Bundesnetzagentur

- Ruling Chamber 7 -

[redacted]

**Decision**

Ref: BK7-22-086-final

In the administrative proceedings

concerning: application for exemption from regulation

Deutsche ReGas GmbH & Co. KGaA, Am Hafen 10, 17509 Lubmin, legally represented by its management board,

applicant,

- Legal representatives of the applicant: Hengeler Mueller, Partnerschaft von Rechtsanwälten mbB, Benrather Straße 18-20, 40213 Düsseldorf -

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

represented by

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

decided on 12 January 2023:

1. The Decision in the administrative proceedings BK7-22-086 of 17 November 2022 (BK7-22-086) is revoked and amended in accordance with the European Commission Decision of 20 December 2022 (C(2022) 9902 final) and reissued as follows.

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2. The capacity created at the "Deutsche Ostsee" liquefied natural gas (LNG) facility, Am Hafen 10 in 17509 Lubmin, is exempted from the application of sections 20 to 26(1) of the German Energy Industry Act (EnWG) and the Ordinance on a regulatory framework for LNG facilities (LNGV) issued on the basis of section 118a EnWG in favour of the applicant in accordance with the following:

   a) The exemption applies to an annual throughput capacity of 13.5 billion cubic metres (13.5bn $m^3$/a; phase I: 4.5bn $m^3$/a as of 1 December 2022; phase II: a further 7bn $m^3$/a from 1 December 2023 and a further 2bn $m^3$/a from 1 October 2024) for the importation, offloading, temporary storage and regasification of LNG within the meaning of section 3 para 26 EnWG.

   b) Capacity created by significant increases of capacity is not exempt.

3. The exemption is limited to a period of 20 years from the start of commercial operation of phase I.

4. The applicant is required to levy charges on users of the exempt infrastructure.

5. The applicant is required to apply a non-discriminatory and transparent procedure for the long-term allocation of capacity. At least the following requirements shall be observed and agreed in the capacity contracts:

   a) Booking requirements for long-term bookers

      (1) All potential users must first register with the applicant.

      (2) The applicant is free to offer different products provided these are designed in a transparent and non-discriminatory manner.

      (3) The minimum booking amount shall be 15% of the total annual throughput capacity to be allocated.

      (4) The minimum booking duration shall be at most 10 years.

      (5) The booking year shall be the calendar year.

   b) Long-term initial allocation of capacity

      (1) A period of at least 10 working days shall be allowed for the submission of booking requests for the long-term initial allocation of capacity. All requests received within this booking period shall be considered as having been received at the same time. The start of the initial allocation shall be made known, drawing attention to the

requirement for registration, at least 10 working days in advance. The registered customers shall be provided with all the allocation rules before the start of the booking window.

(2) In the event of excess demand, the capacity for allocation shall be allocated on a pro-rata basis. In derogation of this, the allocation may be undertaken taking account of the respective booking duration and the booking volume of the booker. Booking requests for a longer booking duration and a larger booking volume may be given priority in the allocation.

(3) The basic tariff applied to the initial allocation shall refer to a booking duration of 20 years. For bookings with shorter durations, it is permissible to impose mark-ups on the basic tariff depending on the duration. These mark-ups and discounts shall be made known to all potential users before the initial allocation. Neither mark-ups nor discounts may exceed 10%.

c) Long-term allocation of the free capacity remaining after the initial allocation

(1) A mark-up on the tariff applied in the initial allocation (basic tariff) is permitted for the long-term allocation of the free capacity remaining after the initial allocation. The mark-up may not exceed 10%.

(2) The allocation mechanism for the long-term allocation of the free capacity remaining after the initial allocation shall be designed in a transparent and non-discriminatory manner. No other requirements are determined.

6. The applicant is required to set aside a reserve quota equal to least 10% of the annual throughput capacity for a short-term allocation of capacity. At least the following requirements shall apply to the short-term allocation of the capacity set aside as the reserve quota:

a) All potential users must first register with the applicant.

b) The capacity for the short-term allocation shall be allocated in the form of slots that must be spread as evenly as possible over the booking year.

c) Each slot must allow the slot owner to unload at least 138,000m³ of LNG.

d) For short-term allocation, at least five slots per years shall be provided in phase I and at least 12 slots in phase II.

e) The slots shall be allocated annually for the following booking year on a recurring date to be published.

f) The slots shall be allocated once a year in an ascending clock auction or another non-discriminatory, transparent, multi-stage auction procedure. If not all the capacity is allocated in the annual auction, the non-yearly short-term allocation of capacity set aside shall be carried out (see operative part 6. k)). The start of the annual auction shall be announced publicly four weeks in advance.

g) The slot product description shall be published no later than two weeks before the annual auction starts and shall include at least the following information:

(1) date for the unloading slot

(2) arrival window

(3) amount of LNG in m³ that can be unloaded securely

(4) available regasification capacity; in phase I at least 600,000 kWh/h/a (0.45bn $m^3$/a), in phase II at least 1,710,000 kWh/h/a (1.35bn $m^3$/a)

(5) regasification period

(6) starting price for the slot (see operative part 6. h))

(7) price step (see operative part 6. i)).

h) The starting price for a slot may be supplemented by a mark-up equal to a maximum of 10% of the basic tariff for a particular annual throughput capacity. The maximum starting price shall be determined using the following formula:

$$\max.\,\text{Startpreis}_{\text{Slot}} = \text{Basistarif} \times \frac{\dot{V}_{\text{K-Slot}}}{\dot{V}_{\text{Basistarif}}} \times 1{,}1$$

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

i) In the event of excess demand, a further auction round shall be conducted in each case. Participation in this auction round is only open to those users that have participated in the previous auction round. The starting price shall be increased in each case by a mark-up to be previously determined by the applicant ("price step"). The ruling chamber shall be

notified of the price step in advance and the price step shall be made known to the participants in advance of the auction.

j) Should, in the event of excess demand, all auction participants exit the auction at the next price step (first-time undersell), the slot shall be allocated among the auction participants that participated in the last auction round preceding the undersell in a non-discriminatory and transparent allocation procedure to be determined and made known in advance by the applicant.

k) Participation in the first auction shall be restricted to registered users not yet having long-term capacity. Slots that have not been allocated in the auction with restricted participation shall be subsequently offered in a second auction to all registered users. Should slots still not be allocated after this auction, the slots shall be offered by the applicant on a non-yearly basis to all registered users in accordance with the first come, first served (FCFS) principle (non-yearly short-term allocation of capacity set aside).

l) Should technical facility restrictions require, the non-yearly allocation of slots may deviate from the requirements for the slot product as follows:

(1) The fixed minimum unloading amount of LNG for a non-yearly slot may be smaller in individual cases in derogation of operative part 6. c). The applicant shall keep any required reduction in the fixed minimum unloading amount as small as necessary.

(2) In addition, the applicant can deviate from the minimum regasification capacity pursuant to operative part 6. g) (4).

m) Any additional costs incurred by the applicant through the allocation of capacity set aside is considered to be compensated for by the mark-up pursuant to operative part 6. h). Further fees or costs (such as a handling fee) may not be charged.

n) Where flexibilisation instruments permitting optimal and flexible use of the interim storage unit and the regasification units are applied, this shall be done in a transparent and non-discriminatory manner.

o) In the event that capacity has not been marketed in the procedure for the non-yearly short-term allocation of capacity set aside, the applicant is required to report in each case to the ruling chamber by 31 March of the following year on the amount of capacity not marketed in the procedure for the non-yearly short-term allocation of capacity set aside. The applicant shall state the reasons why capacity has not been marketed in the non-yearly short-term allocation of capacity set aside.

7. The applicant is required to include special congestion management rules in its capacity contracts. These rules must in particular entitle all users to trade their contracted capacity on the secondary market (secondary marketing). At least the following requirements shall be observed and agreed in the capacity contracts:

   a) Capacity holders may transfer all or part of their capacity to other registered users.

   b) The capacity holder shall inform the applicant of the volume and timing of the secondary marketing in good time before the secondary marketing. The applicant shall inform all market participants registered with it without undue delay about the scope and timing of secondary marketing that is due to take place.

   c) The transfer requires the applicant's agreement, which may only be denied for good cause.

   d) Where capacity has been transferred successfully, the original capacity holder shall be freed from the relevant rights and obligations arising from the capacity contract vis-à-vis the applicant. In other cases, in particular in which the transfer is only temporary, the applicant can make other arrangements.

   e) A user's right to trade its contracted capacity on the secondary market may be exercised up to five days before the date of the unloading slot. The user shall inform the applicant no later than 5 days before the date of the unloading slot whether and to which registered user an unused slot has been transferred.

8. The applicant is required to include special congestion management rules in its capacity contracts that allow unused capacity to be offered on the market in accordance with the UIOLI procedure. At least the following requirements shall be observed and agreed in the capacity contracts:

   a) The UIOLI procedure shall be applied if, no later than 21 days before the date of the unloading slot, a user has not notified a landing or states that it will not use a particular slot and does not name another registered user to whom the slot has been transferred. No secondary marketing under operative part 7. may take place for the duration of the UIOLI procedure.

   b) The applicant shall identify the unloading slot no later than 20 days before the date of the slot in order to enable all registered users to submit a booking request for the free slot from the 19th day preceding the date of the slot. Slots that have become free shall be

allocated in a transparent and non-discriminatory procedure to be determined by the applicant.

c) Should the free slots be allocated successfully, the original capacity holder shall be freed from the relevant rights and obligations arising from the capacity contract vis-à-vis the applicant. Otherwise, the applicant shall return the unmarketable slot to the original holder within three days. However, the release under sentence 1 does not include the capacity holder's payment obligations. Any marketing revenues made must be returned to the original capacity holder. The applicant may charge the original capacity holder an appropriate fee for the marketing.

