not be taken until the exemption proceedings had been concluded and unless an exemption was granted (application of 15 December 2022, page 13).
- 198 Thus the required causality between the exemption and the investment decision to be taken exists in this instance and the exemption takes due account of the existing particular investment risk.

4.4.3. Duration of the exemption

- 199 The risk of non-use of the investment or of a low level of use and the risk of a change in costs and revenues in the future constitute particular risks that are relevant to the exemption decision within the meaning of section 28a(1) para 2 half-sentence 2 EnWG. Nevertheless, according to the recent explanations of the applicant and the view of the European Commission (Decision of 2 June 2023, C(2023) 3743 final, para 147 et seq), these investment risks only justify an exemption for 15 years from the start of commercial operation and not, as the applicant initially requested and was granted in the original exemption decision of 15 March 2023, 20 years. The exemption period therefore had to be changed to 15 years pursuant to Article 3 of the European Commission Decision of 2 June 2023.
- 200 The European Commission takes the view that, when considering the question of whether the exemption period is justified with regard to the risks associated with the project, contractual arrangements should be taken into account and the duration of the exemption should be equal to or less than the expected period for cost recovery of the new infrastructure (Decision of 2 June 2023, C(2023) 3743 final, para 147). [REDACTED], the European Commission

considers the following reasons to support limiting the exemption to 15 years. Firstly, the LNG facility is planned for [REDACTED] from both a financial perspective (business plan) and a contractual one (terms of the long-term booking contracts concluded). [REDACTED]

[REDACTED] One possibility is using it for green ammonia, which would not come under this exemption. As the applicant wrote to the European Commission on 22 May 2023 that an exemption of 15 years would be sufficient to carry out its project, the Commission assumes that the investment decision is based on the financial expectations [REDACTED]

[REDACTED] The Commission staff working document (New Infrastructure Exemptions of 6 May 2009, SEC(2009)642 final) also states [REDACTED]

Rather, the duration of the exemption should be limited to what is required to sufficiently manage the risk of the project and allow the infrastructure investment decision to be taken (European Commission, Decision of 2 June 2023, C(2023) 3743 final, paras 152-153). The European Commission does not consider this conclusion to contradict the decision on the exemption for the "Deutsche Ostsee" LNG facility. Contrary to the current case, where all long-term capacity has been allocated, the majority of the final long-term capacity had not yet been allocated at the "Deutsche Ostsee" LNG facility when the exemption decision was taken (European Commission, Decision of 2 June 2023, C(2023) 3743 final, para 154).

- 201 On this basis, the European Commission considers that the risk of implementing the project would be sufficiently mitigated by an exemption of 15 years (European Commission, Decision of 2 June 2023, C(2023) 3743 final, paras 153, 155). The European Commission has therefore required the ruling chamber to limit the exemption period determined in operative part 3. of the original exemption of 15 March 2023 to 15 years from the start of commercial operation (European Commission, Decision of 2 June 2023, C(2023) 3743 final, Article 1).

4.4.4. State participation

- 202 The ruling chamber and the European Commission do not consider that the planned state participation of 50% by the KfW and the [REDACTED], set out in the partnership agreements, remove the investment risk required for the granting of an exemption for an annual throughput capacity of 10bn m³/a.
- 203 The applicant notified the ruling chamber in a letter of 1 April 2022 (attached as annex 2 to the application of 15 December 2022) on the basis of the exemption granted on 21 June 2021 (BK7-18-063-final) of the planned change of ownership. In the notification, the applicant informed the ruling chamber that the previous partners OilTanking and Vopak would withdraw from the joint venture and, in a first step, transfer their entire stakes to Gasunie. In a second step, it is planned for the development bank KfW to take a 50% stake and GBV Zweiundreißigste

Gesellschaft zur Beteiligungsverwaltung mbH (RWE) to take a 10% stake. Gasunie will be left with a 40% stake. The parties signed the contracts governing this intended transaction on 1 September 2021. The participation of KfW and RWE is not yet final as the European Commission's approval under state aid rules is still outstanding.

- 204 In its examination of the exemption prerequisites, the ruling chamber concluded that, despite the planned state participation of 50% by the KfW and the [REDACTED], set out in the partnership agreements, there is still a relevant investment risk and the exemption prerequisites are still fulfilled. In a non-binding assessment, the Directorate-General for Energy, which is competent in this case, shared this view (see letter from the European Commission of 3 June 2022, attached as annex 3 to the application of 15 December 2022). The view was based on underlying reasons for the above-mentioned increased investment risks caused by the current geopolitical situation and the changed market environment (see section 4.4.1.), which still apply.
- 205 The European Commission considers that state support may reduce the investment risk required for the granting of an exemption (section 28(1) para 2 EnWG and Article 36(1)(b) of Directive 2009/73/EC), so it might not be possible to maintain an exemption (without restrictions). However, the European Commission takes the view that the granting of subsidies does not exclude per se the investment risk required for the granting of an exemption (Decision of the European Commission of 25 May 2021, C(2021)3814 final, paras 102-113).
- 206 The ruling chamber has concluded on the basis of the documents submitted by the applicant in May 2022 that a relevant investment risk within the meaning of Article 36(1)(b) of Directive 2009/73/EC that fully justifies the approval of an exemption still exists. The ruling chamber considers the points it judged pertinent during the assessment in May 2022 to continue to be relevant in the assessment of an exemption for an annual throughput capacity of 10bn m³/a.
- 207 According to the applicant, in the first step the two partners apart from Gasunie, Vopak and OilTanking, will fully withdraw from GLNG by the end of May 2022. In the second step, the planned entry of KfW at the request of the German government is the result of the current geopolitical situation since Russia's invasion of Ukraine and the subsequent urgent need to diversify sources of gas with LNG facilities. KfW will take a 50% stake in the applicant via an investment for the federal government, according to the applicant. Gasunie will have a 40% stake in GLNG. The remaining 10% is to go to RWE. Until the planned transaction is complete, Gasunie, as the sole owner, will push ahead with the construction of the LNG facility and bear any costs for it. [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

208

[REDACTED]

209

The investment costs are estimated to be [REDACTED] including the connection costs that have to be partially borne by the applicant, the applicant stated in May 2022. The base case estimated an IRR of [REDACTED] for the project. These calculations were based on a [REDACTED] with an average tariff of [REDACTED] and [REDACTED] totalling [REDACTED]. The calculation was based on a depreciation period of [REDACTED]. The unusually high inflation level, which led to estimated total investment costs of about [REDACTED], meant that the IRR of [REDACTED] from the calculations of May 2022 had to be adjusted to [REDACTED]. In an alternative investment calculation (upside) [REDACTED] for LNG and [REDACTED], it would be possible to generate a project IRR of [REDACTED], according to the calculations of May 2022. The depreciation period underlying these calculations was also [REDACTED]. An average tariff of [REDACTED] was assumed.

210

[REDACTED]

211

[REDACTED]

212 On this basis, the ruling chamber comes to the conclusion that despite the state participation of KfW of 50% and [REDACTED] set out in the partnership agreements [REDACTED], there is a relevant investment risk justifying the granting of an exemption for an annual throughput capacity of 10bn m³/a. The European Commission shares this view (European Commission Decision of 2 June 2023, C(2023) 3743 final, para 143 et seq).

213 The ruling chamber is convinced by the latest investment calculation credibly presented by the applicant, showing that the conclusion of the long-term contracts running [REDACTED] for a positive investment decision on the part of owner Gasunie and new partners KfW and RWE (see point 5.3 of the side letter to the MoU). Despite the state participation, the project is to be fully financed by equity by the partners in proportion to the size of their stake. Refinancing from tariffs is needed to generate returns. Returns have to be secured by long-term capacity contracts in order for the investors to make a positive investment decision. It may further be assumed that customers' readiness to conclude long-term contracts [REDACTED]

214 The involvement of KfW does not, in the view of the ruling chamber, negate the risk of non-use or the risk of change in costs and/or revenues in the future, which are the investment risks relevant to the issue of an exemption for an annual throughput capacity of 10bn m³/a.

215 It should first be noted that the participation of the state is restricted to its position as a partner with a 50% share, held by KfW, in the applicant as the project/operating company. The project financing is shared equally, according to the size of the stakes, between KfW and the two private investors, Gasunie and RWE.

216

[REDACTED]

[REDACTED]

217

[REDACTED]

218 The ruling chamber does not consider a [REDACTED] inappropriately high (compared to the [REDACTED] in the exemption proceedings BK7-18-063-final), considering the significant utilisation risk associated with the project and the risk of a change in costs and/or revenues in the current, uncertain market environment and owing to the importance of implementing the project quickly in the interests of the security of supply in Germany and the EU (see section 3 LNGG). The European Commission Decision of 25 May 2021 (C(2021) 3814 final, para 105) acknowledged that even an [REDACTED] was not excessive in view of the risk associated with the investment in the LNG facility. These risks – of lower demand for natural gas caused by energy savings and climate change policies, competing LNG infrastructure projects in Germany, probably shorter useful lives because of the provisions of the LNGG, possibly higher total investment costs caused by inflation and supply chain issues – have probably even risen as a result of the current geopolitical situation (see section 4.4.1.).

219 Despite the participation of KfW, significant investment risks remain that justify the exemption applied for. The granting of an exemption, at least for 15 years, for the total annual throughput capacity can make a major contribution to ensuring that the long-term capacity contracts needed for a positive investment decision can be concluded. The European Commission shares the view that state support does not reduce the investment risk so much that the granting of an exemption is called into question. However, in the event of further planned support, a new evaluation of the risk criteria would be required, according to the European Commission (European Commission, Decision of 2 June 2023, C(2023) 3743 final, para 145).

4.5. Unbundling

220 The applicant currently satisfies the special unbundling requirement laid down in section 28a(1) para 3 EnWG. Section 28a(1) para 3 EnWG states that the infrastructure that is to be granted the exemption must be owned by a natural or legal person that is separate in accordance with

sections 8 to 10e EnWG from the system operators in whose systems the infrastructure will be built.

- 221 The unbundling requirement laid down in section 28a(1) para 3 EnWG requires the operator of the infrastructure that is to be granted the exemption to be legally separate from the system operators to whose systems the new infrastructure will be connected. The requirement serves to prevent cross-subsidisation between regulated and non-regulated systems (see Thole, in: Säcker, Berliner Kommentar zum Energierecht, 4th ed 2019, section 28a EnWG, margin no 12; Däuper, in: Theobald/Kühling, Energierecht Kommentar, 116th supplement, May 2022, section 28a EnWG, margin no 11; Arndt, in Britz/Hellermann/Hermes, Energiewirtschaftsgesetz, 3rd ed 2015, section 28a, margin no 8). It can therefore only be met if system operation is transferred to a separate company. The aim and purpose beyond the strict wording of the provision is that not only the owner of the exempt infrastructure is required to be legally separate from the operator of the regulated system but also, and in particular, the operator of the new infrastructure.
- 222 The prerequisites for legal unbundling are met because the applicant is not at the same time the operator of the existing regulated system within the company group to which the LNG facility is to be connected. The operator of the transmission system to which the Brunsbüttel LNG facility is to be connected according to the applicant is Gasunie Deutschland Transport Services GmbH, which is a certified ownership unbundled company.
- 223 The additional reference in section 28a(1) para 3 EnWG to the provisions concerning functional unbundling, information unbundling and unbundling of accounts (sections 8-10e EnWG) equally serves to ensure unbundling between the existing regulated system and the new infrastructure for which an exemption is requested.
- 224 The applicant stated that, as the future operator of the Brunsbüttel LNG facility, it is separate from the transmission system operator Gasunie Deutschland Transport Services GmbH in terms of function, information and accounts in accordance with sections 8 to 10e EnWG (see application of 15 December 2022, page 15).
- 225 Furthermore, the applicability of the unbundling requirement depends on the exemption being granted; it is therefore sufficient for these special requirements to be met once the exemption has been granted. The decisive point in time is the operation of the new infrastructure. Accordingly, the ruling chamber has attached a right to withdraw the exemption in the event that the special unbundling provisions of section 28a(1) para 3 EnWG are not met once the Brunsbüttel LNG facility has started operation (operative part 10. c)). This is necessary but also adequate to guarantee compliance with these requirements.

226 The applicant has also expressly declared that all future partners guarantee that their participation in the company will always be in accordance with the applicable unbundling rules, in particular relating to the confidentiality of information as part of information unbundling and the applicant will also uphold these vis-à-vis the shareholders (application of 15 December 2022, page 15).

4.6. Levying of tariffs

227 Section 28a(1) para 4 EnWG requires tariffs to be levied on users of the infrastructure. The applicant demonstrated to the ruling chamber's satisfaction that it would offer its customers use of the services of the Brunsbüttel LNG facility against payment of relevant capacity tariffs.

228 Not least, merely the request for an exemption would conflict with not levying tariffs for the service provided. This is because one of the objectives in requesting an exemption is specifically to ensure a stable and adequate income from tariffs for as long a period as possible.

229 Section 28a(1) para 4 EnWG does not lay down any further requirements concerning the level and structure of the tariffs. The applicant has stated that it has determined the methodology by which tariffs are to be imposed. It has further provided assurances that it will consider the principles set out in section 21 EnWG when determining the tariffs, which will be appropriate, non-discriminatory and transparent (see application of 15 December 2022, page 15). In order to ensure that the prerequisite of section 28(1) para 4 EnWG is met, the present decision imposes the requirement on the applicant to levy tariffs on its users (see operative part 4.). Furthermore, the notification requirement laid down in operative part 9., also with respect to the obligation to levy tariffs, and the right to amend or withdraw the exemption set out in operative part 10. b) ensure that the ruling chamber can monitor and enforce these requirements effectively.

4.7. No detriment caused by the exemption to competition, to the effective functioning of the internal market in natural gas or the efficient functioning of the regulated systems concerned or to security of supply of natural gas in the EU

230 In accordance with section 28a(1) para 5 EnWG, an exemption may only be granted if it is not detrimental to competition on the markets which are likely to be affected by the investment, (see section 4.7.1.) to the effective functioning of the internal market in natural gas (see section 4.7.2.) or to the efficient functioning of the regulated system to which the infrastructure is connected (see section 4.7.3.), or to security of gas supply in the EU (see section 4.7.4.). These conditions have been met, taking into consideration the secondary provisions in the operative part (in particular, operative parts 5. to 10.).

- 231 Whereas section 28a(1) para 1 EnWG focuses on the "investment", in section 28a(1) para 5 EnWG the effect of the exemption approval, and thus above all the use of the investment as described in the exemption request, is the focus. This is based on the idea that investments generally promote market access, and thus competition on the gas markets, by enlarging infrastructure capacity. This means that a new piece of infrastructure generally has positive effects on competition per se. However, this does not necessarily apply to the conditions under which it can be used or to its specific use by particular market participants.
- 232 The main point of relevance to its competitive significance is whether, and to what extent, a company with a dominant market position is the beneficiary of the exempt infrastructure. As in general competition law, cases in which a dominant company is the main beneficiary of the exemption are particularly problematic.
- 233 The market definition is the accepted tool used to determine upon which markets competition is affected or upon which markets competition could be affected by the infrastructure. Based on the general explanations in section 4.2.1. up to the defining of the relevant markets, this section contains a competition analysis that examines the effect of the exemption on the relevant north-west European market (see section 4.7.1.2.1). There is also a further analysis relating to a more narrowly defined national market (see section 4.7.1.2.2). This takes account of the decision-making practice of the Bundeskartellamt, according to which the wholesale gas market must be defined geographically as at least Germany-wide (see Bundeskartellamt, B8-69/14, margin no 97 et seq). Moreover, the European Commission also considered a more narrowly defined national market relevant in various other exemption proceedings for LNG facilities in the assessment of whether the prerequisites of Article 36(1)(e) of Directive 2009/73/EC and section 28a(1) para 5 EnWG have been met (see European Commission Decision of 25 May 2021, C(2021) 3814 final, para 69 et seq; Decision of 19 August 2022, C(2022) 6098 final, para 86 et seq; Decision of 20 December 2022, C(2022) 9902 final, paras 94 and 97).

4.7.1. Effect on competition of the exemption

- 234 As discussed in section 4.2.1., the analysis of the effect of the exemption on competition draws on a counterfactual scenario of a situation without the Brunsbüttel LNG facility. As the applicant has requested exemption from the application of sections 20 to 26(1) EnWG, the analysis correspondingly examined whether an exemption from tariff regulation and an exemption from the regulated third-party access to the Brunsbüttel LNG facility could cause a detrimental effect on competition that would lead to a worse competitive situation than if there were no Brunsbüttel LNG facility.

235 The granting of a (limited) exemption from tariff and access regulation will not be detrimental to competition on the markets which are likely to be affected by the investment, taking into account the positive effect on competition of the secondary provisions set out in operative parts 5. to 8. with the transparent and non-discriminatory long-term allocation of capacity, a reserve quota, secondary marketing and a UIOLI procedure (see section 4.8.5).

4.7.1.1. No detriment caused by the exemption from tariff regulation

236 Granting the exemption from tariff regulation will not be detrimental to competition on the markets which are likely to be affected by the investment.

237 In this regard, it may be concluded that there is no cause for concern about a worsening of competition. The aim of tariff regulation is to prevent a monopolistic provider imposing excessive prices to increase its monopoly rents. If this kind of pricing occurred at the LNG facility, the facility might be little used, because potential customers have sufficient opportunities elsewhere. There would be no worsening of competition, however, because the extreme scenario of a completely unused LNG facility would ultimately be a situation comparable to that without an LNG facility.

238 The European Commission explained in the exemption proceedings for the Brunsbüttel LNG facility (BK7-18-063-final) and in the exemption proceedings for the Stade LNG facility (BK7-20-107-final) that the exemption from tariff regulation is not detrimental to competition since the tariffs of the LNG facility do not discriminate between the different capacity holders, and increases after the initial allocation are limited to 10% of the base tariff (European Commission Decision of 25 May 2021, C(2021) 3814 final, para 99 and European Commission Decision of 25 May 2021, C(2022) 6098 final, para 110). This was confirmed in these proceedings (see Commission Decision of 2 June 2023, C(2023) 3743 final, paras 130-131).

4.7.1.2. No detriment to the upstream wholesale market caused by the exemption from access regulation

239 Granting a (limited) exemption from access regulation will not be detrimental to competition on the markets which are likely to be affected by the investment or on the internal market for natural gas. In this regard, it was also taken into account that effective congestion mechanisms are imposed on the applicant (see operative parts 5. to 8.), which guarantee in particular permanent third-party access to 10% of the annual throughput capacity on a short-term basis.

240 A hypothetical negative effect on competition on the upstream wholesale market could at most result from the exemption from regulated third-party access in accordance with section 20

EnWG. The aim of the access regulation pursuant to section 20(1) EnWG is to enable all potential interested parties to acquire access capacity on a non-discriminatory basis. As LNG facilities are energy supply networks (see section 3 para 16 and para 20 EnWG), the provisions of section 20 EnWG and the LNGV apply. Associated with these may be, among other things, rules limiting the time period for which capacity may be booked in advance. For the pipeline sector, this period is currently 15 years. The currently applicable rules of the LNGV restrict 20% of the annual throughput capacity for long-term allocation to a maximum of 15 years (section 5(5) LNGV). Moreover, at least 10% of the annual throughput capacity has to be allocated on a short-term basis in the regulated sector (section 8(1) LNGV). If an exemption is granted from the access regulation, no such limits would apply, enabling customers of the LNG facility to acquire capacity for the entire duration of the exemption.

- 241 From a competition perspective, the risk could be one single customer booking the maximum capacity of the LNG facility for the entire period. This scenario may currently be ruled out. For one thing, [REDACTED] annual throughput capacity for long-term allocation (9bn m³/a) [REDACTED] already [REDACTED] to three bookers – ConocoPhillips, INEOS and RWE Supply & Trading (RWEST) – in capacity agreements that are binding and [REDACTED]. The report thus examines the competition effects of the LNG facility taking into account the specific booking situation with the binding long-term bookings by ConocoPhillips, INEOS and RWEST in two alternative scenarios (Frontier Economic, economic report, page 71 et seq).
- 242 Scenario 1 is based on the assumption that market foreclosure caused by the exemption for the LNG facility would only be a concern if the capacity was booked by one or more producers with a strong market position. If, on the other hand, a trader booked the LNG facility capacity, a producer with a strong market position would not be able to exploit this since the trader would access LNG from alternative suppliers on the global market in their own economic interest. The report therefore assumes that in the "worst case" (scenario 1, "long-term bookers decisive") the three bookers, ConocoPhillips, INEOS and RWEST, are active on the producing market and use the booked capacity to regasify their own gas production or, if no such gas production is available, it is presumed, because only if the booker is also active in production can it hold back volumes of LNG (Frontier Economics, economic report, pages 72-73).
- 243 A second scenario assumes that the long-term bookers of the [REDACTED] (ConocoPhillips, INEOS and RWEST) are dependent on certain producers (scenario 2 "long-term bookers dependent on producers"). In this second scenario, Frontier Economics examined the competitive effect for a conservative case in which the respective volumes of [REDACTED] [REDACTED] by the three long-term bookers exist subject to the known economic ties between the individual bookers and producers. It is assumed that the capacity booked by the three long-term

bookers is allocated to certain producers (see Frontier Economics, economic report, page 74 et seq).

