



Decision

File ref: BK7-18-052

In the administrative proceedings

concerning the determination on the standardisation of capacity products in the gas sector
(capacity product standardisation – "KASPAR")

Parties summoned:

Wacker Chemie AG, Hanns-Seidel-Platz 4, 81737 Munich, represented by its Executive Board,

Party summoned 1),

- Legal representative: Rechtsanwalt Manfred Ungemach, Kaiser-Wilhelm-Ring 40,
40545 Düsseldorf -

Gazprom export LLC, Ostrovskogo Sq. 2a letter "A", Saint Petersburg 191023, Russia,
represented by its Director General [REDACTED],

Party summoned 2),

- Legal representatives: Gleiss Lutz Hootz Hirsch PartmbB Rechtsanwälte,
Steuerberater, Dreischeibenhaus 1, 40211 Düsseldorf -

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

its Chair
its Vice Chair
and its Vice Chair

Barbie Kornelia Haller,
Dr Werner Schaller
Diana Harlinghausen,

decided on 10 October 2019:

1. With respect to the design of capacity products within the meaning of section 11 of the German Gas Network Access Ordinance (GasNZV), the following is determined:

a) Gas transmission system operators (TSOs) shall offer transport contracts for firm and interruptible entry or exit capacity solely on the basis of the following capacity products:

aa) Firm capacity products:

(1) Firm, freely allocable capacity (FZK) allows shippers to use booked entry and exit capacity on an unrestricted, firm basis without specifying a transport path. The entry capacity entitles shippers to inject gas at the booked entry point for withdrawal at each booked exit point in the same market area or for transfer at the virtual trading point in the same market area. The exit capacity entitles shippers to withdraw at the booked exit point the gas injected at each booked entry point in the same market area or transferred at the virtual trading point in the same market area.

(2) Conditionally firm, freely allocable capacity (bFZK) allows shippers to use booked entry and exit capacity on a firm basis without specifying a transport path, provided that a pre-defined, external condition is met. In all other cases, use occurs on an interruptible basis. The entry capacity entitles shippers to inject gas at the booked entry point for withdrawal at each booked exit point in the same market area or for transfer at the virtual trading point in the same market area. The exit capacity entitles shippers to withdraw at the booked exit point the gas injected at each booked entry point in the same market area or transferred at the virtual trading point in the same market area.

(3) Firm, dynamically allocable capacity (DZK) allows shippers to use booked entry and exit capacity on a firm basis provided that, in the case of entry capacity, gas is injected at the booked entry point for withdrawal at a pre-specified exit point in the same market area and that, in the case of exit capacity, the gas injected at a pre-specified entry point in the same market area is withdrawn at the booked exit point.

In addition, it allows shippers to use booked entry and exit capacity on an interruptible basis without specifying a transport path. The entry capacity entitles shippers to inject gas at the booked entry point for withdrawal at each booked exit point in the same market area or for transfer at the virtual trading point in the same market area. The exit capacity entitles shippers to withdraw at the booked exit point the gas injected at each booked entry point in the same market area or transferred at the virtual trading point in the same market area.

bb) Interruptible capacity products:

Interruptible, freely allocable capacity (uFZK) allows shippers to use booked entry and exit capacity on an interruptible basis without specifying a transport path. The entry capacity entitles shippers to inject gas at the booked entry point for withdrawal at each booked exit point in the same market area or for transfer at the virtual trading point in the same market area. The exit capacity entitles shippers to withdraw at the booked exit point the gas injected at each booked entry point in the same market area or transferred at the virtual trading point in the same market area.

- b) TSOs shall observe the following requirements when designing the capacity products offered; in addition, they are to work together when designing the products to the extent necessary to offer harmonised capacity products on as large a scale as possible (section 11(1) sentence 2 GasNZV).

aa) The following applies with respect to bFZK:

- (1) Network use on a firm basis is subject to one of the following external conditions:
 - (a) A pre-defined temperature condition (temperature-dependent bFZK: bFZK_{temp}).
 - (b) A pre-defined flow condition (flow-dependent bFZK: bFZK_{last}).
 - (c) A combination of a pre-defined temperature and a pre-defined flow condition (combined bFZK: bFZK_{komb}).
- (2) For each gas day (D) TSOs shall determine at 1pm on the preceding day (D-1) the extent to which the external condition is met, in other words the element of the bFZK offered at an entry/exit point that will be firm and the element that will be interruptible.
- (3) Requirements with respect to bFZK_{temp}:
 - (a) The definition of the temperature condition must allow the firm and interruptible elements to be determined exactly using the reference temperature.
 - (b) The applicable reference temperature shall be based on generally accessible weather data and shall be derived from the data available at the time of the determination in accordance with (2).
- (4) Requirements with respect to bFZK_{last}:
The flow condition is to be finally defined prior to the marketing. The flow forecasts and thus the division into firm and interruptible elements for each gas day (D) shall be based on the data available at the time of the determination in accordance with (2).
- (5) Requirements with respect to bFZK_{komb}:
The requirements set out in (3) apply to temperature conditions and the requirements set out in (4) to flow conditions.

bb) The following applies with respect to DZK:

Provided that it is technically possible, allocation conditions for DZK should not be limited to the entry and exit points of the respective TSO but should enable transport on a firm basis across system operators within the respective market area.

- c) TSOs shall make any necessary interruptions to uFZK and, if any, to the interruptible elements of bFZK and DZK at a specific entry or exit point in the following order, notwithstanding the priority network access for shippers of biogas:

Rank 1: TSOs shall first make interruptions to the part of the re-nomination for firm capacity that exceeds the volume permitted according to section [5] subsection (5) sentence 2 of the annex to the KARLA Gas 1.1 determination, BK7-15-001, (Gas standard capacity contract).

Rank 2: If additional interruptions are necessary after first rank interruptions have been made, interruptions shall be made to uFZK.

Rank 3: If additional interruptions are necessary after first and second rank interruptions have been made, interruptions shall be made to the interruptible elements of bFZK and DZK.

Within a ranking, the order of interruptions shall be based on the chronological order of the contracts, starting with the last contract concluded. If two or more contracts were concluded at the same time, the capacity shall be interrupted proportionally based on the capacity booked by the shippers.

2. The following applies with respect to the pre-conditions for an over-nomination procedure for the allocation of within-day interruptible capacity at interconnection points and at entry/exit points whose capacity is awarded by means of an auction on a capacity booking platform:
 - a) Network users may request the allocation of within-day interruptible capacity at any time by means of nominations that increase the total of their nominations to a level higher than their contracted capacity. Within-day interruptible capacity cannot be allocated until after the closure of the auctions for day-ahead firm and, if any, interruptible capacity.
 - b) Within-day interruptible capacity can only be allocated by means of over-nomination if all firm capacity products for the respective booking point are sold out or not offered.
 - c) Notwithstanding other pre-conditions for the booking and/or use of capacity, the possibility of over-nomination shall be available irrespective of whether or not shippers have previously contributed capacity to the balancing group or to a sub-balancing account for the relevant gas day (D).
 - d) TSOs shall inform shippers of a booking for within-day interruptible capacity by means of over-nomination immediately following the conclusion of the contract in a standardised procedure suitable for bulk business.

3. The following publication and information requirements apply to TSOs:
 - a) Requirements in connection with the offer of bFZK:
 - aa) TSOs shall publish the result of the determination of firm and interruptible elements in accordance with operative part 1(b)(aa)(2) for each day (D) by 1:30pm on the preceding day (D-1).
 - bb) TSOs shall make available the results obtained in compliance with operative part 1(b)(aa)(2) during the current gas year and the three preceding gas years.
 - cc) TSOs shall publish the definition of the temperature condition, stating on which generally accessible weather data the applicable reference temperature is based. In the case of flow-related conditions (bFZK_{last} and bFZK_{komb}), a description of the underlying network restriction, including examples of relevant flow scenarios, shall be published.
 - dd) TSOs shall publish information for each individual point and each individual flow direction on the interruptions made to the interruptible element of bFZK at relevant points during the current gas year and the three preceding gas years.
 - b) Requirements in connection with the offer of DZK:
 - aa) TSOs shall publish the allocation conditions in a commonly used data format agreed with the other TSOs.
 - bb) TSOs shall publish information for each individual point and each individual flow direction on the interruptions made to the interruptible element of DZK at relevant points during the current gas year and the three preceding gas years.
 - c) The publications in accordance with operative part 3(a) and (b) are to be made on the respective TSO's website in a commonly used format enabling automatic readout.

Attention to these publications shall be drawn in auctions for corresponding capacity products.

- d) TSOs shall provide information in real time and in a uniform and transparent format on whether the pre-condition for over-nomination as specified in operative part 2(b) has or has not been met at a respective network point. The relevant information is to be made available on the respective TSO's website and – where appropriate by means of links – via the capacity booking platform used.
 - e) In the case of a virtual interconnection point, the requirements set out in operative part 3(a), (b) and (d) apply to the TSO undertaking the marketing and processing in relation to the shipper.
4. With respect to operative parts 1 to 3, the following dates of application and transitional arrangements apply:
- a) The provisions in operative part 1(a) and (b) on the design of capacity products are to be applied at the latest from the time of the annual yearly capacity auctions in 2021 offering capacity with a contract period beginning on or after 1 October 2021. Capacity products offered prior to this time and not designed in compliance with the provisions in operative part 1(a) and (b) are subject without restriction to the provisions of operative part 4(c) and (d).
 - b) The determination of the firm and interruptible elements of bFZK in accordance with operative part (1)(b)(aa)(2) and publication of the determination results in accordance with operative part 3(a)(bb) are to be made for each gas day beginning with 1 October 2021.
 - c) Allocated bFZK is to comply with the requirements in operative part 1(b)(aa) at the latest for performance periods beginning on or after 1 October 2021.
 - d) Allocated firm capacity with restricted allocability (BZK) is to be converted to DZK in compliance with the provisions of operative part 1(b)(bb) as soon as possible, but at the latest for performance periods beginning on or after 1 October 2021.
 - e) The provisions in operative part 1(c) on interruptions to capacity are to be applied as from 1 October 2021. The provisions apply to all transport contracts as from this date.
 - f) The provisions in operative part 2 with respect to the over-nomination procedure apply as from 1 October 2020.
The availability of BZK does not preclude the allocation of interruptible capacity up until 1 October 2021.
 - g) The publication and information requirements set out in operative part 3 are to be met as from 1 October 2021. By way of derogation, the following applies:
 - aa) The publication of the definition of temperature conditions in accordance with operative part 3(a)(cc), the descriptions of any flow-related conditions in accordance with operative part 3(a)(cc) and the information on allocation conditions in accordance with operative part 3(b)(bb) are to be made available beginning with the offer of capacity in the annual yearly capacity auction in 2021.
 - bb) The real-time information on the over-nomination procedure in accordance with operative part 3(d) is to be made available beginning on 1 October 2020.
5. The order for payment of costs is reserved.

Rationale

I.

The administrative proceedings concern the standardisation of capacity products. The determination lays down conditions and methods for the design of capacity products offered by all German TSOs. In addition, it harmonises pre-conditions and procedures for over-nomination and establishes publication and information requirements.

(1) With respect to the transmission systems, there are two essential differences between the situation in Germany and that in many other Member States of the European Union (EU).

Firstly, there are a large number of TSOs – the following 16 companies are currently active: bayernets GmbH (bayernets), Ferngas Netzgesellschaft mbH, Fluxys Deutschland GmbH, Fluxys TENP GmbH, GASCADE Gastransport GmbH, Gastransport Nord GmbH, Gasunie Deutschland Transport Services GmbH, GRTgaz Deutschland GmbH, Lubmin-Brandov Gastransport GmbH, NEL Gastransport GmbH, Nowega GmbH, ONTRAS Gastransport GmbH, OPAL Gastransport GmbH & Co KG, Open Grid Europe GmbH (OGE), terranets bw GmbH and Thyssengas GmbH.

Secondly, at present the network areas do not all belong to one single market area but to one of two separate market areas – GASPOOL and NetConnect Germany. However, these two market areas are to be merged to create a single, Germany-wide market area (market area merger) no later than 1 April 2022, see section 21(1) sentence 2 GasNZV. The German TSOs are currently planning an earlier merger as of 1 October 2021, in other words at the beginning of the gas year. The legislature justified this change with the findings of an expert opinion commissioned by the Bundesnetzagentur.

See the rationale for the amendment to the ordinance, Bundesrat printed paper 419/17, p 15.

According to the "Expert Opinion concerning Potential for further National or Cross-Border Market Integration and its Implications for the German Gas Market" (market integration report), a merger would increase the liquidity of the German gas market.

The market integration report dated 4 May 2016 is available at:
https://www.bundesnetzagentur.de/DE/Sachgebiete/ElektrizitaetundGas/Unternehmen_Institutionen/HandelundVertrieb/MarktgebieteGas_KOV/marktgebietegas.html

The market area merger is linked with a recalculation of the entry and exit capacity offered by the TSOs ("capacity model"). Among other things, existing network restrictions may change or new restrictions arise. There could be implications both for the amount of capacity offered at each entry or exit point and for the design of the capacity products offered at these points.

(2) Under the "two contract model", German TSOs are to allow their shippers network access without specifying a transaction-dependent transport path on the basis solely of an entry and an exit contract; transportation may take place via several interconnected networks within a market area. The TSOs' transport contracts differ in terms of the contract periods and the "capacity products". A capacity product defines specific limits for the contractually agreed network use. A distinction made by all TSOs in the EU and required by EU law is between firm capacity products and interruptible capacity products.

The German-language version of the GasNZV uses the term "fest" and the German-language European legislation "verbindlich" for "firm" capacity (for definitions of "interruptible capacity" and "firm capacity" see Article 2(1) points 13 and 16 of *Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005*, OJ L 211 14 August 2009, p 36).

In contrast to most European TSOs, German TSOs also differentiate between firm, freely allocable capacity and various other firm capacity products subject to certain restrictions.

Also known as "conditional firm capacity", see decisions of 29 March 2019, BK9-18/610-NCG and 611-GP (REGENT).

At present, the following capacity products are offered in both German market areas, although the design of the products may vary between TSOs:

- firm, freely allocable capacity (FZK);
- conditionally firm, freely allocable capacity (bFZK);
- firm, dynamically allocable capacity (DZK);
- firm capacity with restricted allocability (BZK);
- interruptible, freely allocable capacity (uFZK).

The restrictions for conditionally firm capacity products compared to FZK allow technical transportation limits in the transmission systems to be accommodated. The offer of all firm capacity without restrictions and at the present level would result in the need for substantial network expansion or recourse to other capacity-increasing measures. The following charts show the entry and exit capacity offered in the transmission systems at cross-border and market area interconnection points and network connection points to storage facilities, power plants and final consumers in the GASPOOL and NetConnect Germany market areas in the gas year 2016/2017. The charts do not include agreed capacity to downstream distribution networks.