9. The applicant is required to notify the ruling chamber without delay during the exemption period any time that a market participant of the upstream or downstream German wholesale market (sellers' or buyers' side) intends to book or acquire capacity that would mean the market participant in question would acquire at least 65% in total of the annual throughput capacity of the Deutsche Ostsee LNG facility intended for long-term bookings for at least five years, including first binding capacity contracts for the second phase and any capacity later added or made available and capacity bookings on the secondary market.

10. The applicant is required to ensure during the exemption period that bookings that have to be notified under operative part 9. and the acquisition of capacity that has to be notified under operative part 9. are ruled out or are adjusted before conclusion of the binding booking process in accordance with the rules imposed by the ruling chamber if

a) the market share, to be determined, of the undertaking on the upstream or downstream German gas wholesale market in Germany is at least 30% at that time and

b) an analysis shows that the booking that has to be notified or the acquisition of capacity that has to be notified under operative part 9. could have detrimental effects on competition, in particular if the booking that has to be notified or the acquisition of capacity that has to be notified under operative part 9. would lead to a market share of the relevant undertaking(s) of at least 40% on the upstream or downstream German wholesale market in Germany at any time during the booking duration.

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

11. The applicant shall inform the ruling chamber without undue delay of any circumstances that may require a reassessment of the exemption prerequisites set out in section 28a(1) paras 1 to 5 EnWG, in particular if they may result in compliance with the prerequisites laid down in section 28a(1) paras 1 to 5 EnWG or the conditions laid down in operative parts 4. to 10. being affected.

12. The exemption decision may have further secondary provisions and conditions attached to it subsequently or may be amended, supplemented or revoked in full or in part; the secondary provisions in operative parts 3. to 10. may be revoked, amended or supplemented in full or in part, where

    a) a change in actual circumstances requires a reassessment of the exemption prerequisites set out in section 28a(1) paras 1 to 5 EnWG; or

    b) the applicant fails to meet one or more of the conditions in operative parts 4. to 10.; or

    c) after the "Deutsche Ostsee" LNG facility has been put into operation, the applicant is not separate in accordance with sections 8 to 10e EnWG from the system operation of NEL Gastransport GmbH, GASCADE Gastransport GmbH, Gasunie Deutschland Transport Services GmbH, Fluxys Deutschland GmbH, Lubmin-Brandov Gastransport GmbH, OPAL Gastransport GmbH & Co. KG, ONTRAS Gastransport GmbH or another system operator in whose system the infrastructure is built; or

    d) the European Commission Decision of 20 December 2022 (C(2022) 9902 final) issued on this exemption is amended, revoked or becomes ineffective.

13. The ruling chamber shall notify the European Commission of the amendment, supplement or revocation of the exemption decision pursuant to Article 36 of Directive 2009/73/EC. The European Commission may in this event require the changed decision to be amended or revoked.

14. The exemption applies subject to the condition that construction on the LNG facility is started no later than two years after the European Commission Decision is issued, ie no later than 20 December 2024, and the LNG facility is put into commercial operation no later than five years after the European Commission Decision is issued, ie no later than 20 December 2027, unless the European Commission decides in accordance with Article 36(9) of Directive 2009/73/EC that any delay is due to major obstacles beyond control of the applicant. The applicant shall notify the date of the start of construction and the date of the start of commercial operation in writing to the ruling chamber.

15. The exemption also applies in the event that ownership of the Deutsche Ostsee LNG facility is transferred in full or in part, in the event that operation is transferred to a third party and in the event of changes in the applicant's ownership structure compared with the situation described in the application, provided that:

    a) the ruling chamber is notified of the intended transfer or change in good time before the agreed transfer of rights;

    b) the third party, where taking over operation, commits to complying with the requirements arising from this exemption; and

    c) the ruling chamber does not withdraw the exemption within three months of receipt of the notification. The withdrawal shall be subject to the condition that the transfer or change takes place.

16. In other respects, the application is rejected.

17. The right to order payment of costs is reserved.

## Rationale

### I.

1 In the present administrative proceedings the applicant is seeking an exemption from regulation in accordance with section 28a EnWG for the "Deutsche Ostsee" LNG facility in Lubmin, which the applicant intends to set up and operate in two phases as a floating importation and LNG facility.

2 The site of the planned LNG facility is also the headquarters of the applicant. The project address is, therefore, Am Hafen 10, 17509 Lubmin.

3 The applicant plans for the Deutsche Ostsee LNG facility, once construction is fully completed, to have an annual throughput capacity of 13.5 bn m³ of natural gas.

4 The "Deutsche Ostsee" LNG facility is planned to consist of the following main components:

5 phase I (annual throughput capacity of 4.5bn $m^3$ as of 1 December 2022):

- a floating storage unit (FSU) firmly anchored outside the Bay of Greifswald as a loading and unloading point for terminal users and interim storage unit for the LNG;
- a floating storage and regasification unit (FSRU) in Lubmin port as a regasification plant (known as the port FSRU);
- at least three shuttle ships to transport LNG from the FSU to the port FSRU;
- a pipeline link to send the regasified LNG from the port FSRU into the transmission system (onshore pipeline link).

6 phase II (annual throughput capacity of a further 7.0bn $m^3$ as of 1 December 2023):

- another FSRU firmly anchored outside the Bay of Greifswald (known as the offshore FSRU) as a loading and unloading point for terminal users, interim storage unit and additional regasification unit;
- an offshore pipeline link to send the LNG regasified directly in the offshore FSRU into the transmission system;
- at least three shuttle ships to transport the LNG temporarily stored in the offshore FSRU from the offshore FSRU additionally to the port FSRU;
- an onshore pipeline link to send the LNG regasified in the port FSRU into the transmission system.

phase II (annual throughput capacity of a further 2.0bn $m^3$ as of 1 October 2024):

- two FSRUs firmly anchored outside the Bay of Greifswald as loading and unloading points, interim storage units and regasification units for terminal users; the port FSRU will be moved offshore in addition to the offshore FSRU already located outside the Bay of Greifswald;

- an offshore pipeline link for the FSRU to the transmission system;
- a jetty in Lubmin port with a newly constructed onshore pipeline link for phase I that may be subsequently used for hydrogen.

7 Phase I – first FSRU in Lubmin port: in phase I, the applicant plans to bring an FSRU into Lubmin port in November 2022 (FSRU 1). The annual regasification capacity of the FSRU is up to 7bn m³. During phase I, 4.5bn m³ can be used initially owing to the necessary (re)loading processes.

Offshore, the applicant will have an FSU of standard market design outside the Bay of Greifswald to act as an interim storage unit and reception station for users' LNG tankers landing there. The FSU will have a reception capacity of about [redacted].

Three small, low-emission LNG carriers (SLNGC) will provide a "shuttle service" for the LNG in the form of a "virtual pipeline". The SLNGCs will transport the LNG delivered to the FSU to the port FSRU, where it will be regasified using the FSRU. Three shuttle trips to the FSRU using the loaded SLNGCs are expected to take place each day in the port in this "virtual pipeline".

On the land side, the regasified LNG will be taken from the FSRU using a bridge constructed over the edge of the FSRU to the dock wall of the industrial port and injected through a pipeline link to be set up by NEL Gastransport GmbH into NEL's connection point about 350m away.

8 Phase II – second FSRU for offshore use and relocation of the first FSRU: in phase II another FSRU (FSRU 2) is initially to come into use for regasification purposes by 1 December 2023. The FSRU 2 is to be installed in the Baltic Sea outside the Bay of Greifswald and be permanently connected to existing or newly constructed offshore pipeline infrastructure there. The natural gas will be taken off via the landing infrastructure already present at the port of Lubmin and does not require any additional land-side network connection to the NEL, EUGAL or OPAL pipelines other than the possibly necessary offshore pipeline infrastructure. The planned regasification capacity of the FSRU 2 is an additional 7bn m³. As the FSRU 2 is planned to be offshore, the existing FSU will become obsolete as the FSRU 2 can take over the function of the FSU for the interim storage of LNG. [redacted] During the winter period of 2023/2024, the FSRU 1 will continue to be supplied with LNG, initially in the port of Lubmin by the FSRU 2 (instead of the FSU) and the virtual pipeline (SLNGCs). The FRSU 1 will continue to regasify the supplied LNG and feed it into the transmission system using a pipeline at the port edge. In the course of summer 2024, after the full commissioning of the FSRU 2, the FSRU 1 will be brought to the offshore site and also permanently connected to the offshore pipeline. Once the FSRU 1 has been connected at the offshore site, probably in autumn 2024, the total regasification capacity of the Deutsche Ostsee terminal, 13.5bn m³, will be available.

9 The LNG facility will also be able to regasify hydrogen and feed it into the transmission system in the future.

10 The applicant is a public partly limited partnership (Kommanditgesellschaft auf Aktien; KGaA) based in Lubmin (entered in the commercial register of the local court of Stralsund under HRB 21927). The applicant's activities comprise planning, project planning, constructing, maintaining and operating regasification units for LNG, liquid hydrogen and hydrogen-based products in Germany. The share capital of the applicant is €1,000,000 divided into par-value shares with voting rights of €1 each.