- 244 For the 1bn m³/a not for long-term allocation, the report assumes that, similar to the situation in other German and north-west European LNG facilities, the use would be by producers according to the projection on the basis of current market shares of LNG producers in north-west Europe. It must be stressed here that this is a highly unlikely scenario, since the 1bn m³/a of capacity not yet allocated on a long-term basis is expressly reserved for yearly or non-yearly allocation by auction, as set out in operative part 6., during which users not yet holding any long-term capacity have priority for booking (see Frontier Economics, economic report, page 75).
- 245 The ruling chamber has drawn on the analyses in the report to assess the effect on the competitive situation in the upstream wholesale market (see Frontier Economics, economic report, page 70 et seq). As explained in section 4.2, the ruling chamber, having checked the sources and examined the calculations for plausibility, considers the Frontier Economics report to be a comprehensible economic analysis of competition. The explanations of the ruling chamber below are thus based on the analyses and calculations set out in the report. The ruling chamber is in agreement with the conclusions made there unless otherwise stated. The specific results will be examined in more detail in their context below.
- 246 The report looks at the change in market shares of the market participants and concentration indices for the two alternative scenarios mentioned above and compares these with provisions from the Competition Act (GWB) and the guidelines of the European Commission (European Commission 2004/C31/03, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, margin nos 19-20).
- 247 Pursuant to section 18(4) and (6) GWB, an undertaking is considered to be dominant if it has a market share of at least 40%. Two or three undertakings are presumed to be jointly dominant on a market if they have a combined market share of 50%. If there are four or five undertakings, the threshold is two thirds. It must therefore be examined if, in the alternative scenarios, one of these thresholds would be surpassed and there would thus be a difference compared to the counterfactual scenario of the Brunsbüttel LNG facility not being built. The relevant concentration ratios are abbreviated CR1 (market share of the largest market participant) to CR5 (combined market share of the five largest market participants).
- 248 Market concentration is identified using the market shares of all participants (not just the largest ones) based on the Herfindahl-Hirschmann index (HHI). In the course of its merger controls, the European Commission has defined thresholds for when a change in the HHI may be classed as potentially detrimental to competition. This may be applied to the issue at hand by comparing the HHI with an exemption to the value of the index in the counterfactual scenario: if the exemption does not lead to a "worsening" of the HHI as far as these thresholds are concerned

(which are also used for considerations during merger control procedures), it may be assumed that the exemption for the Brunsbüttel LNG facility will not have negative effects on competition. The relevant threshold values are as follows:

- 249 An HHI of less than 1,000 points indicates a market in which there are usually no competition concerns (owing to a high level of competition). If the HHI is between 1,000 and 2,000 points but the change (here caused by the exemption) is less than 250, there are also usually no competition concerns. If the HHI is over 2,000 points but the change (here caused by the exemption) is less than 150, there are also usually no competition concerns.

4.7.1.2.1 Analysis of the relevant upstream north-west European wholesale market

- 250 The assessments carried out do not indicate any detrimental effect on competition on the upstream wholesale market for north-west Europe. The ruling chamber considers this statement particularly relevant as it views the north-west European market as the relevant competitive market from a geographic perspective.
- 251 As stated above, the analysis is carried out for the first full year after the planned commissioning of the LNG facility in [REDACTED] and for 2034. The report was based on a utilisation of 70% for the terminal in both years. Having conducted its own analysis of the utilisation of LNG facilities in recent years, the ruling chamber came to a similar conclusion as the report, so it considers the assumption of a 70% utilisation to be a conservative one in comparison to the levels of utilisation at north-west European LNG facilities in recent years. A further argument in favour of this assumption is the fact that demand for natural gas is likely to fall due to increased efforts to introduce energy efficiency measures and expand renewable energies at the European level (Fit for 55 and REPowerEU) and at the national level (see section 4.2.). It is also likely that several LNG facilities will be constructed in Germany (see LGG and the German government's information "Securing national energy supplies" of 1 June 2022, <https://www.bundesregierung.de/breg-en/service/secure-gas-supply-2038906>). This underpins the procurement strategy of the federal government, which has now chartered a fifth floating LNG terminal (see BMWK press release of 1 September 2022, <https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2022/09/20220901-bwmk-sichert-sich-fuenftes-schwimmendes-fluessigerdgasterminal-plus-anlandung-gruener-wasserstoff.html>, accessed on 5 February 2023). The supply of regasification capacity in Germany and north-west Europe is likely to increase while liquefaction capacity is limited/scarce (see IEA, Gas Market Report, Q2-2022, April 2022, pages 6-7, <https://iea.blob.core.windows.net/assets/cfd2441e-cd24-413f-bc9f-eb5ab7d82076/GasMarketReport%2CQ2-2022.pdf> and Barbara König, KfW/IPEX-Bank, Flash Analysis, Credit Analysis, Maritime Industries – LNG tankers, How the Russia-Ukraine war is

changing the outlook for LNG tanker shipping, 29 April 2022, <https://www.kfw-ipex-bank.de/PDF/Analysen-und-Meinungen/Marktanalysen/2018-10-KfW-IPEX-Bank-Blitz-Licht-Analyse-Maritime-Industrie-%E2%80%93-LNG-Tanker.pdf> both accessed on 5 February 2023). At the same time, there is still strong global competition, especially with Asian markets. In annex A of the economic report, Frontier Economics attached a highly conservative analysis, from the competition point of view, assuming a full utilisation of 100% of the terminal capacity.

252 To sum up, on the basis of the analyses carried out, both assuming a terminal utilisation of 70% and one of 100% (see Frontier Economics, economic report, annex A), it can be stated that an exemption is neutral as far as competition is concerned. This is the case both for scenario 1, "long-term bookers decisive", assuming that long-term bookers use the capacity to import their own production, and scenario 2, "long-term bookers dependent on producers", in which the long-term bookings are allocated to producers to which, according to the companies, there are economic ties. None of the analyses show an increase in market concentration. On the contrary: the specific long-term booking contracts of ConocoPhillips, INEOS and RWEST actually indicate a positive effect on competition since the long-term bookers do not currently have a strong market position on the competitively relevant gas market (see Frontier Economics, economic report, pages 13 and 80 et seq).

Specifically:

253 (1) Scenario 1: "Long-term bookers decisive"

The effects on competition for scenario 1, "long-term bookers decisive", in which the long-term bookers use their bookings to regasify their own gas production, are shown first. For the 1bn m³/a of capacity allocated on a short-term basis, Frontier Economics assumes a projection on the basis of current market shares of LNG producers in north-west Europe. It should be noted here that the 1bn m³/a not yet allocated on a long-term basis is, in accordance with operative part 6., expressly reserved for yearly or non-yearly allocation by way of an auction mechanism. In scenario 1, the wholesale market for natural gas does not show a high concentration of competition effects either in 2027 or 2034 (see Frontier Economics, economic report, page 81 et seq).

254 Similarly to the explanations in section 4.7.1.2, the indicators used to calculate competition effects (market shares and concentration indices) were used to evaluate this scenario. The three long-term bookers would increase their market shares in both years under consideration, 2027 and 2034. The greatest effect would be on ConocoPhillips, which would raise its market share in 2034 from 2% to 3%. The long-term capacity agreements of the applicant with ConocoPhillips, INEOS and RWEST would cause these undertakings, which have comparatively small market shares and do not have strong positions on the competitively relevant gas market, to see their market shares increase. Consequently, the market shares of the major players would shrink.

The market concentration analysis thus actually shows positive market effects. For example, the concentration of the market in 2034 would be an HHI of 870, compared to 907 in the counterfactual scenario without the Brunsbüttel LNG facility (see Frontier Economics, economic report, page 85, table 5). None of the relevant thresholds for possibly negative competitive effects are exceeded; rather, as stated, scenario 1 shows an enhancement of competition.

255 (2) Scenario 2: "Long-term bookers dependent on producers"

In scenario 2 ("long-term bookers dependent on producers"), Frontier Economics further examined the effects on competition if the long-term capacity bookings at the Brunsbüttel LNG facility were not assigned to the actual long-term bookers but to producers to which the long-term bookers had economic ties. It specified the assignments at the producer level for scenario 2 from primary company sources in a way the ruling chamber could follow. ConocoPhillips, for example, has concluded an agreement with Qatar Energy to supply LNG from their joint production in Qatar for regasification in Brunsbüttel (see Frontier Economics, economic report, page 73). INEOS has concluded an agreement with US producer Sempra for the delivery of LNG for regasification at the Brunsbüttel terminal (see Frontier Economics, economic report, page 73). RWEST, on the other hand, only has a declaration of intent with Sempra about the purchase of LNG. As RWEST has existing supply contracts with other market participants, it may be assumed that it has other possible sources of supply for Brunsbüttel as well. Scenario 2 thus assigns 100% of the bookings of ConocoPhillips to Qatar Energy and those of INEOS to Sempra. In a conservative approach, the capacity of RWEST was assigned to the largest market participant in each of the two years under consideration, because this would lead to the greatest detriment to competition. It was assumed that this would probably be Equinor/Petoro for 2027 and for 2034 it would be Qatar Energy. It may be seen that the exemption would also have a neutral effect on competition in scenario 2, with the assigning of long-term bookings to producers. Even assuming that the long-term bookers did not use their capacity to regasify their own production, there are no indications of competition concerns in either year under consideration when applying the indicators used to calculate competition effects (market shares and concentration indices) described in section 4.7.1.2.

4.7.1.2.2 Analysis of the upstream wholesale market in Germany (more narrowly defined geographic market)

256 This section looks at a competition analysis for the theoretical case of a more narrowly defined upstream wholesale market that is just Germany. This more narrow analysis, in geographic terms, of the relevant market takes into consideration the decision-making practice up to now of the Bundeskartellamt, according to which the wholesale gas market must be defined geographically as at least Germany-wide (see Bundeskartellamt, Ref. B8-69/14, margin no 97

et seq) and the requirements of the European Commission (see Decision of 25 May 2021, C(2021) 3814 final, para 83 et seq and most recently Decision of 20 December 2022 (C(2022) 9902 final, paras 94, 97 and 103-104). In this case, there would be no significant cross-border trade (other than imports). German market participants would be unaffected by price differences on adjacent markets and would not use the available transport capacity at the cross-border interconnection points. The aim of the European Union to achieve a single internal market in natural gas would thus be far off.

257 For the more narrowly defined market, it may be said that competitive effects are more evident overall, owing to the greater concentration on the German market as compared to the north-west European one. The competitive effect would be greater for the same volume effects. The report's analysis is based on the assumption that even without the Brunsbüttel LNG facility, imports would arrive in the market, narrowly defined as Germany, via the other planned LNG terminals in the country. The assumptions on the composition of the future north-west European LNG imports in the competition analysis thus also apply to the more narrowly defined German market.

258 Frontier Economics sees the calculation of the German market as an alternative assessment (see supplementary report, pages 14-15) that does not, however, reflect the real market and competition situation in north-west Europe. The report therefore includes this additional consideration for the unlikely event that there are massive backward steps in the integration of the European internal market. The ruling chamber agrees with this line of argumentation, working rather on the opposite assumption that there will be future further European market developments (see Ruling Chamber 7 decision of 21 June 2021, BK7-18-063-final, page 70 et seq and decision of 19 September 2022, BK7-20-107-final, page 64).

259 Nevertheless, the ruling chamber has examined the results of the study for the more narrowly defined national market and included the alternative analyses in its considerations. Frontier Economics examined the two scenarios already described (scenario 1, "long-term bookers decisive" and scenario 2, "long-term bookers dependent on producers") in terms of their competitive effect on the more narrowly defined national market. It concludes for both scenarios and both years under consideration, 2027 and 2034, in the more narrowly defined national market that an exemption and thus the completion of the Brunsbüttel LNG facility would not have negative, but in fact clearly positive, effects on competition in Germany.

Specifically:

260 (1) Scenario 1: "Long-term bookers decisive"

The first scenario ("long-term bookers decisive") showed a similar result to the analysis for the north-west European market but with an even greater decline in market concentration of 160

points in 2027 and 202 in 2034. The analyses in the report actually showed a drop in the concentration values to below 1,000 for both years under consideration. The HHI was over 1,000 for both years in the counterfactual scenario (without the Brunsbüttel LNG facility), ie above the threshold. In the factual scenario with the exemption and the Brunsbüttel LNG facility, the concentration values were below the 1,000 point threshold (978), indicating markets with lively competition in which, generally speaking, there are no competition concerns at all. In scenario 1 for 2034, ConocoPhillips would see the biggest growth in market share of 4%, from 1% to 5%. The report shows that in both years, the undertakings with the largest market shares would lose market share to the three long-term bookers. This would give rise to the previously described competition-enhancing effects of a reduction in market concentration (see Frontier Economics, economic report, page 89 et seq).

261 (2) Scenario 2: "Long-term bookers dependent on producers"

In scenario 2 ("long-term bookers dependent on producers"), the report examined the effects on competition if the long-term bookers did not use the long-term booked capacity at the Brunsbüttel LNG facility to regasify their own production but were controlled by producers to which, according to the undertakings themselves, they have economic ties. As in scenario 1, the report concludes that the exemption and the Brunsbüttel LNG facility will have a neutral effect on competition in the more narrowly defined national market in both years under consideration, 2027 and 2034. This means that even if the second-largest market participant were to book all long-term booked capacity in both years under consideration, the indicators used to calculate competition effects (market shares and concentration indices) described in section 4.7.1.2 do not give rise to any signs for concern regarding competition.

4.7.1.2.3 Interim conclusion for the upstream wholesale market

262 The ruling chamber thus concludes that there are no competitive concerns with respect to the upstream wholesale market that would prevent the issuing of the exemption. Neither the analysis of the north-west European upstream wholesale market nor the analysis of the more narrowly defined market give rise to any relevant negative effects on competition. In fact, the analyses show that there would be a clearly positive effect on competition, especially in scenario 1.

263 As all the capacity for long-term allocation (9bn m³/a) has already been allocated in a binding manner and [REDACTED], the possibility of one or two customers making bookings that would be detrimental to competition is effectively blocked. The ruling chamber did not, therefore, consider it necessary to impose booking limitations for dominant undertakings. Based on [REDACTED] that are binding and [REDACTED] by ConocoPhillips, INEOS and RWE Supply & Trading for the Brunsbüttel LNG facility, the facility

will lead to a diversification of supply sources and will promote competition, as the long-term bookers mentioned do not have a dominant market position either at the producer or downstream levels of the market for natural gas in Germany and north-west Europe (see Frontier Economics, economic report, page 14 and 70 et seq). In addition, it can be assumed that market concentration in the natural gas market will weaken anyway because of energy efficiency measures and the expansion of renewable energies. It should also be taken into account that effective congestion mechanisms to combat the hoarding of capacity have been imposed on the applicant, guaranteeing, in particular, permanent, non-discriminatory third-party access to 10% of the annual throughput capacity on a short-term basis for the entire duration of the exemption (see section 4.8, in particular 4.8.5.).

264 In light of the current booking situation for the capacity for long-term allocation at the Brunsbüttel LNG facility, the European Commission also comes to the conclusion that the construction of the facility would strengthen the competition in gas supply and the exemption would not be detrimental to competition. To rule out effects detrimental to competition in the future, for example if large amounts of capacity were to be transferred to a potentially dominant undertaking at a later date in secondary trading, the European Commission has required the ruling chamber to add a "market assessment clause" to the binding part of the exemption. The ruling chamber has explicitly included such a procedure in operative parts 9. and 10. (see also section 4.7.1.4).

4.7.1.3. Analysis of effects on competition in downstream markets

265 The assessments carried out do not indicate any negative effects on competition in downstream markets either.

266 Frontier Economics carried out in-depth examinations and analyses to determine whether detrimental effects on competition in downstream markets were to be expected (Frontier Economics, economic report, annex B).

267 It conducted an analysis of the downstream market in the economic report. This analysis, like the one of the upstream wholesale market, compared the effects on the competitive situation with an LNG facility exempt from regulation and in the counterfactual scenario in which the terminal is not implemented at all. Here, too, the report took account of the long-term bookings that are already binding and [REDACTED] (see Frontier Economics, economic report, page 116). The calculations were made for the year 2027.

268 Frontier Economics found in this analysis, as for the effects of scenario 1 on the wholesale market, that the exemption and the construction of the Brunsbüttel LNG facility would stimulate competition at the import level, which Frontier Economics attributes to the LNG facility enabling

long-term bookers to replace sales of larger market participants such as EnBW/VNG or Uniper. Of the three long-term bookers, only RWEST is one of the seven gas wholesalers examined by the European Commission as part of the Gazprom-Wintershall merger proceedings. However, RWEST's market share of 5% is still very small (see Frontier Economics, economic report, page 116). As the other two long-term bookers are gas producers and thus not active in any significant way on the German wholesale market, the report expects the entry of these two undertakings onto the market to intensify competition at this level (see Frontier Economics, economic report, page 117).

- 269 The report concludes that the Brunsbüttel LNG facility with an exemption will enhance competition on the sales side of the wholesale market because the long-term bookers were not previously active on the German wholesale market on a large scale. The competition concentration thus falls noticeably in the analysis, by 235 points from 1,781 to 1,547 on the HHI (see Frontier Economics, economic report, pages 117-118).
- 270 Frontier Economics also presents in a comprehensible manner that the national markets for the supply of final customers undoubtedly have intense competition and there is no indication that an exemption for the LNG facility could have negative effects on competition on final customer markets (see Frontier Economics, economic report, page 118 et seq).
- 271 The ruling chamber is able to follow the conclusions of the experts and does not see any indication of a detrimental effect on competition in downstream markets either. On the contrary, an improvement in competition is to be expected as the long-term bookers have so far very small market shares. In its Decision, the European Commission also comes to the conclusion that no detrimental effect is to be expected on the downstream German or north-west European wholesale market (European Commission Decision of 2 June 2023, C(2023) 3743 final, para 107).

4.7.1.4. Result of the competition analyses and safeguard clause

- 272 The ruling chamber and the European Commission (European Commission Decision of 2 June 2023, C(2023) 3743 final, para 107 et seq) come to the conclusion that, based on the current booking situation and the assumptions made, there are no concerns about a detrimental effect on competition.
- 273 However, the European Commission has required the ruling chamber to include a safeguard clause in the form of a market assessment clause in the operative part of the exemption (European Commission Decision of 2 June 2023, C(2023) 3743 final, Article 4). The ruling chamber had considered that the notification requirements placed on the applicant and the review requirements placed on the ruling chamber in the notified exemption were already

sufficient to prevent negative effects on competition throughout the duration of the exemption. However, the European Commission considered it necessary to expressly include a market assessment clause in the operative part in order to guarantee sufficient legal and operational certainty for the implementation. The ruling chamber has complied with this requirement and expressly included a legally binding procedure to this effect in operative parts 9. and 10. This clause should be looked at in light of the difficulty of making reliable long-term forecasts under the current geopolitical and market conditions. Moreover, the LNG facility capacity that has been allocated on a long-term basis is freely tradeable on the secondary market, so effects detrimental to competition cannot be completely ruled out if significant amounts of capacity are transferred. The market assessment clause ensures that there will be no detriment to competition over the many years of the exemption.

- 274 To this end, the European Commission has required the ruling chamber to include a legally binding, two-stage notification and assessment procedure in the operative part of the exemption decision, which may lead to a booking limitation (European Commission Decision of 2 June 2023, C(2023) 3743 final, para 115 et seq and Article 4). The ruling chamber has fully met this requirement in operative parts 9. and 10.
- 275 These parts require the applicant to notify the ruling chamber without undue delay of an intended booking or the acquisition of capacity by a market participant of the upstream and/or downstream German wholesale market that would lead to the market participant in question acquiring at least 65% in total of the annual throughput capacity intended for long-term bookings at the Brunsbüttel LNG facility.
- 276 In the first stage, the ruling chamber has to determine the market share of the relevant undertaking on the upstream or downstream German wholesale gas market. If this assessment shows a market share of at least 30%, the ruling chamber has to follow up with a second stage in which it assesses the possible effect on competition of the booking that has to be notified or the acquisition of capacity that has to be notified under operative part 9. and consults the Bundeskartellamt. In connection with the application of Article 36(1)(3) of Directive 2009/73/EC, the European Commission assumes that there is a risk of attaining or strengthening a dominant market position if a booking at any time during the booking duration would lead to a market share of at least 40% on the part of the respective undertaking(s) (see European Commission Decision of 20 December 2022, C(2022)9902 final, Article 1(d)).
- 277 In the event that negative consequences on competition are identified because there is a risk of an undertaking attaining or strengthening a dominant position in the market, the ruling chamber must restrict the scope and/or the duration of the booking. The booking process may come to a binding conclusion without restrictions if the ruling chamber comes to the conclusion that no negative competitive situation can be identified and has informed the applicant of this

(see section 3.8.6. and the European Commission Decision of 2 June 2023, C(2023) 3743 final, para 116 and Article 4).