Figure 1: Offer of entry capacity in the gas year 2016/2017 (GWh/h)

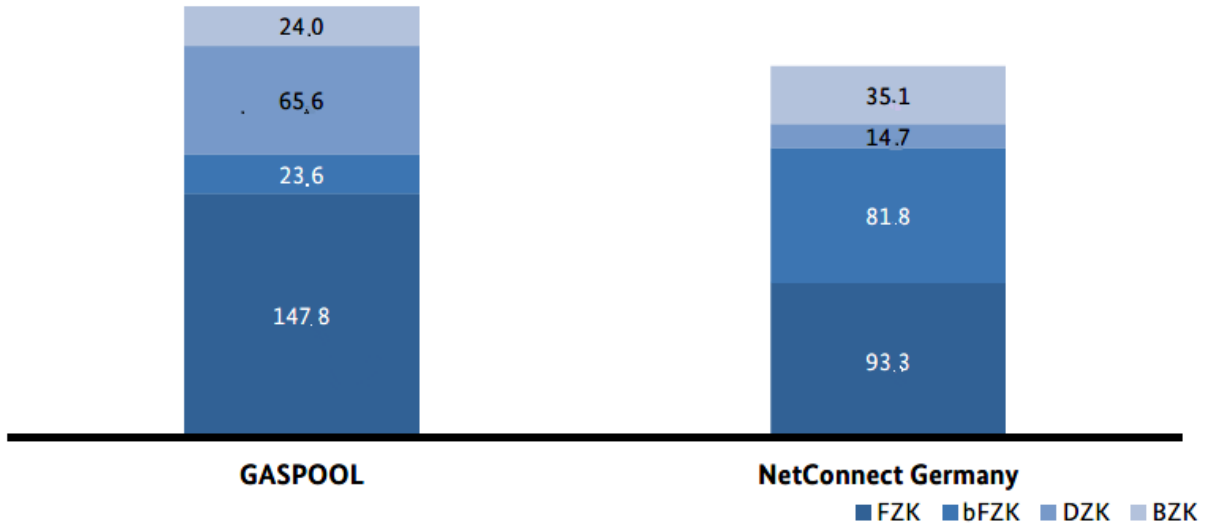
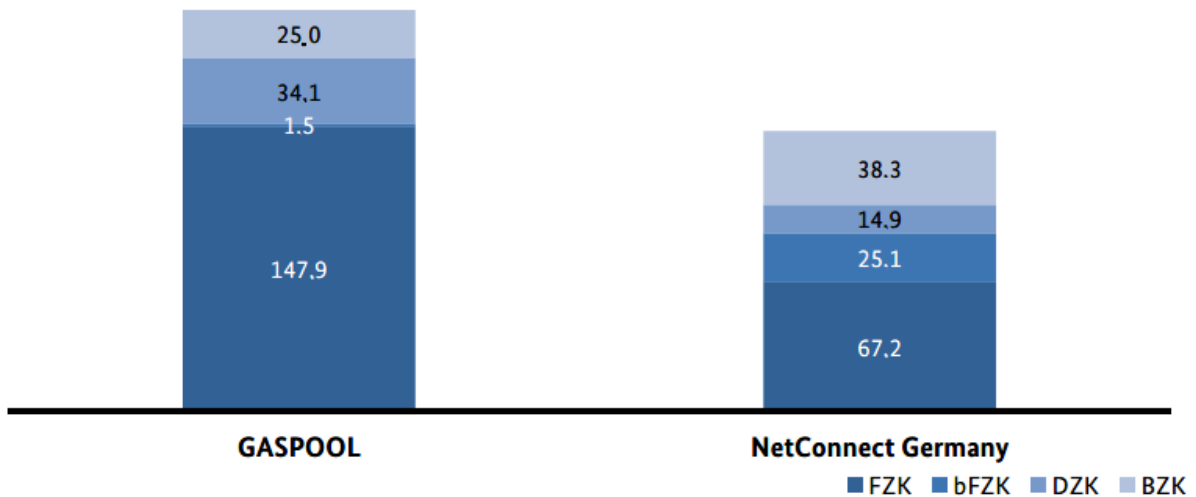


Figure 2: Offer of exit capacity in the gas year 2016/2017 (GWh/h)



Source:

Monitoring report 2018 published by the Bundesnetzagentur and the Bundeskartellamt as at 8 February 2019, p 373-4.

Available at:

https://www.bundesnetzagentur.de/DE/Sachgebiete/ElektrizitaetundGas/Unternehmen_Institutionen/DatenaustauschundMonitoring/Monitoring/Monitoringberichte/Monitoring_Berichte_node.html

(3) In recent years, various studies have been carried out on the capacity products offered in EU Member States, in particular with regard to efficient network use, energy market integration in the EU, transparency and adequacy of network access. The report dated 28 August 2014 commissioned by the Bundesnetzagentur on "Capacity products in the German Gas Market –

Stock-Taking and Further Development" (capacity products report) related solely to the German market areas.

The capacity products report is available at:
https://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Energie/Unternehmen_Institutionen/NetzzugangUndMesswesen/Gas/GutachtenBNetzAKapazitaetsprodukteWECOM.html

The Agency for the Cooperation of Energy Regulators (ACER) published a report on the conditionalities stipulated in European TSOs' transport contracts for firm capacity (ACER report) in compliance with Article 38(4) of Commission Regulation (EU) 2017/459 of 16 March 2017 on *capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013* (OJ L 72 17 March 2017, p 1). The report sets out ACER's conclusions and is accompanied by a separate, external consultancy study. The findings presented in the report and the study differ in some cases.

The documents are available at:
<https://acer.europa.eu/Media/News/Pages/ACER-reports-on-gas-conditional-capacity-products-in-the-EU.aspx>

Most recently, the German Federation of Energy Traders (Verband Deutscher Energiehändler e.V. – EFET) published a short study analysing FZK entry capacity requirements in Germany. The study looks at the demand for FZK in the past and compares the amount of FZK entry capacity offered with the peak demand.

The document is available at: <https://www.efet-d.org>

(4) The ruling chamber opened own-initiative proceedings on the standardisation of capacity products on 28 June 2018. The proceedings are addressed to all operators of gas transmission systems.

Notification of the opening of proceedings was given on the Bundesnetzagentur's website and in the Bundesnetzagentur Official Gazette (No 13/2018 of 11 July 2018, Order No 90, p 1026 et seq). The ruling chamber launched a public consultation upon opening the proceedings, giving the TSOs and all other stakeholders the opportunity to comment. Based on the capacity products report, among other things, the ruling chamber outlined possible points for determination, including an exhaustive list of permissible capacity products for entry and exit capacity, a harmonised interruption order for reductions in nominations, and harmonised capacity product characteristics. An English-language version of the proceedings opening and consultation document was published on the Bundesnetzagentur's website on 24 July 2018. The following associations, interest groups and companies responded: Bundesverband der Energie- und Wasserwirtschaft e.V. (BDEW), Bundesverband Neue Energiewirtschaft (bne), EFET, Energie Baden-Württemberg AG (EnBW), ENGIE Deutschland AG (ENGIE), Equinor

Deutschland GmbH (Equinor), Vereinigung der Fernleitungsnetzbetreiber Gas e.V. (FNB Gas), Gazprom Marketing & Trading Limited (GM&T), Initiative Erdgasspeicher e.V. (INES), RWE Supply & Trading GmbH (RWE), Shell Energy Europe Limited (SEEL), Uniper SE (Uniper) and Verband Kommunaler Unternehmen e.V. (VKU).

The first consultation document and the thirteen responses are available at:
https://www.bundesnetzagentur.de/DE/Service-Funktionen/Beschlusskammern/1_GZ/BK7-GZ/2018/2018-0001bis0999/2018_0001bis0099/BK7-18-0052/BK7-18-0052_Verfahrenseinleitung.html

The ruling chamber drafted more specific provisions, taking into account the responses received, and put these out for a further consultation on 21 December 2018. An English-language version of the consultation document was published on the Bundesnetzagentur's website on 24 January 2019. The following associations, interest groups and companies responded: bayernets, party summoned 1), party summoned 2), BDEW, EFET, EnBW, FNB Gas, GM&T, innogy Gas Storage NWE GmbH (innogy), INES, OGE, RWE, Mr [REDACTED] and SEEL.

The second consultation document and the fourteen responses are available at:
https://www.bundesnetzagentur.de/DE/Service-Funktionen/Beschlusskammern/1_GZ/BK7-GZ/2018/2018-0001bis0999/2018_0001bis0099/BK7-18-0052/BK7-18-0052_Verfahrenseinleitung.html

In view of the large number of points covered by the determination, reference is made to the content of the responses in the respective part of the rationale.

Parties 1) and 2) were admitted to the proceedings with the decisions of 11 April 2019 (BK7-18-052-B1) and 25 June 2019 (BK7-18-052-B2). By contrast, the application to participate in the proceedings submitted by Mr [REDACTED] on 26 July 2019 was rejected in the decision of 10 September 2019 (BK7-18-052-B3).

The decisions on the applications for participation are available at:
https://www.bundesnetzagentur.de/DE/Service-Funktionen/Beschlusskammern/1_GZ/BK7-GZ/2018/2018-0001bis0999/2018_0001bis0099/BK7-18-0052/BK7-18-0052_Verfahrenseinleitung.html

All parties to the proceedings were invited in writing on 29 August 2019 to give their final views by 13 September 2019. The regulatory authorities of the federal states, the Bundeskartellamt and the Committee of representatives of the federal state regulatory authorities were informed on 24 July 2018 of the opening of proceedings and the opportunity to comment. The involvement of the Committee, the Bundeskartellamt and the federal state regulatory authorities took place through the submission of the draft decision on 20 September 2019. The Bundeskartellamt submitted written comments dated 8 October 2019.

(5) For further details, reference is made to the contents of the file.

II.

The determination is formally and substantively lawful. In particular, the ruling chamber has properly exercised its discretion.

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

The ruling chamber is basing its determination on section 29(1) of the German Energy Industry Act (EnWG) in conjunction with section 50(1) paras 1, 4 and 19 and (5) GasNZV.

2. Formal legality

The formal requirements have been met.

2.1. Competence

The competence of the Bundesnetzagentur for the decision derives from section 54(1) EnWG and that of the ruling chamber from section 59(1) sentence 1 EnWG.

2.2. Hearing and consultation

The ruling chamber has given the parties involved and the representatives of the economic sectors affected by the proceedings the opportunity to state their views pursuant to section 67(1) and (2) EnWG.

The ruling chamber held a first consultation beginning on 28 June 2018, presenting its basic deliberations. The ruling chamber drafted detailed provisions, taking into account the responses received, and published these for a further consultation on 21 December 2018. The parties to the proceedings were invited in writing on 29 August 2019 to give their final views.

2.3. Involvement of other authorities

The involvement of other authorities has taken place to the extent required. The regulatory authorities of the federal states were informed on 24 July 2018 pursuant to section 55(1) sentence 2 EnWG of the opening of proceedings and the opportunity to comment; the Bundeskartellamt and the Committee of representatives of the federal state regulatory authorities were also informed. The formal involvement of the Committee pursuant to section 60a(2) EnWG and of the Bundeskartellamt and the federal state regulatory authorities pursuant to section 58(1) sentence 2 EnWG, with the opportunity to comment, took place through the submission of the draft decision on 20 September 2019.

3. Substantive legality

The determination is also substantively lawful. The determination is addressed to the group of German gas TSOs (section 3.1. below) and is limited to provisions which the Bundesnetzagentur is empowered to lay down for the addressees (section 3.2. below). The ruling chamber has correctly exercised its discretion for deciding whether or not to take action and which action to take (section 3.3. below).

3.1. Addressees of the determination

The determination is addressed to the group of operators of gas transmission systems, section 29(1) in conjunction with section 3 para 5 EnWG.

3.2. Points subject to determination and respective legal bases

The determination is limited to provisions which the Bundesnetzagentur is empowered to lay down by virtue of section 29(1) EnWG in conjunction with section 50 GasNZV.

(1) The determination of an exhaustive list of permissible capacity products and the rules for the design of these products as set out in operative part 1 are based on section 50(1) para 4 GasNZV. This provision empowers the regulatory authority to make determinations on capacity products within the meaning of section 11 GasNZV. The determination contains provisions on the respective product characteristics (operative part 1(a) and (b)), including the relation between the transport rights in the event of any necessary interruptions (operative part 1(c)). The provisions of operative part 1 concern the design of capacity products at entry and exit points, but not internal ordering (see section 8(3) sentence 2 GasNZV).

(2) The ruling chamber is empowered to lay down the provisions set out in operative part 2 concerning the pre-conditions for an over-nomination procedure for the allocation of within-day interruptible capacity by virtue of section 50(1) para 19 GasNZV. This legal provision was revised by the Ordinance to improve the regulatory framework for the construction of LNG infrastructure in Germany (Federal Law Gazette I, p 786), which entered into force on 20 June 2019. The revised provision – without making any substantive changes compared to the previous version – makes it clear that the Bundesnetzagentur can lay down comprehensive rules for over-nomination procedures for the allocation of within-day interruptible capacity.

See draft of the Federal Ministry for Economic Affairs and Energy (BMWi) of 14 March 2019, p 21.

(3) The requirement for TSOs to publish additional information as laid down in operative part 3 is based on section 50(5) sentence 1 GasNZV. This provision provides for determinations requiring system operators to publish information in addition to that specified in section 40 GasNZV that is needed for competition in gas trading or for supplying customers.

(4) Operative part 4 sets out dates of application and transitional arrangements which supplement the preceding rules and are thus based on the above-mentioned legal provisions.

3.3. Discretionary scope for action

The ruling chamber has correctly exercised its discretion, section 40 of the German Administrative Procedure Act (VwVfG). The ruling chamber has been guided by the purposes of its empowerment, which include realising efficient network access, section 50(1) GasNZV. The ruling chamber considers a network access system to be efficient when those requesting access use the network infrastructure to the highest possible degree at the lowest possible cost and thus can operate in a competitively structured market on reasonable terms as a supplier.

Identical to the wording in the decision of 14 August 2015, BK7-15-001 (KARLA Gas 1.1), p 16.

Moreover, the ruling chamber, with its determination, is following the aims set out in section 1(1) EnWG, namely the secure, low-priced, consumer-friendly and efficient supply of gas for society as a whole. Finally, the ruling chamber's decision takes into account the requirements for safe network operation, section 50(1) GasNZV.

The decision to issue a determination on the standardisation of capacity products was based on the following fundamental deliberations:

(1) The two existing market areas are to be merged no later than 1 April 2022 (at present, however, the merger is planned for 1 October 2021). The merger is linked with a new capacity model and a reassessment of the entry and exit capacity currently offered. The ruling chamber was concerned that this could lead to a further differentiation instead of a further harmonisation of firm capacity products. In light of this, the determination aims to ensure transparent, non-discriminatory and efficient network access.