11 The applicant will construct and operate the LNG infrastructure known as Deutsche Ostsee, which is the subject of this application.

12 The applicant provided information in letters of 30 September 2022, 4 October 2022 and 7 December 2022 that, following several capital increases since the application had been submitted, the limited liability shareholders were as shown below. The following limited liability shareholders are shareholders of the applicant:

| Aktionäre | Wohnsitz bzw. Sitz | Anteilshöhe in % |
|---|---|---|
| [redacted] | | |

13 The new limited liability shareholders who have joined [redacted] and [redacted] as a result of the capital increase have not acquired a controlling or co-controlling stake in the applicant.

14 [redacted]

15 The applicant takes the view that the legal requirements for the application are unaffected by the capital increases and the change in shareholdings. In particular, none of the new limited liability shareholders are involved in the system operators of those gas transmission lines to which the Deutsche Ostsee LNG facility is to be connected or could be connected in phase I or phase II, primarily the North European Natural Gas Pipeline (NEL) but possibly also the Baltic Sea Pipeline Link (OPAL) or the European Gas Pipeline Link (EUGAL).

16 The sole general partner of the applicant is WCP Deutschland GmbH, with a business address of Theodor-Storm-Straße 17, 76646 Bruchsal (entered in the commercial register of the local court of Mannheim under HRB 743472). WCP Deutschland GmbH does not act as a (transport) network operator nor does it hold stakes in (transport) network operators. Moreover, it does not produce or market electricity or gas on the European energy markets, either directly or indirectly via stakes in other companies. [redacted] The shareholders of WCP Deutschland GmbH are Grundwerte Verwaltungs-GmbH, which has a 60% stake and is based in Bruchsal (entered in the commercial register of the local court of Mannheim under HRB 733427) and Dr. Knabe Steuerberatungsgesellschaft mbH Holding, which has a 40% stake and is based in Potsdam. The sole shareholder of Grundwerte Verwaltungs-GmbH is [redacted]. The sole shareholder of Dr. Knabe Steuerberatungsgesellschaft mbH Holding is [redacted]. Neither [redacted] nor [redacted] currently have stakes in other energy-related companies.

17 Various potential users of the LNG infrastructure had already expressed their interest in booking long-term capacity ahead of a public expression of interest procedure.

18 The applicant applied for the opening of proceedings to grant an exemption from regulation under section 28a(1) and (3) EnWG in conjunction with Article 36 of Directive 2009/73/EC in a letter of 28 July 2022. The applicant submitted extensive documentation in connection with its application. The documentation included in particular information describing the project, the project planning

and financing, on the corporate structures and the facility's services. The applicant further submitted an analysis of competition and security of supply on 11 August 2022.

19 The applicant stated that it met all the requirements for an exemption from regulation. The applicant in particular stated that competition and security of supply would be enhanced, that the planned LNG facility constituted major new infrastructure with a high investment risk, and that the LNG facility would be owned by the applicant and thus by a company that was separate from a system operator. The applicant also stated that charges would be levied on users of the facility and that there would be no detriment to competition or to the effective functioning of the internal market in natural gas.

20 The application submitted by the applicant was initially incomplete. The applicant was therefore requested to submit missing documents and information in emails and letters, in particular on 18 August 2022, 15 September 2022, 20 September 2022 and 21 September 2022 and in telephone and video calls of 12 August 2022, 20 September 2022 and 6 October 2022. The applicant met these requests, in particular in emails and letters dated 30 August 2022, 30 September 2022, 4 October 2022 and 7 October 2022.

21 The applicant requested

an exemption from the application of the provisions of sections 20 to 26 EnWG for the total annual throughput capacity of 13.5bn m³ of the planned LNG facility for a period of 20 years in total beginning from the start of commercial operation:

The exemption from the application of the provisions of sections 20 to 26 EnWG is to begin

- from the start of commercial operation of the floating terminal "Neptune" (FSRU 1) for an annual throughput capacity of 4.5bn $m^3$ for the importation, offloading, storage and regasification of LNG in the Lubmin port;
- from the start of commercial operation of another floating terminal (FSRU 2) for an annual throughput capacity of 7bn $m^3$ for the importation, offloading, storage and regasification of LNG at the offshore site outside the Bay of Greifswald off the coast of Lubmin;
- from the start of commercial operation of the floating terminal "Neptune" (FSRU 1) for an annual throughput capacity of a further 2bn $m^3$ after the relocation of the FSRU 1 to the offshore site outside the Bay of Greifswald.

22 The Bundeskartellamt and the regulatory authority of Mecklenburg-Western Pomerania were notified by email of the opening of proceedings on 10 August 2022 and 18 August 2022 respectively.

23 The ruling chamber, having checked the documents for completeness, sent the application documents to the European Commission on 10 October 2022.

24 On 29 September 2022 the ruling chamber sent the applicant a written draft of rules and mechanisms for the management and allocation of capacity for the purpose of consultation. These included in particular requirements for the non-discriminatory long-term initial allocation, the short-term allocation of capacity on the basis of a reserve quota, secondary marketing, and a UIOLI procedure. The applicant also provided a statement in writing on 4 October 2022. [redacted]

25 Taking into account the applicant's comments, the ruling chamber drew up the final rules and mechanisms for capacity management and allocation and sent them to the applicant in a letter of 10 October 2022.

26 On the basis of these rules and mechanisms, the applicant conducted an expression of interest procedure in the period from 10 October 2022 to 21 October 2022, which was divided into a binding expression of interest procedure for phase I and a non-binding one for phase II. The applicant submitted the results of the expression of interest procedure to the ruling chamber in letters of 25 October and 26 October 2022. [redacted]

27 The ruling chamber held a consultation from 10 October to 17 October 2022. During this consultation, the regulatory authorities of the Member States plus all regulatory authorities of the Council of European Energy Regulators (CEER) including the UK and Norway were given the opportunity to respond to the applicant's project description and the provisional rules and mechanisms for the management and allocation of capacity of the ruling chamber. The regulatory authorities of Denmark and Romania took this opportunity on 11 October 2022 and 17 October 2022 respectively. No comments were made on the LNG project. In addition, the regulatory authority of Albania acknowledged receipt of the documents and information on 11 October 2022, but did not submit a response to the applicant's LNG project.

28 The ruling chamber drafted a decision. The draft was sent to the applicant on 7 November 2022. Overall, the applicant was given the opportunity to comment in numerous letters, emails, telephone calls and meetings, most recently on 6 October 2022 and 7 November 2022.

29 The applicant stated its views on the draft decision in a letter of 10 November 2022 and a further letter of 11 November 2022. Its main point was that the amount of capacity requested by [redacted] in the course of the competition analysis should be assumed differently, because the undertaking had submitted offers for [redacted]. Therefore, it would be logical to add to the percentage shown with regard to the requested capacity for phase I and to derive the possible consequences for the downstream market in the explanations in section 3.7.1.5. The applicant's other comments were restricted to notes on wording and editorial comments.

30 The ruling chamber submitted the draft decision to the Bundeskartellamt on 7 November 2022, giving the Bundeskartellamt the opportunity to provide a statement and with a view to obtaining the Bundeskartellamt's agreement in accordance with section 58(1) sentences 1 and 2 EnWG. The Bundeskartellamt gave its agreement in an email on 16 November 2022.

31 The decision produced in agreement with the Bundeskartellamt was sent to the European Commission together with all the documents from the proceedings on 17 November 2022 for comment and the final decision.

32 On 21 November 2022, the European Commission published an announcement on its website to give stakeholders the opportunity to comment within a week. No responses were received. On 21 November 2022, the European Commission sent the ruling chamber a series of questions for the applicant, which the applicant answered on 23 November 2022.

33 On 20 December 2022, the European Commission issued its Decision on the decision of 17 November 2022, which was received by the ruling chamber on 21 December 2022 (C(2022) 9902 final). The Commission ordered the ruling chamber to attach further conditions to the exemption decision. To prevent a detrimental effect on competition throughout the many years of

the exemption period, the ruling chamber is required, as part of a special notification and assessment procedure, to rule out capacity bookings of at least 65% in total of the capacity for long-term allocation, where necessary through special retrospective safeguards or booking limitations, if such bookings could establish or reinforce a dominant market position of the booker.

34 For further details, reference is made to content of the files and the Commission Decision of 20 December 2022 (C(2022) 9902 final).

**II.**

35 The application is admissible and, in the scope approved here, founded. The prerequisites for granting an exemption are met with respect to the LNG facility. Due discretionary powers were exercised and the exemption issued in accordance with the European Commission Decision of 20 December 2022 (C(2022) 9902 final) and conditions and secondary provisions attached to it.

36 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

37 The legal basis for the revocation of the original exemption decision, its amendment and the new version of the granting of the exemption with secondary provisions in accordance with the European Commission Decision of 20 December 2022 (C(2022) 9902 final) is section 28a(1) and (3) EnWG in conjunction with Article 36 of Directive 2009/73/EC.

38 Pursuant to section 28a(3) EnWG and the third subparagraph of Article 36(9) of Directive 2009/73/EC, the regulatory authority must comply with the Commission decision to amend or revoke the exemption decision within a period of one month. This Decision implements the amendments required by the European Commission in its Decision of 20 December 2022 (C(2022) 9902 final) in full.

39 The legal basis for granting an exemption from regulation is section 28a(1) and (3) EnWG in conjunction with Article 36(6) to (9) of Directive 2009/73/EC.