278 The European Commission has expressly pointed out that an assessment by the ruling chamber does not equal a prohibition of the booking in question and neither do the thresholds of the assessment clause represent intervention thresholds. The thresholds included in the safeguard merely trigger a competitive assessment of the booking in question on the market, which enables the ruling chamber to form a view on the competitive situation in a timely manner and intervene only in case of concrete concerns (European Commission Decision of 2 June 2023, C(2023) 3743 final, para 114).

4.7.2. Effect on the effective functioning of the internal market in natural gas and principle of energy solidarity

279 The exemption is not detrimental to the effective functioning of the internal market in natural gas (section 28a(1) para 5, second alternative EnWG).

280 As explained in section 4.2.1, an investment in physical infrastructure that facilitates access to additional sources or volumes of gas in itself enhances competition and thus also promotes the effective functioning of the internal market in natural gas, the main aim of which is the promotion of cross-border trade (see recital 1 of Regulation (EC) No 715/2009). The Brunsbüttel LNG facility will allow additional gas volumes to be imported from outside the EU, increasing the liquidity at European trading points, at least at the German Trading Hub Europe (THE). In light of the war in Ukraine and the associated need to replace Russian gas imports, it will make a significant contribution to diversification. The offer of new capacity at an LNG facility will enable new market participants to enter the European natural gas market, enhancing competition, all the more so since the largest gas importer so far, Gazprom, is no longer regarded as reliable at the political level owing to the current situation and has halted its gas deliveries to Germany and other EU Member States. The ability to have permanently secured, short-term access to 10% of annual throughput capacity of the Brunsbüttel LNG facility (see operative part 6. and section 4.8.4.) will help to diversify gas imports. The applicant has shown that the investment will not take place without the exemption being granted (see section 4.4.). The exemption thus does not only not have a negative effect on the effective functioning of the internal market in natural gas but may in fact contribute to the positive effects described above.

281 The principle of energy solidarity, which, in a judgment of 15 July 2021 (Case C-848/19), the Court of Justice of the European Union (CJEU) ruled is to be taken into consideration in the granting of an exemption, is not breached in this case with regard to the effective functioning of the internal market in natural gas either (on the principle of energy solidarity with regard to the

security of supply of other Member States, see section 4.7.4). At the same time, the examination carried out under the principle of energy solidarity also covers the possible detriment to the efficient functioning of the regulated systems concerned, which was added to Article 36(1)(e) third and fourth alternatives of Directive 2009/73/EC by the amending Directive (EU) 2019/692 (see section 4.7.3). In the judgment of 15 July 2021 (Case C-848/19, paras 53 and 71 et seq), the CJEU argues that the principle of energy solidarity laid down in Article 194(1) TFEU obliges the EU and Member States to make efforts to take into account the interests of other Member States and to balance those interests where there is a conflict. This principle is not breached in this case, as it is not to be expected that the Brunsbüttel LNG facility will weaken competition in other Member States.

282 It should be taken into consideration at this point that negative effects on competition could only occur, if at all, on the relevant market for initial sales of natural gas in north-west Europe (Germany, the Benelux countries, Denmark, UK). Outside the relevant market, no negative effects are to be feared, since it may be assumed that competition there is sufficiently independent of developments in Germany.

283 Within the relevant market, the competition analysis has already concluded that competition in the other Member States is sufficiently diversified and there is competition between many providers.

284 There is therefore no indication that the Brunsbüttel LNG facility would be detrimental to competition and the effective functioning of the energy internal market in the EU or other Member States, taking account of the principle of energy solidarity specified in the CJEU judgment of 15 July 2021 (Case C-848/19). No arguments to the contrary were made during the consultation of the regulatory authorities of the Member States either.

285 The European Commission, in its decision of 2 June 2023, (C(2023) 3743 final, paras 68 et seq and 161), also assumed that the CJEU requirements on the principle of solidarity under Article 194 TFEU are met.

4.7.3. Impact on the efficient functioning of the regulated systems concerned and principle of energy solidarity

286 The exemption is not detrimental to the efficient functioning of the regulated systems concerned either (section 28a(1) para 5, third alternative EnWG).

287 The applicant has made an application for capacity expansion in accordance with section 39 GasNZV to Gasunie Deutschland Transport Services GmbH, so that the latter can provide the entry capacity into the transmission system that the applicant considers necessary as soon as the LNG facility goes into operation. The transmission system operators took the entry capacity

required for the operation of the LNG facility into consideration in the "LNGplus" variant of the modelling for the NDP 2022. The NDP 2022 is currently at the stage pursuant to section 15a(2) EnWG, in which the transmission system operators have to evaluate the result of the public participation in the expansion plans.

- 288 The NDP aims to identify measures for the needs-based (and thus efficient) optimisation of the system and the needs-based and efficient expansion of the system. It is essentially the job of the transmission system operator to identify long-term capacity requirements and ensure that this demand can be met with suitable and economically reasonable measures. The drawing up of the scenario framework and the network development plan play a key role in this. Market players have the opportunity to participate in the consultation. In addition, market demand is indicated at the cross-border interconnection points every two years and may result in incremental capacity processes under Regulation (EU) 2017/459. Ultimately, available capacity has to be offered to network users under appropriate, non-discriminatory conditions. This also applies to capacity that technically can be provided at different network points but is only available in the network once.
- 289 Taking account of the entry capacity needed by the LNG facility in the NDP thus ensures that potential inefficiency (eg creating and operating unnecessary, duplicated structures) of the regulated system to which the LNG facility is connected will be avoided.
- 290 Negative effects on the efficient functioning of the regulated systems concerned cannot therefore be identified at this time. There are no indications that could support an opposing view, nor were any put forward in the consultation of the regulatory authorities of the Member States. There is therefore no assumption of a negative impact on the principle of energy solidarity confirmed by the CJEU in its judgment of 15 July 2021 (Case C-848/19) with regard to the regulated systems concerned. The European Commission ultimately shares this view (European Commission Decision of 2 June 2023, C(2023) 3743 final, para 160 et seq).

4.7.4. Effects on the security of gas supply and principle of energy solidarity

- 291 Granting the exemption for the Brunsbüttel LNG facility will not have negative effects on the security of energy supply of the EU or the security of supply in the other EU Member States and is thus not in breach of the principle of energy solidarity laid down in Article 194(1)(a) and (b) TFEU as described by the CJEU in its judgment of 15 July 2021 (Case C-848/19). The applicant also provided proof of this in the course of the administrative proceedings with a report (see Frontier Economics, economic report, page 51 et seq).
- 292 According to the CJEU judgment of 15 July 2021 (see Case C-848/19, paras 53 and 71 et seq) the principle of solidarity laid down in Article 194(1)(a) and (b) TFEU entails a general obligation

on the part of the EU and the Member States, in the exercise of their respective powers in the field of energy policy, to take into account the interests of the other stakeholders and to balance those interests where there is a conflict. This does not mean that energy policy must never, under any circumstances, have negative impacts for the particular interests of a Member State in the field of energy. However, the EU and the Member States must endeavour to avoid adopting measures liable to affect the interests of the EU and the other Member States as regards security of supply, its economic viability, and the diversification of supply or of sources of supply.

293 It has already been established that the Brunsbüttel LNG facility will enhance the supply situation in Germany (see section 4.2.2.). This enhancement will also benefit the other Member States because in the event of a crisis additional volumes will be available that can also be delivered to other Member States. By contrast, a negative impact on the supply situation in the other Member States cannot be identified. It is, for example, not evident that the Brunsbüttel LNG facility would absorb volumes that would otherwise be available to LNG facilities in other Member States. The global LNG market with an annual trading volume of 485bn m³ LNG (2019) is sufficiently large compared with the maximum capacity of the Brunsbüttel LNG facility of 10bn m³/a. Thus it cannot be assumed that the additional demand from the Brunsbüttel LNG facility will have a significant impact on the supply and demand balance. In addition, it can be assumed that Member States with a higher level of dependency on LNG imports typically secure volumes relevant for security of supply through long-term contracts. To replace Russian gas imports, Member State governments and the European Commission's REPowerEU plan envisage an expansion of LNG infrastructure. Furthermore, in light of the current situation, it cannot be assumed that the addition of the Brunsbüttel LNG facility will result in infrastructure projects that are relevant to security of supply in other Member States not being implemented because of the implementation of the Brunsbüttel LNG facility. Further negative effects on the supply situation in other Member States are not evident.

No views to the contrary were put forward in the consultation of the regulatory authorities of the Member States and the regulatory authorities of the UK and Norway carried out by the ruling chamber.

294 Granting the exemption is therefore not in breach of the principle of energy solidarity as described in the CJEU judgment of 15 July 2021 (Case C-848/19) and is not detrimental to security of supply of natural gas in the Union (section 28a(1) para 5 EnWG and Article 36(1)(e) of Directive 2009/73/EC). The European Commission came to the same conclusion (European Commission Decision of 2 June 2023, C(2023) 3743 final, para 68 et seq).

4.8. Discretion and implementation of the European Commission Decision

- 295 In accordance with section 28a(1) EnWG ("may"), the decision to grant an exemption is at the discretion of the regulatory authority. Having weighed up the arguments for and against an exemption and taken into account the purpose of the exemption provision and the principle of proportionality (section 40 of the Administrative Procedure Act, VwVfG), the ruling chamber has decided to grant the exemption as set out in the operative part (see section 4.8.1. and 4.8.2.) with the secondary provisions and obligations set out in the operative part (see section 4.8.3. to 4.8.11.).
- 296 By contrast, the resumption of the closed proceedings BK7-18-063 and the revocation of the binding exemption of 21 June 2021 (BK7-18-063-final) in the decision of 15 March 2023 were not within the discretion of the ruling chamber. Since the prerequisites for the proceedings to be resumed pursuant to section 51 VwVfG were met, the proceedings BK7-18-063 had to be resumed following the application by the applicant. Given the existence of the prerequisites of section 51 VwVfG, the ruling chamber had no discretion in this matter. Because, owing to the changed circumstances, the prerequisites for the issue of a new exemption, more favourable to the applicant, for an LNG facility with an annual throughput capacity of 10bn m³/a are met (see sections 3. and 4.), the binding exemption of 21 June 2021 (BK7-18-063-final) for an LNG facility with an annual throughput capacity of 8bn m³/a had to be revoked in the decision of 15 March 2023 (BK7-22-140).
- 297 The amendments to the original exemption decision of 15 March 2023 required by the Decision of the European Commission of 2 June 2023 (C(2023) 3743 final) are not subject to the discretion of the ruling chamber either. Pursuant to Article 288(4) TFEU, these are binding on the ruling chamber, which is bound to implement them in accordance with section 28a(3) EnWG and the third subparagraph of Article 36(9) of Directive 2009/73/EC (see Thole, in: Säcker, Berliner Kommentar zum Energierecht, 4th ed 2019, section 28a, margin no 30; Arndt, in: Britz/Hellermann/Hermes, EnWG, 3rd ed 2015, section 28a, margin no 18 et seq; Siegel, in: Kment, Energiewirtschaftsgesetz, 2nd ed 2019, margin no 12).
- 298 For a discretionary decision under section 28a(1) EnWG, however, the following points are relevant. In accordance with section 28a(3) sentence 2 EnWG in conjunction with the second and third subparagraphs of Article 36(6) of Directive 2009/73/EC, secondary provisions may/shall be attached to the decision. These may relate to a limit on the duration of the exemption or to non-discriminatory access, management and allocation of capacity. As can be seen from the reference to national circumstances in the second subparagraph of Article 36(6) of Directive 2009/73/EC, the determination of further secondary provisions in accordance with general administrative procedure law is unaffected.

- 299 On this basis, the ruling chamber has issued the exemption with a series of restrictions that satisfy these requirements. This is based on the following considerations:
- 300 The fact that the LNG facility in Brunsbüttel will contribute to the creation of new LNG infrastructure in Germany and enable LNG to be imported directly to Germany is an argument in favour of an exemption. It will open up new sources of natural gas and transport routes. In this way, it will make an important contribution to the diversification and security of natural gas supplies in Germany and north-west Europe in light of the current geopolitical situation. The LNG facility in Brunsbüttel offers the possibility, which is urgently needed, of importing additional volumes to Germany and north-west Europe and thus replacing the lost Russian gas imports. In this way, it will enhance competition and the European internal market (see section 4.2.1.). Because of the situation arising from the Ukraine war, it is relevant to ensuring security of supply in Germany and the European Union (see section 4.2.2.).
- 301 In this context, an argument against an unrestricted exemption is the fact that the LNG market is developing dynamically and forecasts about its future development are uncertain. The best way to promote competition and also security of supply in this dynamic environment is to ensure that the infrastructure remains open for new market participants at least partially (10% of the annual throughput capacity) even during the exemption, which applies for many years, by guaranteeing long-term, non-discriminatory third-party access. Otherwise, the LNG facility would be reserved for the exclusive use of just a few customers on the basis of long-term capacity contracts for the long exemption period. In view of its considerable significance for competition and security of supply and of the dynamic developments on the LNG market, this foreclosure of the new LNG infrastructure for such a long time is unjustified. This fact is also highlighted in the European Commission staff working document, which states that effective congestion measures are more likely to be necessary if the exemption permits long-term capacity contracts. In such cases, it may be necessary to mitigate the foreclosure effect of such contracts in order to ensure that competition and security of supply are enhanced (see Commission staff working document, *loc cit*, para 42).
- 302 Various aspects must be taken into consideration in this discretionary decision (see section 4.8.4.), in particular the duration of the exemption and the effectiveness and proportionality of the measures imposed. It should also be noted that the working document refers to the old Directive 2003/55/EC, in which the provisions for rules and mechanisms for the allocation and management of capacity were considerably less strict. In the old Directive 2003/55/EC, the decision about whether such rules were needed was at the discretion of the regulatory authority ("may decide upon"). Moreover, the discretion of the regulatory authority was explicitly restricted by the addition that the implementation of long-term contracts could not be prevented. The current Directive 2009/73/EC no longer includes such a restriction.

What is more, the decision about whether rules for the allocation and management of capacity are needed is no longer at the discretion of the regulatory authority but is mandatory ("shall decide upon"). Moreover, unlike its predecessor, the current Directive 2009/73/EC sets out that the regulatory authority must require a procedure to combat the hoarding of capacity (UIOLI) and to enable secondary marketing. In accordance with Directive 2009/73/EC, only the issue of how and which rules for a UIOLI procedure and secondary marketing are necessary and appropriate in the individual case are at the discretion of the regulatory authority.

- 303 On the other hand, the fact that major new infrastructure requires huge investments that are subject to considerable risks needs to be taken into consideration. The background to section 28a EnWG shows that the aim and purpose of the provision is to create a stable framework by granting exemption from regulation for a limited period for individual new infrastructure projects that would not come to fruition if the regulatory provisions of sections 20 to 28 EnWG had to be complied with (see Bundesrat printed paper 613/04 (decision) of 24 September 2004, page 25). The investment is to take account both of the principle of competition and of the security of supply on an increasingly unified European energy market (see section 28a(1) para 1 in conjunction with section 1(1) and (2) EnWG). The aim is not to make it economically impossible to build new interconnectors or major LNG and storage facilities because of network access requirements that might change over time. Investors need planning certainty, which is often secured using long-term capacity contracts (see section 4.4.). As the contribution of the infrastructure to the diversification of transport routes and sources of supply and the possibility of replacing Russian gas imports by importing additional volumes lead to an enhancement of competition and security of supply (see section 4.2.), it is justified for section 28a EnWG in conjunction with Article 36 of Directive 2009/73/EC to permit a deviation from the provisions on non-discriminatory access (rules for the allocation and management of capacity, provisions on tariffs, transparency provisions and unbundling provisions) for a limited period of time. Nevertheless, it is appropriate to restrict the exemption so as not to weaken the effectiveness of the general access regime too much (see Commission staff working document, paras 11 and 17; Arndt, in: Britz/Hellermann/Hermes, *Energiewirtschaftsgesetz*, 3rd ed, section 28a, margin no 2). The exemption provision was thus designed as a discretionary provision in order to enable these concerns to be adequately taken into account and weighed up against the individual circumstances of the case (see Bundesrat printed paper 613/04 (decision) of 24 September 2004, page 25). In accordance with the second subparagraph of Article 36(6) of Directive 2009/73/EC, in the discretionary decision on the duration, scope and conditions regarding non-discriminatory access to the new infrastructure, account also needed to be taken of the additional capacity to be built, the time horizon of the project and national circumstances.
- 304 With this in mind, the ruling chamber has only imposed provisions regarding the duration of the exemption and conditions for the allocation and management of capacity where and to the

extent necessary and appropriate, to the best of its knowledge, to enable the investment, to enhance competition in gas supply and security of gas supply due to the investment (Article 36(1)(a) of Directive 2009/73/EC), to prevent a detrimental effect to competition, the efficient functioning of the internal market in gas or the regulated systems and security of gas supply in the EU due to the exemption decision (Article 36(1)(e) of Directive 2009/73/EC) and to ensure non-discriminatory access to the new infrastructure (second subparagraph of Article 36(6) of Directive 2009/73/EC).

- 305 Ultimately, the decisive argument for the granting of the exemption for a limited period and subject to conditions and secondary provisions was that the construction of the LNG facility is also in the interest of the economy as a whole as it will diversify sources of supply and transport routes (see Bundesrat printed paper 613/04 (decision) of 24 September 2004, page 25). This is particularly true because of the current situation caused by the Ukraine war, as the construction of LNG infrastructure is an essential element in replacing Russian gas imports. Owing to the particular risk related to investment in the LNG facility and bearing in mind that the investment decision has not yet been made, the argument that the Brunsbüttel LNG facility would not be built if the exemption were not granted seems, at the current time, convincing (see section 4.4.).
- 306 However, having examined the circumstances of the individual case, it seems suitable and, according to the statements of the applicant on 22 May 2023 and the requirements of the European Commission (Article 2 of the Decision of 2 June 2023, C(2023) 3743 final), necessary and appropriate to limit the exemption to 15 years from the start of operation and to attach conditions regarding the allocation and management of capacity and congestion management in order to enhance competition and security of gas supply due to the investment (Article 36(1)(a) of Directive 2009/73/EC), to prevent a detrimental effect on competition or the efficient functioning of the internal market in gas or the regulated systems concerned or of security of gas supply in the Union (Article 36(1)(e) of Directive 2009/73/EC), to take into consideration the principle of energy solidarity under EU law and to ensure non-discriminatory access to the new infrastructure (second subparagraph of Article 36(6) of Directive 2009/73/EC) without preventing the enabling of the investment.

Specifically:

4.8.1. Revocation and amendment of the original exemption decision in accordance with the Commission Decision (operative part 1.)

- 307 The revocation of the original exemption decision issued on 15 March 2023 and the amendment and reissuing in accordance with the Commission Decision of 2 June 2023 (C(2023) 3743 final) pursuant to operative part 1. is based on section 28a(3) EnWG and the third subparagraph of

Article 36(9) of Directive 2009/73/EC, pursuant to which the regulatory authority has to comply with the Commission Decision within one month and amend or revoke the exemption decision in accordance with the Commission Decision. Under Article 288(4) TFEU, the Commission Decision is binding upon the ruling chamber in its entirety. There is, as such, no scope of discretion (see Thole, in: Säcker, Berliner Kommentar zum Energierecht, 4th ed 2019, section 28a, margin no 30; Arndt, in: Britz/Hellermann/Hermes, EnWG, 3rd ed 2015, section 28a, margin no 18 et seq; Siegel, in: Kment, Energiewirtschaftsgesetz, 2nd ed 2019, margin no 12).

- 308 On 2 June 2023, the European Commission issued a Decision (C(2023) 3743 final) pursuant to Article 36 of Directive 2009/73/EC on the original exemption decision of 15 March 2023. The European Commission Decision essentially confirmed the exemption granted but also required the ruling chamber to make substantive changes and additions.
- 309 Firstly, the European Commission required the ruling chamber to change the duration of the exemption set out in operative part 3. from 20 years to 15 years in order to ensure compliance with the exemption requirements of Article 36(1) of Directive 2009/73/EC (Decision of 2 June 2023, C(2023) 3743 final, Article 3). The ruling chamber has done so and determined an exemption duration of 15 years in operative part 3. (see sections 4.4.4. and 4.8.3.).
- 310 The European Commission also required the ruling chamber to include a safeguard clause in the form of a market assessment clause in the operative part of the exemption (European Commission Decision of 2 June 2023, , (2023) 3743 final, Article 4). The ruling chamber had considered that the notification requirements placed on the applicant and the review requirements placed on the ruling chamber in the notified exemption were already sufficient. The European Commission, however, considered that an explicit requirement in the operative part was needed to ensure sufficient legal and operational certainty for the implementation. The ruling chamber has implemented this requirement in operative parts 9. and 10. (see section 4.8.6.), expressly imposing a legally binding procedure. This will prevent negative effects on competition throughout the many years of the exemption amid the difficulty of making reliable long-term forecasts under the current geopolitical and market conditions.
- 311 In accordance with the requirements of the European Commission on a market assessment clause, the ruling chamber requires the applicant to notify the ruling chamber without undue delay any time that a market participant of the German wholesale market intends to book or acquire capacity that would lead to the acquisition of at least 65% in total of the annual throughput capacity of the Brunsbüttel LNG facility intended for long-term bookings for at least five years. This includes both bookings of primary capacity and the acquisition of secondary capacity. In such a case, the European Commission Decision requires the ruling chamber to assess whether this market participant holds a market share of at least 30% on the upstream

or downstream German wholesale gas market. In the event that the market share of the undertaking calculated by the ruling chamber is at least 30% of the upstream or downstream German wholesale gas market in Germany, the European Commission further requires the ruling chamber to assess the possible effect on competition of the booking that has to be notified or the acquisition that has to be notified under operative part 9. and, where necessary, to impose booking limitations on the scope or duration of the booking.