Various respondents (for example EFET, EnBW and RWE in both consultations and Mr ██████████ in the second consultation) recommended that capacity products should be harmonised or even limited to one firm and one interruptible capacity product. It was recommended that this should be accompanied by (new) arrangements for congestion management so as to counteract a reduction in the firm capacity offered and distribute the costs arising from network congestion across all network users.

Separate from the present determination proceedings, the ACER Report (margin no 34 et seq) recommends specific action by the regulatory authorities with regard to conditional capacity products: while these capacity products may offer certain efficiency advantages in complex market areas such as NetConnect Germany and GASPOOL, they do not correspond to the "ideal implementation" of an entry-exit system; a case-based cost-benefit analysis of the use of such capacity products is therefore recommended.

The ruling chamber has not responded to the recommendations made in the course of and outside the formal determination proceedings by deviating from its original objective. The ruling chamber's aim in the first instance is to prevent the market area merger from leading to a further differentiation of capacity products. That aside, the market area merger process entails considerable implementation effort and is not to be complicated further. Drawing up a capacity model for a joint market area requires forecasts of future capacity demand, shippers' usage patterns and resulting gas flows. These forecasts would be even more difficult to make if capacity products were limited to FZK and uFZK, because TSOs would need to forecast the changes in usage patterns that would occur as a result of the changes in the products offered. In addition, it would be necessary to determine the extent to which shippers would be prepared to offer TSOs restrictive services within the meaning of section 9(3) GasNZV. This would be likely to lead to drastic reductions in the amount of firm capacity offered, which could be counteracted only gradually by the restrictive services or network expansion.

Moreover, the ruling chamber is in the first instance following a general, market area-wide approach. The aim here is to meet the intention of the GasNZV to give all German market participants uniform rights and thereby avoid discrimination by merging the two market areas.

See Bundesrat printed paper 419/17, p 15.

The additional publication requirements ultimately also serve this aim: clear information on the capacity product characteristics is to be made available to the market. The determination of an exhaustive list of capacity products, including conditionally firm capacity, still allows for a case-based analysis to be made.

(2) Furthermore, the ruling chamber had to assess the current and future impact of the capacity products on the aim behind the market area merger, namely increasing liquidity and competition in the gas market (Bundesrat printed paper 419/17, p 15). The capacity products report (p 157-8) and the market integration report (p 8-9 and p 57-8) both point to the potential for improvement within the market area that could be achieved by adapting the capacity products.

(3) In opening the proceedings, the ruling chamber was able to give stakeholders the opportunity to draw attention to aspects of network access requiring regulation.

The ruling chamber has taken up the recommendation for a harmonised over-nomination procedure for the allocation of within-day interruptible capacity.

The ruling chamber has not taken up the recommendation made by EFET in the first consultation for the timescales for allocating capacity at storage points to be brought into line with exchange trading processes. The timescales could only be aligned by amending Regulation (EU) 2017/459 or section 13(1) sentence 3 and (3) GasNZV – reintroduction of the first-come, first-served (FCFS) principle for capacity allocation at points to storage facilities.

The individual points covered by the determination are underpinned by the deliberations set out in sections 3.3.1. to 3.3.4.7. below.

3.3.1. Design of capacity products (operative part 1)

The ruling chamber has decided on a basic design for capacity products. The provisions in operative part 1 cover an exhaustive list of permissible capacity products (operative part 1(a); section 3.3.1.1. below), the design of permissible bFZK products (operative part 1(b)(aa); section 3.3.1.2. below), the design of permissible DZK products (operative part 1(b)(bb); section 3.3.1.3. below) and the interruption order to be followed by TSOs (operative part 1(c); section 3.3.1.4. below).

3.3.1.1. Exhaustive list of permissible capacity products (operative part 1(a))

Operative part 1(a) sets out the exhaustive list of permissible capacity products defined by the ruling chamber. This precludes TSOs from granting network access by means of other capacity products.

(1) Necessity for determination

The ruling chamber considers it necessary to determine a uniform design for capacity products. Without a uniform design, it is likely that there will be a further differentiation of products instead of a reduction in existing differences. The determination thus ensures adequate and efficient network access and supports European market integration.

The upcoming market area merger gives cause to expect a further differentiation – either between existing capacity products or through the introduction of new capacity products. The TSOs need to carry out new network calculations for the single German market area in compliance with section 9(2) GasNZV. In future there will be a direct allocability between entry/exit points in the current GASPOOL market area and the current NetConnect Germany market area (single entry-exit system), leading to changes in the capacity calculations and the assessment of network congestion. This ultimately has an effect on the individual entry/exit points. Both the amount of (firm) technical capacity within the meaning of section 2 para 13 GasNZV and the specific capacity products offered may be affected, because the capacity products reflect the individual network restrictions (capacity products report, p 21).

A further differentiation of capacity products could adversely affect gas trading liquidity in the single German market area and create obstacles to network access.

Shippers always need to take account of system operators' individual specifications and face the disadvantages if basic differences in product characteristics restrict the combination of entry and exit contracts. This is to be prevented in accordance with section 11(1) sentence 2 GasNZV. A high degree of differentiation also affects efficient network access. As described in section 3.3. the ruling chamber considers a network access system to be efficient when those requesting access use the network infrastructure to the highest possible degree at the lowest possible cost and thus can operate in a competitively structured market on reasonable terms as a supplier.

Highly differentiated capacity products naturally entail higher costs for those requesting network access, both in acquiring and in using the transport rights.

Obstacles can ultimately be created for other, possibly new market participants if products are unnecessarily designed specifically for certain usage scenarios. The aim of free allocability in an entry-exit system is to achieve the highest possible degree of flexibility in the use of transport rights within the technical limits of the network.

The ruling chamber therefore takes the view that attaching technical restrictions to the design of the capacity products meets the legislative goals and purposes (section 20(1b) sentences 1 and 10 EnWG, and section 8(2) sentence 1, section 9(3) and section 11(1) sentence 2 GasNZV). TSOs are unable to attach restrictions that are not technically necessary to the capacity products either on their own or with the involvement of individual shippers. The consequent restrictions on companies and the market are offset by the goal of efficient and non-discriminatory network access in the entry-exit system. This ultimately ensures liquidity in the gas market. The Bundeskartellamt, in its response dated 8 October 2019, did not express any doubts about the named goals and purposes being able to justify the restrictions.

(2) Exhaustive list of permissible capacity products

In the first instance, it is necessary to prevent a further differentiation of firm capacity products. Compared with other EU countries (study accompanying the ACER report, margin no 12 et seq and no 23 et seq), Germany already has a wide range of different firm capacity products. The ruling chamber has restricted the range to those capacity products that meet the legislative requirements and create an even balance between the goals of section 1(1) EnWG. The ruling chamber has also taken account of the practical need to reproduce network restrictions efficiently and the ambitious deadline set in section 21(1) sentence 2 GasNZV for merging the market areas. The ruling chamber has also taken account of the fact that the gradual merger of different TSOs' networks has led to a high degree of complexity at Germany's transmission system level. Comparisons with transmission systems in other EU countries are therefore only possible to a limited extent.

(a) The permissible capacity products therefore comprise:

Firm, freely allocable capacity (FZK). This allows use of the network on a consistently firm basis without specifying a transport path; this applies both to point-to-point transport and to the use of the virtual trading point in the market area. The capacity product is necessary under the national and EU legislative frameworks as it combines the product characteristics of unconditional firmness (section 11(1) sentence 1 GasNZV, Articles 2(1) point 16 and 14(1)(b) of Regulation (EC) No 715/2009) and unconditional free allocability (section 20(1b) sentence 10 EnWG, section 8(1) and (2) GasNZV, recital 19 of Regulation (EC) No 715/2009). FZK allows the most flexible use

of the network and makes an important contribution to gas trading liquidity and national security of supply through firm access to the virtual trading point in the market area (capacity products report, p 132 et seq on the suitability of the capacity products from the network users' perspective).

Interruptible, freely allocable capacity (uFZK). This capacity product allows use of the network on an interruptible basis without specifying a transport path and is necessary under both the EU and the national legislative framework (Article 14(1)(b) of Regulation (EC) No 715/2009, section 11(1) sentence 1 GasNZV).

Conditionally firm, freely allocable capacity (bFZK). These capacity products allow use of the network on a firm basis subject to certain external conditions. Provided that the external condition is met, use of the network is allowed on a firm basis without specifying a transport path. In all other cases, use occurs on an interruptible basis without specifying a transport path. The capacity product allows TSOs to contractually reproduce specific network restrictions in areas of the network vulnerable to surplus or short supply, for instance resulting from temperature-dependent local offtake (see capacity products report, p 143-4 for a brief description of possible network restrictions).

Firm, dynamically allocable capacity (DZK). This capacity product allows use of the network on a firm basis for certain point-to-point transportations, that is depending on corresponding injections and withdrawals at pre-specified network points. It also allows transportation on an interruptible basis without specifying a transport path. This capacity product allows TSOs to reproduce other network restrictions than with bFZK (capacity products report, loc cit). It frequently involves entry/exit points in one specific transmission system.

This essentially enables existing capacity products to be retained. The ruling chamber still has the option of carrying out a case-based assessment following the market area merger, as recommended elsewhere (see ACER report, margin no 35, and accompanying study, margin no 13).

(b) FZK, bFZK and DZK are firm capacity and uFZK is interruptible capacity within the meaning of section 11 GasNZV.

See Bundesrat printed paper 419/17, p 13 on the amendment of section 13 GasNZV: "This makes it possible for holders of firm capacity products developed by the TSOs in recent years, such as temperature-dependent capacity (bFZK) or dynamically allocable capacity with interruptible access to the virtual trading point (DZK), to also be given the opportunity for upgrading."

The ruling chamber takes the view that these terms can largely be used synonymously with the terminology used in the EU legislation, which differentiates between "firm capacity" (Article 2(1) point 16 of Regulation (EC) No 715/2009) and "interruptible capacity" (Article 2(1) point 13 of Regulation (EC) No 715/2009). The bFZK and DZK capacity products are also referred to as "conditional firm capacity" because of the restrictions compared to FZK.

See the decisions of 29 March 2019, BK9-18/608 (BEATE 2.0), BK9-18/610-NCG (REGENT-NCG) and BK9-18/611-GP (REGENT-GP).

One of the consequences is that in accordance with Article 32(1) of Regulation (EU) 2017/459 TSOs may only offer standard capacity products for interruptible capacity of a duration longer than one day if the corresponding monthly, quarterly or yearly standard capacity product for FZK, bFZK and DZK was sold at an auction premium, was sold out, or was not offered. With the exception of daily capacity products (Article 32(2) of Regulation (EU) 2017/459), these firm capacity products prevent the allocation of uFZK of the same duration.

See also in this respect operative part 2(b) on the pre-conditions for over-nomination.

(c) The exhaustive list precludes TSOs from offering other capacity products or altering one of the specified products. Measured against the named goals and purposes, the ruling chamber considers this to be necessary and reasonable.

The ruling chamber has not followed the recommendation made by OGE (response dated 25 February 2019) to include certain openings. The example was given that only a reduced amount of technical capacity was available when extensive maintenance work was carried out on transmission systems. The exhaustive list prevented a special yearly capacity product from being offered that excluded the right to use the network on a firm basis during maintenance periods. The capacity could therefore only be marketed outside maintenance periods as non-yearly standard capacity; this would result in the need for price multipliers (operative part 2 of the decision of 29 March 2019, BK9-18/612 (MARGIT) for interconnection points; operative part 2 of the decision of 29 March 2019, BK9-18/608 (BEATE 2.0) for other entry/exit points). Alternatively, capacity could be offered as yearly capacity with the knowledge of planned maintenance, but all firm capacity (including already contracted capacity) would need to be reduced proportionally during the maintenance period. This alternative was not the usual procedure currently followed by OGE.

The ruling chamber takes the view that the advantages of the exhaustive list of capacity products in terms of transparency and simple network access outweigh the disadvantages. The capacity products are to define essential network access conditions and be based on the capability of the transmission system (section 9(2) GasNZV). The list of products allows the maximisation of firm capacity, taking account of technical restrictions. In the ruling chamber's view, the decisive fact is that the aim in the example given by OGE is not to achieve a higher

degree of network utilisation or to maximise firm capacity within the limits of the network's capability. The amount of firm capacity that could actually be used on a given gas day would not change. Rather, the aim of the operator-specific capacity product would be to avoid the need for tariff multipliers and to be able to offer shippers the convenience of one single booking. This approach is supported by the fact that the application of multipliers for non-yearly standard capacity products in the case of extensive maintenance work may not achieve the purpose of compensating for vacancy costs (decision of 29 March 2019, BK9-18/612 (MARGIT), margin no 43-4.). However, the application of multipliers is not subject to the proviso that vacancy costs must actually be compensated in each and every case. The ruling chamber therefore considers it appropriate not to allow the application of multipliers to be avoided by means of a specific capacity product. Decisive for the ruling chamber is the simplification brought about by a list of products that is binding for the whole market, even if a certain degree of booking convenience cannot be offered in a few individual cases.

Furthermore, the contractual conditions applicable in addition to the capacity product specifications should also allow for adequate account to be taken of maintenance work.

(3) No restriction to FZK and uFZK

The list of products comprises three firm and one interruptible capacity product. The recommendation for only one firm capacity product (FZK) and one interruptible product (uFZK) to be allowed in future has therefore not been followed. Such recommendations were made by EnBW, Equinor, INES and RWE (in the first consultation), and Mr [REDACTED] (in the second consultation). The ruling chamber does not consider such a restriction either to be necessary for legal reasons or to be appropriate in light of the aims set out in section 1(1) EnWG.

(a) Neither the national nor the EU legal situation requires permissible capacity products to be explicitly restricted to FZK and uFZK. There is therefore no obligatory limit for the ruling chamber's scope for choice.

The ruling chamber maintains the legal opinion that section 20(1b) EnWG and the provisions of the GasNZV do not preclude the initial offer of conditionally firm capacity products. This opinion was already expressed in the decision of 24 February 2011, BK7-10-001, which required TSOs to include certain provisions in capacity agreements for market area interconnection points and cross-border interconnection points. Section [2] para 3 explicitly provides for the offer of capacity with allocation conditions and restrictions of use. Although the decision has since been revoked, this should not prevent the offer of capacity with allocation conditions and restrictions of use.

Decision of 14 August 2015, BK7-15-001 (KARLA Gas 1.1), p 19.

In the ruling chamber's view, there has not since been a change to the legal situation which would require a different assessment.

Section 20(1b) sentences 1 and 10 EnWG require operators to arrange access to the gas supply system by offering entry and exit capacity that enables network access without specifying a transaction-dependent transport path and that is independently usable and transferable. Rights to booked capacity are to be designed in such a way that they entitle the shipper to inject gas at each entry point for withdrawal at each exit point in the network (entry-exit system).