40 With regard to the examination and the procedure, section 28a(3) EnWG refers to Article 36(3) to (9) of Directive 2009/73/EC. Article 36 of Directive 2009/73/EC was last amended by Article 1 of the amending Directive (EU) 2019/692 of 17 April 2019 (OJ L 117, page 1). The amending Directive was transposed into German law on 12 December 2019 by the Act amending the Energy Industry Act to implement Directive (EU) 2019/692 of the European Parliament and of the Council concerning common rules for the internal market in natural gas (Federal Law Gazette I No 45 (11 December 2019)). References to section 28a EnWG/Article 36 of Directive 2009/73/EC are to this version.

### 2. Formal legality

41 Regarding the formal legality of this decision, the legal provisions governing the procedure, in particular concerning the competence (see section 2.1 below), the required involvement of other authorities (see section 2.3 below) and the legal right to a hearing (see section 2.4 below), have been adhered to. In its role as the operator of the LNG facility, the applicant in particular also has the right to make an application (see section 2.5 below.).

#### 2.1. Competence

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

### 2.2. Procedure

43 The provisions governing the procedure have been adhered to.

44 In particular, the ruling chamber, in accordance with section 28a(3) sentence 2 EnWG in conjunction with the third subparagraph of Article 36(6) of Directive 2009/73/EC, laid down the rules and mechanisms for the management and allocation of capacity in writing on 10 October 2022 before granting the exemption. The ruling chamber included in the congestion management rules, among other things, the obligation to offer unused capacity on the market (UIOLI procedure) and the requirement for users of the infrastructure to be entitled to trade their capacities on the secondary market (see third subparagraph of Article 36(6) of Directive 2009/73/EC).

45 The applicant conducted the expression of interest procedure as required by the third subparagraph of Article 36(6) of Directive 2009/73/EC in the period from 10 October 2022 to 21 October 2022 in accordance with the rules and mechanisms for capacity management and allocation laid down by the ruling chamber. This procedure allowed all potential users of the infrastructure to indicate their interest in contracting capacity before capacity allocation in the new infrastructure took place. The applicant notified the ruling chamber of the results of this procedure in a letter of 25 October 2022 and a correction of 26 October 2022.

46 The ruling chamber took account of the results of the expression of interest procedure required by the third subparagraph of Article 36(6) of Directive 2009/73/EC in its assessment of the criteria referred to in section 28a(1) EnWG, in particular para 1 (the infrastructure must enhance competition in gas supply and enhance security of supply), para 2 (investment risk) and para 5 (the exemption must not be detrimental to competition in the relevant markets which are likely to be affected by the investment, to the efficient functioning of the internal market in natural gas, or to the efficient functioning of the regulated systems affected or to security of supply of natural gas in the European Union).

### 2.3. Involvement of other authorities

47 The regulatory authority of the federal state, in this instance Mecklenburg-Western Pomerania, was notified of the opening of proceedings in accordance with section 55(1) sentence 2 EnWG.

48 The participation of the regulatory authority of Mecklenburg-Western Pomerania under section 58(1) sentence 2 EnWG was not necessary in this instance since the applicant, as the future operator of the LNG facility, is not a system operator (section 3 para 27 EnWG).

49 The ruling chamber submitted the draft decision to the Bundeskartellamt in accordance with section 58(1) sentences 1 and 2 EnWG, giving the Bundeskartellamt the opportunity to provide a statement and with a view to obtaining the Bundeskartellamt's agreement. The Bundeskartellamt gave its agreement on 16 November 2022.

50 In addition, the ruling chamber sent the complete application documents to the European Commission without delay. It was to be noted in this connection that the applicant did not produce the complete application documentation until after the opening of the proceedings.

51 A consultation of Member States likely to be affected was carried out in accordance with section 28a(3) sentence 2 EnWG in conjunction with Article 36(3) subparagraph 2(a) of Directive 2009/73/EC from 10 October 2022 to 17 October 2022. The regulatory authorities of the Member States and, additionally, all CEER regulatory authorities including the UK and Norway were thus given the opportunity to comment. While the regulatory authorities of Albania, Denmark and Romania sent responses, none of them commented on the content of the planned project.

52 A consultation of the relevant authorities of third countries under section 28a(3) sentence 2 EnWG in conjunction with Article 36(3) subparagraph 2(b) of Directive 2009/73/EC, on the other hand, was not necessary as the infrastructure in question is not connected with the Union network under the jurisdiction of a Member State, and originates from or ends in one or more third countries.

53 The European Commission was properly involved pursuant to section 28a(3) EnWG in conjunction with Article 36(8) and (9) of Directive 2009/73/EC. In accordance with these provisions, the exemption decision is subject to the scrutiny of the European Commission, which may, in accordance with section 28a(3) sentence 2 EnWG in conjunction with Article 36(8) and (9) of Directive 2009/73/EC, require the regulatory authority to amend or revoke the national decision to grant an exemption. The decision produced in agreement with the Bundeskartellamt was sent to the European Commission together with all the documents from the proceedings on 17 November 2022 for comment and the final decision.

54 On 20 December 2022, the European Commission issued its Decision (C(2022) 9902 final) on the original exemption, which was received by the ruling chamber on 21 December 2022. The European Commission required the ruling chamber to amend the exemption and attach additional secondary provisions.

55 Pursuant to section 28a(3) EnWG in conjunction with the third subparagraph of Article 36(9) of Directive 2009/73/EC, the request for amendment from the European Commission was complied with by the relevant regulatory authority within a period of one month. This Decision implements the request fully and in a timely manner.

56 For further details, reference is made to content of the files and the Commission Decision of 20 December 2022 (C(2022) 9902 final).

### 2.4. Hearing

57 The applicant was given full and multiple opportunities to state its views in the course of the proceedings in accordance with section 67(1) EnWG.

### 2.5. Right to apply

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

### 2.6. Interest in a decision being reached

59 The applicant would still have an interest in a decision being reached even if, for instance, construction of the LNG facility was not sufficiently likely. The absence of an interest in a decision being reached could be assumed, however, if the applicant's request for exemption was pointless because there were already planning or approval-related obstacles preventing the project. At present, however, it is not clear to the ruling chamber whether this is the case. The fact that the applicant is seriously pursuing the approval procedure is sufficient for there to be an interest in a decision being reached and the applicant has satisfied the ruling chamber that this is the case. It explained that the construction and operation of the FSRUs including the auxiliary installations do not themselves require a planning approval decision or planning permission. Meeting the approval and planning-related requirements for the pipeline link to the LNG facility (FSRU 1) is the responsibility of the TSOs that have to provide the connection. As the project promoter for the construction and operation of the FSRU 1 in phase I and the planned offshore operation of the FSRU 2 in phase II, the applicant applied for approval under emission control legislation in July 2022. It also applied for permission to start construction work on the upgrading of the port infrastructure from the relevant authority in August 2022. In July 2022, the applicant also requested from the relevant authority police permission to bring the FSRU I into the industrial port of Lubmin at the beginning of phase I and the designation of a transfer zone to transfer the LNG from the offshore gas storage tank, the FSU, to the smaller LNG carriers (see letter from the applicant of 30 August 2022). However, it is not necessary to wait for the approvals before deciding on the exemption in accordance with section 28a EnWG. If it were, this would lead to additional timescale and economic risks for projects for which an exemption was sought.

### 3. Substantive legality

60 The revocation of the original exemption decision, its amendment and the new version in accordance with the the European Commission Decision of 20 December 2022 (C(2022) 9902 final) is also substantively lawful. The prerequisites for exemption pursuant to section 28a(1) EnWG in conjunction with Article 36(1) of Directive 2009/73/EC have been met with regard to the amendment and re-issue of the exemption decision for the Deutsche Ostsee LNG facility. The decision is also substantively lawful, because the prerequisites for exemption are met in the case of the Deutsche Ostsee LNG facility. The planned facility in Lubmin is to be classified as an LNG facility within the meaning of section 28a(1) EnWG in conjunction with Article 36(1) of Directive 2009/73/EC (see section 3.1 below). The other prerequisites for exemption are also met in the case of the Deutsche Ostsee LNG facility. The LNG facility will enhance competition in gas supply and security of supply (see section 3.2 below). The facility constitutes a major new infrastructure (see section 3.3 below). The investment risk is such that the investment would not take place unless an exemption was granted (see section 3.4 below.). The special unbundling requirement – for the LNG facility operator to be separate from the system operator in whose system the infrastructure will be built – in accordance with sections 8 to 10e EnWG is satisfied (see section 3.5 below.). The requirement for charges to be levied is fulfilled (see section 3.6 below.). The exemption is not found to be detrimental to competition in the relevant markets which are likely to be affected by the investment, to the efficient functioning of the internal market in natural gas or the efficient functioning of the regulated systems concerned or to security of supply of natural gas in the EU (see section 3.7 below.). In addition, rules and mechanisms for capacity management and allocation were defined before the exemption was granted (see section 3.8 below).

61 Where the prerequisites for exemption are met in the case of the LNG facility, the decision on granting an exemption lies at the discretion of the ruling chamber. Having weighed up all the aspects, the ruling chamber decided to grant the exemption subject to secondary provisions (see section 3.8 below.). The amendments to the original exemption decision of 17 November 2022 implement the European Commission Decision of 20 December 2022 (C(2022) 9902 final) in full in accordance with section 28a(3) EnWG and the third subparagraph of Article 36(9) of Directive 2009/73/EC.