- 312 The European Commission Decision also requires the ruling chamber to monitor the implementation of the conditions set out in the decision (Decision of 2 June 2023, C(2023) 3743 final, Article 2) and to report on it to the European Commission upon request. The monitoring of the conditions imposed by the European Commission is ensured by the reporting requirement pursuant to operative part 11. and the right of amendment and withdrawal set out in operative part 12. a) and b) (see sections 4.8.8. and 4.8.9.).
- 313 This amended exemption decision implements the request for amendment of the Commission of 2 June 2023 in full in accordance with section 28a(3) sentence 3 EnWG and the third subparagraph of Article 36(9) of Directive 2009/73/EC. It does not contain any other changes to content from the original exemption of 15 March 2023.

4.8.2. Granting of the exemption (operative part 2)

- 314 In operative part 2., an annual throughput capacity of 10bn m³/a at the Brunsbüttel LNG facility is exempted from the application of sections 20 to 26(1) EnWG and the LNGV issued on the basis of section 118a EnWG. This covers both the application of a determination pursuant to section 26(1) EnWG and an ordinance pursuant to section 118a EnWG, currently the LNGV.
- 315 It includes exemption from both access and tariff regulation. By way of derogation from the broader wording of section 28a(1) half-sentence 1 EnWG, there is no need for an exemption from the unbundling provisions of sections 8 to 10e EnWG. These provisions are not relevant to LNG system operators, so there is no need for an exemption. Sections 8 to 10e EnWG apply to the relationship between transmission system operators and their vertically integrated energy supply undertakings. Correspondingly, the certification requirement and thus the ex ante check on compliance with sections 8 to 10e EnWG in accordance with sections 4a and 4b EnWG only apply to transmission system operators. Although LNG facilities are classed as gas supply networks and energy supply networks pursuant to section 3 paras 16 and 20 EnWG, they do not come under the definition of transmission systems within the meaning of section 3 para 19 EnWG and are thus not transmission systems within the meaning of section 3 para 31f EnWG. The applicant is therefore not a transmission system operator or addressed by the unbundling provisions of sections 8 to 10e EnWG.

- 316 There is also no need for an exemption from sections 26(2) to 28 EnWG, as these are not relevant in this case either. The Brunsbüttel LNG facility is neither an upstream pipeline network (sections 26 and 27 EnWG) nor a storage facility (section 28 EnWG).
- 317 The ruling chamber took the view, by contrast, that a partial exemption, limited to either access or tariff regulation, did not come into question. As shown in the analysis of the utilisation risk (see section 4.4.1.), this would not sufficiently absorb the risk. The applicant needs an exemption for both tariffs and access in order to ensure a recovery of the investment made that secures the construction and operation of the LNG facility. The exemption from the access provisions was restricted by the conditions on the allocation and management of capacity to the extent necessary to take account of the nature of the exemption provision but without presenting excessive obstacles to investment.
- 318 The exemption also covers interruptible capacity. For clarity's sake, it should be noted that it must be ensured that the marketing of the capacity set aside with the reserve quota (see operative part 6.) is unaffected by the marketing of interruptible capacity. In other respects, the allocation and management of interruptible capacity is subject to the freedom of contract between the applicant and the users, in compliance with the applicable legal requirements, in particular non-discrimination in accordance with section 11(1) sentence 1 EnWG.
- 319 Storage services within the meaning of a gas storage facility pursuant to section 3 para 19c EnWG, however, are not covered by this exemption. In accordance with section 3 para 26 EnWG, "LNG facility" is legally defined as a terminal which is used for the liquefaction of natural gas or the importation, offloading, and regasification of LNG. This includes ancillary services and temporary storage necessary for the regasification process and subsequent delivery to the transmission system. However, it specifically does not include any part of LNG terminals used for storage. The parts of LNG facilities used for storage are legally classed as gas storage facilities. Using the tanks of the LNG facility for storage thus requires a separate approval in accordance with section 28a EnWG. However, this is not intended in this case and has not been applied for (see section 4.1.1.).
- 320 Provided that the tank is only used for temporary storage for redistribution in the large-scale/small-scale area, it is not subject to regulation under the EnWG (see section 4.1.2.). Such services are therefore not covered by the exemption either. Regulation under the EnWG relates solely to the network-based energy supply (section 1(1) EnWG). Accordingly, the definition of an LNG facility in the EnWG only subjects the storage of LNG in the tank of an LNG facility to regulation to the extent that it is used for subsequent injection into a transmission system.
- 321 Moreover, capacity created by future significant increases of capacity is not covered by the exemption (see operative part 2. b)). Section 28a(2) EnWG provides further details on when an increase of capacity is considered "significant". This provision sets out that the significant nature

of the capacity increase is to be determined with regard to the investment volume and the additional capacity volume using an objective approach. Capacity increases that open up new sources of gas supply are always to be regarded as significant. In the view of the ruling chamber, there was no question of an exemption for such significant increases of capacity because these could themselves become the subject of a new exemption in accordance with section 28a(2) EnWG in conjunction with Article 36(6) of Directive 2009/73/EC. Granting an exemption to have "in reserve" is out of the question. Rather, owing to the scope of such a capacity increase, a new examination and assessment of the grounds for exemption and conditions regarding the duration of the exemption and the non-discriminatory access to the additionally created capacity is necessary (see second subparagraph of Article 36(6) of Directive 2009/73/EC).

4.8.3. Time limit (operative part 3.)

- 322 In accordance with section 28a(1) EnWG and the corresponding provision in Directive 2009/73/EC, Article 36(1), an exemption from the network access regime of the EnWG may only be granted for a defined period of time. Operative part 3. thus limits the exemption duration in this exemption decision to a period of 15 years from the start of commercial operation. This period differs from the 20 years initially applied for and granted in the original exemption decision of 15 March 2023. Setting an exemption duration of 15 years complies with the requirements of the European Commission, according to which the ruling chamber has to change the duration of the exemption set out in operative part 3. from 20 years to 15 years in order to ensure compliance with the exemption requirements of Article 36(1) of Directive 2009/73/EC (Article 3 of the Decision of 2 June 2023, C(2023) 3743 final).
- 323 The European Commission considers this period sufficient to take account of the particular investment risk and to create a sufficiently stable investment climate. The European Commission has in particular taken into consideration that, according to the statements of the applicant made in a letter to the European Commission of 22 May 2023, an exemption of 15 years would be sufficient to carry out its plans (for more details, see section 4.4.4.).
- 324 The European Commission takes the view that, when considering the question of whether the exemption period is justified in view of the risks related to the project, contractual arrangements should be taken into account and the duration of the exemption should be equal to or less than the expected period for cost recovery of the new infrastructure (Decision of 2 June 2023, C(2023) 3743 final, para 147). [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

██████████ One possibility is using it for green ammonia, which would not come under this exemption.

- 325 As the applicant wrote to the European Commission on 22 May 2023 that an exemption of 15 years would be sufficient to carry out its project, the Commission assumes that the investment decision is based on the financial expectations for these ██████████ ██████████. The Commission staff working document (New Infrastructure Exemptions of 6 May 2009, SEC(2009)642 final) also states ██████████ ██████████. Rather, the duration of the exemption should be limited to what is required to sufficiently manage the risk of the project and allow the infrastructure investment decision to be taken (European Commission, Decision of 2 June 2023, C(2023) 3743 final, paras 152-153). The European Commission does not consider this conclusion to contradict the decision on the exemption for the "Deutsche Ostsee" LNG facility. In that case, the majority of the capacity for long-term allocation at the Deutsche Ostsee LNG facility had not yet been assigned, whereas in these proceedings all the capacity for long-term allocation has already been assigned (European Commission, Decision of 2 June 2023, C(2023) 3743 final, para 154).
- 326 On this basis, the European Commission considers that the risk of implementing the project would be sufficiently mitigated by an exemption of 15 years (European Commission, Decision of 2 June 2023, C(2023) 3743 final, paras 153, 155). The European Commission has therefore required the ruling chamber to limit the the exemption period determined in operative part 3. of the original exemption of 15 March 2023 to 15 years from the start of commercial operation (European Commission, of the Decision of 2 June 2023, C(2023) 3743 final, Article 1).
- 327 The ruling chamber is bound by the requirement of the European Commission under Article 288(4) TFEU and does not have its own scope of discretion.
- 328 Pursuant to operative part 12., the start of commercial operation is to be notified in writing to the ruling chamber to ensure that the period of the exemption is clear.
- 329 For clarity's sake, it should be noted here that the exemption decision does not constitute an operating licence. Thus the exemption period also has no significance as to how long the facility is actually used or may be used. The exemption merely lays down the regulatory framework for the period of 15 years. Any other provisions on the basis of national (in particular the LGG and the Federal Climate Change Act (KSG)) or European (in particular Fit for 55) regulations for the move away from fossil fuels must be observed by the applicant and taken into account in the contracts concluded with the users. In accordance with the LGG, the approvals for LNG facilities falling under the scope of the law are also to be limited to 31 December 2043 at the latest to ensure conformity with Germany's climate targets. The facilities can be operated beyond this date, however, if they are used for climate-neutral hydrogen and its derivatives.

This ensures that the target of climate neutrality by 2045 set by the KSG can still be achieved. Since in particular synthetically produced methane and green gases such as hydrogen can fall under the term "gas" as defined in the EnWG (section 3 para 19a), insofar as they are injected into a gas supply network, a period of application for the exemption beyond 2043 is also conceivable in this respect in harmony with the LGG and the KSG.

4.8.4. Requirements regarding tariffs (operative part 4.)

330 In accordance with operative part 4., the applicant is required to levy tariffs on users of the exempt infrastructure. This ensures that the requirement of section 28a(1) para 4 EnWG is met in the long term. It is at most a formal condition for the applicant, since the applicant intended to levy tariffs anyway and needs to do so to refinance its investment.

4.8.5. Rules and mechanisms for the allocation and management of capacity (operative parts 5. to 8.)

331 Operative parts 5. to 8. set out the conditions for non-discriminatory access to the Brunsbüttel LNG facility within the meaning of the second and third subparagraphs of Article 36(6) of Directive 2009/73/EC.

332 (1) Discretionary decision

With regard to the examination of the procedure, section 28a(3) sentence 2 EnWG refers to Article 36(3) to (9) of Directive 2009/73/EC. The German version of the second subparagraph of Article 36(6) of Directive 2009/73/EC states that in each case, the regulatory authority must take into account the need to impose conditions regarding the duration of the exemption and non-discriminatory access to the new infrastructure ("*...wird in jedem Einzelfall der Notwendigkeit Rechnung getragen, Bedingungen für die Dauer der Ausnahme und den nichtdiskriminierenden Zugang zu der neuen Infrastruktur aufzuerlegen*"). According to the wording of the German version, this seems to be a non-discretionary decision, with conditions for non-discriminatory access necessary in each case. However, according to the formulation in the English original it is a discretionary decision to be made on a case-by-case basis. The English version reads: "In deciding to grant an exemption consideration shall be given, on a case by case basis, to the need to impose conditions regarding the duration of the exemption and non-discriminatory access". As the English original was the basis of negotiations in the European Parliament, it is presumably to be given precedence over the German translation. In favour of this argument is the fact that the French version also assumes a discretionary decision ("*En décidant d'octroyer une dérogation, il convient de prendre en compte, au cas par cas, la nécessité d'imposer des conditions concernant la durée de la dérogation et l'accès sans*").

discrimination à l'infrastructure"). It may therefore be assumed that it is, in principle, within the discretion of the regulatory authority (for restrictions see point (2) below) whether, in a specific case, there is a need to impose conditions regarding non-discriminatory access to infrastructure and which conditions are suitable, necessary and appropriate in that case (see also Thole, in: Säcker, Berliner Kommentar zum Energierecht, 4th ed 2019, section 28a EnWG, margin no 21).

333 (2) Restriction of discretion

However, the Directive restricts the discretion of the regulatory authority in two points pursuant to the third subparagraph of Article 36(6) of Directive 2009/73/EC. In accordance with this, the regulatory authority must decide upon rules and mechanisms for management and allocation of capacity, including certain congestion mechanisms. These include the requirement to combat the hoarding of capacity, according to which unused capacity is to be offered on the market (UIOLI procedure). Furthermore, a minimum requirement is to be laid down that entitles users of the infrastructure to trade their contracted capacity on the secondary market.

334 (3) Limits of exercise of discretion

In accordance with section 40 VwVfG, the ruling chamber paid attention in the exercise of its discretion to the purpose of section 28a EnWG in conjunction with Article 36 of Directive 2009/73/EC (see in particular section 4.8 (4)) and the legal limits of discretion, in particular the principle of proportionality and the principle of equal treatment. In accordance with the second subparagraph of Article 36(6) of Directive 2009/73/EC, account must, in particular, be taken of the additional capacity to be built and its significance to gas supply, the time horizon of the project and national circumstances.

335 (4) Exercise of discretion

The ruling chamber has exercised the discretion conferred upon it by section 28a(1) and (3) sentence 2 EnWG in conjunction with the second and third subparagraphs of Article 36(6) of Directive 2009/73/EC by not issuing the exemption from the access obligations in section 20 EnWG without restrictions but only to the extent necessary for it to enable the investment.

336 (5) Restrictive nature of the exemption and purpose of the exemption

This approach corresponds to the restrictive nature of the exemption in the approval criterion in section 28a EnWG. Due to the nature of the exemption, the handling of exemptions from the access obligations of sections 20 to section 26(1) EnWG running for many years is to be restrictive in order not to unjustifiably limit the applicable network access regime. The established access regime designed to guarantee non-discriminatory access to network infrastructure plays a key role in the liberalisation of the energy market. In line with the purpose of the exemption provision, therefore, long-running exemptions from the access obligations of sections 20 to section 26(1) EnWG are only justified if and insofar as they are necessary to

achieve this purpose (see Commission Decision C(2021) 3814 final, para 110; Commission staff working document, paras 11 and 17; see also Arndt, in: Britz/Hellermann/Hermes, *Energiewirtschaftsgesetz*, 3rd ed 2015; section 28a, margin no 2).

337 The exemption set out in section 28a EnWG aims to promote major infrastructure projects in the interests of enhancing competition and security of supply in the gas sector. In view of the significant investments that have to be made, investors and lenders of capital need planning certainty about long-term recovery of capital. This planning certainty is generally created by concluding long-term capacity contracts. Otherwise, the financing risk increases and the willingness to invest decreases. The exemption from the access obligations of sections 20 to section 26(1) EnWG is intended to create a stable investment environment for a limited period of time, in particular by enabling long-term contracts, in order for the new infrastructure to enhance competition and security of supply in the gas sector (see Bundesrat printed paper 613/04 (decision) of 24 September 2004, page 25). Accordingly, an exemption from the access obligations of the EnWG is only justified insofar as it is necessary to enable the investment.

338 (6) Meaning of non-discriminatory access to infrastructure

This result is confirmed by the requirement, set out in section 11(1) sentence 1 EnWG, of operators of energy supply networks to operate such networks in a non-discriminatory manner. In accordance with section 3 para 16 EnWG, energy supply networks are defined as gas supply networks. In accordance with section 3 para 20 EnWG, LNG facilities are included as gas supply networks. LNG system operators are thus required to operate LNG facilities in a non-discriminatory manner. The non-discriminatory operation of the infrastructure serves to ensure competition on the upstream and downstream levels of the value chain of production and distribution of gas to customers. Barriers to market entry and exit need to be low for as many competitors as possible to be active on the market. A core element of non-discriminatory operation is therefore the possibility of being able to use the infrastructure without disadvantaging other market participants (non-discriminatory access to infrastructure). An exemption from regulation in accordance with section 28a EnWG in conjunction with Article 36 of Directive 2009/73/EC cannot simply exempt an LNG system operator from the basic obligation set out in section 11(1) EnWG, because this provision is not one of those for which an exemption may be granted. Therefore, section 28a(1) EnWG in conjunction with Article 36(1) of Directive 2009/73/EC also mentions the principle of non-discriminatory operation and makes a prerequisite for the exemption from certain regulatory provisions the fact that the investment enhances competition in gas supply (section 28a(1) para 1 EnWG) and that the exemption must not be detrimental to competition or to the effective functioning of the internal market in natural gas (section 28a(1) para 5 EnWG) or to efficient functioning of the systems concerned and the

security of supply of natural gas in the European Union (section 28a(1) para 5 third and fourth alternatives EnWG, new version). In addition, in accordance with the second subparagraph of Article 36(6) of Directive 2009/73/EC, the regulatory authority must give consideration, on a case-by-case basis, to the need to impose conditions regarding non-discriminatory access to the infrastructure. Accordingly, the European Commission has also highlighted several times in exemption proceedings the importance of provisions for the non-discriminatory allocation of long-term capacity and the secure access to 10% of total annual capacity of the LNG facility from the reserve quota to enhance security of supply and competition (European Commission, Decision of 25 May 2021, C(2021) 3814 final, paras 58-59, and European Commission, Decision of 19 August 2022, C(2022) 6098 final, para 55).

339 (7) Contribution to enhancement of competition and security of supply in the gas sector

In making its discretionary decision, the ruling chamber considered the fact that the Brunsbüttel LNG facility will advance the roll-out of a previously non-existent LNG infrastructure in Germany (opening of the first LNG facility in December 2022). This can open up completely new, overseas sources of gas for Germany and create new transport routes directly to the country. In light of the current geopolitical situation as well, the possibility created by LNG facilities of importing additional volumes of LNG is of great importance in the energy market in order to replace Russian natural gas imports in the short to medium term. In this way, the LNG facility can make a significant contribution to the diversification of the natural gas supply in Germany and related markets in north-west Europe. It will thus enhance competition and security of supply in the gas sector (section 28a(1) para 1 EnWG).

340 (8) Trend towards short-term trading on the LNG market

The ruling chamber further considered the fact that the LNG market is developing dynamically and gaining in importance in Europe. This is particularly relevant given the current geopolitical situation and its effects on the energy markets.

341 The ruling chamber analysed various key figures from the LNG market for the period from 2012 to 2019 in order to assess whether, and in what form, conditions for non-discriminatory access to the LNG facility (second subparagraph of Article 36(6) of Directive 2009/73/EC) were necessary. The sources used were the "GIIGNL Annual Reports" from 2020 and 2021 from the International Group of Liquefied Natural Gas Importers (GIIGNL), an organisation that seeks to promote the development of activities in the field of LNG. Both these reports are publicly accessible (see <https://giignl.org/resources2/>, accessed on 4 November 2022).

342 In the course of this assessment, the ruling chamber noted that essentially the volume of LNG imports is increasing significantly worldwide. In the light of recent events, this trend is likely to continue as pipeline imports to Europe from Russia have to be replaced by other gas sources,

particularly LNG. As the overall amount of LNG imports rose, the type of transactions made has also changed. While 75% of all LNG trades by volume were long-term (ie with a contractual duration of more than four years) in 2012, in 2019 this proportion had fallen to 66% and in 2020 to 60%. The proportion of short-term (with a contractual duration of no more than four years) LNG trades by volume rose accordingly from 25% in 2012 to 40% in 2020 (35% spot volumes plus 5% other short-term volumes).

343 These trends were also confirmed by a report commissioned by the European Commission (Directorate-General for Energy, Internal Energy Market) (see Trinomics/REKK/enquidity: Study on Gas market upgrading and modernisation – Regulatory framework for LNG terminals, study for the European Commission, May 2020). Overall, a persistent trend towards more LNG imports to Europe was observed in the past due to a convergence of pricing between the Asian and European markets and rising import capacities, in particular from the USA. This is likely to continue as a result of the prevailing geopolitical situation, as already stated. Consequently, the existing LNG facilities in Europe are being increasingly utilised (see Trinomics/REKK/enquidity: Study on Gas market upgrading and modernisation, page 18 et seq). Efforts are also being made to expand the LNG infrastructure, especially in north-west Europe and in Germany in particular. LNG imports are gaining importance significantly in light of the energy transition in Germany and in particular because of the current geopolitical situation due to the Ukraine war and the associated need to diversify sources of natural gas supply and replace Russian gas imports. A growing LNG spot market and growing demand for short-term products was observed (see Trinomics/REKK/enquidity: Study on Gas market upgrading and modernisation, pages 22-23, 39).

344 (9) Conditions serve to maintain the approval requirements (enhancement of competition and security of supply in accordance with section 28a(1) para 1 EnWG)

The ruling chamber thus set conditions for non-discriminatory access to the Brunsbüttel LNG facility in operative parts 5. to 8. In light of the background described, these conditions ensure that the LNG facility can make the greatest possible contribution to the enhancement of competition and security of supply (section 28a(1) para 1 EnWG) and thus ultimately ensure that the project can be approved. This situation was also pointed out by the European Union staff, who considered it likely that, where exemption requests enable long-term capacity contracts, effective congestion mechanisms will be necessary to avoid a possible foreclosure effect (see Commission staff working document, para 42).