The named capacity products comply with these requirements. All of the products allow shippers to use the virtual trading point and to inject gas at each entry point for withdrawal at each exit point. Differences exist only to the extent that use of the network does not occur on a firm basis in all cases. However, the only mention of firmness in the EnWG is in section 14b. In accordance with section 24 EnWG, firmness as a condition for network access is primarily the subject of the provisions of the GasNZV. Section 20(1b) sentences 1 and 10 EnWG do not explicitly state when, for instance, firm access to the virtual trading point in the market area has to be guaranteed.

Section 3 GasNZV expands on the right to network access set out in section 20(1b) EnWG.

Bundesrat printed paper 312/10, p 58.

Section 3(3) requires entry and exit contracts to be offered that entitle shippers to use the network from the entry point to the virtual trading point and from the virtual trading point to the exit point respectively. As with section 20(1b) sentences 1 and 10 EnWG, there are no specific requirements concerning firmness and consequently there is no requirement to restrict capacity products to FZK and uFZK.

Section 8(2) in conjunction with section 9(1) GasNZV requires TSOs to determine and offer the freely allocable technical capacity. "Technical capacity" is understood to be the maximum firm capacity that can be offered in consideration of system integrity and operating requirements, section 2 para 13 GasNZV. Where entry and exit capacity calculations show that an insufficient amount of freely allocable capacity can be offered, measures to increase the amount of freely allocable capacity on offer are to be examined, section 9(3) sentence 1 GasNZV. These measures include the offer of entry and exit capacity linked with allocation conditions. This possibility is to exist despite the principle of free allocability, section 8(2) sentence 3 GasNZV.

The ruling chamber takes the view that the framework provided by the GasNZV allows the offer of firm capacity products other than FZK, not only to increase the amount of freely allocable capacity on offer in the above-mentioned sense but also to enable any calculated remaining line capacity that is not suitable to be offered as FZK to be marketed as a high-quality capacity product ("qualitative maximisation"). Otherwise, this remaining line capacity would only be able to be offered as uFZK, with no indication of the possibility to use the network on a firm basis within certain limits. The pre-condition for qualitative maximisation is that the freely allocable technical capacity has been calculated correctly in the first instance and that a sufficient amount of firm, freely allocable capacity can then be offered. The permissibility of firm capacity products

with interruptible elements is, finally, indicated in section 13(2) GasNZV. This provision entitles shippers to convert capacity into firm capacity or capacity products with a smaller interruptible element.

Under Article 32 of *Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC* (OJ L 211 14 August 2009, p 94), access to the system is essentially to be organised by the individual Member States. The Directive therefore does not include explicit requirements concerning capacity products.

Recital 19 of Regulation (EC) No 715/2009 states that network users should be given the freedom to book entry and exit capacity independently in order to strengthen the liquidity of the wholesale markets. Gas transport must therefore be through zones instead of along pre-specified contractual paths. Recital 20 of Regulation (EC) No 715/2009 states that the harmonisation of transport contracts does not mean that all TSOs' terms and conditions must be the same – this only applies to minimum requirements that must be met by all transport contracts. Based on this, the provisions of Article 2 paras 13 and 16, Article 13(1) fourth subparagraph and Article 14 of Regulation (EC) No 715/2009 are more specific than Directive 2009/73/EC, as they differentiate between firm capacity and interruptible capacity. However, the ruling chamber does not regard this as the definition of two exhaustive capacity products. No other interpretation is made in the ACER report drawn up on the basis of Article 38(4) of Regulation (EU) 2017/459. The report aims to summarise the conditionalities stipulated in contracts for firm capacity and their effects. The fact that this does not only mean conditions for FZK and uFZK follows from recital 13 of Regulation (EU) 2017/459:

"In implementing complex entry-exit regimes, particularly with physical gas flows – destined for other markets – across those zones, transmission system operators have implemented and national regulatory authorities have approved different contractual approaches to firm capacity products the effect of which should be assessed in an Union-wide context."

The ACER report (margin no 15) states that both Directive 2009/73/EC and Regulation (EC) No 715/2009 are silent as far as conditional firm capacity products are concerned. However, the question is raised as to whether these capacity products are detrimental to the integration of the EU's gas markets and are thus contrary to the aim and purpose of the aforementioned legislation. The ruling chamber refers in this respect to the findings of the capacity products report (p 136). The report finds that conditional firm capacity products are predominantly suitable for transit users' purposes.

(b) The call to allow only one firm capacity product (FZK) and one interruptible product (uFZK) is countered by the goal of efficient and low-priced network-based supply and the ruling chamber's aim not to complicate the market area merger process.

The regulatory authority is required to exercise its powers to make determinations in accordance with the purposes of its empowerment, section 40 VwVfG. According to section 50(1) GasNZV, the purposes are to achieve efficient access and to promote the aims set out in section 1(1) EnWG.

At present, the offer of firm capacity in the two German market areas is based to a considerable extent on conditional capacity products.

See Figures 1 and 2 on p 8 of this decision: overviews of the entry and exit capacity offered in the gas year 2016/2017.

A restriction to only two capacity products would result in a drastic reduction in the firm capacity calculated at network points within a market area and network points on the market area borders. According to the estimate in the capacity products report (p 168-9), the reduction – relating to the current two market areas – would be around 30%. The reduction for some system operators would be as high as 50% of the identified firm capacity. The ruling chamber believes that the market area merger is likely to worsen the effects.

Responses from market participants (for example SEEL in the second consultation) emphasised that it was essential to prevent a reduction in firm capacity. Although extensive network expansion would stem capacity reductions, all shippers and ultimately the general public would be burdened with considerable costs (capacity products report, p 169; explicitly against unnecessary, costly network expansion: SEEL, second consultation). In the ruling chamber's view, it cannot be assumed that a categorical restriction to only two capacity products – through possibly higher liquidity at the virtual trading point – would prove advantageous for low-priced supply. At least, the advantages are not sufficiently certain to justify a relevant discretionary decision. In the first instance, the costs of increasing FZK or of the capacity-increasing measures taken in accordance with section 9(3) GasNZV would need to be compensated by liquidity increases. Network use would then actually need to change. Here, the ruling chamber would also like to refer to the short study commissioned by EFET on FZK entry capacity requirements in Germany. According to the study, the total demand for FZK entry capacity is not clearly disproportionate to the amount of identified FZK. The ruling chamber does not see any indication in the study's findings of the necessity to completely abandon established DZK products, for instance.

The ruling chamber has also taken into consideration the recommendation made in the ACER report to carry out a case-based cost-benefit analysis. First, the case-based analysis generally opposes a categorical restriction to only two capacity products. Second, German TSOs offer all network users the opportunity to request an upgrading of the capacity products offered based on the incremental capacity process (Article 3 points 11 and 22 et seq of Regulation (EU) 2017/459).

Various respondents (for example EFET, EnBW and RWE in both consultations) recommended that a restriction to FZK and uFZK should be linked with fundamentally new arrangements for congestion management. In addition to measures such as flow commitments, long-term options or local gas balancing, the arrangements could include an oversubscription and buy-back scheme to counteract a reduction in firm capacity.

See point 2.2.2 of Annex I to Regulation (EC) No 715/2009 on the oversubscription and buy-back scheme; section 9(4) GasNZV.

The ruling chamber does not consider abandoning the current capacity products to be appropriate. The current range of capacity products offered is based to a very large extent on conditionally firm capacity; TSOs would need to make use to a similar extent of the services mentioned. At the same time, the ruling chamber does not see any direct guaranteed advantages. The ACER report sees no qualitative difference between ex ante and ex post restrictions. While the report refers to the use of interruptible capacity in addition to FZK, the ruling chamber is convinced of a qualitative maximisation within the technical limits. As already stated (p 17), the ruling chamber's aim with the determination is to prevent the market area merger from leading to a further differentiation of capacity products and also not to complicate the market area merger process.

(4) Prohibition of the offer of BZK without reserving the right to make exceptions

The exhaustive list means – where the infrastructure is subject to sections 20-28 EnWG – that it is no longer possible to offer BZK. In this respect, the ruling chamber has essentially followed the recommendation made in the capacity products report (p 157-8) to abolish the BZK capacity product. Contrary to the recommendation, however, the ruling chamber is not reserving the right to make exceptions. The ruling chamber has made the following deliberations:

(a) Abolishing BZK will achieve a more consistent implementation of the legally required entry-exit system (section 20(1b) sentence 10 EnWG). Section 20(1b) sentence 1 EnWG requires network access to be guaranteed in all cases by offering entry and exit capacity that enables network access without specifying a transaction-dependent transport path and that is independently usable and transferable. Section 3(3) sentence 1 GasNZV requires entry and exit contracts to allow use of the network to and from the virtual trading point respectively. Lastly, section 11(1) GasNZV requires TSOs to offer both firm and interruptible capacity.

In the ruling chamber's view, therefore, firm capacity products need not include use of the virtual trading point in the market area on a firm basis, but must at least enable use on an interruptible basis. This precludes definitively specifying a transaction-dependent transport path upon conclusion of a contract. The advantage is that uFZK is always to be offered and all transport rights granted with this product should be included in all firm capacity products. This deliberation also underpins the provision of operative part 1(c) (interruption order) and operative part 2

(capacity sell-out as a pre-condition for re-nomination). It is supported by the requirement that firm capacity should first and foremost be booked (Article 32 of Regulation (EU) 2017/459). Entry and exit capacity (BZK) does not generally – in other words independently of specific nominations and physical or virtual gas flows – entitle shippers to use the virtual trading point or transport gas from or to any entry/exit points in the market area.

Definition of BZK in the "Cooperation agreement between the operators of gas supply networks in Germany (KoV)", amended version dated 29 March 2018, Annex 1, section 9(1)(e):

"Capacity with restricted allocability: enables use of the network from the booked entry point to one or more specified exit points or use of the network from the booked exit point to one or more specified entry points. Use of the virtual trading point is excluded."

Rather, shippers are restricted to corresponding injections and withdrawals at specified network points and thus to a specified transport path from conclusion of the contract onwards for the whole product duration. The lower the number of corresponding network points, the greater the impact on the independent usability and transferability of the capacity rights.

See *Sauer* in: Elspaß/Graßmann/Rasbach (eds), 1 ed 2018, EnWG, section 20 margin no 179.

It makes no difference whether a shipper agrees to or even requests these restrictions. Here, the objection raised by party summoned 2) that it has no interest in the additional service does not ultimately hold good. In this respect, network access design is beyond the control of both system operators and network users.

See *Sauer* in: Elspaß/Graßmann/Rasbach (eds), 1 ed 2018, EnWG, section 20 margin no 167.

(b) Abolishing BZK also promotes the secure, low-priced and efficient supply of gas for society as a whole because it is expected to increase liquidity in the gas market (capacity products report, p 157-8; market integration report, p 8-9 and p 57-8). The additional right to use the virtual trading point on an interruptible basis enables transit traders to carry out short-term trading activities (spot and prompt market segments) at the German virtual trading points. Although the reports were drawn up several years ago and certain changes may have taken place in the gas market since, the ruling chamber generally considers the assessments relating to BZK to still be applicable. Access to the virtual trading point can increase liquidity, irrespective of any changes in infrastructure, booking patterns and actual network use that may have taken place in the meantime.

The arrangement also does not entail any technical obstacles or overriding disadvantages. In the ruling chamber's view, abolishing BZK will not result either in a reduction in firm capacity or

in network expansion. The DZK capacity product restricts network use on a firm basis to specified combinations of entry/exit points and is therefore equally suitable to reproduce network restrictions (capacity products report, p 144). Modelling BZK and DZK always takes account of the firm transport rights; a conversion should therefore not have any effect on the amount of capacity offered or on the capacity model for the single German market area. No comments to the contrary were made in the two consultations.

(c) Offering BZK is prohibited without exception. This is contrary to the recommendation made in the capacity products report (p 158) and to the following responses: BDEW, EFET, FNB Gas, GM&T, INES, SEEL (in the first consultation); bayernets, party summoned 1) and BDEW (in the second consultation). In the ruling chamber's view, there are no well-founded arguments in favour of retaining the capacity product.

(aa) The ruling chamber does not agree that DZK is an inadequate substitute for BZK.

According to bayernets (*loc cit*), for instance, inefficient network use would be encouraged if all firm capacity products had to include interruptible use of the virtual trading point and had to be sold out before interruptible capacity could be allocated. Network users not interested in firm point-to-point transport would no longer be able to book interruptible capacity irrespective of the availability of firm BZK. Rather, these shippers would need to acquire DZK and would then be competing with those network users with an actual interest in firm point-to-point transport.

In the ruling chamber's view, this argumentation is insufficient. As already stated, section 20(1b) sentence 1 EnWG requires network access to be allowed without specifying a transaction-dependent transport path. The ruling chamber takes the view that if a TSO is unable – based on the calculations pursuant to section 9(2) GasNZV – to offer unconditionally firm and freely allocable entry/exit capacity, the conditionally firm capacity product then offered by the TSO must be as firm as possible. The transport of firm capacity, even if it has an interruptible element, should always have priority over uFZK; this deliberation also underpins the specified order for interruptions. Hence DZK is to be booked before uFZK and interruptions to the interruptible element of DZK are to be made after interruptions to uFZK.

See operative part (1)(c) and the rationale on p 36 et seq on ranks 2 and 3.

Furthermore, the ruling chamber is not convinced by the argument that network use would be more efficient if BZK were offered. This argument is in fact led by the understanding that efficiency is strictly based on physical transport maximisation or "network orientation". The ruling chamber does not consider this to be necessarily true. In legislation, by contrast, transparent and easily comprehensible criteria are taken as the basis, for example interruptions are to be based on the time stamp of transport contracts (Article 35 of Regulation (EU) 2017/459) and firm capacity rights are to be reduced proportionally (section 18 GasNZV).

(bb) The ruling chamber does not consider retaining BZK for "short distances" to be necessary given the current factual and legal situation. The ruling chamber has therefore not followed the recommendation made to this effect in the capacity products report (p 158).

The past factual and legal situation was such that in some cases a short-distance BZK capacity product (BZK(Kurzstrecke)) was offered with large discounts pursuant to section 20 GasNEV in order to achieve better utilisation of the transmission system or avoid the construction of direct lines. The discount for short distances could be higher than that for interruptible capacity at other points in the system, particularly because any use of the virtual trading point was ruled out.

See the decision of 24 March 2015, BK9-14/608.

Ruling Chamber 9 has since issued several determinations implementing *Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas* (OJ L 72 17 March 2017, p 29). These determinations state that "[...] full orientation of the tariffs for conditional capacity products with the reference price is appropriate without exception" (BK9-18/610-NCG, margin no 405; BK9-18/611-GP, margin no 408).

Adjustments to the application of the reference price methodology to certain entry/exit points may be made where necessary in accordance with Article 6(4) of Regulation (EU) 2017/460. Ruling Chamber 9 takes the view that the application of an adjusted tariff can be made dependent on the specific type of network use. For instance, operative part 3(a) of the decision of 29 March 2019, BK9-18/610-NCG, (margin no 407) requires that the general and not the adjusted tariff structures be applied if and insofar as access to the virtual trading point is used. Thus there is also no tariff-related reason why the BZK capacity product must be retained, since the conversion of the current BZK(Kurzstrecke) product to DZK does not represent a preliminary decision.