#### 3.1. Subject of the application

62 Under section 28a EnWG, LNG facilities, as major new infrastructure, can be exempted from regulation for a limited period of time. The facility in Lubmin that is planned by the applicant

constitutes an LNG facility within the meaning of section 28a(1) EnWG (see sections 3.1.1 and 3.1.2 below.; re classification as major new infrastructure see section 3.3).

63 The planned facility is a floating terminal for the importation, offloading, temporary storage and regasification of LNG for subsequent injection into the transmission system (see application of 28 July 2022, page 2, and the reference there to section 2(1) para 1 in conjunction with para 6.1 of the annex to the LNG Acceleration Act of 24 May 2022 (LNGG) and the applicant's letter of 30 August 2022, annex 12, page 1). The planned LNG facility will be built in two phases. Under phase I, there will initially be an annual throughput capacity of 4.5bn m³/a, planned to be available from 1 December 2022. The total annual throughput capacity of 13.5bn $m^3$ will be reached with the conclusion of phase II, which is planned to be from 1 October 2024 (see letter of the applicant of 30 August 2022, annex 12, page 2).

64 The following main components are planned for the Deutsche Ostsee LNG facility (see application of 28 July 2022, page 8 et seq and letter of the applicant of 30 August 2022, annex 12, page 2):

phase I (annual throughput capacity of 4.5bn m³ as of 1 December 2022):

- a floating storage unit (FSU) firmly anchored outside the Bay of Greifswald as a loading and unloading point for facility users and interim storage unit for the LNG;
- an FSRU in the port of Lubmin as a regasification unit (port FSRU, FSRU 1);
- at least three small low-emission LNG carriers (SLNGCs) to shuttle LNG from the FSU to the port FSRU, FSRU 1;
- a pipeline link to send the regasified LNG from the port FSRU, FSRU 1, into the transmission system (onshore pipeline link).

phase II (annual throughput capacity of a further 7.0bn $m^3$ as of 1 December 2023):

- another FSRU firmly anchored outside the Bay of Greifswald (known as the offshore FSRU, FSRU 2) as a loading and unloading point for facility users, interim storage unit and additional regasification unit. The offshore FSRU, FSRU 2, will render the FSU from phase I obsolete.
- an offshore pipeline link to send the LNG regasified directly in the offshore FSRU, FSRU 2, into the transmission system;
- at least three shuttle ships to transport the LNG temporarily stored in the offshore FSRU, FSRU 2, from the offshore FSRU additionally to the port FSRU, FSRU 1;
- an onshore pipeline link to send the LNG regasified in the port FSRU, FSRU 1, into the transmission system.

phase II (annual throughput capacity of a further 2.0bn $m^3$ as of 1 October 2024):

- two FSRUs firmly anchored outside the Bay of Greifswald (FSRU 1 + FSRU 2) as loading and unloading points, interim storage units and regasification units for terminal users; therefore, the port FSRU (FSRU 1) will be moved offshore in addition to the offshore FSRU, FSRU 2, already located outside the Bay of Greifswald; The SLNGCs will then no longer be necessary.
- an offshore pipeline link for FSRU 1+2 to the transmission system;
- a jetty in Lubmin port with a newly constructed onshore pipeline link for phase I that may be subsequently used for hydrogen.

65 As well as services in the large-scale sector (offloading, interim storage, regasification and injection into the transmission system), the application also envisages possibly offering services in the small-scale sector, also known as dispatching or fuelling services.

66 According to the applicant's documentation, the services planned for users are to be distinguished as follows:

67 large-scale users must have at least the following usage rights:

- accepting and unloading LNG cargoes coming ashore from terminal users;
- interim storage of the LNG for the purpose of regasification;
- LNG regasification and subsequent injection into the German transmission system.

68 [redacted]

69 Users wishing to make use of small-scale services must acquire at least one of the following usage rights:

- berthing, unloading/loading of ships with LNG; or
- bunkering, ie loading ships with LNG at sea; or
- loading of road tankers with LNG; or
- loading of rail tankers with LNG.

(On the large-scale and small-scale services, see the letter of the applicant of 30 August 2022, annex 12, page 4 et seq).

70 In these proceedings, it was necessary to determine how the individual services were to be classified in regulatory terms in order to define the possible scope of the exemption. The applicant conclusively demonstrated that the planned services coming under the large-scale services are to be classified as attributable to an LNG facility and thus subject to the provisions of the EnWG (see section 3.1.1 below). By contrast, the small-scale services (see 3.1.2 below.) are not subject to regulation and are therefore not covered by the exemption. The applicant confirmed in writing on 30 August 2022 that it intended to maintain separate financial accounts for the sector temporarily

exempt from regulation and the non-regulated sector for the relevant services and their usage charges.

71 Specifically:

### 3.1.1. LNG facility

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

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

74 LNG stands for liquefied natural gas; the physical state of LNG changes in the LNG facility by being either cooled and liquefied or heated and regasified (see Schex, in: Kment, EnWG, 2nd ed 2019, section 3 para 71).

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

76 The fact that the planned facility is a floating terminal does not pose a problem to this classification. The underlying term "LNG facility" as defined in section 3 para 26 EnWG and the identical wording of Article 2 point 11 of Directive 2009/73/EC do not distinguish between floating or onshore LNG terminals, with both coming under the definition of LNG facility in energy legislation. The only relevant point is that it is a terminal which is used for the liquefaction of natural gas or the importation, offloading, and regasification of LNG, and includes ancillary services and temporary storage necessary for the regasification process and subsequent delivery to the transmission system, which is the case here.

77 The applicant's statement that it intends to offer large-scale and small-scale services does not stand in the way of the classification as an LNG facility within the meaning of section 3 para 26 EnWG either (see the letter of the applicant of 30 August 2022, annex 12, page 1). It explains in this context that the facility's offloading capacity is greater than its throughput capacity:

- Phase I: [redacted]
- Phase II: [redacted]

It is therefore possible to carry out small-scale services on the one hand and large-scale services on the other without them negatively affecting each other (see the letter of the applicant of 30 August 2022, page 5).

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

79 If the same storage tank is used for different storage purposes, it is decisive that a distinction can be made between the tank's different uses in order to enable it to be attributed to, for example, an LNG facility, a gas storage facility or the large-scale/small-scale area.

80 The services and associated storage purposes planned by the applicant are either, as explained above, attributable to the LNG facility or, as small-scale services, are not subject to regulation as explained below.

#### 3.1.2. Distinction of small-scale services

81 The storage of LNG for the purpose of redistribution in liquid form – small-scale services (for the applicant's small-scale services, see section 3.1 above) – is not subject to regulation and is therefore not covered by the exemption. This conclusion is based on the following considerations.

82 LNG has various possible uses. In addition to regasification and subsequent delivery to the transmission system, LNG can also be used for applications in the mobility sector. For instance, LNG is becoming increasingly important as a fuel for heavy goods vehicles and is also used as a shipping fuel. The use of LNG directly – in liquid form – as an end product by final consumers or for industrial applications is referred to here as the small-scale area.

83 Temporary storage for the purpose of redistributing the LNG, eg by LNG tank vessels or road tankers, in the small-scale area does not constitute storage under the regulatory provisions of the EnWG. This is because storage tanks in the small-scale area that are not connected to a regulated

LNG facility within the meaning of section 3 para 26 EnWG or another gas supply network within the meaning of section 3 para 20 EnWG are in themselves not subject to regulation under the EnWG due to the fact that there is no pipeline connection. If integrated use is made of the storage tank of an LNG facility according to section 3 para 26 EnWG, as is planned in this instance, for example for services for the small-scale area, a pipeline connection and therefore the applicability of the EnWG may indeed initially be assumed (see Legislative purpose, section 1(1) EnWG). Ultimately, however, it can be concluded that the regulatory provisions of the EnWG do not also apply to such storage tanks for the small-scale area that are connected to a gas supply network because of the storage purpose.

84 This is supported by the wording of section 3 para 26 and para 19c EnWG: the distinction between an LNG facility and a gas storage facility is explicitly based on the storage purpose. Temporary storage that is necessary for the regasification process and subsequent delivery to the transmission system is attributable to an LNG facility as defined in section 3 para 26 EnWG. A storage tank that is solely used for "storage" (re the legislative wording "storage": for example Hellermann, in: Britz/Hellermann/Hermes: Energiewirtschaftsgesetz, 3rd ed 2015, section 3 margin no 52) is attributable to a regulated gas storage facility within the meaning of section 3 para 19c EnWG. If the (temporary) storage of LNG is for the purpose of redistribution by ships, road or rail tankers, as in this instance, the small-scale area is attributable to neither a regulated LNG facility as defined in section 3 para 26 EnWG nor a regulated storage facility within the meaning of section 3 para 19c EnWG. Thus, in the absence of statutory arrangements, the small-scale area is not subject to regulation under the EnWG.

85 This is also supported by systematic deliberations as it provides for a clearly defined and distinguishable scope of application for parts used for storage within the meaning of section 3 para 26 and para 19c EnWG and rules out inconsistencies in assessment.

86 Equally, a historical and teleological interpretation does not produce any other indications. Rather, the aim and purpose of the EnWG also provide for a distinction based on the storage purpose. The aim and purpose of the EnWG is to ensure a network-based supply of electricity, gas and hydrogen for the general public that is as secure, low-priced, consumer-friendly, efficient and environmentally compatible as possible (see section 1(1) EnWG). However, the storage of LNG for redistribution in the small-scale area by road tankers, rail tankers or ships specifically serves the non-network-based transport of LNG by these vehicles and not network-based supply.