345 Under the regulatory framework of Article 36 of Directive 2009/73/EC, the ruling chamber must first determine whether the LNG facility enhances competition and security of supply in the gas sector in the relevant market. Only if this is the case are the legal requirements for a possible granting of the exemption in accordance with section 28a(1) para 1 EnWG fulfilled.

346 As far as the legal consequences are concerned, it is then at the discretion of the regulatory authority to decide to what extent the exemption is to be approved and how the rules and mechanisms for the management and allocation of capacity are to be designed to meet the competing goals of the exemption as far as possible. The standard here is not the same as for the legal requirements. The aim is to enable access to the LNG facility in a way that supports competition to the greatest extent possible even during the exemption period. Unlike in the analysis of the enhancement of competition and security of supply pursuant to section 28a(1) para 1 EnWG, the reference point here is not just competition in the German/north-west European market, but also intra-terminal competition, ie competition for access to the LNG facility itself. As part of the discretionary decision to be made with regards to the capacity rules, therefore, the promotion of competition and security of supply resulting from an exemption from regulation that does not go beyond what is necessary needs to be taken into account (see Commission Decision C(2021) 3814 final, paras 91 and 110). Moreover, the investment in the major infrastructure, if it is in principle beneficial for competition and security of supply, should be enabled thanks to the exemption from regulation. This makes it clear that the exemption from regulation cannot go beyond what is necessary to permit the investment. The applicant must therefore show that without the exemption, the investment would not be made because of the regulatory risk associated with it (section 28a(1) para 2 EnWG). As it reaches its discretionary decision, the regulatory authority has various parallel means at its disposal to restrict the exemption to the extent necessary (see also European Commission Decision of 25 May 2021, C(2021) 3814 final, para 110). For one thing, the exemption must be of a limited duration (section 28a(1) EnWG). An exemption may cover all or part of the capacity of the new infrastructure, or only certain parts of the infrastructure (first subparagraph of Article 36(6) and Article 36(8)(c) of Directive 2009/73/EC). In addition, the regulatory authority is to determine rules and mechanisms for the management and allocation of capacity before issuing approval for the exemption. The regulatory authority has discretion to decide which rules are necessary and appropriate to achieve the aims of the exemption in addition to the mandatory right of secondary marketing and the procedure to combat the hoarding of capacity (UIOLI). It must weigh up the interests to ensure that competition and security of supply are promoted to the greatest extent possible without making the investment impossible. It takes into account intra-terminal competition as well as competition in gas supply on the relevant German/north-west European market. The imposition of a reserve quota of at least 10% of the annual throughput capacity in operative part 6. fully meets these requirements, as it guarantees long-term, third-party access for potential customers for the entire duration of the approval, effectively combating foreclosure effects, which are detrimental to competition.

347 At the same time, the amount of at least 10% of annual throughput capacity to be set aside ensures that the investment is not made impossible by the access obligations imposed, as the long-term capacity contracts needed to secure the investment can be concluded.

348 The ruling chamber did not, however, consider it necessary to impose booking limitations for dominant undertakings (see also section 4.8.6.). Based on [REDACTED] that are binding and [REDACTED] by ConocoPhillips, INEOS and RWE Supply & Trading for the Brunsbüttel LNG facility, the facility will lead to a diversification of supply sources and will promote competition, as the bookers mentioned do not have a dominant market position either on the producer level or on the downstream level of the market for natural gas in Germany and north-west Europe (Frontier Economics, economic report, pages 14 and 70 et seq). In addition, it can be assumed that market concentration in the natural gas market will weaken anyway because of energy efficiency measures and the expansion of renewable energies.

349 (10) Proportionality

The conditions in the operative part are also proportionate. They are suitable to ensure a non-discriminatory access that is as effective as possible on a short-term basis, also for potential new customers, during the period of validity of the exemption. To this end, at least 10% of the total capacity of the Brunsbüttel LNG facility must be marketed on a firm basis each year with a determined lead time (year-ahead or non-yearly). This will prevent the LNG facility from being closed off to potential new customers by long-term capacity contracts, creating a potential contractual congestion situation for the duration of the exemption.

350 The conditions in the operative part are necessary to ensure a non-discriminatory access that is as effective as possible, also for potential new customers, during the period of validity of the exemption. They are the result of considering and forecasting the LNG market, taking into account the congestion and exemption possibilities applicable for the grid-based supply and the technical specifications of the LNG facility provided by the applicant, its marketing concept and the legitimate concerns of lenders and potential customers. They do not go beyond what is necessary to ensure effective, non-discriminatory access during the period of validity of the exemption. Less burdensome measures are not evident.

351 The conditions in the operative part are also appropriate. They take into account the benefits of the planned LNG facility for competition and security of supply and mitigate the regulatory risks to the extent that the investment is made possible. The exemption thus permits 90% of the total capacity to be marketed in long-term contracts. Investors and lenders can therefore record calculable, long-term capital recovery, leading to a sufficiently secure, stable investment climate. What is more, the ruling chamber took account of the individual technical and operational specifications of the Brunsbüttel LNG facility in its determination of the rules and mechanisms for the allocation and management of capacity.

4.8.5.1. Long-term capacity allocation (operative part 5.)

352 In operative part 5., the applicant is required to apply a non-discriminatory and transparent procedure for the long-term allocation of capacity. The applicant must include in its capacity contracts at least the rules detailed in operative part 5. a) on the registration requirement, the minimum booking amount, minimum booking duration and the booking year, which ensure non-discriminatory allocation of capacity. Furthermore, the applicant must observe the time scales for the allocation of long-term capacity set out in operative part 5. b). More detailed rules on the long-term allocation of the free capacity remaining after the initial allocation are set out in operative part 5. c).

353 Additional rules that provide further detail on a non-discriminatory procedure are permissible. The principle of non-discrimination thus also applies to capacity allocation under the exemption. This is not contrary to the exemption from the access obligations set out in section 20 EnWG. As explained above (see sections 4.8. and 4.8.5.), the discretionary decision to grant the exemption and impose conditions for non-discriminatory access has to take account of the extent to which an exemption is necessary to enable the investment. There is no indication that the rules set out in operative part 5. on the long-term allocation of capacity make the investment plans impossible, nor does the applicant claim this.

354 a) Booking requirements for long-term bookers (operative part 5. a))

Operative part 5. a) sets out the booking requirements long-term bookers have to meet in the interests of a smooth, non-discriminatory operational allocation procedure.

Specifically:

355 (1) Registration

The provision of operative part 5. a) (1), in accordance with which potential users must be registered with the provider of capacity in order to acquire capacity, is an established practice in the marketing of capacity in the transmission sector. Advance registration meets the understandable need of the applicant to have a known, reliable contracting partner. It is not an impermissible hurdle to free access to the relevant infrastructure. Participants in the expression of interest procedure need not re-register. The applicant has entrepreneurial freedom to decide to what extent it makes further assessments, such as credit assessments, or other checks on potential users, as long as the principle of non-discrimination is maintained and the assessments do not constitute unreasonable barriers to market entry.

356 (2) Minimum booking amount

Operative part 5. a) (2) allows the applicant to set a minimum booking amount of no more than 1bn m³ of the total annual throughput capacity to be allocated in its capacity contracts.

357 In exercising its discretion, the ruling chamber took into consideration the applicant's legitimate interest in limiting the number of initial bookers. This pursues the permissible aim of being able to manage the long, complex process of initiating contracts and determining annual service plans in the subsequent operational phase of the LNG facility with a reasonable amount of effort. Setting a minimum booking amount limits the possible number of customers if the LNG is at full capacity and is thus a suitable means of achieving this aim. However, a high minimum booking amount would limit the number of potential customers too much and could present an impermissible barrier to access for other smaller, potential market participants. Taking into account the planned annual throughput capacity of 10 bn m³/a of natural gas and based on the applicant's plans for the initial allocation of capacity, the ruling chamber considers that a minimum booking amount of no more than 1bn m³/a of natural gas of the total annual throughput capacity to be allocated is appropriate to pursue the applicant's legitimate interest in reducing the complexity to ensure the capabilities of terminal operations but not create impermissibly high barriers to access.

358 Creating an upper limit for the minimum booking amount permits the applicant to set a lower minimum booking amount if the operational and technical conditions of the LNG facility allow. Setting a minimum booking amount does not prevent bookings of more than 1bn m³/a of the total annual throughput capacity to be allocated. This provision thus contributes to a supportive investment environment because it does not limit the amount individual customers can book, per se, unless demand exceeds supply.

359 (3) Minimum booking duration

Operative part 5 a)(3) sets out that the minimum booking duration must be at most ten years. This is based on the following considerations. Major new infrastructure facilities, such as LNG facilities, essentially serve to enhance competition and security of supply in the gas industry by opening up new sources of gas supply and enable additional volumes to be imported in the absence of Russian imports. Constructing major new infrastructure facilities like these requires large investments. The applicant and its lenders need some certainty about their future revenues in order to make the final investment decision to construct the LNG facility. They can achieve this aim if the initial bookers book long-term capacity. As for the minimum booking amount, it should also be taken into account here that a minimum booking duration that was too long could pose an impermissible obstacle to access. It could put off potential customers with more short-term planning, which would be contrary to the aim pursued in the second subparagraph of Article 36(6) of Directive 2009/73/EC and laid down in section 11(1) sentence 1 EnWG of ensuring third-party access to the infrastructure that is as non-discriminatory as possible.

360 The ruling chamber views a minimum booking duration of no more than 10 years as reasonable to meet the applicant's interest in planning certainty while also enabling customers who want shorter booking durations to have access to the LNG facility. This keeps potential barriers to access low. Moreover, the applicant can certainly make contracts with a longer duration if customers are in agreement. The principle of proportionality is thus also taken into account as the provision does not go beyond what is necessary to ensure low barriers to access while also enabling the investment.

361 (4) Booking year

The provision that the booking year is identical with the calendar year (operative part 5. a) (4)) ensures that all parties involved have the same understanding. The clarification is necessary so that all market participants know that the rule is different to, for example, the transmission sector (where the gas year is the booking year). The ruling chamber would also like to point out for the sake of clarity that this provision does not prevent a booking or duration for capacity products beginning in the course of the year.

362 b) Long-term initial allocation of capacity (operative part 5. b))

Operative part 5. b) contains minimum requirements for a non-discriminatory and transparent procedure for the initial allocation of capacity on the basis of long-term contracts.

Specifically:

363 (1) Minimum period of 10 working days for equally ranked expressions of interest in the contracting of capacity

Operative part 5. b) (1) sets out that all expressions of interest in the initial allocation of capacity on the basis of long-term capacity contracts received within a booking window of 10 working days are to be treated equally. This includes potential users who have not previously taken part in pre-contractual negotiations. This provision ensures that all potential users have equal opportunities, as required in the expression of interest procedure set out in the sixth subparagraph of Article 36(3) of Directive 2009/73/EC. A booking period of at least 10 working days is set to prevent individual potential users from exploiting any additional information they may have gained because of the differences in progress of pre-contractual negotiations. All booking requests received in this booking period are regarded as having been received at the same time. The start of the initial allocation shall be made known, drawing attention to the requirement for registration, at least 10 working days in advance. The registered customers are to be provided with all the allocation rules before the start of the booking window. This gives all potential users enough time to prepare and submit a booking request, regardless of whether they have already started pre-contractual negotiations with the applicant.

364 The provision ultimately serves to enhance competition (Article 36(1)(a) and (e) of Directive 2009/73/EC) and ensure non-discriminatory access to the new infrastructure (second subparagraph of Article 36(6) of Directive 2009/73/EC) by giving as many market participants as possible equal opportunity to enter the market. As 90% of the total capacity of the LNG facility can be allocated on the basis of long-term capacity contracts, it is important to uphold the principle of non-discrimination, particularly in the long-term initial allocation. The booking window is also appropriate. There are no concerns of an unjustifiably long delay to the procedure of the initial allocation of capacity.

365 (2) Provisions in the event of excess demand

Operative part 5. b) (2) contains provisions for a non-discriminatory procedure in the event of excess demand. It is based on the following considerations. With a uniform booking period, there is the possibility that demand may exceed supply, so it must be decided how any excess demand is to be resolved. The procedure for resolving excess demand should not impact the aims related to the setting of a uniform booking period. The point of determining a uniform booking period is to give as many potential users as possible equal opportunity to take part in the allocation procedure, regardless of how much information they have at the time. This guarantees non-discriminatory access (second subparagraph of Article 36(6) of Directive 2009/73/EC) to the LNG facility, including with regard to the capacity to be allocated on a long-term basis. Barriers to market entry that are as low as possible ultimately serve to enhance competition (section 28a(1) para 1 EnWG). The provision that, in the event of excess demand, the available capacity will be allocated on a pro-rata basis serves the above-mentioned goals, because as many potential users as possible are taken into consideration in a non-discriminatory and equal manner. Each user must do without the same percentage of the capacity it originally wanted.

366 In derogation of this, the ruling chamber has determined that the allocation may be made taking account of the respective booking duration and the booking volume of the booker. Booking requests for a longer booking duration and a larger booking volume (a larger number of slots) may be given priority in the allocation. This provision is suitable both to enable a positive investment decision to be made – which is also in the interests of security of supply in Germany and the European Union – and to establish a non-discriminatory procedure for the event of excess demand that does not create excessive barriers to market entry. The ruling chamber is still adhering to the application of the pro-rata principle as the starting point for the allocation of long-term capacity. The ruling chamber takes the view that allocation on a pro-rata basis is a particularly important element of the rules and mechanisms for the management and allocation of capacity because it enables lower bids to be considered as well and not ruled out from the outset. This means barriers to access are not too high and competition is enhanced.

367 c) Long-term allocation of the free capacity remaining after the initial allocation (operative part 5. c))

Operative part 5. c) sets out the minimum rules for the procedure for the allocation of capacity remaining after the initial allocation on the basis of long-term contracts so as to ensure transparency and non-discrimination. In its considerations, the ruling chamber has kept the rules to the minimum needed to ensure transparent and non-discriminatory access to the capacity to be allocated on a long-term basis. Further requirements applying to the allocation mechanism were not absolutely necessary, although the minimum rules also do not rule them out.

368 (1) Determination of the maximum price premium over the initial allocation

The ruling chamber takes the view that price premiums in the course of further capacity allocation following the initial allocation, as planned by the applicant, are permissible. Operative part 5. c) (1) caps any possible premium on the long-term allocation of the free capacity remaining after the initial allocation at a maximum of 10% of the tariff applied in the initial allocation. This is based on the following considerations.

369 The ruling chamber takes the view that a price premium of 10% on the contract price applicable at the time for initially allocated capacity is appropriate. It is suitable to improve the marketing opportunities at the time of the initial allocation, increasing the likelihood that the investment will actually be realised. A positive view should be taken of this, since the opening up of new sources of gas can promote both competition and security of supply (section 28a(1) para 1 EnWG). In particular, in light of the current situation, LNG facilities can make a significant contribution towards safeguarding security of supply by enabling additional volumes to be imported to replace Russian gas imports. On the other hand, the maximum price premium is small enough not to inappropriately disadvantage potential users of the remaining capacity (second subparagraph of Article 36(6) of Directive 2009/73/EC). It may be assumed not to be an inappropriate obstacle to access. The ruling chamber's view is based on the Commission Decision of 25 May 2021 (C(2021) 3814 final, para 99), which caps price premiums after the first auction round to 10% of the base tariff. The cap prevents the exemption from having a detrimental effect on competition.

370 (2) No provisions on the allocation mechanism

The aim of the ruling chamber in setting rules and mechanisms for the management and allocation of capacity in operative part 5. c) (2) is to ensure non-discriminatory initial access and permanently secure, useful and non-discriminatory third-party access (second subparagraph of Article 36(6) of Directive 2009/73/EC). The ruling chamber considers the provisions on the initial allocation and the rules on the congestion mechanism to be sufficient to achieve these goals without the need for further provisions regarding the long-term allocation of the free capacity

remaining after the initial allocation. The applicant is thus free to choose the allocation mechanism to be applied for such capacity, provided that the general requirements of non-discrimination and transparency are fulfilled. The ruling chamber takes the view that this applies to, for example, a first-come, first-served (FCFS) procedure just as much as to an allocation auction.

- 371 The bookings made by the initial bookers in the initial allocation are unaffected by the carrying out of another allocation procedure for the capacity still available after the initial allocation. If excess demand only occurs during another procedure for the long-term allocation of capacity remaining after the initial allocation, a non-discriminatory allocation has to be carried out on a pro-rata basis only among the participants of the further allocation procedure.

4.8.5.2. Reserve quota (operative part 6.)

- 372 Operative part 6. requires the applicant to set aside a reserve quota equal to at least 10% of the annual throughput capacity for a short-term allocation of capacity. That means that with a planned annual throughput capacity of 10bn m³/a, 1bn m³/a needs to be set aside each year for short-term yearly or non-yearly marketing. This is a minimum requirement, so the applicant is free to allocate more capacity on a short-term basis. The ruling chamber has deliberately refrained from imposing a requirement for the long-term marketing of capacity so as not to prevent any additional marketing on a short-term basis.
- 373 The ruling chamber has exercised its discretion to issue this provision. The provision guarantees permanently secure access to the LNG facility on a short-term basis for potential new market participants. It thus prevents a foreclosure of the new LNG infrastructure caused by long-term capacity contracts for the long period of validity of an exemption. At the same time, the level of the quota has been chosen so as not to present an insurmountable obstacle to investment and to appropriately take into account the interests of the applicant and its lenders in being able to plan the recovery of capital based on long-term capacity contracts. It also had to be imposed for reasons of equal treatment because a corresponding provision was included in comparable exemption proceedings (see BK7, decision of 12 January 2023 (BK7-22-086-final); decision of 19 September 2022, BK7-20-107-final). It was therefore necessary to create comparable usage conditions for LNG facilities exempted from regulation.

At least the following requirements shall apply to the short-term allocation of the capacity set aside as the reserve quota (operative part 6. a) to o)).

- 374 (1) Purpose of the reserve quota

The reserve quota determined by the ruling chamber of at least 10% of the total capacity and the provisions for the allocation of short-term capacity set aside serve to guarantee non-

discriminatory initial access and permanently effective and non-discriminatory third-party access in accordance with the provisions of section 11(1) sentence 1 EnWG and section 28a EnWG in conjunction with Article 36 of Directive 2009/73/EC.

375 (2) Conditions for non-discriminatory access (sixth subparagraph of Article 36(3) of Directive 2009/73/EC)

First of all, section 11(1) sentence 1 EnWG requires the applicant to operate the LNG facility in a non-discriminatory manner. In accordance with section 28a(1) and (3) EnWG in conjunction with Article 36 of Directive 2009/73/EC, the investment in new infrastructure is to enhance competition and security of supply in the gas sector (section 28a(1) para 1 EnWG). Furthermore, the exemption may not be detrimental to competition, to the internal market in natural gas, to the regulated systems concerned or to the security of natural gas supply (section 28a(1) para 5 EnWG). The rules and mechanisms for management and allocation of capacity are essential to achieve these aims. In line with the purpose of the exemption provision of section 28a EnWG in conjunction with Article 36 of Directive 2009/73/EC, an exemption may only be granted insofar as it is necessary to enable the investment. Accordingly, the third subparagraph of Article 36(6) of the Directive sets out that the regulatory authority must determine these rules in advance as an intermediate step before the final award. The Directive envisages that the rules on congestion management must at least include the entitlement of users to trade on the secondary market and a procedure to offer unused capacity on the market (UIOLI procedure). In accordance with the second subparagraph of Article 36(6) of Directive 2009/73/EC, the regulatory authority may impose further conditions to ensure non-discriminatory access to the new infrastructure.

376 (3) Reserve quota as a suitable means of ensuring permanent access

The reserve quota of 10% of the total capacity is suitable to ensure permanent third-party access to the LNG facility. Under the allocation rules issued by the ruling chamber, 10% of the total capacity is marketed on a short-term basis (year-ahead or non-yearly). Given the trend on the LNG spot market towards increased demand for short-term products in Europe, as observed before the start of the current gas supply crisis, (see Trinomics/REKK/enquidity: Study on Gas market upgrading and modernisation – Regulatory framework for LNG terminals, study for the European Commission, May 2020, pages 22 et seq, 39 and 95), this kind of short-term product could be attractive for potential traders with this focus.

377 In addition, the reserve quota contributes to diversification. It is necessary to reduce one-sided, new dependence on just a few LNG importers or import countries. Otherwise, the infrastructure would remain reserved for just a few LNG importers for the next 15 years on the basis of long-term capacity contracts.

378 (4) Necessity of the reserve quota to ensure permanent access

The reserve quota set out in operative part 6. is, in the view of the ruling chamber, also necessary to restrict the exemption from the applicable network access regime to what is necessary to enable the investment and, in the interests of enhancing competition and security of supply (section 28a(1) para 1 EnWG), to ensure permanent, effective and non-discriminatory third-party access over the many years of the approval period. Less burdensome but equally effective measures are not evident.