(cc) BDEW stated in its response dated 25 February 2019 that it was in favour of continuing to allow BZK should network use outside the allocation condition always lead to interruption at a specific entry/exit point. It was said that converting BZK to DZK did not promote liquidity in the gas market in this case and had a negative impact in terms of transparency. The ruling chamber does not agree with this viewpoint.

The ruling chamber considers the case referred to by BDEW to be largely theoretical. Access to the virtual trading point in a market area is usually available at a given entry/exit point. The point is not technically isolated from the market area; there is merely a higher risk of interruption if the virtual trading point is used. This applies even in the case of final consumers according to operative part 3(a) of the Ruling Chamber 9 decision of 29 March 2019, BK9-18/610-NCG. ■■■■■

■■■■■ where the virtual trading point is used. In order to guarantee sufficient transparency, the ruling

chamber is also requiring the publication of information on interruptions for each individual point (operative part 3(b)).

3.3.1.2. Design of bFZK (operative part 1(b)(aa))

In operative part 1(b)(aa), the ruling chamber lays down binding rules for the design of bFZK capacity products. With the bFZK capacity product, shippers are entitled to network usage on a fixed basis if and insofar as a certain external condition is met. The TSO can thus reproduce network restrictions existing in areas of the network vulnerable to surplus or short supply. These could result from temperature-dependent local offtake, for example.

On the representation of possible network restrictions, see capacity products report, p 143-44

The condition is initially based on the previously established external conditions because of the upcoming market area merger, as mentioned in section 3.3.1.1. However, the design of these capacity products must also meet the reliability and transparency requirements that the ruling chamber associates with firm capacity products.

3.3.1.2.1. Permissible external conditions

(1) The ruling chamber has decided to issue an exhaustive list of the permissible external conditions. It is following the general approach taken in the capacity products report (p 155) to create an ideal structure of bFZK applicable to all network operators and not to allow TSOs to design the product in any other way.

See in this respect the rationale for the exhaustive list (p 18 of this decision) and the explanations to the comments submitted by OGE dated 25 February 2019.

Its aim is to promote transparent and efficient access to the network. In accordance with operative part 1(b)(aa)(1), temperature conditions, flow conditions and combinations of the two are permissible in a capacity product.

(2) Contrary to the recommendation made in the capacity products report, therefore (p 34, 136, 155), the conditions will not be restricted to temperature. The ruling chamber does, in fact, share the view that flow-dependent bFZK products, in particular, have so far showed deficits in transparency and comprehensibility. Nevertheless, there were two basic reasons for not following the recommendation: first, the upcoming merger of the market areas will increase the amount of forecasting work for the TSOs for the capacity products offered. An appropriate balance therefore needs to be found between the challenges of the new network restrictions and efficient, transparent network access. Moreover, the ruling chamber judges the day-ahead notification of the firm element to be essential, because owners of firm capacity rights need to have certainty about the extent of the firm part. This reliability is the difference between firm and

interruptible capacity products. The ruling chamber is of the opinion that merely stating that there were few interruptions or reductions in the past is insufficient. However, the day-ahead notification is likely to be difficult to implement with the current concepts of the bFZK_{last} and bFZK_{komb} products. In particular, so-called "firming flow condition(s)"

(see capacity products report, p 33, footnote 21)

may not be continued. Should the TSOs manage to usefully combine a partially or completely flow-dependent external condition with the day-ahead notification, however, the ruling chamber sees no reason at this time to prohibit the offer of such a product. If they do not succeed, the capacity should be marketed as bFZK_{temp}, DZK or uFZK.

See recommendation of the capacity products report, p 155.

(3) The provisions of operative part 1(b)(aa)(1) prohibit the use of new external conditions. The ruling chamber does not consider that this option is necessary to maximise firm capacity within the network restrictions.

See in this respect the rationale for the exhaustive list (p 18 of this decision) and the explanations to the comments submitted by OGE dated 25 February 2019.

3.3.1.2.2. Determination of the firm element on the previous day

In accordance with operative part 1(b)(aa)(2), the TSOs must determine at 1pm on the previous day (D-1) the extent to which the external condition of bFZK is met. This determines the proportion of the booked bFZK that will provide entitlement to network usage on a firm basis on the gas day (D) and the proportion that will be interruptible. The ruling chamber has thus established a rule that applies to all bFZK products, regardless of any external condition.

(1) Day-ahead determination previously only usual for temperature conditions

The bFZK_{temp} products offered up to now had comparable rules about day-ahead determinations.

See the overview in the capacity products report, p 32 et seq.

By contrast, no such determination has thus far been envisaged for pure flow conditions (bFZK_{last}) or with regard to the flow-related element in combinations of flow and temperature conditions (bFZK_{komb}). There is therefore no division into firm and interruptible elements on the previous day.

In the understanding of the ruling chamber, the reason for this in the case of bFZK_{last} is as follows: usage of the network on a firm basis should only be restricted in this case if a physical flow of gas occurs at short notice that cannot be dealt with by interruptions of uFZK or the use of internal gas balancing. The necessary reductions are then made proportionally across all booked bFZK_{last} and not, for example, based on the time stamp of the respective transport contracts (see Article 35 of Regulation (EU) 2017/459). Using this method, there is no need to

divide the capacity into firm and interruptible elements. As the physical gas flow often depends on the re-nomination, shippers only find out about any reductions at extremely short notice.

The current standard combination of conditions reads as follows: the interruptible element subject to the temperature condition is also only subject to reductions if, in addition, physical gas flows are exceeded at certain network points (capacity products report, loc cit). It is therefore a "[further] firming flow condition" (capacity products report, p 33, footnote 21).

(2) Future day-ahead determination for all bFZK

Under operative part 1(b)(aa)(2), determinations must be made at 1pm on the previous day (D-1) for all bFZK products, regardless of the external conditions applied. This enables shippers to be informed in a timely manner, at 1:30pm (see operative part 3(a)(aa)).

The ruling chamber considers that it is an essential component of firm capacity products that shippers receive information in a timely manner about the amount to which their network usage is not subject to risk of interruption. They must be able to state this amount in absolute numbers in the capacity units used in the marketing, ie kWh/h or kWh/d in accordance with Article 10 of Regulation (EU) 2017/459. The ruling chamber thus judges the explanation that the transport right in the case of congestion occurring at short notice is only limited to a relative proportion of the available transport capacity to be insufficient. This kind of capacity product would not provide enough transparency about actual risks and would ultimately be the equivalent of an interruptible product with modified reduction rules; the ruling chamber takes the view that it would not be correct to describe the respective elements of the product as "firm".

Evaluation of the capacity products report, p 155: "bFZK products with a flow condition permit use of the network on a firm basis provided that certain flow conditions, which are not transparent for shippers, are fulfilled. Based on the results of the comparison of these two product categories in section 2.3.2, the current bFZK products with a flow condition may, from the network user's point of view, be largely seen as equivalent to uFZK."

Ultimately, elements will still be subject to interruption risks at short notice in the future, but TSOs must notify the result of their determinations, which will contribute to an efficient and non-discriminatory network access.

The ruling chamber considers that a notification at 1:30pm of the day before the relevant gas day (D-1) is timely. It has followed suggestions from FNG Gas, OGE and EnBW to push back the times originally mentioned in the second consultation (D-1 10am and 12pm). Checking whether the condition has been met and notifying later can improve the forecasting quality.

The notification must thus be made before shippers have to have submitted their initial nomination (D-1, 2pm CET or CEST at the latest). This initial nomination can lead to restrictions for the later re-nomination.

See ruling of 14 August 2015, BK7-15-001 ("KARLA Gas 1.1."), annex: gas standard capacity contract, section [5] Nomination and re-nomination.

The notification is also made before the start of the rolling day-ahead capacity auctions (D-1, 4:30pm CET or CEST, see Article 14(5) of Regulation (EU) 2017/459). Shippers are thus able to make up the difference between their essential transport requirements and their transport rights without interruption risk by making further day-ahead bookings.

(3) Other deliberations of the ruling chamber

The ruling chamber is of the opinion that this provision will promote non-discriminatory and transparent access to the network. Although it was argued in response to the consultation that the bFZK products marketed thus far have some advantages in certain usage scenarios, the ruling chamber nevertheless believes that the provision will predominantly bring advantages for the gas market.

In the course of the two consultations, INES, innogy and SEEL (all responding to the second consultation) expressed concern that this could result in less bFZK or firm capacity in general on offer and for that reason, the division on the previous day should not apply to all bFZK products without exception. The BDEW and FNG Gas saw a risk that the determination on the previous day could have a negative effect on the short-term offer of firm capacity (day-ahead and within-day), both for bFZK_{last} and bFZK_{temp}.

The ruling chamber does not share these concerns. In its view, the day-ahead determination should in any case not have a negative effect on the long-term offer (yearly, quarterly, monthly) of relevant capacity products. The amount on offer continues to be based on the long-term network calculations of the TSOs in accordance with section 9 GasNZV. The day-ahead determination is merely intended to make the interruption risks for a particular gas day transparent. The capability of the transmission system will be unaffected; the existing risks of reduction or interruption will merely be clearly communicated. The ruling chamber is thus ultimately unconvinced by FNG Gas' statement in the second consultation that interruptions are extremely rare. If a TSO does not consider itself able to confirm the network usage on an unconditionally firm basis for the next gas day, it is also justified to state this risk transparently.

There should not be any negative impact on the short-term offer (day-ahead and within-day) either. The day-ahead determination and the designation of the interruptible element should not be associated with any other physical flows, so there should not be any need to interrupt network usage more often than before. It is true that in the case of bFZK_{last}, elements of the product will in future be described as interruptible from the time of the day-ahead notification that were previously described as firm until the actual reduction. However, in accordance with operative part 1(c), the interruptible elements will only be interrupted after all uFZK (rank 3). As the relative transport right is not any worse, the ruling chamber considers that the day-ahead division is appropriate in this case, too. The notification will improve transparency and enable

shippers to manage their portfolio accordingly, ie by securing the interruptible elements of booked capacity with firm day-ahead capacity. The day-ahead notification does remove the option for short-term "firming flow condition(s)".

See capacity products report, p 33, footnote 21.

The ruling chamber takes the view that the interruption order envisaged will have a comparable effect.

The deliberations above apply even in light of the fact that reductions of bFZK_{last} have been very rarely or not at all necessary in recent gas years because, for one thing, this applies to a lot of uFZK as well, depending on the entry/exit point.

See the data collected for the ruling of 29 March 2019, BK9-18/612 ("MARGIT"), annex I and the calculation tool, available on the Bundesnetzagentur website.

In addition, the deliberations above do not focus on the frequency of interruptions in the past but on whether TSOs can rule them out in a binding manner for the next gas day.

The ruling chamber has refrained from implementing the provision included in its original consultation, that after the day-ahead determination only FZK, DZK and uFZK may be offered for the following gas day.

See operative part 1(b)(i)(6) of the consultation document of 21 December 2018.

While some respondents to the consultation (EFET and EnBW in the second consultation) were in agreement with this rule, others pointed out that it would restrict the short-term offer of firm capacity, which, in turn, could have a negative effect on the balancing energy market (BDEW, FNG Gas, innogy). The short-term FZK offer would be smaller than the offer of bFZK, ie the sum of firm and interruptible elements. In the course of the second consultation, FNG Gas also pointed out the technical effort required for implementation and questions regarding the implementation in the case of surrendered capacity.

While the ruling chamber would still consider the exclusive offer of FZK and uFZK to be consistent, the responses showed that the advantages do not clearly outweigh the disadvantages in all use cases and the ruling chamber has thus decided not to prohibit the short-term marketing of bFZK at this time.

3.3.1.2.3. Provisions affecting bFZK_{temp} (operative part 1(b)(aa)(3))

(1) Under operative part (1)(b)(aa)(3)(a), the definition of the temperature condition must allow a third party to determine the firm and interruptible elements exactly using the reference temperature. The aim of this provision is to enable shippers to plan reliably for their own product portfolio and to check the determination of the elements carried out by the TSOs. This provision is likely to correspond to the bFZK_{temp} products already marketed. A certain reference temperature value thus results in a certain division without depending on any other factors.

The ruling chamber has decided not to impose a specific interval for the relationship between reference temperature and division as proposed in the capacity products report (p 157). TSOs should develop individual solutions as far as possible. No such suggestion was made in the consultation either.

(2) The weather data used by TSOs as a data source for the occurrence of the temperature condition must be generally accessible (operative part 1(b)(aa)(3)(b)). The ruling chamber does not see a need for this provision to be restricted to the use of public weather services. The ruling chamber has here taken note of the response to the second consultation by FNG Gas, which pointed out that TSOs are not always authorised to pass on weather data. The important thing is that the information is generally accessible so that the temperature measurements are comprehensible and foreseeable. The decisive factor should be that the temperature measurement is suitable to reflect existing network restrictions as accurately as possible. If, for example, other weather stations that are not part of a public weather service are better suited to determining the reference temperature, they should be used.

(3) The ruling chamber has also not followed the proposal in the capacity products report (p 157) to make the relation between reference temperature and scope of guaranteed fulfilment adjustable at cyclical intervals (annually) in order to take adequate account of changes in offtake behaviour. Even with a right of termination as called for in the report, a cyclical adjustment of the firm elements of already allocated bFZK would not permit multi-annual marketing for reasons of transparency, market requirements and legal regulations.

3.3.1.2.4. Provisions affecting bFZK_{last} (operative part 1(b)(aa)(4))

(1) Under operative part 1(b)(aa)(4), the flow condition is to be defined prior to the marketing. The flow forecasts and thus the division into firm and interruptible elements for each gas day (D) shall be based on the data available at the time of the determination pursuant to (2).

For reasons given above (3.3.1.2.1.), the ruling chamber has not prohibited the offer of bFZK_{last} and has therefore not followed the recommendation of the capacity products report (p 155). The transparency deficits of previous bFZK_{last} products are to be combatted by a comprehensible definition of network restrictions and by the determination of the firm and interruptible elements on the previous day. The publications in accordance with operative part 3(a)(bb), including examples of relevant flow scenarios, are based on the clear definition of the flow condition. The ruling chamber's intention here is to improve comprehensibility for shippers and to make reliable information available. The ruling chamber considers these minimum requirements to be essential, because shippers will not be able to calculate the firm and interruptible elements themselves, unlike in the case of the temperature conditions under operative part 1(b)(aa)(3).

(2) If the assumption made by FNG Gas (second consultation) that the day-ahead determination and the requirements discussed here would lead to a lower offer of bFZK_{last} turn out to be

correct, that would be acceptable. The ruling chamber takes the view that firm capacity would only appear to be reduced, in fact, because without the requirements given here, it is not justified to describe the capacity product as firm. If it is not possible to make firm capacity products transparent and comprehensible to the extent necessary, from the point of view of shippers they are ultimately uFZK with a lower probability of interruption.