87 This understanding is also supported by the concept of a consistent application of the law (principle of non-discrimination), for it is not evident why, in this instance, the identical use (storage for the small-scale area) of storage tanks not connected to a regulated LNG facility within the meaning of section 3 para 26 EnWG or another gas supply network within the meaning of section 3 para 20 EnWG that can be clearly classed from the outset as not relevant for regulation because the

storage tank has no pipeline connection should be subject to regulation in this instance just because of the combined/integrated use of the storage tank of an LNG facility. In this case as well, storage still serves the redistribution of LNG by ships and tankers, etc and not network-based supply for the general public.

88 The wording of the European legislation in Article 2 point 11 of Directive 2009/73/EC, which is identical to section 3 para 26 EnWG, does not lead to a different conclusion either.

89 Finally, an argument against such an understanding could at most be difficulties in distinguishing between regulated and non-regulated services in terms of the risk of cross-subsidisation as this could be detrimental to network-based supply for the general public. However, the applicant has stated plausibly that it intends to maintain separate financial accounts for the sector temporarily exempt from regulation and the non-regulated sector for the relevant terminal services and their usage charges in order to avoid cross-subsidisation (see applicant's letter of 30 August 2022, page 5). There is therefore no evidence in this instance of the risk of cross-subsidisation as described above.

90 In conclusion, the use of LNG in the small-scale area is not subject to regulation under the EnWG.

### 3.2. Enhancement of competition and security of supply

91 In accordance with section 28a(1) para 1 EnWG the investment must enhance competition in gas supply and security of supply. In addition, in accordance with section 28a(1) para 5 EnWG the exemption must not be detrimental to competition in the relevant markets which are likely to be affected by the investment. The analysis of the latter is set out in section 3.7.

92 The applicant satisfied the ruling chamber of compliance with all the criteria through the submission of the Frontier Economics report "Effects of the planned LNG terminal "Deutsche Ostsee" on security of supply and competition in the gas market – economic report commissioned by Deutsche ReGas GmbH & Co. KGaA (hereinafter referred to as Frontier Economics, economic report), submitted on 11 August 2022. A supplement to the economic report (hereinafter referred to as Frontier Economics, supplementary report) was submitted to the ruling chamber by email on 28 September 2022. The supplementary report focuses on the competitive analysis and assessment of the wholesale market as a whole, in particularly from the perspective of the buyers' side (see section 3.7.1.5). In other exemption proceedings, the European Commission considered it necessary to look at the whole downstream market as well in order to permit an assessment of the competitive situation as a whole.

93 The ruling chamber checked the sources provided by Frontier Economics and assessed the plausibility of the calculations made. It came to the conclusion that the competitive and security of supply effects presented by Frontier Economics in its report were understandable. In its analysis

of competition and security of supply, the ruling chamber has thus based its argument on the analyses and calculations carried out by Frontier Economics. It deals with these issues in more detail below. The supply security and competition analyses in the report are restricted to the delivery of natural gas to the natural gas network.

94 In carrying out the analyses, Frontier Economics focused on the current situation on the north-west European and on the German market (a classification of the relevant product market may be found in section 3.2.1.2) and made forecasts. In general, it may be said that the development of the gas market depends on a multitude of factors, including economic and political changes with a view to the supply and demand of natural gas. It is therefore not fully possible to make firm predictions and calculations about the development of the gas market (see Frontier Economics, economic report, page 26).

95 On the demand side, the report made the assumptions summarised below for the north-west European market, which are largely equally relevant for the German market. It is assumed that gas consumption will reduce in the medium to long-term. This assumption is partly based on climate targets and the exploiting of energy efficiency measures, which at the European level are anchored in, for example, the Fit for 55 package (see https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/, accessed on 25 October 2022) At national level, too, legislators have already instigated huge savings targets for the energy supply with natural gas. The current considerable price rises for natural gas are also likely to create incentives for energy efficiency measures. The politically motivated aim to become independent of Russian gas imports is to lead to a long-term reduction in natural gas consumption (see Frontier Economics, economic report, page 26-27).

96 Considerable changes in the provider structure of natural gas may be observed. Domestic gas production will reduce drastically, both in the north-west European and German markets. Conventional domestic production in north-west Europe will fall by about 90% and in Germany by about 70% by 2030 (see Frontier Economics, economic report, page 28 and 33). The reduction in north-west Europe is partly due to the reduction of natural gas production in the Netherlands. The phase-out of the Groningen gas field will mean that the Netherlands will in future produce less gas than the country needs to meet national demand. One consequence for the German market will be that an important source of natural gas will be lost. It is therefore to be expected that the German market will see lower imports from the Netherlands to Germany. The calculations and analyses of security of supply and competition are therefore based on a complete end to exports from the Netherlands by 2030 (see Frontier Economics, economic report, page 28 and 33).

97 The calculations and analyses for suppliers of pipeline gas to north-west Europe are subject to further restrictions. For example, it is assumed that in the short term, Norwegian gas will make a significant contribution to supplying north-west Europe, including Germany, but in the medium

term it is expected to decline. This is partly due to the increasingly exhausted fields, but also to a reduction in demand (see Frontier Economics, economic report, page 29). According to press reports, production and pipelines are currently at full capacity and cannot be increased with the existing fields (see https://www.dw.com/de/norwegen-sichert-deutschland-gaslieferungen-zu-und-st%C3%B6%C3%9Ft-an-grenzen/a-62816704; accessed on 24 October 2022). The economic report was thus based on a forecast of the Norwegian Petroleum Directorate up to 2026 and after that the scenario report 2022, "min" scenario, which assumes falling imports from Norway (see Frontier Economics, economic report, pages 29 and 34).

98 Following the REPowerEU communication (a Joint European Action for more affordable, secure and sustainable energy; Communication from the Commission to the European Parliament, the European Council, the Council, the Economic and Social Committee and the Committee of the Regions of 8 March 2022, COM/2022/108 final; "REPowerEU"), the EU intends to become completely independent of natural gas imports from Russia. Natural gas imports from Russia to the EU are expected to fall 30% by the end of 2022. The competition analysis is based on the premise that owing to the geopolitical developments in summer 2022, with the reduction/cessation of volumes from Russia, there will be a complete end to imports of Russian gas by 2025. Based on this premise, the last Russian imports would occur in 2024. According to the report, this assumption is bolstered by the political objectives set in the core countries of the north-west European gas market in 2022 (Frontier Economics, economic report, page 29). As far the analyses of security of supply were concerned, they left Russian gas out completely because of the high level of uncertainty. Russian gas was excluded from 2022 onwards in the calculations and charts (Frontier Economics, economic report, page 41).

99 The reduction of piped gas imports makes it necessary to roll out LNG infrastructure to cover national demand for gas. Germany currently has one LNG facility (FSRU), in Wilhelmshaven, which was opened on 17 December 2022 (see https://www.uniper.energy/news/de/fsru-fuer-deutschlands-erstes-lng-terminal-erreicht-wilhelmshaven, accessed 5 January 2023). In the short to medium term, various projects are planned or underway: notably five non-fixed, floating LNG terminals (see https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2022/05/20220505-bund-und-niedersachen-unterzeichnen-vereinbarung-zum-ausbau-der-lng-und-greengas-importinfrastruktur-niedersachsen.html and https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2022/09/20220901-bwmk-sichert-sich-fuenftes-schwimmendes-fluessigerdgasterminal-plus-anlandung-gruener-wasserstoff.html, both accessed on 24 October 2022), one fixed, land-based LNG facility in Brunsbüttel and one fixed, land-based LNG terminal in Stade (see Frontier Economics, economic report, page 34). The economic report thus takes account of corresponding assumptions on imports of LNG in its calculations.

100 As for time, the competition analysis focuses on 2023, the first full year after the planned commissioning of the LNG facility at the end of 2022, and 2024, the year in which its capacity is planned to reach its maximum. In addition, a closer look is taken at the year 2030 to take account of the effects of future developments on results (see Frontier Economics, economic report, page 51). The report considers security of supply in the period from 2022 to 2033. This is the time for which the highest validity of the data may be assumed (see Frontier Economics, economic report, page 39).

101 The report essentially bases the forecast on the network development plans available at the time the report was drawn up – the NDPs developed by the German transmission system operators (Gas NDP 2022, interim report) and the Ten- Year Network Development Plan (TYNDP 2022 (2021)) developed by the European Network of Transmission System Operators for Gas (ENTSOG). Frontier Economics comes to the conclusion that a perspective of much more than 10 years into the future, from today, does not make sense, as it would be of limited reliability due to the lack of certainty about the development of other parameters affecting security of supply that would have to be taken into account (see Frontier Economics, economic report, page 39). Conversely, the periods/years under consideration by Frontier Economics offer the most useful data.

102 It is true that an assessment of the whole period of the exemption may be relevant, both to the analysis of the effect on competition and the security of supply, but forecasts of market developments over a longer period are highly uncertain, as explained above (see Frontier Economics, economic report, page 39 and page 51). The ruling chamber shares this view.

103 The report's basic differentiation criterion in its market analysis as regards the geographic market definition was, apart from the availability of transport capacity, price correlation. Similarly to market analyses previously carried out for comparable proceedings, Frontier Economics decided not to include the French market as part of the relevant market for the purposes of the study (see Frontier Economics, economic report, page 68). The ruling chamber can follow the logic of this decision, even though it has identified a very level of integration of the French market with the German one in its analysis of price correlation in recent years (see also the more detailed explanation under section 3.2.1.3).