379 (5) Secondary marketing and UIOLI procedure are not equally effective means of ensuring permanent access

In the view of the ruling chamber, the two congestion mechanisms set out in the third subparagraph of Article 36(6) of Directive 2009/73/EC – secondary marketing and the UIOLI procedure – are not sufficient in and of themselves to give new market participants that did not book capacity in the initial allocation effective access to the LNG facility.

380 Neither the UIOLI procedure nor the right to secondary marketing offer secure short-term capacity, because the possible offer is in the control of the primary capacity holder. Moreover, the UIOLI procedure may only generate available capacity with a very short lead time (for a further critical view of this issue, see Trinomics/REKK/enquidity: Study on Gas market upgrading and modernisation – Regulatory framework for LNG terminals, study for the European Commission, May 2020, page 95).

381 To determine appropriate lead times in short-term marketing and in a UIOLI procedure, the ruling chamber carried out assessments of lead times of transactions on the LNG spot market and on the time required for the relevant steps in the LNG transport cycle. In the LNG transport analysis, the focus was on transports between the export and import ports, which take a lot of time. The calculation of the transport times is based on the data and assumptions in "The LNG Shipping Forecast: cost rebounding, outlook uncertain" from the University of Oxford's Institute for Energy Studies (<https://www.oxfordenergy.org/publications/lng-shipping-forecast-costs-rebounding-outlook-uncertain/>, March 2018) and on the shipping routes given on the website <https://sea-distances.org>. The assumptions on lead times for transactions on the LNG spot market are based on various press reports (including a Reuters report of 26 February 2019 on Bontang LNG's offer of two spot cargoes for delivery in April and May 2019; Reuters report of 8 May 2019 on Angola LNG's offer of a spot cargo in the second half of May 2019, Reuters report of 24 May 2019 on offers of the Tangguh LNG project in Indonesia for three spot cargoes with delivery in August and September 2019, Brunei LNG's offer for a spot cargo with delivery in late June 2019 and the offer from Norway's DEA Norge for a spot cargo with delivery in July 2019). The ruling chamber's assessments showed that spot transactions are usually traded with at least a month, and often several months, of lead time. The transactions also often offer several spot deliveries at different times in the upcoming months. Lead times for the charter of the LNG

tanker have to be factored in, depending on the transport arrangements agreed. LNG trading makes a distinction between two types of transport contract (GIIGNL annual report 2019). One type arranges for the buyer to take the LNG from the liquefaction plant and be responsible for the transport to the receiving plant itself (Free on Board, FOB). The other type arranges for the seller to deliver the LNG to the agreed port of arrival (Delivered Ex Ship, DES). In addition, travel times ranging from 11 days (modern LNG tankers with dual-fuel, diesel-electric drive transporting from Sabine Pass in the US) to more than 30 days (older drive technology and transport from Australia) have to be taken into account as well, depending on the location of the liquefaction plant. It will not generally be possible to complete these spot trades within a UIOLI deadline of 30 days or fewer.

- 382 Moreover, the UIOLI procedure, whether it has a lead time of, for example, 20 or even more days before the date of the unloading slot, only generates capacity that is available at very short notice and is, at most, suited to redirect a tanker that is already planned or even already on its way to Europe to another destination port. It is not suitable for a complete spot delivery.
- 383 The ruling chamber therefore views the reserve quota as a mechanism that is additionally necessary overall to enable third-party access to the LNG facility, which will promote competition, as only this kind of short-term product allows customers to book capacity several months to a year ahead and thus offers the lead times needed to handle one or more spot deliveries. Moreover, this kind of offer is available and plannable every year with a lead time before the start of the booking year.
- 384 It should be noted that the short-term product generated by the reserve quota, which has considerably longer lead times than the UIOLI procedure, can reach a much larger group of potential customers. Such a product is also available in a plannable, secure way, regardless of which potential customer the primary capacity holder decides on. Therefore, only this kind of short-term product offers a permanent, secure and plannable third-party access.
- 385 (6) No foreclosure of the infrastructure in view of the duration of the exemption

In accordance with the second subparagraph of Article 36(6) of Directive 2009/73/EC, consideration must be given to the duration of the exemption in determining conditions for non-discriminatory access. The exemption was granted for a period of 15 years from the start of commercial operation. The LNG market remains a highly dynamic, rapidly and strongly developing market whose development is difficult to predict, especially in light of the current geopolitical situation and with regard to the energy transition and climate change policy. Before the Ukraine war, there was a clear upwards trend of LNG imports, increasing utilisation of LNG facilities in Europe and increasing importance of LNG imports in the continent (see Trinomics/REKK/enquidity: Study on Gas market upgrading and modernisation – Regulatory framework for LNG terminals, study for the European Commission, May 2020, page 19 et seq).

This trend is likely to be reinforced considerably in light of the current efforts to replace Russian gas imports in Germany and the European Union (see IEA, Gas Market Report, Q2-2022, April 2022, page 6 et seq, and Barbara König, KfW IPEX-Bank, Flash Analysis, Credit Analysis, Maritime Industries – LNG tankers, How the Russia-Ukraine war is changing the outlook for LNG tanker shipping, 29 April 2022). Before the Ukraine war, at least, there was also a growing LNG spot market and growing demand for short-term products (see Trinomics/REKK/enquidity: Study on Gas market upgrading and modernisation, pages 22 et seq, 39 and 95).

- 386 The Brunsbüttel LNG facility offers the possibility of opening up new, direct sources of gas for supply in Germany, in addition to the pipeline-supplied gas from countries like Norway. Additional volumes of LNG are urgently needed in order to become independent of Russian gas imports as quickly as possible. In Germany itself, there was until recently no LNG facility directly connected to a German transmission system. In light of the current geopolitical situation, Germany is pushing ahead with the creation of its own LNG infrastructure in the form of various LNG facilities that have either already been taken into operation or are planned, with the aim of replacing Russian gas deliveries. If this new infrastructure were to be restricted to a small group of initial bookers for a period of 15 years, its contribution to enhancing competition and security of supply in the gas sector would be reduced. The European Commission has also specifically mentioned the significance of the reserve quota to reduce dependence on a few market participants and open up access to a large number of market participants in view of the long duration of the exemption (see European Commission Decision of 25 May 2021, C(2021) 3814 final, paras 58-59). If just the two congestion mechanisms, secondary marketing and the UIOLI procedure, were introduced, there would only be short-term booking opportunities that could not be planned. A congestion management procedure that only used the two instruments of secondary marketing and a UIOLI procedure, therefore, would probably be largely ineffective in view of the currently identifiable time constraints on the LNG spot market described above.
- 387 For the reasons given, the ruling chamber considers it necessary to introduce an additional congestion mechanism to ensure the above-mentioned requirements of section 28a EnWG in conjunction with Article 36 of Directive 2009/73/EC are met and taking into consideration the restrictive character of the exemption of section 28a EnWG. Having weighed up the relevant points of view as discussed, the ruling chamber considers a secure, permanent, non-discriminatory third-party access over the whole duration of the exemption to be necessary for at least part of the capacity, in order to prevent the foreclosure of the Brunsbüttel LNG facility over the many years of the exemption, which would be detrimental to competition. The ruling chamber takes the view that such a congestion mechanism has to allow third-party market participants to securely obtain a booking of year-ahead capacity.
- 388 (7) Comparable rules for operators and users of import pipelines and other LNG facilities

The reserve quota imposed by the ruling chamber does not put the applicant or its customer in a worse position than operators or network users of pipelines such as those that permit the import of gas from Norway or Russia. In the pipeline sector, the long-term marketing of capacity is possible for 15 years (in accordance with Article 11(3) of the network code on capacity allocation mechanisms, Regulation (EU) 2017/459), which corresponds to the possibility of concluding long-term agreements for 15 years under this exemption. Moreover, 20% of the technical capacity at each interconnection point must be set aside and offered in accordance with Article 8(7) CAM NC (Regulation (EU) 2017/459) (see operative part 4. of the Determination of 14 August 2015, BK7-15-001 – KARLA Gas 1.1). In accordance with this provision, at least 10% is offered on a long-term basis no earlier than in the annual auction held during the fifth gas year preceding the start of the relevant gas year (see Article 8(7)(a) of Regulation (EU) 2017/459). The other 10% is offered on an annual basis no earlier than the quarterly auction held preceding the start of the relevant gas year (see Article 8(7)(b) of Regulation (EU) 2017/459). Therefore, in the pipeline sector as well, 10% of capacity must be permanently reserved for short-term (non-yearly) allocation (see Article 8(7)(b) of Regulation (EU) 2017/459). In accordance with the Determination mentioned above, this also applies to incremental capacity.

389 Not least, the reserve quota of 10% also had to be imposed for reasons of equal treatment because a corresponding provision is included in other exemption decisions. The principle of equal treatment therefore makes it necessary to create comparable usage conditions for LNG facilities exempted from regulation.

390 (8) Level of the reserve quota

The level of the reserve quota of at least 10% of annual throughput capacity is thus based on the general provisions for the allocation of short-term capacity for the coming booking year in the pipeline sector (see Article 8(7) and (8) CAM NC, Regulation (EU) 2017/459). In the past, it could be seen that there were also LNG facilities in the relevant north-west European market that only marketed 90% of their capacity on a long-term basis (eg 90% at Zeebrugge and Fos Cavaou and 92% at Gate terminal, see Trinomics/REKK/enquidity: Study on Gas market upgrading and modernisation – Regulatory framework for LNG terminals, study for the European Commission, May 2020, pages 40-41). Moreover, a significantly higher proportion of short-term marketing or even exclusive marketing on a short-term basis was seen in the past at the LNG facilities in Spain and Italy (see Trinomics/REKK/enquidity: Study on Gas market upgrading and modernisation – Regulatory framework for LNG terminals, study for the European Commission, May 2020, pages 40-41). The level of capacity to be allocated on a short-term basis, 10% of the total capacity, seems sufficient and suitable in order to make a positive contribution to the

enhancement of competition at the LNG facility and at the same time not to present an excessive obstacle to investment.

391 (9) Reserve quota as the result of weighing up competing interests

The intention of the design of the reserve quota set out in the provisions of operative part 6. a) to o) and the provisions on the short-term marketing of the capacity set aside is to meet, as far as possible, the justified interests of the applicant in the necessary investment conditions and technical and operational feasibility as well as the public interest in establishing LNG infrastructure in Germany as swiftly as possible to safeguard security of supply while at the same time ensuring permanent third-party access to the LNG facility that is as effective as possible. These provisions are suitable, necessary and appropriate to achieve these aims.

392 Furthermore, the applicant is free to offer more, not yet allocated capacity within this framework if it so desires. The wording "at least" in operative part 6. makes clear that the applicant may make additional arrangements provided that the provisions set out in the exemption decision are not affected.

Specifically:

393 a) Registration (operative part 6. a))

In accordance with operative part 6. a), potential customers must first register with the applicant before participating in the allocation of short-term capacity. Owing to the understandable need for security on the part of the applicant and to enable business and operational processes to proceed smoothly, the registration requirement applies to every acquirer of capacity, whether in the first initial allocation or when allocating free capacity remaining after the initial allocation. As the short-term marketing takes place annually and must be announced publicly four weeks in advance (see operative part 6. f)), the registration requirement does not pose an inappropriate barrier to access.

394 b) Short-term allocation of capacity in the form of slots (operative part 6. b))

In operative part 6. b), the ruling chamber has determined that the capacity to be allocated on a short-term basis must be marketed in the form of slots. This seems to be operationally practical for the applicant as well as being a suitable product for potential LNG facility users.

The ruling chamber assumes that there will not be disproportionate effort involved in the operational implementation of the short-term marketing of capacity in the form of slots. The slots to be allocated on a short-term basis are intended to give more potential users the opportunity to receive non-yearly access to the terminal at regular intervals. It has therefore been determined that the slots must be spread as evenly as possible over the booking year.

395 c) Minimum unloading amount of 150,000 m³ per slot (operative part 6. c))

In determining the rules and mechanisms for the management and allocation of capacity, the ruling chamber considers it necessary to ensure a permanently secure, useful and non-discriminatory third-party access (see section 4.8.5.). To ensure that this provision does not come to nothing and that an economically reasonable and useful product can be generated, the ruling chamber considers that a fixed minimum amount of LNG that has to be unloaded per slot needs to be determined as well.

396 Based on the ruling chamber's analysis of the forecast tanker sizes, low market entry barriers with regard to the attractiveness of possible short-term products rather argue in favour of slots of 170,000 m³ or more of LNG, because if a slot for short-term marketing enables in the best case scenario an average LNG tanker with a capacity of about 170,000 m³ of LNG to be unloaded, the greatest possible number of potential customers will receive access to the short-term products, taking into account the duration of the exemption and the trend towards larger tankers. It will thus be more likely that there will be demand for such a product.

397 The ruling chamber considers it important to recall, however, that this future forecast necessarily brings with it some uncertainties. To take adequate account of these, permit greater flexibility with regard to possible short-term products and also take into consideration any technical restrictions, the ruling chamber has concluded that a minimum unloading amount of 150,000 m³ of LNG is sufficient at the present time to ensure a permanently secure, useful and non-discriminatory third-party access. However, a larger unloading amount of around 170,000 m³ of LNG should be aimed for as far as technically possible, in view of the current forecast.

398 The determined amount of at least 150,000 m³ of LNG also takes account of the individual technical and operational conditions of the Brunsbüttel LNG facility. The applicant itself assumes a typical average-size LNG tanker of 150,000 m³ in its example calculations. As the amount is a minimum requirement, the applicant is not prevented from offering slots with an unloading amount greater than 150,000 m³.

399 d) Minimum number of slots (operative part 6. d))

The number of slots to be offered for short-term capacity allocation each year has been set at at least eight.

400 The provision setting a minimum number of slots ensures that the slots are spread as evenly as possible throughout the year so that there are also slots in attractive months in which the demand for natural gas is stronger. The provision therefore helps to secure effective third-party access and the promotion of competition.

401 Short-term capacity to be allocated of 10% of the total annual throughput capacity (1bn m³ of natural gas a year) and a minimum unloading amount of 150,000 m³ of LNG per slot would, mathematically, result in about 11 slots each year. The ruling chamber has decided to set the

minimum number of slots at eight, ensuring a very high level of flexibility in product design in order to take account of the requirements of the market. The applicant must ensure for each year that the sum of the minimum unloading amount of all slots offered always equals at least 10% of the maximum annual throughput capacity.

402 The applicant is therefore free to offer the market fewer slots in one year than in another year, for example, but with larger minimum unloading amounts. Equally, it can offer more slots provided it does not fall below the minimum unloading amount of 150,000 m³ of LNG per slot. Moreover, the minimum unloading amounts offered in the slots in a year do not have to be identical. The essential point is that no fewer than the minimum number of eight slots per year are offered.

403 e) Timing of the allocation (operative part 6. e))

Operative part 6. e) sets out the date by which the slots have to be allocated. This timing has to be compatible with the applicant's operational procedures. The ruling chamber has therefore determined that the slots be allocated annually on a recurring date to be published. It is up to the applicant to set a specific date and thus ensure compatibility with its operational procedures. The date must be communicated transparently to the market with sufficient notice in the interests of a transparent and non-discriminatory third-party access.

404 f) Allocation in auction (operative part 6. f))

In the interests of effective third-party access, the allocation procedure for the slots to be allocated on a short-term basis must be structured in a transparent and non-discriminatory manner. The ruling chamber considers both these criteria to be fulfilled by the ascending clock auction. All auction participants have the same information at the same time about the available slot product and can take part in the auction on an equal basis. Alternatively, the applicant is free to decide on another non-discriminatory and transparent, multi-stage auction procedure. It has been determined that the start of the auction must be announced publicly four weeks in advance so that all relevant market participants have sufficient opportunity to prepare for their participation in the auction and to undertake any necessary registration processes for terminal users with the applicant. Participation is limited to registered users without any products marketed on a long-term basis.

405 Further, it is made clear that initially an annual allocation must be carried out. If capacity is not allocated in the course of the annual allocation procedure, for any slots not allocated in the auctions short-term allocation will take place using a further procedure for the allocation of short-term capacity set aside and not allocated in the course of the annual auction (see rationale on operative part 6. k)).

406 g) Transparency requirements (operative part 6. g))

The transparency requirements determined by the ruling chamber are necessary to ensure that potential customers have effective third-party access.

- 407 In principle the applicant is free to structure the slot product description in a way it considers sensible with regards to marketing that is as successful as possible and effectively operating the LNG facility. However, the ruling chamber considers the provisions of operative part 6. g) (1) to (7) essential to ensure that potential users have clarity about the product they can acquire and that the slots have a minimum level of comparability. The slot product description must be published no later than two weeks before the auction starts to give all market participants enough time to prepare for the auction.
- 408 The compulsory information includes the date for the unloading slot (operative part 6. g) (1)) and the arrival window (operative part 6. g) (2)). The amount of LNG in m³ that can be unloaded securely must also be specified (operative part 6. g) (3)). This provision does not apply to any amounts that may be additionally unloaded on an interruptible basis.
- 409 The provision for the secured regasification capacity (operative part 6. g) (4)) of at least 196 m³ LNG/h has been calculated on the basis that for a tenth of the total annual throughput capacity, there must also be a tenth of the maximum regasification capacity available. This permits even customers booking on a short-term basis to regasify the LNG brought ashore evenly over the year (annual amount). Setting a minimum figure allows the applicant to make larger regasification capacities available flexibly as well.
- 410 The regasification period of the offered slot (operative part 6. g)(5)) is calculated from the quotient of the amount of LNG pursuant to operative part 6. g)(3) and the regasification capacity pursuant to operative part 6. g)(4). For example, a slot permitting the unloading of 150,000 m³ of LNG and a regasification capacity of 196 m³ LNG/h would result in a regasification period of about 765 hours.
- 411 The mandatory transparency information also includes the starting price for the slot (operative part 6. g)(6)), taking into account the provisions of operative part 6. h), and the individual price steps (operative part 6. g)(7)) taking into account the provisions of operative part 6. i). These transparency requirements are necessary to ensure that potential customers have effective third-party access.
- 412 h) Starting price (operative part 6. h))

The starting price for a slot may be determined at any level by the applicant provided that it does not exceed a maximum value. The formula for calculating the maximum starting price is:

$$\text{max. start price}_{K-Slo} = \text{base tariff} \times \frac{\dot{V}_{Slot}}{\dot{V}_{\text{annual throughput capacity}}} \times 1.1$$

With the variables:

base tariff $\left[\frac{\text{€}}{\text{a}}\right]$:	The price that initial bookers have to pay for a certain annual throughput capacity of LNG.
$\dot{V}_{\text{Slot}} \left[\frac{\text{m}^3 \text{LNG}}{\text{Slot}}\right]$:	The volume of LNG that can be unloaded in a slot.
$\dot{V}_{\text{annual throughput capacity}} \left[\frac{\text{m}^3 \text{LNG}}{\text{a}}\right]$:	The volume of LNG upon which the base tariff for initial bookers is based.

413 The formula shows that in the calculation of the starting price for a slot based on the base tariff, only the ratio of the volume of the respective slot to the amount of LNG underlying the base tariff is relevant. As for the premium in operative part 5. c) (1), the applicant may also apply a premium of no more than 10% here. It was not necessary to determine a lower limit for the starting price. The lower the starting price, the more attractive participating in the auction will be for potential users. In making arrangements for the short-term allocation of capacity, the ruling chamber aims to give multiple, in particular new, market participants the opportunity to acquire capacity for the year ahead in the interests of promoting competition. A starting price that is low (as low as possible) is thus to be welcomed.

414 i) Rules for excess demand (operative part 6. i))

Operative part 6. i) sets out that in the event of excess demand in the marketing of a slot, a further auction round must be conducted. Participation is only open to those users that have participated in the auction round immediately previous to this one. Users who have not participated in the auction or who exited the auction for the slot in an earlier round do not have the right to participate in the auction (again). The provision in operative part 6. i) also makes clear that it is up to the applicant to determine the level of the price step. It is the applicant that has the necessary information to calculate a suitable amount. The requirement set out in operative part 6. i) to notify the level of the price step is necessary for the ruling chamber to carry out its supervisory responsibilities. A price step that is too large could negatively impact the progress of the auction. If the ruling chamber has information that the price step chosen could negatively impact the progress of the auction, it can where necessary require the level of the price step to be changed. So that this can be done before the start of the auction, the ruling chamber must be informed by the applicant of the level of the price step determined by the applicant in good time before the slot auctions are carried out and the applicants are to be informed of it ahead of the auction.

415 j) Undersell in an ascending clock auction (operative part 6. j))

Operative part 6. j) sets out the procedure in the event of an undersell in the ascending clock auction for the allocation of short-term capacity.