See capacity products report, p 34 and 155.

3.3.1.2.5. Provisions affecting bFZK_{komb} (operative part 1(b)(aa)(5))

Under operative part 1(b)(aa)(5), the requirements for bFZK_{temp} and bFZK_{last} apply in principle to the combination product bFZK_{komb}. The ruling chamber's intention here is to prevent the requirements being circumvented. In the case of bFZK_{komb}, it is not possible for shippers to determine the division into firm and interruptible parts themselves using the reference temperature alone, as is set out in operative part 1(b)(aa)(3)(a) for bFZK_{temp}. However, the division resulting from the combination of conditions must be finally determined on the previous day.

3.3.1.3. Design of DZK (operative part 1(b)(bb))

(1) Provided it is technically possible, allocation conditions for DZK should include entry and exit points outside the transmission system of the marketing operator. A restriction of allocability simply based on ownership boundaries would not be in line with the TSOs' obligation to work together to the extent required for harmonised capacity products to be offered on as large a scale as possible (section 11(1) sentence 2 GasNZV). The ruling chamber has not followed the proposal of FNG Gas (second consultation) to include an explicit proviso about economic reasonableness. The aim of this is to emphasise the exceptional nature of such cases. Restrictions are likely to be particularly hard to justify in the case of "pipe-in-pipe" solutions (where more than one TSO shares ownership of a pipeline network). The necessary IT requirements are already being put in place as virtual interconnection points are being set up, and thus do not pose any obstacle to the designation of DZK across network operators.

(2) The ruling chamber has refrained from introducing further standardisations of DZK. FNG Gas pointed out that a harmonisation of the product is being pursued in the course of the update of the common contractual standards (annex 1 to the KoV). The ruling chamber has welcomed this and does not consider further determinations to be necessary at this time.

3.3.1.4. Interruption order (operative part 1(c))

Operative part 1(c) requires TSOs to make interruptions to capacity at a specific entry or exit point in the prescribed order. These provisions refer only to uFZK and to the interruptible

elements of bFZK and DZK. As far as FZK and the firm elements of bFZK and DZK are concerned, the principle remains that adjustments may only be made in cases of suspension or release from the obligation to perform that are covered by law or ordinances having the force of law. Moreover, provisions of laws or ordinances having the force of law regarding priority network access for shippers of biogas remain unaffected by the provisions of operative part 1(c). According to these provisions, biogas capacity within a range is to be interrupted last, irrespective of the time stamp, provided that Article 35 of Regulation (EU) 2017/469 does not apply.

Apart from the defined sequence given in Article 35 of Regulation (EU) 2017/459 for "interruptible capacity", TSOs were previously only bound by the general requirements for non-discriminatory network access. The exact approach taken for firm capacity products with interruptible elements varied from TSO to TSO (see capacity products report, p 45-46). The interruptible element of firm capacity products did not come under Article 35 of Regulation (EU) 2017/459 and in the case of interruptions, firm capacity products with interruptible elements were reduced in instalments, regardless of the contractual time stamp. These differing approaches and the lack of comprehensibility made regulation necessary.

(1) No provisions across points

This determination does not make provisions or specify the order of interruptions across all points. Internal order points are not affected by the provisions, particularly as, in accordance with section 8(3) sentence 2 GasNZV, strictly speaking no capacity products within the meaning of section 11 GasNZV are offered there. TSOs are responsible for deciding at which booking point a specific instance of congestion should be resolved by interruptions as part of their network management and system responsibility tasks. In line with this determination, any decision that has to be made by them about the booking point or points must be non-discriminatory and benefit the network.

The ruling chamber has therefore not followed the suggestions made by various respondents to make provisions across all points. During the consultation process, EFET and EnBW argued that a provision on the interruption order applicable to each individual point could jeopardise the ruling chamber's aim of classifying DZK as a higher-value product than uFZK. Therefore, in the case of DZK it must be ensured that the respective uFZK was already completely interrupted both at the entry and at the exit point (ie across points) before the interruptible element of DZK was interrupted, the respondents argued. Otherwise, they continued, it would be up to the TSO to serve the DZK or the uFZK first.

The ruling chamber has not followed this proposal because it is doubtful whether the issue described is generally valid. EFET describes the problem using the example of the DZK at a particular entry and a particular exit point. EnBW's response, too, refers to a DZK product

offered at a particular network connection point and a predefined corresponding entry point. The other respondents did not express any such concerns. The ruling chamber concludes that the issue is not a general one. It therefore does not believe it would be appropriate to set a general rule applicable to all DZK products, particularly with a view to the upcoming market area merger and the related changes to capacity products. Nevertheless, the ruling chamber acknowledges that the example described by EFET and EnBW could make it necessary to make the rules on interruption order more specific in the future. The ruling chamber is not able to fully anticipate the future offer of DZK in the single market area and has therefore decided not to issue provisions on the interruption order for the time being. However, the provision that the selection of the points to be interrupted must achieve the desired physical effect and be non-discriminatory remains unaffected. The ruling chamber will therefore continue to monitor the behaviour of TSOs and their effects separately from the merger of the market areas and will take measures if necessary.

(2) Interruption order across operators

Moreover, it is made clear that the interruption order applicable to each individual point must apply across operators in the event that a physical point is managed by more than one operator. At such a point, the interruptible capacity of all the TSOs active at that point must be interrupted before the interruptible elements of bFZK or DZK are interrupted. OGE pointed out (second consultation) that otherwise, interruptions could occur that do not make sense in terms of fluid mechanics. The transport capacities of the transmission system would then not be fully utilised. The ruling chamber shares this view. The aim of interrupting capacity is to maintain the fluidic integrity of the network to the greatest possible extent in a situation in which the network is overloaded. The focus is therefore the infrastructure itself and not the operators. It follows that at physical points that are divided into multiple booking points for marketing purposes, the marketing aspect fades into the background.

(3) Interruption under rank 1

The priority interruption (rank 1) of the portion of the re-nomination exceeding the permissible limits is based on section 5 sentence 2 of the Standard contractual terms for gas.

TSOs must include this clause in their capacity agreements on the basis of the ruling of 14 August 2015, BK7-15-001 (KARLA Gas 1.1).

This rule is intended to ensure that the provisions restricting the re-nomination right are not circumvented. The priority interruption prevents shippers from gaining unfair advantages from not observing re-nomination limits.

See the rationale for the ruling of 24 February 2011, BK7-10-001, p 52-53.

(4) Interruption under rank 2

The subsequent interruption of uFZK (rank 2) may be inferred from the name "interruptible capacity". In contrast to firm capacity products, including those with an interruptible element, the main characteristic of uFZK is that it can be interrupted if the total of nominations exceeds the quantity of gas that can flow at a certain network point.

See Article 35(1) of Regulation (EU) 2017/459.

(5) Interruption under rank 3

The interruptible element of bFZK and DZK is interrupted after uFZK (rank 3). The privileged treatment of firm capacity products with an interruptible element is based on the reasoning that the interruption risks of these products should be kept as low as possible. Firm capacity, even if it has an interruptible element, should always have a transport right over uFZK. The ruling chamber is working here on the understanding, expressed in the rationale to section 13 GasNZV, that bFZK and DZK are "firm capacity products".

See the rationale to the amendment of section 13(2) GasNZV in Bundesrat printed paper 419/17, page 13.

The majority of the respondents to the consultation (inc BDEW, EFET, EnBW, Equinor, FNG Gas, INES) support the privileged treatment of firm capacity products with interruptible elements.

Contrary to the suggestions of INES and party summoned 2), the ruling chamber has refrained from differentiating between the interruptible elements of bFZK and DZK within rank 3, ie one product will not be interrupted before the other. The two product categories have different properties and therefore serve different purposes. The ruling chamber therefore considers that it is neither possible under the current circumstances nor necessary for one of them to be given a generally higher value than the other. It is up to shippers to decide which product is of higher value, depending on the specific use case. The ruling chamber does not therefore consider it appropriate to confer a privileged status on, for example, bFZK as was suggested.

(6) Interruption with a rank based on the time stamp

Within the ranking, an interruption will be performed in line with the chronological order of the conclusion of the contracts, starting with the last contract concluded. In the event of simultaneous conclusion of contract, the capacity will be interrupted in proportion to the total capacity booked by the shippers. This provision corresponds to Article 35 of Regulation (EU) 2017/459, which refers to interruptible capacity.

Up to now, the TSOs have interpreted this to mean that it only applies to uFZK. They have therefore always interrupted the interruptible element of firm capacity products in instalments, regardless of the contractual time stamp. That means, for example, that the interruptible element of booked, firm, day-ahead capacity was interrupted with the same rank as the interruptible element of booked yearly capacity. In their responses to the consultation, BDEW, FNG Gas and

INES called for this approach to be continued on the basis that bFZK and DZK are classified as firm capacity products. The provision to reduce FZK in instalments should therefore be applied in the same way as for bFZK and DZK and applied to the interruptible element as well, they argued. Regardless of the question of whether Article 35 of Regulation (EU) 2017/459 should already be applied to the interruptible elements of firm capacity products, the ruling chamber considers an interruption based on the time stamp to be appropriate in this case too. On the one hand, this removes the certainty of being able to transport at least the amount of the relative proportion, but on the other it fits into the existing legal framework. Article 35 of Regulation (EU) 2017/459 judges the contractual time stamp to be a suitable tool to balance the various interests at stake. The probability of interruption can be reduced by a longer-term booking, so shippers have the ability to weigh up risks and opportunities themselves. The established congestion measures mitigate the risk of market exclusion. The application of the contractual time stamp therefore makes network access more transparent and the interruption risk easier to plan for. Market signals can take effect. It is not possible to argue that in the case of interruption by instalments of the interruptible elements of bFZK (as called for by innogy), shippers' risk in transactions in the balancing market and, in phases of high flow, with price peaks in the trading market would be limited by the fact that in the event of an interruption, the respective shippers would not be interrupted completely. Shippers making long-term bookings take on a certain risk too. The ruling chamber cannot infer from innogy's statements why this risk should be given a lower priority than the financial risk incurred by shippers booking short-term whose capacity was completely interrupted. Even apart from the explanations in innogy's response, the ruling chamber does not see that the owners of short-term capacity products would be subjected to such an unusual risk from the use of the time stamp that a deviation from the principle of Article 35 of Regulation (EU) 2017/459 would be justified.

3.3.2. Determinations on the over-nomination procedure (operative part 2)

(1) In operative part 2 the ruling chamber lays down the pre-conditions for and details of the over-nomination procedure for the allocation of within-day uFZK. As the within-day firm capacity auctions are held very frequently (Article 15 of Regulation (EU) 2017/459), no separate auctions for within-day uFZK with the same duration are held subsequently. Instead, within-day interruptible capacity will be allocated by means of an over-nomination procedure (Article 32(6) of Regulation (EU) 2017/459). Article 3 point 25 of Regulation (EU) 2017/459 defines over-nomination as the entitlement of network users who fulfil minimum requirements for submitting nominations to request interruptible capacity at any time within-day by submitting a nomination which increases the total of their nominations to a level higher than their contracted capacity. Under section 50(1) para 19 GasNZV, the Bundesnetzagentur is empowered to make determinations about the pre-conditions, the procedure and the details of the over-nomination procedure for the allocation of within-day uFZK.

(2) During the first consultation, comments were made about the differing treatment of the over-nomination procedure by TSOs (EFET, RWE, EnBW). It was said to be at present unclear under which pre-conditions and at what time over-nomination was possible.

The ruling chamber considers that the provisions of Article 32 of Regulation (EU) 2017/459 leave some leeway with regard to implementation that should be standardised for the single German market area in the interests of efficient and non-discriminatory network access.

(3) Scope of the over-nomination procedure

The over-nomination procedure for the allocation of within-day uFZK is applied at interconnection points and at entry/exit points whose capacity is awarded by means of an auction on a capacity booking platform.

(a) For interconnection points (Article 3 point 2 of Regulation (EU) 2017/459) and virtual interconnection points (Article 3 point 23 of Regulation (EU) 2017/459), the legal basis is Article 32(6) of Regulation (EU) 2017/459, in accordance with which, within-day interruptible capacity is allocated by means of an over-nomination procedure. This provision also applies to entry points from and exit points to third countries.

See applicability extension decision in accordance with Article 2(1) sentence 2 of Regulation (EU) 2017/459 in the decision of 14 August 2015, BK7-15-001 (KARLA Gas 1.1).

(b) The over-nomination procedure further applies to other entry/exit points whose capacity is awarded by means of an auction on a capacity booking platform. The ruling chamber considers this to be a consistent implementation of the references in the GasNZV to Regulation (EU) 2017/459. It also meets a request made in the second consultation (INES).

Currently affected by this are points from and to storage facilities, but not the entry/exit points mentioned in section 13(3) GasNZV or internal orders (section 8(3) sentence 2 GasNZV). At points from and to storage facilities, capacity is allocated by means of an auction; the auctions must comply with the provisions of Regulation (EU) 2017/459 (section 13(1) sentences 1 and 4 GasNZV). The aim of this legislation was to create an "identical framework" for the procurement of entry and exit capacity at interconnection points and points from and to storage facilities.

Bundesrat printed paper 419/17, p 13-14.

The ruling chamber takes the view that this aim will only be reached if the reference of section 13(1) sentence 4 GasNZV is interpreted broadly. It should be extended not only to the auction procedure within the meaning of Regulation (EU) 2017/459 but also to the over-nomination procedure for within-day interruptible capacity. An identical framework is only established when all allocation rules applicable at interconnection points also apply to the award of entry and exit capacity from and to storage facilities.

3.3.2.1. Earliest time of capacity allocation (operative part 2 (a))

(1) The allocation of within-day uFZK by means of an over-nomination procedure cannot take place until after the closure of the auctions for day-ahead capacity. Only after the closure of the auctions for day-ahead firm and, where appropriate, interruptible capacity can a previously submitted nomination that exceeds the contracted capacity be classed as a shipper's demand for within-day uFZK and this capacity can be allocated by means of an over-nomination procedure. The timing comes from the priority marketing of standard capacity products with longer duration in accordance with Article 32(10) in conjunction with Article 8(3) of Regulation (EU) 2017/459, ie in this case the day-ahead interruptible capacity product. The ruling chamber has thus accepted the suggestion made by EnBW and EFET (second consultation).

(2) Operative part 2(a) further makes clear that after the closure of the auctions for day-ahead interruptible capacity, the within-day uFZK can be requested and allocated by means of over-nomination at any time, provided that the other pre-conditions are fulfilled. This corresponds to the provision laid down in Article 3 point 25 of Regulation (EU) 2017/459.

3.3.2.2. Firm capacity products sold out or not offered (operative part 2(b))

Within-day uFZK can only be allocated by means of over-nomination when all firm capacity products are sold out or not offered.