104 The analysis of competition enhancement is to be based on the investment project subject to the framework conditions of the exemption (see section 3.2.1 below.). The Deutsche Ostsee LNG facility will also enhance security of supply. Firstly, it will facilitate access to new sources of gas worldwide. Secondly, it will create redundancies with respect to existing import routes by opening up a large number of new transport routes. Last but not least, it will increase the flexibility of gas supply by facilitating access to a large number of transport routes connecting a wide range of sources of gas worldwide. The applicant confirmed this finding with various comparative and

quantitative analyses of supply security with and without the specific LNG facility (counterfactual scenario) (see section 3.2.2 below).

### 3.2.1. Enhancement of competition in gas supply

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

#### 3.2.1.1 General principles

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

107 In contrast to the terminology otherwise commonly used, neither Directive 2009/73/EC nor section 28a EnWG make reference to the "relevant market" or an otherwise specified market, although Directive 2009/73/EC makes reference in other provisions to markets that are specified in more detail. There are equally few details about when competition on a particular market is enhanced.

108 The European Commission, in its working document on the application of Article 22 of Directive 2003/55/EC (see Commission staff working document on Article 22 of Directive 2003/55/EC concerning common rules for the internal market in natural gas and Article 7 of Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity – New Infrastructure Exemptions of 6 May 2009, SEC(2009)642 final), assumes that the enhancement of competition test in Article 22 of Directive 2003/55/EC is a sui generis test, although the principles of general anti-trust law ("*to have regard to*", loc cit, para 31) and relevant analytical techniques should be applied ("should apply analytical techniques that are consistent with those applied in competition cases at national and European level", loc cit, para 36). Here, not every negative effect is to be seen as detrimental to the exemption; instead, positive and negative effects must be weighed up against each other and balanced:

109 "The enhancement of competition test in these provisions is a sui generis test. However, in the application of the test it is relevant to have regard to the principles developed under Articles 81 and Article 82 of the EC Treaty and the EC Merger Regulation. This implies that likely negative effects and likely positive effects must be assessed and balanced." (loc cit, paragraph 31).

110 Whether or not competition is enhanced, therefore, does not necessarily depend on whether there is just a neutral effect or even a deterioration on one of the relevant markets to be analysed. Rather, what is decisive is a weighing up of the possible negative and possible positive effects.

111 According to the wording of section 28a(1) para 1 EnWG the decisive factor is whether the investment enhances competition. By contrast, according to section 28a(1) para 5 EnWG, the exemption must not be detrimental to competition in the relevant markets which are likely to be affected. The two provisions firstly have criteria with different levels of stringency (enhancement/lack of detriment) and secondly refer to different objects (investment/exemption).

112 The ruling chamber takes the view that the term "investment" refers to the investment project on which the request for exemption is based. In order to determine whether the investment enhances competition, a comparative (counterfactual) scenario is required; in the case of section 28a(1) para 1 EnWG this scenario must be a situation without the investment.

113 With respect to the criterion in section 28a(1) para 5 EnWG, the situation with an investment project for which an exemption has been granted must be compared with the competitive situation that would exist if the exemption was not granted. Since the exemption may only be granted if the investment would not take place unless an exemption was granted (section 28a(1) para 2 EnWG), a scenario in which the LNG facility is constructed but is subject to regulation is not a relevant comparative scenario. Thus the comparative scenario in the case of section 28a(1) para 5 EnWG is also a situation without an investment project.

114 In both cases, therefore, the competitive conditions without the new infrastructure must be compared with the competitive conditions with the construction of the exempted investment project infrastructure. The difference – in addition to the criterion (enhancement or lack of deterioration) – is that section 28a(1) para 1 EnWG relates to the infrastructure in the form of the exemption request while section 28a(1) para 5 EnWG relates to the exemption itself.

115 The definition of the relevant market is a tool that enables a systematic analysis of the boundaries of competition between companies (in both product and geographic terms). The analysis should look at those markets on which the infrastructure for which an exemption is requested is likely to have a significant effect and examine "those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure" (see Commission Notice on the definition of relevant market for the purposes of Community competition law, 97/C 372/03 of 9 December 1997, point 2). The analysis takes account of general principles of competition law, both product and geographic dimensions, and demand substitutability. To this end, the relevant product and geographic markets on which the planned investment could have an effect are identified.

116 "A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use" (see Commission Notice of 9 December 1997, point 7).

117 "The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas" (see loc cit, point 8).

118 The provision of infrastructure for the importation of LNG has an effect above all on the market that would include the importation of LNG and the conversion of LNG into natural gas. The relevant market should be defined as the natural gas supply – comprising imports of pipelined natural gas and LNG and domestic production – in north-west Europe (Germany, the Benelux countries, Denmark, France and the UK).

#### 3.2.1.2 Relevant product market

119 The relevant product market is defined on the basis of the principle of substitutability. Products are identified that can reasonably substitute the products concerned. Two products can only be attributed to the same market if they are mutually substitutable to a sufficient extent. Switching from one product to the other should be possible in a relatively short time frame and without significant costs (see Frontier Economics, economic report, page 54).

120 At the Deutsche Ostsee LNG facility, LNG will be imported for the main purpose of regasification and subsequent delivery to the existing pipeline system. The regasified LNG must meet the gas quality requirements set by the DVGW (Deutscher Verein des Gas- und Wasserfachs e. V.) for delivery to the pipeline system; thus its product characteristics cannot be seen to be different from those of other natural gas that is transported in the same pipeline system. LNG is therefore fully substitutable with, for example, natural gas imported by pipeline, and vice versa. The European Commission also considers there to be direct competition between LNG and pipelined natural gas, stating:

121 "The Commission found that, in countries where import infrastructures for LNG are present, LNG would constitute a direct competitive constraint to gas imported via pipelines", see Case No COMP/M.6477 – BP/Chevron/ENI/Sonangol/Total/JV of 16 May 2012, paragraph 18 with reference to Case No COMP/M.4545 – Statoil / Hydro of 3 May 2007).

122 Another substitute is locally produced natural gas, so it can be assumed that traders on the wholesale market can respond to price signals and switch at short notice between LNG, pipelined natural gas and locally produced natural gas, which also includes the production of biomethane.

123 The relevant product market should therefore be identified as the tradable volume of natural gas. This comprises LNG, pipelined natural gas imports and local production. The market players on the supply side comprise natural gas and LNG producers, while those on the demand side comprise import companies as well as smaller players that directly or indirectly acquire volumes of gas marketed by producers via wholesale markets. It is perfectly possible for market players to be active on both the supply and the demand side.

#### 3.2.1.3 Relevant geographic market

124 The definition of the geographic market needs to take account of the extent to which consumers or suppliers would shift their activities to a different area when justified by relevant price signals. As with the definition of the relevant product market, substitution should be possible within a relatively short time frame (at the most one year) and without significant costs.

125 In this instance, the planned Deutsche Ostsee LNG facility is located in the single German market area (THE); the relevant market for the gas imported to Lubmin therefore initially comprises the entire territory of the Federal Republic of Germany. Whether customers or suppliers shift to adjacent market areas if there are changes in prices depends (among other things) on the transport options that can be used between the market areas concerned and on the pricing of these options. For example, supplying a consumer in Germany with gas acquired in the Netherlands is only lucrative if the commodity price payable in the Netherlands is low enough to overcompensate for the additional transport costs. Transport costs are regulated at European level and it is not possible to offer costs that are lower than the level set by regulation even if demand is very low. By contrast, it is possible to add a mark-up on the regulated tariff if transport capacity availability is low. An absence of such mark-ups therefore indicates that transport capacity availability is not low. An analysis made by the ruling chamber of all bundled capacity auctions carried out on the PRISMA platform in 2019 showed that prices were marked up in only 0.074% of the auctions. The current geopolitical events caused by the war in Ukraine have led to individual auctions being held with mark-ups in locally limited areas. The ruling chamber sees these mark-ups particularly in the light of the current geopolitical situation and the associated, short-term changes to desired import sources and does not consider that they will be of great significance in the medium term. Moreover, the ruling chamber expects that, from a structural perspective, the transport capacity will adjust to meet the changed demand. The network operators have already launched such plans and the first projects are likely to be completed by the end of 2022 (see OGE press release of 8 April 2022 on the Wilhelmshaven LNG terminal: OGE plant Anbindung an das Fernleitungsnetz bis Ende 2022). In addition, on 1 June 2022 a law to speed up planning approvals with the aim of securing the energy supply entered into force (LNG Acceleration Act, LNGG). The current geopolitical situation does not provide a reason to call the developments of

recent years and the increasing market integration into question, far less to assume that these developments would be reversed. The ruling chamber thus considers it unlikely that current events will lead to permanent transport restrictions from adjacent market areas. It takes the view that the findings of the evaluation in 2019 can still be used. They showed that in general, and particularly in the period from the planned commissioning date of the facility, it may be assumed that there will be sufficient transport capacity. In particular, it is currently assumed that owing to the reductions in Russian pipeline volumes there will be abundant capacity to direct the LNG volumes through the NEL, EUGAL and OPAL pipeline links into the German transmission system. This does not rule out surplus demand in limited local areas in future, but as far as Germany is concerned, this is rather the case in the south-east of the country. It should also be taken into account that the analysis only allows conclusions to be drawn about transport capacity between adjacent market areas and does not look at transport restrictions across several market areas. In general, it can be assumed that the greater the distance from the original market, the greater the transport restrictions and the more difficult it is to physically move gas between Germany and, for example, Portugal.