The event known as an undersell, which is when all participants exit the auction from one round to the next, may also occur. The procedure then ideally used to allocate capacity in such a case depends on the specific circumstances, such as the number of auction participants. Until recently, there were no LNG facilities in Germany. The ruling chamber does not therefore have any LNG-specific experience with slots for short-term marketing and the undersell issue at hand. The ruling chamber ultimately assumes that, owing to its proximity to users, the applicant will be able to determine a suitable, non-discriminatory allocation procedure in the event of an undersell among the most recent auction participants in the interest of maximising the marketing of slots. Apart from non-discrimination, therefore, the only requirement is for the slot to be allocated among the participants of the last auction round before the undersell. This is a logical provision because participants that had already exited the auction previously have signalled that they are not interested in acquiring the slot at the current price (slot price including applied premium). It is not clear why an undersell should lead to a situation in which such participants would be allowed to review their decision. It is therefore not necessary to apply a further provision to guarantee effective third-party access.

- 416 k) Phased allocation procedure and non-yearly, short-term allocation of capacity set aside (operative part 6. k))

The allocation of capacity set aside is intended to guarantee that new market participants can access the LNG facility at short notice. The ruling chamber has therefore determined that the auction will initially be restricted to those participants that do not yet have long-term capacity for the coming booking year.

- 417 If not all the slots are allocated in the first auction round, another auction round must be held for the unallocated slots. All registered users, including those that already have long-term capacity, may participate in the second round in order to maximise the marketing opportunities. Short-term marketing is primarily intended to secure access for potential new customers for the duration of an exemption in order to mitigate the foreclosure effects caused by the total capacity largely being allocated on a long-term basis. The best way of achieving this aim is only to allow the long-term bookers to participate when new customers have not expressed (full) demand in the first round.

- 418 Should slots still not be allocated after this second round auction, the slots must be offered by the applicant on a non-yearly basis to all registered users in accordance with the FCFS principle. In the view of the ruling chamber, the non-yearly short-term allocation of capacity set aside helps to enhance competition and security of supply by providing additional non-yearly capacity while also taking the specific technical and operational conditions of the Brunsbüttel LNG facility into account.

- 419 l) Deviations in the procedure for non-yearly allocation in the event of technical restrictions (operative part 6. l))

Operative part 6. l) permits deviations from the provisions on the slot product (operative part 6. c) for the non-yearly short-term allocation of unmarketed capacity set aside in order to meet the comprehensible, specific technical conditions of the Brunsbüttel LNG facility. This option may only be used in the event of technical or operational restrictions.

- 420 (1) For technical reasons, it may not be possible in individual cases for the applicant to provide non-yearly slots with a fixed minimum unloading amount of 150,000 m³ of LNG per slot. To take account of these technical restrictions and the applicant's contractual commitments, operative part 6. l) provides for the fixed minimum unloading amount of LNG to be reduced in individual cases for the non-yearly allocation of slots set aside. Nevertheless, the applicant must keep any required reduction in the fixed minimum unloading amount as small as possible.

- 421 (2) Operative part 6 l) sets out that, by way of derogation to the requirement in operative part 6 g) (4), the regasification capacity for a non-yearly slot must be at least 300 m³ LNG/h. In the provision for the secured non-yearly regasification capacity of at least 300 m³ LNG/h, the ruling chamber is following the proposal of the applicant. The ruling chamber assumes that the applicant has taken adequate account of the technical and operational conditions of the LNG facility. This is a minimum amount, and the applicant is free to offer a higher regasification capacity for non-yearly slots as long as it does so in a transparent and non-discriminatory manner.

- 422 m) Further fees and costs (operative part 6. m))

The ruling chamber acknowledges that additional costs are associated with the more fragmented short-term allocation of capacity than with the initial allocation. However, it regards it as impermissible to use this as a justification for imposing further fees or costs (such as a handling fee). The permissible price premium set out in operative part 6. h) fully covers the additional costs, in the view of the ruling chamber.

- 423 (n) Borrowing and lending (operative part 6. n))

Operative part 6. n) regulates the non-discriminatory application of the borrowing and lending principle for the capacity to be allocated on a short-term basis. The principle of borrowing and lending described by the applicant means that the LNG taken into and out of storage in the operational LNG facility does not have to be identified. Users that have not yet injected any of their own LNG into storage can already access the LNG stored by other users in order to be able to use the regasification capacity (annual amount) they have booked for the whole year. The ruling chamber considers this principle essential, especially in the event that the LNG facility is heavily utilised, to guarantee its operations with marketing in the form of annual throughput

capacities. At the same time, the borrowing and lending principle offers a degree of flexibility to users by making it possible to use a higher or lower regasification capacity under certain circumstances. This enables users to control the time at which their LNG is taken out of storage and regasified and adjust it to current market developments.

424 Under the rules determined, the borrowing and lending principle is envisaged for bookers of short-term capacity as well. The design of the borrowing and lending principle takes sufficient account of the associated risks for the applicant and long-term bookers. There could be a default risk for the applicant or long-term bookers because users in the short-term capacity auction can acquire a slot with a lead time of up to 14 months. If such users, who may be new, participate fully in the borrowing and lending principle, they would be allowed to take LNG out of storage and regasify it before their first LNG tanker has arrived and would only have to replace these amounts with their own delivery later. In the event that one of these users were to become insolvent in the intervening period or was unable to inject LNG into storage for other reasons, there would be a default risk. The applicant or the long-term bookers might have to replace the missing amounts, depending on the contractual arrangements for default risk. To remove this risk, users with capacity acquired on a short-term basis are allowed to participate in the borrowing and lending principle beginning no later than the time when their amount starts to be injected.

425 So as not to disproportionately restrict the applicant's freedom to make arrangements, the wording "no later than" permits the applicant to allow holders of capacity acquired on a short-term basis to participate in the borrowing and lending principle before they have started injecting LNG into storage.

426 o) Reports on non-yearly short-term marketing (operative part 6. o))

Operative part 6. o) sets out that the applicant must report in each case to the ruling chamber by 31 March of the following year on the amount of capacity not marketed in the procedure for the non-yearly short-term allocation of capacity set aside and on the reasons for this. The report enables the provisions on the non-yearly short-term allocation to be monitored (operative part 6. k) and l)). These provisions are based on a forecast taking into account trends in short-term marketing in the LNG market. Given the nature of the forecast, the ruling chamber has decided for reasons of proportionality to keep the provisions on the non-yearly short-term marketing to a minimum. The reporting requirement enables the ruling chamber to monitor whether capacity set aside is actually offered on a non-yearly basis and whether there is demand for this product. If technical or operational reasons prevent a non-yearly allocation, the applicant must inform the ruling chamber of the reasons in accordance with operative part 6. o). To minimise the administrative work involved, the notification requirement only applies in cases where marketing has not taken place.

4.8.5.3. Secondary marketing (operative part 7.)

427 Operative part 7. requires the applicant to include special congestion management rules in its capacity contracts, which must at least entitle all users to trade their contracted capacity on the secondary market. This provision serves to implement the third subparagraph of Article 36(6) of Directive 2009/73/EC, pursuant to which the ruling chamber must require congestion management rules to entitle users of the infrastructure to trade their contracted capacities on the secondary market. The wording "at least" makes clear that the applicant may make further congestion management rules.

428 a) Right to secondary marketing and registration (operative part 7. a))

429 (1) Registration

Owing to the applicant's need for security when trading on the secondary market takes place, too, and in the interests of smooth operations, the registration requirement also applies to capacity transfer under secondary trading.

430 (2) Term "transfer"

The term "transfer" should be understood in a broad sense and covers granting the right to use capacity/slots as well as transferring capacity/slots. It is therefore possible for capacity holders to grant a right to use capacity temporarily and transfer individual slots as well as to transfer all the capacity/slots covered by a contract permanently. Capacity holders can therefore transfer all or some of the capacity/slots they have booked to third parties and can also grant third parties the right to use all or some of the capacity/slots.

431 b) Transparency requirement (operative part 7. b))

In order to fulfil transparency requirements, the capacity holder must inform the applicant of the volume and timing of secondary marketing in good time before the secondary marketing. The applicant must then inform at least all registered market participants without undue delay about the scope and timing of the secondary marketing that is due to take place.

432 This requirement is ultimately derived from the European Commission Decision of 25 May 2021 (C(2021) 3814 final, Article 3, paras 93-94) in the first exemption proceedings for the Brunsbüttel LNG facility. The Commission justified this requirement by noting that bilateral secondary market trades are very intransparent, which can render access to such capacity for new entrants difficult. The European Commission believes it is sufficient to, for example, require the capacity holder to notify the applicant sufficiently in advance of any sale of capacity, so that the applicant could provide the information on volume and timing of secondary capacity available to all pre-registered market participants. This would ensure that the exemption was

not detrimental to competition (European Commission Decision of 25 May 2021, C(2021) 3814 final, paras 93-94).

433 Thus in order to ensure sufficient transparency with respect to capacity available on the secondary market, information on the volume and timing of capacity available on the secondary market should be made accessible in a non-discriminatory manner. The ruling chamber takes the view that it is also necessary for the capacity holder to inform the applicant of planned secondary marketing and for the applicant to inform at least all registered market participants in order to meet the full scope of the transparency requirements. It is also necessary in order to enable all participants to be given the same chances and prevent some participants from gaining more information than others, especially in cases where potential users have not yet placed a request for capacity transfer on the platform and may therefore miss offers. The only way to prevent this is for the capacity holder to inform the applicant about the marketing and for potential customers to be given reliable information about the capacity holder's plans to use/conduct secondary marketing.

434 This is expressly without prejudice to further transparency requirements and rules from other legal acts, to the extent that they apply to the LNG facilities that are exempt from regulation. Such requirements may currently be found, for example, in Regulation (EC) No 715/2009 and Regulation (EU) 2022/2576.

435 c) Agreement from the LNG facility operator (operative part 7. c))

In accordance with operative part 7. c), capacity transfers in secondary marketing require the applicant's agreement. Transferring capacity/slots and granting the right to use capacity/slots both require the applicant's agreement. The applicant is responsible for making the annual service plan and coordinating any necessary adjustments in the course of the booking year. To be able to carry out these tasks, it is essential for the applicant to have reliable information about which users hold the capacity and how they plan to use it. This is also in line with the comments made by the European Commission in its Decision of 25 May 2021 (C(2021) 3814 final, para 88); the Commission takes the view that agreement to secondary marketing from the facility operator is necessary in order to enable the terminal operator to enforce the obligations arising from the exemption.

436 The applicant must in principle give its agreement and may only deny it if there is good cause not to transfer the capacity. Good cause would include in particular justified doubts about the financial and/or technical performance of the user wishing to take on the capacity, taking into consideration objective and non-discriminatory criteria.

437 d) Rights and obligations in the transfer of capacity (operative part 7. d))

Operative part 7. d) makes clear that where capacity has been transferred successfully, the new capacity holder takes on all the rights and obligations arising from the capacity contract. Consequently, the original capacity holder is freed from the rights and obligations arising from the capacity contract vis-à-vis the applicant when the capacity is transferred. In other cases, and where merely a right to use capacity/slots is granted, the terminal operator can make other arrangements.

438 e) Notification of the actual use of slots and timing of secondary marketing (operative part 7. e))

It is necessary to distinguish between secondary marketing and the UIOLI procedure. The applicant's explanations up to now show that secondary marketing is intended to take place before the UIOLI procedure, but that it can also take place if the UIOLI procedure was not applied or was not successful. The ruling chamber views this approach as sensible and has determined circumstances to keep the ability to use the two procedures separate. See the explanations on the UIOLI procedure (see operative part 8.) for more information on the wording.

4.8.5.4. Use it or lose it procedure (operative part 8.)

439 Operative part 8. contains a requirement for the applicant to include special congestion management rules in its capacity contracts that require unused capacity to be offered on the market in accordance with the UIOLI procedure. The provision requiring the applicant to offer unused capacity on the market serves to implement the third subparagraph of Article 36(6) of Directive 2009/73/EC, pursuant to which the ruling chamber is to require congestion management rules to include the obligation to offer unused capacity on the market.

440 The applicant must therefore observe and agree in the capacity contracts at least the requirements set out in operative part 7. a) to c). The applicant is free to make further rules to structure this procedure provided that they are compatible with the mandatory rules set out in operative part 8. a) to c) and with the principles of transparency and non-discrimination.

441 a) Notification on the non-use of slots and lead time of 20 days and relation to secondary marketing (operative part 8. a))

Operative part 8. a) sets out that the UIOLI procedure must be applied if a user states that it will not use a slot no later than 20 days before the date of the unloading slot and does not name another registered user to whom the slot has been transferred. It further makes clear that no trading on the secondary market may take place for the duration of the UIOLI procedure.

442 (1) Notification of non-use

The UIOLI procedure should begin as soon as possible and at the latest as soon as the applicant is certain that a particular slot is not going to be used and the planned user has not named another registered user to whom the slot has been transferred.

443 The notification is intended for the event of non-use. This means that the UIOLI principle must be applied if the non-use of a slot within the relevant lead time deadline of 20 days and no other registered user has been named to whom the unloading slot has been transferred.

444 The applicant must ensure with suitable contractual arrangements with users and/or as part of the operational implementation of the terminal schedule that abusive non-notifications of non-use are ruled out.

445 If the UIOLI procedure is applied, secondary marketing is ruled out. As soon as the UIOLI procedure is applied, it is no longer possible for the original capacity holder to offer the capacity on the secondary market. If the UIOLI procedure is unsuccessful, however, secondary marketing can then take place.

446 (2) Registration and setting of the lead time at 20 days

The lead time is set at 20 days. The ruling chamber weighed up the competing interests in determining the lead time. The provision takes into account the understandable interests of potential customers in a use of their primary capacity product that is as valuable and flexible as possible and of the applicant in concluding long-term contracts to secure its investment.

447 It should be noted that making unused capacity available as early as possible enables other market participants to make good use of it and can be an effective way to combat capacity hoarding. The UIOLI procedure should therefore start as early as possible and no later than the time when the applicant is certain that a particular slot will not be used. A longer lead time thus increases the chances that a new customer can request the product.

448 Following the evaluations of the ruling chamber, the ruling chamber considers a deadline for the announcement of unused capacity in the UIOLI procedure of 20 days to be appropriate in this case. It still corresponds to the usual lead times for a UIOLI procedure at other European LNG facilities. These short lead times generally meet the interests of the primary capacity holders in using their acquired capacity as efficiently as possible. It is true, given the short lead time and long journey times from the liquefaction facilities, that this kind of short-term product will probably be requested only rarely, such as when a tanker already at sea can be diverted to the LNG facility because of attractive prices on the market.

449 The ruling chamber does acknowledge that a longer lead time of more than 20 days could make a long-term booking, and thus the investment in the LNG facility, more difficult or even prevent it. In this regard, the ruling chamber has also taken into account that the reserve quota means that a more attractive short-term product with longer lead times is permanently available on a

yearly or non-yearly basis. This counteracts the foreclosure of the LNG facility for the entire duration of the exemption and adequately ensures non-discriminatory third-party access to the LNG facility. For reasons of proportionality, therefore, a lead time of 20 days seems appropriate here despite the fact that, from the customer's point of view, this kind of short-term product is less attractive.

450 b) Marketing of the unloading slot and registration (operative part 8. b))

No later than 19 days before the originally planned date of the unloading slot, the slot must be marketed by the applicant in a non-discriminatory procedure to be determined by the applicant and open to all registered users. Slots that have become free shall be allocated in a transparent and non-discriminatory procedure to be determined by the applicant. This provision is intended to ensure that all potential users have the opportunity to participate in the procedure for the allocation of the unused slot.

451 As for the previous provisions for long-term and short-term allocation and secondary marketing, it is also mandatory for users to register with the applicant for the UIOLI procedure.

452 c) Rights and obligations in the event of successful allocation and return of surrendered capacity (operative part 8. c))

Operative part 8. c) sets out that, as for secondary marketing, if the free slot is allocated successfully, the original capacity holder is freed from the rights and obligations arising from the capacity contract vis-à-vis the applicant. If the capacity is not allocated, the applicant returns it to the original holder (return of surrendered capacity). This provision is based on the applicant's justified need for security and interest in smooth functioning of operations and the interest of the primary capacity holder in the ability to make flexible use of the primary capacity opened up by the return of surrendered capacity.

4.8.6. Competitive market assessment clause (operative parts 9. and 10.)

453 Operative parts 9. and 10. implement the competitive market assessment clause required by the European Commission in Article 4 of the Decision of 2 June 2023 (C(2023) 3743 final).

454 The European Commission concluded that, on the basis of the current booking situation for the capacity to be allocated on a long-term basis and the market shares of the long-term bookers, there are no concerns about a detrimental effect on competition on the upstream or downstream wholesale market caused by the issuing of an exemption. In fact, the involvement of new market participants will have a positive effect on competition. Limitations on bookings by potentially dominant undertakings are therefore not necessary at this time, because the binding bookings already made by ConocoPhillips, INEOS and RWEST mean that there is no longer any

possibility of long-term bookings by third parties. The competition analysis showed that bookings by these three companies will have an expressly positive effect on competition. However, long-term forecasts are subject to increased risk due to the current geopolitical and market situation. Moreover, the capacity already allocated on a long-term basis can be freely traded on the secondary market. In order to rule out future detriment to competition throughout the many years of the exemption period, the European Commission considers it necessary to expressly include a legally binding provision on a two-stage notification and assessment procedure in the operative part of the exemption decision (see European Commission Decision of 2 June 2023, C(2023) 3743 final, para 110).

455 The notification and assessment procedure required by the European Commission is intended to ensure that the condition for an exemption to be issued under Article 36(1)(a) and (e) of Directive 2009/73/EC and section 28a(1) para 1 and para 5 EnWG is met for the entire exemption period. In accordance with Article 36(1)(a) and (e) of Directive 2009/73/EC and section 28a(1) para 1 and para 5 EnWG, a condition for the exemption to be issued is that the investment must enhance competition in gas supply and the exemption must not be detrimental to competition on the relevant markets which are likely to be affected

456 Operative part 9. sets out the notification requirement of the applicant envisaged as part of this procedure. The related, two-stage assessment by the ruling chamber is covered in operative part 10. In the event that the assessments detailed under operative part 10. a) and b) indicate detrimental effects on competition caused by the booking or capacity transfer subject to the notification requirement, the ruling chamber is required under Article 4 of the European Commission Decision to limit the booking or acquisition of capacity (see European Commission Decision of 2 June 2023, C(2023) 3743, final). Operative part 10., which requires the applicant to rule out such bookings or acquisition of capacity, implements these requirements.

Specifically:

457 (1) Notification requirement

Operative part 9. requires the applicant to notify the ruling chamber without undue delay of booking requests by market participants or the intended acquisition of capacity by market participants of the upstream and/or downstream German wholesale gas market that would lead to the market participant in question acquiring at least 65% of the total capacity available for long-term bookings at the Brunsbüttel LNG facility for at least five years. When considering whether 65% of the total capacity available for long-term bookings at the LNG facility has been reached, both bookings of primary capacity and the acquisition of capacity on the secondary market must be taken into consideration (see Article 4 of the European Commission Decision of 2 June 2023, C(2023) 3743, final). That means that regardless of the size of the booking/capacity, any intended booking/acquisition of capacity, including via secondary

marketing, must be notified if it would lead to the relevant undertaking acquiring at least 65% of the total capacity available for long-term bookings at the Brunsbüttel LNG facility for at least five years, taking into account any binding capacity contracts already made (including via trading on the secondary market). This provision implements fully the notification requirement set out in Article 4 of the European Commission Decision (see European Commission Decision of 2 June 2023, C(2023) 3743, final).

- 458 (2) Exclusion of certain bookings and capacity transfers in accordance with operative part 10. Operative part 10. implements the two-stage assessment procedure specified by the European Commission in Article 4 of its Decision (see European Commission Decision of 2 June 2023, C(2023) 3743 final).
- 459 In accordance with Article 4 of the European Commission Decision, in the first stage the ruling chamber must assess whether the undertaking intending to make a booking or acquisition of capacity that is subject to the notification requirement under Article 4 of the European Commission Decision (see European Commission Decision of 2 June 2023, C(2023) 3743, final) has a market share of at least 30% on the upstream or downstream German wholesale gas market. If the ruling chamber's assessment in this first stage shows that the market share on the upstream or downstream wholesale market is less than 30%, the booking process can be continued in a binding manner by the applicant at this time. There is no need for the assessment of a possible detrimental effect on competition in a second stage as required by Article 4 of the European Commission Decision of 2 June 2023 (C(2023) 3743, final).
- 460 In the event that the assessment pursuant to Article 4 of the European Commission Decision of 2 June 2023 (C(2023) 3743, final) shows that the undertaking's market share on the upstream or downstream German wholesale market is at least 30%, the ruling chamber must assess in a second stage the possible effects of the intended booking on competition in light of the case-law of the CJEU and the law enforcement practice of the European Commission and the German competition authority with regard to Articles 101 and 102 TFEU before the binding booking may take place. In line with the European Commission's requirements, the ruling chamber must in particular take the capacity and the duration of the intended booking into consideration in its assessment. A situation is deemed to be detrimental to competition if it brings the risk that one or more undertakings could attain a dominant position in the market or strengthen such a position. According to the European Commission, a relevant risk of attaining or strengthening a dominant market position within the meaning of Article 36(1)(e) of Directive 2009/73/EC may be assumed if the booking that has to be notified or the acquisition that has to be notified under operative part 9. would lead to a market share of the relevant undertaking of at least 40% at any time during the duration of the booking (see European Commission Decision of 20 December 2022, C(2022) 9902 final, Article 1 c) to d)).