(1) Firm capacity sold out

The fact that the firm capacity must be sold out as a pre-condition of the over-nomination procedure is based on Article 32(7) of Regulation (EU) 2017/459. Firm capacity products with an interruptible element are also to be regarded as firm capacity within the meaning of this determination.

See the explanations on p 20 of this decision.

Accordingly, within-day bFZK and DZK must be sold out before shippers can be allocated within-day uFZK by means of over-nomination.

(a) The aim and purpose of this condition is to make use of the network infrastructure as (cost-)efficient as possible, which requires that firm capacity is marketed with priority over interruptible capacity. If shippers were able to book uFZK independently of this, they might be able to profit from higher discounts despite the extremely slight possibility of interruption.

(b) This condition is also reasonable. It enables shippers to receive a higher-value capacity product. In the case of DZK, this applies regardless of interest in the specific allocation restriction because the interruptible element of DZK is interrupted after uFZK, in accordance with operative part 1(c).

(c) In the second consultation round, respondents including bayernets, BDEW and OGE criticised the provision according to which DZK was also to be marketed in priority to uFZK. They wrote that DZK had been developed to meet customers' particular transport service requirements and at the same time to avoid additional costs caused by an unnecessary expansion of the network. The target group of the product was said to be shippers exclusively interested in a point-to-point connection. The requirement for all firm capacity to be booked as a priority would force shippers to acquire DZK even if they were only interested in the use of the virtual trading point. This would put them into unnecessary competition with the shippers interested in the point-to-point connection, blocking DZK. There would be a resulting increased demand for DZK that could lead to shippers requiring the firm element of DZK – for example, to increase the supply security of power plants – missing out.

In principle, it is possible to understand the interests of market participants not to trigger an unnecessarily high demand for DZK with the requirements of the over-nomination procedure. Nevertheless, it is not possible to follow this suggestion. Article 32(1) and (7) of Regulation (EU) 2017/459 explicitly provide for the priority marketing of within-day firm capacity. This legal concept is to be applied to DZK, despite the limitations of firm network usage. Under operative part 1(a), DZK is a firm capacity product and under operative part 1(c), its interruptible element takes priority over uFZK. Given this higher value, it would not be compatible with the aim of making use of the network infrastructure as (cost-)efficient as possible to refrain from the priority marketing.

(2) Firm capacity not offered

Operative part 2(b), which allows for the possibility of over-nomination in the event that firm capacity was not offered, corresponds to the request made by various market participants in the second round of the consultation (eg BDEW, EFET, EnBW, and SEEL). It is specifically laid down for the auctioning of uFZK with a longer duration in Article 32 of Regulation (EU) 2017/459. Article 32(7) of Regulation (EU) 2017/459 does not include such a provision with regard to the over-nomination procedure, but it may be assumed that this was an oversight. It is not clear why this condition should not also apply to the allocation of uFZK by means of an over-nomination procedure.

3.3.2.3. No requirement for the previous contribution of capacity to the balancing group or sub-balancing account (operative part 2(c))

(1) In operative part 2(c), the ruling chamber has determined that the possibility of over-nomination is available in principle to all shippers and not – as specified in section 13d point 3 sentence 1 of annex 1 KoV – only to those shippers that have previously contributed capacity to the balancing group or to a sub-balancing account for the relevant gas day. TSOs did already have the option of deviating from the provision in the KoV limiting the possibility of over-

nomination and of regulating the possibility of over-nomination regardless of the contribution of capacity in their supplementary terms and conditions.

See section 13d point 3 sentence 4 of annex 1 KoV.

However, very few TSOs took this opportunity. The pre-conditions for over-nomination were, therefore, inconsistent and not very transparent for network users. The provision in operative part 2(c) was thus necessary to standardise and simplify the pre-conditions for over-nomination in the interests of efficient and non-discriminatory network access.

(a) Some responses to the first consultation (EFET, EnBW and RWE) pointed out the differing design. These responses maintained that some TSOs required the booking and nomination of firm capacity as a pre-condition for an over-nomination, which is neither comprehensible nor justified.

(b) The ruling chamber shares this view. There is no sufficient objective reason for the restrictive KoV provision described above. It may be the case that managing the over-nomination procedure requires fewer IT resources from the TSO if the procedure is only open to those shippers that have previously contributed capacity to the balancing group or to a sub-balancing account for the relevant gas day, but this idea – of cost-effective network operation – needs to be weighed against the restriction placed on those shippers that are then not able to participate in the over-nomination procedure. It is true that the condition could be met by contributing a very small amount of capacity, of one kilowatt-hour for example, to the balancing group or a sub-balancing account for the relevant gas day, but there is potential for discrimination, particularly against new market participants.

(c) Moreover, lack of time is the only reason why within-day uFZK is allocated by means of an over-nomination procedure and not via auctions. It is not the intention of the over-nomination procedure to limit the group of network users. It is therefore unclear why every network user should not be able to acquire capacity, in this case by means of over-nomination – as is the case for auction procedures.

(d) Opening up the over-nomination procedure potentially for all shippers would not cause interruptible capacity with a duration of a day or more to become less attractive to an inappropriate extent in comparison, because the within-day uFZK that is acquired by means of over-nomination still has the general disadvantage compared to other interruptible capacity products (eg day-ahead uFZK) that it is prioritised for interruption due to the contractual time stamp (see Article 35 of Regulation (EU) 2017/459).

(e) Moreover, Article 32 of Regulation (EU) 2017/459 does not contain any provisions to the contrary, but leaves the details of the over-nomination procedure open. The definition given in Article 3 point 25 of Regulation (EU) 2017/459 does not contradict this provision either. It does

impose the condition that the total of nominations must be at a level higher than the contracted capacity, but this would be the case if zero capacity were to be contracted (and contributed).

(f) The provision received a wholly positive reception from market participants (eg RWE, SEEL, BDEW) in the course of the second consultation round. FNB Gas also pointed out that TSOs that had previously required a contribution of capacity to the balancing group or to a sub-balancing account were trying to remove this requirement as part of their over-nomination procedure in light of the determination proceedings.

(2) Other pre-conditions for the booking and/or use of capacity remain unaffected by the provision in operative part 2(c). In the second consultation, FNB Gas pushed for clarification that general pre-conditions for the booking and use of capacity must also apply in the case of over-nomination. Specifically, the association listed the following general requirements, which are also laid down in the KoV:

- Market players interested in over-nomination must be known to the relevant TSO as a shipper and registered with the TSO as such.
- The possibility of a credit assessment and, where justified, the requirement of a security or prepayment must be permitted.
- The shipper must provide notification of a fully established balancing group in which the capacity booked by means of over-nomination must be contributed and thereafter the relevant allocation takes place.
- A successful communications test must be carried out with regard to the relevant entry or exit point to ensure that the shipper, or a third party named by the shipper, is technically capable of sending and receiving nomination messages.

The ruling chamber shares this view. The pre-conditions of capacity bookings and use should be determined independently of the type of allocation procedure and exceptions may arise from the particularities of the specific allocation procedure. This is also shown by the definition of over-nomination in Article 3 point 25 of Regulation (EU) 2017/459, which specifically refers to the other minimum requirements for submitting nominations. The requirements mentioned by FNB Gas are understandable and do not impede appropriate implementation.

3.3.2.4. Booking confirmation (operative part 2(d))

(1) Under operative part 2(d), TSOs must inform shippers of a booking for within-day uFZK by means of an over-nomination procedure immediately following the conclusion of the contract in a standardised procedure suitable for bulk business. It is necessary to provide information about the amount of capacity booked by means of over-nomination because the contract comes about without an explicit declaration of acceptance on the part of the TSO.

The confirmation should be made in a standardised procedure suitable for bulk business immediately following the conclusion of the contract. A standardised procedure means that the TSOs must ensure that the information being provided is consistent in terms of its format (manner in which the information is transmitted) and its content (data fields and structure). Both the format and the content of the confirmation must be suitable for bulk business. The format used to provide information on over-nomination must be equally accessible for all shippers. The ruling chamber considers the content to be suitable for bulk business if it can be machine-read automatically from the message and further processed in an automated manner. This does not include the manual provision of data content.

Market players called for a standardised procedure suitable for bulk business in both consultations (EFET, RWE). The ruling chamber acknowledges the benefit brought about by such a procedure. Just the possibility of being able to machine-read the information and further process it contributes to efficient network access. Capacity booking by means of over-nomination thus becomes more efficient and can be processed electronically by all shippers. Standardising the format and content therefore contributes to a non-discriminatory and transparent design of the over-nomination procedure.

(a) In the second consultation, there were calls to use the Edifact or Edig@s data format and to provide the information via email to implement this requirement (EFET, RWE). The information provided should include the following: TSO name; balancing group for which the over-nomination was submitted; network point; duration of over-nomination, entry or exit capacity amount; information on tariffs (EFET, party summoned 2).

(b) The ruling chamber considers that transmitting the relevant information in Edifact or Edig@s format would fulfil the requirements of this determination (standardised procedure, suitable for bulk business). Introducing this procedure would also not require a disproportionate amount of effort on the part of TSOs. FNB Gas, in response to an enquiry by the ruling chamber, stated that the information relevant for the confirmation of an over-nomination is not currently part of the existing Edifact/Edig@s message types. For example, the NOMRES and NOMINT message types used for the nomination do not include data fields relevant to a capacity booking, such as one for the transmission of the capacity tariff. However, it is not in dispute that the information relevant to capacity bookings by means of over-nomination could also be shown using such message types (or other ones); for example, if the message types mentioned were to be expanded, taking account of an appropriate timeframe for preparation and implementation.

Edifact/Edig@s message types are adapted and expanded at regular intervals via the change management team of the BDEW project group EDI@energy or by the DVGW. It could thus be ensured that information on capacity bookings by means of over-nomination that has been standardised across the industry is integrated. This would not be associated with a disproportionate amount of additional effort either, because it would involve an established

adaptation process. This process could thus also be used to implement the requirement introduced in this determination that shippers must be informed of bookings by means of an over-nomination procedure in a standardised procedure suitable for bulk business. The ruling chamber takes the view that the advantages of a standardised procedure suitable for bulk business, as described above, outweigh the effort involved in preparing or expanding and implementing message types suitable for this procedure in Edifact or Edig@s data format.

(c) In its statement (second consultation), FNB Gas was of the opinion that the current method of providing information, in an email, was sufficient. Shippers already receive prompt and comprehensive information about the scope of capacity allocation by means of over-nomination, it said. Similarly to the approach taken on the most-used capacity booking platform, PRISMA, when within-day uFZK is acquired by means of over-nomination, the TSO sends a booking confirmation by email that contains exactly the same information as is sent to shippers via the platform following an auction on PRISMA.

The ruling chamber does not consider that sending the relevant information in an email fulfils the requirements of this determination, at least not in the form that the TSOs have so far done. FNB Gas provided various practical examples of a confirmation message in response to a request from the ruling chamber. The emails provided are not standardised, at least not currently; they are different in terms of both content and structure. The existence of different data fields and the fact that different structural representations are chosen according to the specific company means that at the moment, these messages cannot be evaluated in a way that is suitable for bulk business. This means of provision would therefore require significant adjustments to make it meet the requirements of this determination.

(2) Against this background, the TSOs are called on to agree an industry-wide information provision procedure with a uniform implementation of the requirements set out in this determination and to establish a standardised procedure suitable for bulk business. The procedures discussed in the consultation responses that have already been established as a means of mutual communication in the energy sector should generally be preferred to newly developed ones.

3.3.3. Further publication requirements (operative part 3)

Operative part 3 places additional information and publication requirements on TSOs.

This is done on the basis of section 29(1) EnWG in conjunction with section 50(5) sentence 1 GasNZV, in accordance with which TSOs may be required by determinations to publish information necessary for competition in the gas trade or for the supply of customers in addition to that mentioned in section 40 GasNZV. In particular, pursuant to section 50(5) sentence 2

GasNZV, determinations can specify particular standard formats. The ruling chamber is properly exercising the discretion conferred on it.

The information and publication requirements determined in operative part 3 relate to some specific properties of capacity products with conditional firmness, interruptions and the over-nomination procedure. The ruling chamber's intention here is to make the actual restrictions of capacity products with conditional firmness compared with FZK as transparent and simple to understand as possible for shippers. The ruling chamber has refrained from introducing more comprehensive provisions as were explored in the second consultation, in particular provisions on the format of some information already subject to publication requirements ("Information on capacity products"). The ruling chamber has taken account of the responses of FNB Gas and the BDEW (both in the second consultation), which criticised the comparatively large amount of effort required. Other responses welcomed moves to improve transparency in general, but the ruling chamber understands that there is less interest in processing already available information than in information that is not currently available (see, for example, the responses of party summoned 2) and INES during the second consultation).

3.3.3.1. Requirements in connection with the offer of bFZK (operative part 3(a))

These publication requirements are specifically attached to the offer of bFZK.

(1) In accordance with operative part 3(a)(aa), the determination of firm and interruptible elements must be published on the TSO's website by 1:30pm on the previous day (D-1). This provision is in conjunction with operative part 1(b)(aa)(2), pursuant to which TSOs have to determine the firm and interruptible elements by 1pm on the previous day (D-1). The publication requirement is based on aspects of transparency and reliability of firm capacity products and ensures that the division is communicated in line with market requirements. The relevant information is available to anyone, regardless of any booking previously made, from that time on. Shippers can thus use this information in the course of the initial nomination

(by 2pm on the day before the day of supply, see section 12 point 2 of annex 1 KoV)

and the auctions for day-ahead capacity

(starting at 4:30pm on the day before, see Article 14(5) of Regulation (EU) 2017/459).

(2) In accordance with operative part 3(a)(bb), the determined divisions must be available for past gas days as well as of 1 October 2021. This is not likely to require additional effort on the part of TSOs because they would merely have to keep the daily divisions that they have to publish in any case. Shippers would find the process more comprehensible, in particular when bFZK is offered with flow-related conditions or there is no access to past temperature data. Shippers will be able to see how firm a particular product has been over longer periods of time. The ruling chamber considers the period of the past three gas years to be particularly relevant,

not least because in accordance with the decision of 29 March 2019, BK9-18/612 ("MARGIT") [margin no 60], this reference period should be able to provide reliable forecast figures for the probability of interruptions.

(3) In accordance with operative part 3(a)(cc), TSOs must publish the definition of the temperature condition. Because under operative part (1)(b)(aa)(3)(c), the definition must be provided in a way that allows a third party to determine the firm and interruptible elements exactly using the reference temperature, there is a high level of comprehensibility.

If bFZK with a flow-related condition is offered, TSOs must publish a description of the condition, including examples of relevant flow scenarios. The ruling chamber's intention here is to improve transparency and comprehensibility of the relevant capacity products. While anyone with access to the reference temperature can determine the division of products with temperature conditions, for products with flow-related conditions it can only be determined exactly by the TSO. Appropriate explanations are intended to make up for this lack of information.

(4) In accordance with operative part 3(a)(dd), TSOs must publish information on the interruptions to the interruptible element of bFZK. The ruling chamber's intention here is to make it easier for network users to estimate the reliability of interruptible elements of bFZK without putting a burden on TSOs that is disproportionate to the benefit involved.

In accordance with section 20 GasNZV in the version valid until 9 September 2010, various "network-related data" were to be published individually by each TSO. Since then, the subsequent regulation in section 40(1) sentences 1 to 3 GasNZV has referred to publication requirements pursuant to Annex I of Regulation (EC) No 715/2009. The necessary data include planned and actual interruptions of interruptible capacity and planned and unplanned interruptions of firm services. Publications must be made on an EU-wide platform.

Point 3.3(1)(f) and (g) and point 3.1.1 of Annex I of Regulation (EC) No 715/2009; the EU-wide platform can be accessed at <https://transparency.entsog.eu>.

The EU platform does not currently distinguish between different firm capacity products. The ruling chamber therefore considers that it would be useful for TSOs to publish additional information for each product on their websites. These requirements are likely to correspond to many of the current "transparency modules" or "dashboards" that TSOs have. This sort of publication will reduce the distortion of interruption risks for each product, eg for virtual interconnection points where various bFZK products may be offered at the same time.

The statistical interruptions of the various capacity products permit shippers to estimate the interruption risk and to incur risk or factor it into their economic considerations. Access to the network therefore becomes more transparent and more efficient. The ruling chamber has deliberately refrained from imposing a provision, however designed, on TSOs to calculate the interruption risk. Such a risk calculation would necessarily include some assumptions and

evaluations that shippers should undertake themselves, in their own interest, motivated by their own willingness to take on risk and their own individual transport requirements. Moreover, the TSOs' calculating this risk would suggest a level of accuracy that is ultimately not possible to attain. Statistical interruptions, by contrast, are a reliable variable that can be interpreted by shippers and that are available to a sufficient extent for this purpose.

3.3.3.2. Requirements in connection with the offer of DZK (operative part 3(b))

These publication requirements are specifically attached to the offer of DZK.

(1) In accordance with operative part 3(b)(aa), TSOs must publish the allocation conditions of the DZK they offer in a commonly used data format agreed with the other TSOs. The ruling chamber's intention here is to simplify network access and improve transparency. The number of TSOs active in Germany and the variety of capacity products on offer result in increased complexity for shippers. Information has to be compiled from different sources. This becomes clear when compared to adjacent European entry-exit systems in which there is generally only one TSO and only one firm and one interruptible capacity product on offer.

(2) In accordance with operative part 3(b)(bb), TSOs must also publish information on the interruptions to the interruptible element of DZK. This provision is the equivalent of operative part 3(a)(dd) for bFZK. The ruling chamber's intention here is to make it easier for network users to estimate the reliability of the interruptible element of DZK that permits free allocability. The ruling chamber therefore considers in this case, too, that it would be useful for TSOs to publish additional information for each product on their websites. However, the data are less useful for DZK than for bFZK. DZK allows use of the network on a firm basis at any time within the framework of the allocation condition, whereas bFZK only differentiates between firm and interruptible elements. The frequency of interruptions could also depend considerably on the extent to which shippers comply with the allocation condition.

3.3.3.3. Provisions on the publication format (operative part 3(c))

In accordance with operative part 3(c), the publications pursuant to operative part 3(a) and (b) are to be made on the respective TSO's website in a commonly used format enabling automatic readout. This stipulation corresponds to the requirements applicable to publication requirements pursuant to section 40(1) sentence 3 GasNZV and is intended to provide shippers with fast, standardised access to this information.

Furthermore, attention shall be drawn in capacity auctions on the capacity booking platform to this publication. The ruling chamber is here taking account of the fact that each TSO has a website and interested shippers therefore have to compile information from various sources.

Drawing attention to the publication is intended to allow data to be accessed as directly as possible, without merely pointing out the TSO's website.

3.3.3.4. Real-time information about possibility of over-nomination (operative part 3(d))

(1) TSOs are required to provide information in real time and in a uniform and transparent format on whether the pre-conditions for acquiring within-day uFZK by means of an over-nomination procedure have or have not been met at a network point. The relevant information is to be made available on the website of the respective TSO and – if appropriate by means of links – via the booking platform used.

(2) This information is necessary because of the pre-conditions for the over-nomination procedure pursuant to operative part 2(b). Within-day uFZK can only be allocated by means of over-nomination when all firm capacity products have been sold out or were not offered. It may well be theoretically possible for shippers to check these material pre-conditions for an over-nomination by checking and tracking the various auctions on the respective capacity booking platform, but it would require a great deal of effort and a residual risk of incorrect determination would remain. TSOs, on the other hand, are better placed to assess whether the pre-conditions for the over-nomination procedure have been met. The information must be provided to network users in real time and in a uniform and transparent format. The information must be provided in real time because an over-nomination for which the material pre-conditions have not been fulfilled could exceed the booked capacity and incur a contractual penalty, see section 30 annex I KoV.

(3) It makes sense to provide the information on the website of the respective TSO and in addition on the respective booking platform, because all other booking processes are handled centrally via that platform as well. This provision was welcomed in the second consultation (OGE, SEEL). RWE also supported the provision of information at a "central point". Network users would then not have to compile the information relevant to them from different sources or different portals. SEEL stated that the provision would reduce both operational risks and the effort involved in preparing information for network users. FNB Gas was in favour of publication on the website of the respective TSO, as already happens. It added that a link to the TSOs' website could also be placed on the capacity booking platform (at the respective network point).

For the reasons given above, the ruling chamber considers it necessary that the information is provided on the booking platform as well as being on the TSO's website. This provision can be fulfilled by a link to the TSO's website.

(4) The ruling chamber has refrained from issuing further provisions on content and form at this time. TSOs should meet the needs of the market within the framework set out in this determination at their own responsibility and establish a uniform and transparent format. The

ruling chamber takes the view that there are various possible approaches, one example of which would be to provide the necessary information using a "traffic light" system, ie red for an over-nomination that was not possible and green for a possible over-nomination. The necessary information should be provided from the time the bidding round for day-ahead capacity opens (see Article 14(8) of Regulation (EU) 2017/459), until the auction for within-day capacity closes (see Article 15(3) of Regulation (EU) 2017/459). Shippers can thus assess at any time whether a nomination that has already or will be submitted exceeding the contracted capacity will lead to capacity allocation by means of over-nomination or result in exceeding capacity with a corresponding penalty (request of party summoned 2)). It might also be possible to notify shippers that have already submitted an over-nomination automatically after each auction for firm within-day capacity if available firm capacity precludes the allocation of interruptible within-day capacity by means of over-nomination. A warning of any specific potential contractual penalties could also be sent if there were no re-nomination to the maximum amount of the contracted capacity.

3.3.3.5. Publications in the case of a virtual interconnection point (operative part 3(e))

Operative part 3(e) merely makes clear that in the case of the establishment of a virtual interconnection point pursuant to Article 3 point 23 and Article 19(9) of Regulation (EU) 2017/459, the publication requirements apply to the TSO assuming the marketing. This TSO and the adjacent one are the only ones that deal with shippers on the marketing side.

3.3.4. Dates of application and transitional arrangements (operative part 4)

Operative part 4 sets out the dates of application and transitional arrangements regarding the provisions of operative parts 1 to 3, thus forming annexes to the respective points covered by the determination.

3.3.4.1. Date of application for the design of capacity products (operative part 4(a))

In accordance with operative part 4(a), the provisions in operative part 1(a) and (b) on the design of capacity products are to be applied at the latest alongside the offer of capacity with a contract period beginning on or after 1 October 2021. Excepted from this is the offer in the annual yearly capacity auction that is expected to begin on 6 July 2020 in accordance with Article 11(4) of Regulation (EU) 2017/459. The offer in the yearly capacity auctions expected to take place on 5 July 2021 is thus the first that has to comply with the requirements of operative part 1(a) and (b). Non-yearly capacity rights for the gas year 2020/2021 can still be offered until 1 October 2021 without the requirements of operative part 1(a) and (b) having to be met. In this case, however, the requirements of operative part 4(c) and (d) must be met.

The ruling chamber has set this time to give TSOs enough leeway for technical implementation and contractual adjustments. It is also the last auction for yearly capacity before the start of the gas year 2021/2022 on 1 October 2021. According to current plans, the two existing market areas will be joined to form one single area on this day, and not on 1 April 2022 as laid down in section 21(1) GasNZV.

TSOs are free to adjust their capacity offer to the provisions at an earlier time if they wish.

3.3.4.2. Date of application for the determination of firm and interruptible elements of bFZK and corresponding publication (operative 4(b))

In accordance with operative part 4(b), the determination of the firm and interruptible elements of bFZK (operative part (1)(b)(aa)(2)) and publication of the result (operative part 3(a)(bb)) are to be made for each gas day beginning with 1 October 2021. This is the earliest start date for the performance period of capacity contracts acquired in the annual auction of 5 July 2021. If TSOs have already adjusted their capacity offer at an earlier time, the implementation should take place at the earliest start date for the performance period.

3.3.4.3. Transitional arrangement for allocated bFZK (operative 4(c))

In accordance with operative part 4(c), allocated bFZK is to comply with the requirements in operative part 1(b)(aa) at the latest for performance periods beginning on 1 October 2021. This covers capacity contracts for bFZK that have already been concluded by the time this determination is issued or are concluded by the time of the annual yearly capacity auction in 2021.

In accordance with section 50(1) para 4 GasNZV, the regulatory authority is authorised to make determinations to establish and offer capacity as provided for by section 9 GasNZV, in particular on capacity products pursuant to section 11. In accordance with the spirit and purpose of this provision, the ruling chamber does not consider itself restricted to determinations exclusively relating to the future offer of capacity products, ie transport contracts that have not yet been concluded. Product features can generally not be defined or changed without affecting already contracted capacity at the respective entry/exit point, so the regulatory authority must be authorised to make provisions affecting already booked capacity. This is the only way to achieve an efficient network access and the purposes mentioned in section 1(1) EnWG and applies to the corresponding capacity rights, not least in view of the long marketing periods.

See Article 11(3) of Regulation (EU) 2017/459: "The auction process shall offer capacity at least for the upcoming 5 gas years and for no longer than the upcoming 15 gas years for existing capacity. [...]".

The ruling chamber has therefore decided that all bFZK for performance periods beginning on 1 October 2021 and later is to comply with the requirements in operative part 1(b)(aa). Otherwise, there would be, for example, different temperature conditions at an entry/exit point depending on the time when the contract was concluded, which the ruling chamber does not consider to be useful from a transparency point of view. The provision also applies to allocated bFZK products for which no division into firm and interruptible elements is envisaged for the previous day and which therefore could be viewed as "firm" for much longer.

See the explanations on p 31 of this decision; the ruling chamber is particularly referring to flow conditions and "firming flow conditions".

The ruling chamber is thus ensuring that all TSOs implement the provision in a uniform manner. Both existing and future bookings of bFZK are thus equally subject to the division into firm and interruptible elements without enabling a differentiation to be made between these products. The holders of already allocated bFZK will probably only be slightly disadvantaged by this. While a certain proportion will in future be classed as interruptible from the day before, any interruptions that are necessary will be carried out in rank 3, depending on the contractual time stamp, in accordance with operative part 1(c).

3.3.4.4. Transitional arrangement for allocated BZK (operative part 4(d))

In accordance with operative part 4(d), allocated BZK is to be converted to DZK at the latest for performance periods beginning on 1 October 2021. This will enable network usage on an interruptible basis as well as the previous firm network usage.

Pursuant to the above explanations on bFZK (section 3.3.4.3), the ruling chamber considers itself authorised to issue provisions relating to capacity already booked at the time of the decision.

The ruling chamber takes the view that the TSOs can carry out the adjustment pursuant to operative part 4(d) without impacting the process of market area merger, because network calculations will not be negatively affected. Moreover, the adjustment has to take place regardless of any advantages or disadvantages from the point of view of capacity rights holders, because these conditions of network access cannot be done away with.

See the explanations in section 3.3.1.1.

3.3.4.5. Date of application for provisions on interruptions (operative part 4(e))

In accordance with operative part 4(e), the provisions on interruptions are to be applied as from 1 October 2021 and cover previously booked transport contracts.

Pursuant to the above explanations on bFZK (section 3.3.4.3), the ruling chamber considers itself authorised to issue provisions relating to capacity already booked at the time the determination is issued. It is making use of this authorisation under operative part 4(e) because having different interruption orders operating in parallel would neither improve transparency nor ensure the intended privileged status of firm capacity products. It is ultimately also the case here that the holders of allocated capacity will only be slightly disadvantaged because under operative part 1(c), any necessary interruptions within the rank will be made depending on the contractual time stamp.

3.3.4.6. Date of application and transitional arrangements for the over-nomination procedure (operative part 4(f))

In accordance with operative part 4(f), the provisions with respect to the over-nomination procedure apply as from 1 October 2020.

The ruling chamber is hereby granting the TSOs an appropriate time for implementation, including the technical aspects. In the second consultation, FNB Gas stated that an implementation period of at least nine months from the issue of the determination was necessary.

Under sentence 2 of operative part 4(f), the availability of BZK does not preclude the allocation of interruptible capacity up until 1 October 2021. This stipulation applies to all standard capacity products, but in particular to the over-nomination procedure in deviation from operative part 2(b).

The ruling chamber is here taking account of the fact that the marketing of BZK will still be possible until 1 October 2021. BZK is offered by TSOs as a firm capacity product but does not include any freely allocable network usage on an interruptible basis. Unlike for DZK, therefore, it is not reasonable for shippers to have to acquire BZK over uFZK.

3.3.4.7. Date of application of the provisions regarding publication and information requirements (operative part 4(g))

In accordance with operative part 4(g), the publication and information requirements are to be met as from 1 October 2021. This provision is in line with the time from which all transport contracts whose duration has not completely elapsed will have to comply with the provisions of operative part 1(a) and (b).

By way of derogation, the publication of the definition of temperature conditions pursuant to operative part 3(a)(cc), the descriptions of any flow-related conditions pursuant to operative part 3(a)(cc) and the information on allocation conditions pursuant to operative part 3(b)(bb) are to be made available beginning with the offer of capacity in the annual yearly capacity auctions in July 2021. This provision is mandatory because the adjusted capacity products might be

marketed for the first time in the auction and shippers have to know the exact arrangements of them.

Finally, the real-time information on the over-nomination procedure (operative part 3(d)) is to be made available beginning on 1 October 2020. This provision is a consequence of the date of application pursuant to operative part 4(f).

3.4. Costs (operative part 5)

A separate notice of the costs (fees and expenses) will be issued in accordance with section 91 EnWG.

Information on legal remedies

An appeal may be filed against this decision within one month of service of the decision. Appeals must 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 of filing the appeal. The period begins with the lodging of the appeal and 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 has no suspensory effect (section 76(1) EnWG).

Barbie Kornelia Haller
Chair

Dr Werner Schaller
Vice Chair

Diana Harlinghausen
Vice Chair