- 461 If the ruling chamber concludes in this second assessment stage that the intended booking or the intended acquisition of capacity on the primary or secondary market would lead to a situation that was detrimental to competition, the ruling chamber must limit the scope and/or duration of the relevant capacity as required by the European Commission. Then the applicant may conclude the booking process in a binding manner taking into account the ruling chamber's requirements to limit the booking or the acquisition of capacity (see European Commission Decision of 2 June 2023, C(2023) 3743 final, Article 4).
- 462 If, however, the ruling chamber concludes in this second assessment stage that the intended booking or the intended acquisition of capacity would not lead to a situation that was detrimental to competition, it informs the applicant accordingly in accordance with Article 4 of the European Commission Decision (European Commission Decision of 2 June 2023, C(2023) 3743 final). The applicant may then conclude the booking process in a binding manner without restrictions.
- 463 In accordance with Article 4 of the European Commission Decision of 2 June 2023 (C(2023) 3743 final), the ruling chamber is required to consult the German competition authority – the Bundeskartellamt – when carrying out any necessary assessment. Under section 28a(3) sentence 1 EnWG, it is the applicant that is required to provide evidence that the exemption prerequisite of Article 36(1)(a) and (e) of Directive 2009/73/EC and section 28a(1) para 1 and para 5 EnWG is met, pursuant to which the investment must enhance competition in gas supply throughout the whole period of the exemption and there may be no detrimental effect on competition arising from the exemption.
- 464 The ruling chamber has implemented the two-stage assessment procedure required by the European Commission in operative part 10. in such a way that obligations are placed on the applicant.
- 465 Accordingly, operative part 10. requires the applicant to ensure during the period of exemption that bookings or the acquisition of capacity leading to the acquisition of at least 65% in total of the annual throughput capacity intended for long-term bookings at the Brunsbüttel LNG facility for at least five years by one undertaking are, in accordance with the detailed rules set out in operative part 10. a) and b), ruled out or are adjusted before conclusion of the binding booking or capacity transfer in accordance with the rules imposed by the ruling chamber. The exclusion or adjustment of a booking or acquisition of capacity by an undertaking must occur in accordance with operative part 10. a) and b) if
- 466 a) the market share to be determined by the ruling chamber of the undertaking on the upstream or downstream German gas wholesale market in Germany is at least 30% at that time and
- 467 b) the analysis to be carried out by the ruling chamber shows that the booking that has to be notified or the acquisition of capacity that has to be notified under operative part 9. could have

a detrimental effect on competition. This may be assumed in particular if the booking that has to be notified or the capacity acquisition that has to be notified under operative part 9. would lead to a market share of the relevant undertaking(s) of at least 40% of the upstream or downstream German gas wholesale market in Germany at any time during the duration of the booking (see Article 1 of the European Commission Decision of 2 June 2023, C(2023) 3743 final).

- 468 In assessing the requirements of operative part 10. a) and b), the ruling chamber must observe and apply the above-mentioned binding rules and the above-mentioned required procedure of the European Commission as per Article 4 of the European Commission Decision of 2 June 2023 (C(2023) 3743 final).
- 469 Sentence 2 of operative part 10. requires the applicant, in line with the requirements of the European Commission, to ensure that the booking process for the bookings that have to be notified under operative part 9. or the acquisition of capacity that has to be notified under operative part 9. is only concluded in a binding manner when the ruling chamber informs the applicant that the assessment procedure is complete. It is still possible to conclude booking contracts provided that these include a corresponding clause requiring compliance with and implementation of any requirements imposed by the ruling chamber in the course of the assessment procedure in accordance with operative part 10. In the case of the transfer of capacity via secondary marketing, an unconditional consent to the capacity transfer pursuant to operative part 7. c) may, in accordance with operative part 10., only be given when the ruling chamber has informed the applicant of the result of the assessment procedure carried out pursuant to operative part 10.
- 470 The assessment procedure required by the European Commission serves to promote and guarantee competition. It does not absolutely rule out bookings totalling at least 65% of the annual throughput capacity for long-term allocation. The European Commission expressly pointed this out. It noted that an assessment by the ruling chamber does not equal a prohibition of the booking in question and neither do the thresholds of the assessment clause represent intervention thresholds. The thresholds included in the safeguard merely trigger a competitive assessment of the booking in question on the market, which enables the ruling chamber to form a view on the competitive situation in a timely manner and intervene only in case of concrete concerns (European Commission Decision of 2 June 2023, C(2023) 3743 final, para 114).
- 471 As explained above, the European Commission is currently of the view that none of the scenarios examined that are critical for competition would have a detrimental effect on competition (see European Commission Decision of 2 June 2023, C(2023) 3743 final, para 107 et seq). On the contrary, the European Commission has pointed out that the capacity bookings already made for the LNG facility's capacity for long-term allocation by the three market

participants concerned will actually have a positive effect on the upstream wholesale market since the booking undertakings have not so far been active on the German wholesale market on a large scale (see European Commission Decision of 2 June 2023, C(2023) 3743 final, para 102). The market assessment clause required by the European Commission and the related notification and assessment procedure are merely intended to ensure that the exemption prerequisites are complied with over the many years of the exemption (15 years) given the possibility of capacity being transferred in the course of trading on the secondary market and owing to the difficulty of making reliable long-term forecasts (European Commission Decision of 2 June 2023, C(2023) 3743 final, para 110 et seq).

- 472 The point of the safeguard clause is not to rule out large capacity booking requests. Rather, the two-stage assessment procedure described must be followed in the event of bookings or capacity transfers that are subject to the notification requirement. The assessment procedure may be ended after the first stage, depending on the results. In particular, undertakings with a market share of less than 30% of the upstream and/or downstream gas wholesale market can make capacity bookings of 65% or more without any restrictions. This will promote competition by particularly benefiting new market participants and may open up the market to new players. It reduces market entry barriers for these players and positively influences competition in the internal market. The assessment of the competitive effect of a capacity booking of 65% or more does not rule out a capacity booking even for an undertaking with a market share of at least 30% on the upstream and/or downstream wholesale market, however. If the ruling chamber does not identify any detrimental effect on competition in the second stage of the assessment, it is possible and desirable for such undertakings to make capacity bookings without limitations. Even in the event that detrimental effects on competition are identified, bookings are not fully ruled out but rather subject to limitations on the size and/or duration imposed by the ruling chamber to an extent that promotes competition.
- 473 The notification and assessment procedure required by the European Commission thus serves to strengthen competition and open up the LNG market, especially for new customers. The market intervention is reduced to a low level as bookings are not fully ruled out.

4.8.7. Reporting requirement (operative part 11.)

- 474 Operative part 11. requires the applicant to inform the ruling chamber without undue delay of any circumstances that may require a reassessment of the prerequisites set out in section 28a(1) paras 1 to 5 EnWG or result in compliance with the requirements laid down in operative parts 4. to 10. being affected.

- 475 The exemption prerequisites set out in section 28a(1) paras 1 to 5 EnWG could undergo changes over the long period of validity of the exemption of 15 years. The reporting requirement is therefore intended to enable the ruling chamber to undertake any reassessment of the exemption prerequisites that such changes make necessary and to evaluate it. In addition, the reporting requirement is intended to permit the ruling chamber to monitor the applicant's compliance with requirements insofar as obligations were placed upon its behaviour in operative parts 4. to 10.
- 476 "Circumstances" may mean any incidents that are within the applicant's control and those that are not. Incidents that are sufficiently likely to occur in the near future or are in a sufficiently specific stage of planning must also be reported. It may be assumed that this will be at the latest when the company management has made a decision. For reasons of proportionality, only those circumstances that could require a reassessment of the exemption prerequisites or affect compliance with the behavioural requirements laid down in operative parts 4. to 10. have to be reported, but it should be noted that just the possibility of a reassessment is enough to trigger the reporting requirement. The ruling chamber is then responsible for the actual assessment. The circumstances must be notified to the ruling chamber without undue delay, ie without culpable delay (section 121 of the Civil Code, BGB).
- 477 In the closed exemption proceedings for the Brunsbüttel LNG facility and in these proceedings, the European Commission pointed out in particular that in the event of the applicant receiving any subsidy, the applicant would have to notify the ruling chamber as it could affect compliance with the exemption prerequisite about an investment risk justifying an exemption (section 28a(1) para 2 EnWG/Article 36(1)(b) of Directive 2009/73/EC) and could make it necessary to reassess the scope and duration of the exemption decision (European Commission Decision C(2021) 3814 final, para 111 and European Commission Decision of 2 June 2023, C(2023) 3743 final, para 145). This requirement is implemented in operative parts 11. and 12. of the exemption decision.

4.8.8. Amendment, supplement or revocation of secondary provisions or the exemption (operative part 12.)

- 478 The provision in operative part 12. permits the ruling chamber to revoke, amend or supplement in full or in part the secondary provisions in operative parts 3. to 10. and to withdraw the exemption or attach further secondary provisions and conditions to it subsequently. There are various circumstances in which secondary provisions or the exemption may be amended, supplemented or revoked under operative part 12. The first situation in which an amendment or revocation comes into question is if a change in actual circumstances requires a reassessment of the exemption prerequisites set out in section 28a(1) paras 1 to 5 EnWG (operative

part 12. a)). It is also possible to carry out an amendment or revocation if the applicant does not meet one or more of the conditions set out in operative parts 4. to 10. (operative part 12. b)). A further possibility of amendment or withdrawal occurs if the applicant is not separate from the system operation of Gasunie Deutschland Transport Services GmbH or that of a third-party system operator in whose system the infrastructure is built as required by section 28(1) para 3 EnWG and in accordance with sections 8 to 10e EnWG after the LNG facility has been put into operation (operative part 12. c)). The exemption decision explicitly states that it may be amended or revoked in the event that the European Commission Decision issued on this exemption is amended or revoked or becomes ineffective (operative part 12. d)).

479 (1) Change in actual circumstances (operative part 12. a))

Operative part 12. ensures that the exemption may be revised. Accordingly, further secondary provisions and conditions may be added to the exemption decision, and the decision may be revoked, amended or supplemented in full or in part. Furthermore, the secondary provisions in operative parts 3. to 10. may be amended, supplemented or revoked in full or in part where a change in actual circumstances requires a reassessment of the exemption prerequisites set out in section 28a(1) paras 1 to 5 EnWG. This provision is linked to the reporting requirement set out in operative part 11. and allows the ruling chamber to amend the exemption decision according to the new conditions in the event of changed circumstances.

480 This is in the interests of the applicant and its customers but also of potential market participants, in particular with regard to the rules and mechanisms for the allocation and management of capacity set out in operative parts 5. to 10. These rules are based on an analysis of the LNG market and forecast of its future development. Decisions based on forecasts are naturally associated with some forecasting risks, which become greater the further in the future the forecast looks. It might be necessary to amend the secondary provisions contained in operative parts 3. to 10., in particular the rules and mechanisms for the allocation and management of capacity, in order to adequately take account of future developments that differ significantly from forecasts throughout the long period of the exemption. For example, an economically efficient use of the capacity can be ensured if it turns out that developments on the LNG market make amendments necessary. The ruling chamber can, also for reasons of proportionality, repeal secondary provisions in full or in part if it subsequently becomes clear that they are not necessary (anymore).

481 The right of amendment and withdrawal also ensure compliance with the approval requirements over the long exemption period of 15 years. The European Commission stated in the exemption proceedings that it could be necessary to reassess the approval prerequisite of the investment risk and possibly to examine and amend the exemption decision if subsidies for the construction of the LNG facility were granted (European Commission Decision of 25 May 2021,

C(2021) 3814 final, Article 4 and paras 110-111; European Commission Decision of 2 June 2023, C(2023) 3743 final, para 145). This situation could give rise to questions about the necessity of the exemption since the investment risk would be reduced by the granting of subsidies for investors. The European Commission takes the view that the applicant must notify the ruling chamber of any such subsidy under operative part 11. of this exemption decision. The ruling chamber would then have to reassess the exemption prerequisite of the investment risk justifying the exemption (section 28a(1) para 2 EnWG and Article 1(b) of Directive 2009/73/EC) and consider whether to change or withdraw the exemption decision. However, the European Commission takes the view that the granting of subsidies does not exclude per se the investment risk required for the granting of an exemption. Depending on the circumstances, such a case may possibly require limiting the exemption, for example to a part of the capacity or to a shorter duration, as exemptions should be limited to what is necessary (European Commission Decision of 25 May 2021, C(2021) 3814 final, paras 110-111; European Commission Decision of 2 June 2023, C(2023) 3743 final, paras 144-145).

482 (2) Breach of conditions (operative part 12. b))

Operative part 12. b) permits the monitoring of compliance with the secondary provisions of operative parts 4. to 10., which the ruling chamber considers necessary to establish the legal requirements for an exemption to be granted. The requirement in operative part 4., for example, ensures that the levying of tariffs for the use of infrastructure set out in section 28a(1) para 4 EnWG is complied with. Meanwhile, the rules and mechanisms for the allocation and management of capacity contained in operative parts 5. to 8. serve to enhance competition and security of supply in the gas sector pursuant to section 28a(1) para 1 EnWG by preventing foreclosure of the new infrastructure over the many years of the exemption and only allowing an exemption from the access obligations of section 20 EnWG to the extent necessary to enable the investment. The right to amend or withdraw the exemption set out in operative part 12. enables the ruling chamber to respond appropriately if the provisions, which ensure the application can be approved, are not complied with.

483 (3) Breach of unbundling requirement (operative part 12. c))

Operative part 12. c) ensures compliance with the special unbundling requirement laid down in section 28a(1) para 3 EnWG, in accordance with which the owner and operator of the new infrastructure must, under sections 8 to 10e EnWG, be unbundled in legal, functional, accounting and information terms from the operator of the system to which the infrastructure is connected. The critical time for compliance with this unbundling requirement is the start of operations (see Däuper, in: Theobald/Kühling, Energierecht Kommentar, 116th supplement, May 2022, margin no 11). The possibility of amending or withdrawing the granted exemption set out in operative part 12. c) enables the ruling chamber to monitor and enforce the special

unbundling requirement of section 28a(1) para 3 EnWG once the facility has been put into operation.

484 (4) Amendment, revocation or loss of effect of the European Commission Decision (operative part 12. d))

Operative part 12. d) refers to the requirement of the European Commission Decision of 25 May 2021 (C(2021) 3814 final, Article 4 and para 25). The exemption decision now expressly states that it may be amended or withdrawn if the decision of the European Commission under Article 36(9) of Directive 2009/73/EC is amended, withdrawn or otherwise loses its effect. A decision of the European Commission under Article 36(9) of Directive 2009/73/EC may lose its effect due to court proceedings, for example, or because of the conditions subsequent set out in the fifth subparagraph of Article 36(9) of Directive 2009/73/EC, that the infrastructure has not become operational within five years or construction of the infrastructure has not yet started within two years of the adoption of the Commission decision. In the two-stage administrative procedure for granting an exemption under section 28a EnWG in conjunction with Article 36 of Directive 2009/73/EC, therefore, this provision makes explicitly clear that the national exemption decision is in line with the approval of an exemption decision by the European Commission, which is required under the EU participation procedure under Article 36(9) of Directive 2009/73/EC.

485 (5) Response options

Exercising the discretion granted to it by section 28a EnWG, the ruling chamber has decided on a range of different possible responses ranging from partially revoking, amending or supplementing the secondary provisions through to revoking them, subsequently issuing secondary provisions and, as a last resort, withdrawing the exemption itself. This upholds the principle of proportionality because minor infractions of the conditions do not jeopardise the exemption as a whole, which would be obviously disproportionate. The possible responses enable the ruling chamber to consider the severity of any breaches, taking account of the circumstances of the individual case and the principle of proportionality. For reasons of proportionality, therefore, the last resort of a withdrawal would only come into consideration if conditions that are particularly important for the approval of the exemption were breached severely/repeatedly and if it was not possible to use one of the other possible responses as a more lenient means. Moreover, there is the possibility of revoking the exemption decision due to the decision of the European Commission under Article 36(9) of Directive 2009/73/EC being revoked or losing its effect.

4.8.9. Notification requirement to the European Commission in the event of amendment to or revocation of the exemption decision (operative part 13.)

486 The provision in operative part 13., like the provision in operative part 12. d), serves to ensure in the two-stage administrative procedure that the national exemption decision is in line with the approval by the European Commission, which is required under the EU participation procedure under Article 36(9) of Directive 2009/73/EC. In addition, the provision makes clear that the European Commission may in this event require the changed decision to be amended or revoked.

4.8.10. Applicability of the exemption (operative part 14.)

487 Operative part 14. places a condition subsequent on the exemption, that construction on the Brunsbüttel LNG facility be started no later than two years after the European Commission Decision is issued and the LNG facility is put into commercial operation no later than four years after the European Commission Decision is issued, with the date of the start of construction and the date of commercial operation each being notified in writing to the ruling chamber without undue delay.

488 As well as the date of the start of construction, the relevant reference for the condition subsequent corresponding to the exemption period set out in operative part 3. is the time when the commercial operation starts. As the date of the start of commercial operation is the reference for operative part 3., which limits the exemption to a period of 15 years, and for operative part 14., the notification requirement creates legal certainty about the period of validity of the exemption. The same applies for the notification requirement about the date of the start of construction.

489 The condition subsequent refers back to the Commission Decision for the Stade LNG facility (Article 3 of the Commission Decision of 19 August 2022 (C(2022) 6098 final)), pursuant to which the exemption should include a due date with regard to the deadlines connected to the start of construction and operation in the ninth subparagraph of Article 36(9) of Directive 2009/73/EC. In light of the time frame for the construction of the LNG facility, the lengths of time stated in the Directive seem adequate to allow for any delays arising from planning approval or technical problems. The applicant is thus granted a timespan of two years for the start of construction and five years for the start of operation. The timespans granted correspond with the periods of applicability mentioned in the fifth subparagraph of Article 36(9) of Directive 2009/73/EC and, to ensure that the national exemption and the Commission Decision are synchronised, are based on the date of issue of the Commission Decision. These times are also, incidentally, the longest period of applicability of planning permissions in many of the

building codes of the German federal states. This provision prevents the applicant from merely keeping the decision "in reserve", thereby possibly discouraging other market participants from making progress with their own investment projects. The requirement to notify the date of the start of construction and of commercial operation creates clarity as to the period of applicability of the exemption from the provisions of the network access regime of sections 20 to 26 EnWG. In accordance with the fifth subparagraph of Article 36(9) of Directive 2009/73/EC, the condition subsequent does not take effect if the Commission decides that any delays are due to major obstacles beyond the applicant's control.

4.8.11. Applicability in the event of changes of ownership, operation or ownership structure (operative part 15.)

- 490 Operative part 15. enables ownership or operation of the Brunsbüttel LNG facility to be transferred and changes to be made to ownership structure without jeopardising the exemption.
- 491 Without this operative part, doubt would remain as to whether this would be possible, since the exemption in accordance with section 28a EnWG, which relates to a specific infrastructure, bears features of an administrative act related to an object but also, being based on the unbundling provisions and the competitive conditions, features of an administrative act related to a person.
- 492 Operative part 15. thus enables the legal acts mentioned without jeopardising the exemption but attaches certain conditions to them. It is necessary for the ruling chamber to be notified of the intended change in good time and for a third party to which the LNG facility operation is being transferred to commit to complying with the conditions of the approval. This avoids a situation in which only the rights and not the obligations from the approval would be transferred. Moreover, the ruling chamber retains a right of withdrawal that can be made use of if, for example, the transfers mentioned would be detrimental to competition.
- 493 "Operation" within the meaning of these provisions is the taking on of the sector-specific responsibility for compliance with the provisions of energy legislation, in particular the responsibility under public law towards the regulatory authorities. The permissible performance of tasks and functions by third parties, eg within the framework of operating agreements, service agreements or planning activities, is unaffected. No general statement as to whether such activities are to be classed as the operation of LNG facilities in other legal contexts is made here.

4.8.12. Rejection of the application in other respects (operative part 16.)

494 Operative part 16. rejects the application in other respects. Because of the changed exemption period of 15 years, the exemption granted falls short of what was requested.

4.8.13. Ruling on costs (operative part 17.)

495 A separate notice of the costs will be issued in accordance with section 91(1) sentence 1 para 4 EnWG.

Information on legal remedies

Appeals against this decision may be brought within one month of its service. Appeals should be filed with the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, Tulpenfeld 4, 53113 Bonn. It is sufficient if the appeal is received by the Higher Regional Court of Düsseldorf within the time limit specified (address: Cecilienallee 3, 40474 Düsseldorf)

The appeal must be accompanied by a written statement setting out the grounds for appeal. The written statement must be provided within one month. The one-month period begins with the filing of the appeal; this deadline may be extended by the court of appeal's presiding judge upon request. The statement of grounds must state the extent to which the decision is being contested and its modification or revocation sought and must indicate the facts and evidence on which the appeal is based. The appeal and the grounds for appeal must be signed by a lawyer.

The appeal does not have suspensory effect (section 76(1) EnWG).

Anne Zeidler

Chair

Dr Antje Peters

Vice Chair

Dr Werner Schaller

Vice Chair