126 In summary, it can be said that despite the current geopolitical situation, the ruling chamber does not see any reason to question that there is sufficient capacity for transport in the medium term between the market area to which LNG is imported and adjacent market areas – with the exception of south-east Germany – and therefore the relevant geographic market should be defined more broadly than the original market area. In fact, the ruling chamber considers it necessary for the calculations on the competitive effects to be based on the existing integrated north-west European market in order for the analysis to be as realistic as possible. Looking at a hypothetically more narrowly defined, purely national market should, in the view of the ruling chamber, at most be used to validate and classify the results of the broader, north-west European market. Because transport restrictions increase as the distance from the original market increases, defining Europe as the relevant geographic market would be too wide an area.

127 A further criterion that should be looked at when defining the relevant geographic market is price correlation between markets. A high degree of price correlation means that price movements are generally parallel and there are no significant price differences. In economic terms, this is a strong indication of integrated markets: a sufficient number of market players apparently switch between substitutable trading hubs – they buy gas where the price is lowest (irrespective of national borders) and/or sell gas where the price is highest (irrespective of national borders). Converging prices show that such "arbitrage" is possible and is also put into practice. For competitively integrated markets it is then not at all necessary for every gas supplier and gas customer to market with a high degree of flexibility between trading points. As long as there are a sufficient number of traders that can act in such a way, the prices converge, and so a player in one national market is not able to act independently of the competitive situation in the other neighbouring countries (see

Frontier Economics, economic report, pages 62-63). With respect to this, the Quo vadis study commissioned by the European Commission comes to the conclusion that the wholesale markets of Denmark, Belgium, the UK, the Netherlands and Germany create a single price zone (see EY/REKK: Quo vadis EU gas market regulatory framework – Study on a Gas Market Design for Europe, February 2018, page 5). A further study on price correlation was carried out by the Oxford Institute for Energy Studies (see Oxford Institute for Energy Studies (OIES): European traded gas hubs: an updated analysis on liquidity, maturity and barriers to market integration, May 2017). In 2017 it was concluded that in 2016 there was a very high degree of price correlation between the NCG, GASPOOL, Zeebrugge (Belgium) and PEG Nord (France) trading points ("*In North West Europe (TTF, NCG, Gaspool, ZEE, PEGN), price alignment and price level convergence continues to be strong: this region behaves as if it is a single-price area, i.e. a fully integrated trans-national market for gas*", loc cit, page 18). According to the study, the British NBP is usually also very well integrated, but not in the rare cases when physical flows on the interconnector are not possible (loc cit, page 19). As previously explained in the report, (see Frontier Economics, economic report, pages 68), France is not viewed as part of the relevant market on the grounds that there is insufficient transport capacity at the sole cross-border interconnection point between France and Germany, which could be an obstacle to market integration, regardless of price correlation.

128 The ruling chamber, in contrast, identified a very high level of integration of the French and German markets in its analysis of price correlation. As already stated in decisions BK7-18-063-final and BK7-20-107-final, the ruling chamber views the relevant geographic market as north-west Europe, comprised of Germany, France, the Benelux countries, Denmark and the UK. This view is supported by market players that were consulted by the European Commission in connection with the Gazprom/Wintershall/Target Companies merger probe and that identified in particular Germany, Belgium, the Netherlands and the UK as Member States forming part of a regional market (see Case No COMP/M6910 – *GAZPROM/WINTERSHALL/TARGET COMPANIES*, paragraphs 88 to 90).

129 The ruling chamber believes that the degree of market integration in north-west Europe described above will increase further given the aim of creating an internal market in natural gas in accordance with Directive 2009/73/EC. No conflicting trend is to be expected in particular during the period of validity of the exemption.

130 Nevertheless, the ruling chamber does not consider it necessary to recalculate the competition analysis, because, as far as the market definition is concerned, including France in the north-west European market would be an even more conservative assumption as it would mean an even lower market concentration on the supply side. It would therefore be even less likely that the exemption would have a negative effect.

131 A brief analysis made by the ruling chamber of price correlation between the THE market area trading point and the PEG trading point showed that the PEG trading point can be viewed as belonging to the above-mentioned group of trading points with a very high degree of price correlation. Until April 2022, the price correlation was very strong both in terms of amount and trend. Since April 2022, the price developments occurring in parallel with geopolitical events have continued to show a high level of price correlation, but the absolute amount of the price has turned into a price spread between the market areas THE and PEG since the beginning of April. In the opinion of the ruling chamber, the price spread since the beginning of April 2022 is reflecting a short-term market shock caused by these events. Larger price spreads generally lead to more possibilities for arbitrage trading, but the ruling chamber sees parallels in the current situation to ones in the past when a short-term market shock occurred in short-term extreme market situations and led to greater price spreads. Although the current situation is ongoing as this approval is issued, the ruling chamber classes such an extreme market event as a short-term effect. The key point for the period of many years relevant to this exemption is that the ruling chamber does not consider it likely that the north-west European market will be less integrated in the medium term.

#### 3.2.1.4 Summary

132 With reference to the markets as defined above, the ruling chamber finds that competition is enhanced by the investment. As long as an investment in physical infrastructure facilitates access to additional sources or volumes of gas, the investment in itself enhances competition. Physical import capacity is provided that would not be available without the new infrastructure. The capacity can be used to import natural gas. Even without the specific importation, competition would be enhanced simply because of the existing potential for additional imports (see Frontier Economics, economic report, page 51). The ruling chamber does not see any possible negative effects on competition resulting from the existence of the Deutsche Ostsee LNG facility that would have to be weighed up against this positive effect. Potentially negative effects on competition resulting from the use of the new infrastructure given the exemption are looked at in section 3.7.

### 3.2.2. Enhancement of security of supply by the LNG facility

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

134 According to section 28a(1) para 1 EnWG an exemption can only be granted if the investment enhances the security of gas supply. It was therefore necessary to look at whether security of supply is enhanced by the integration of the Deutsche Ostsee LNG facility compared with the current situation (counterfactual scenario). Even though neither the requirement in section 28a(1)

para 1 EnWG nor the identical requirement in Article 36(1)(a) of Directive 2009/73/EC makes reference to this, it is necessary from a geographic viewpoint to look at the effects both on Germany and on the EU, and in this case especially the relevant north-west European market (see section 3.2.1.3). From the product perspective, this is because it is ultimately a requirement laid down in European law relating to the European internal market. The systematic context also provides an argument in favour of this. Following a legal amendment, both section 28a(1) para 1 EnWG and the identical provision of Article 36(1)(a) of Directive 2009/73/EC now refer to the effects on the security of natural gas supply of the EU.

135 The Deutsche Ostsee LNG facility will diversity the gas supply by facilitating access to new sources. In the light of recent geopolitical events, the diversification of gas sources with LNG facilities and the substitution of Russian gas imports have become a central, urgent requirement to ensure security of supply in Germany and the EU (see section 3.2.2.2). The Deutsche Ostsee LNG facility will also open up new transport routes (see section 3.2.2.3). The additional capacity will strengthen the resilience (see section 3.2.2.4) of gas supply in Germany and the EU. In addition, it will increase the flexibility of gas supply (see section 3.2.2.5) by facilitating access to a large number of new sources of gas as well as access to the Deutsche Ostsee LNG facility for new market players for the duration of the exemption (see section 3.2.2.6).

#### 3.2.2.1 Term "security of supply"

136 The term "security of supply" in section 28a(1) para 1 EnWG corresponds to the "secure supply" mentioned as a legislative purpose in section 1(1) EnWG. No standard definition has so far become established at the national or international level (see Theobald, in: Theobald/Kühlung, Energierecht Kommentar, 116th supplement, May 2022, section 1, margin no 17). The term security of supply must be read in the light of Article 194(1)(b) of the Treaty on the Functioning of the European Union (TFEU). This provision states that ensuring security of supply, as one of the four aims of EU energy policy, is focused on meeting energy demand in terms of quantity and reliability (see Hamer, in: von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7th ed 2015, TFEU Art. 194, margin no 15). Ultimately, the questions relevant to assessing security of supply are whether the gas supply infrastructure can still meet the demand for natural gas even in a crisis situation or at times of particularly high demand (peak load). Accordingly, the aspects relevant to determining and assessing security of supply include those listed in section 51(2) EnWG relating to the monitoring of security of supply. These include the supply and demand balance on the relevant market, the level of expected future demand, and the situation with respect to peak demand or suppliers' shortfalls.

137 In geographic terms, it is necessary to look at the German and European gas market and the forecast development of the market in the next few years. The applicant understandably based its

quantitative analyses on Germany because the effect of an infrastructure on security of supply will often be most relevant locally. As the forecast developments in north-west Europe are similar, this should not result in any major differences (see Frontier Economics, economic report, page 39).

138 The fact should also be taken into account that an enhancement of supply security in Germany always has a positive effect on supply security in the EU, and especially in the north-west European neighbouring countries, as well. The Federal Republic of Germany is a transit country that is very important for security of supply within the EU, given its central location within the European gas transport system and numerous connections to other Member States at the transmission system level via cross-border interconnection points. According to the applicant's plans, the Deutsche Ostsee LNG facility will be connected to the German and thus also the European transmission system. An enhanced supply situation in Germany as a result of the addition of the Deutsche Ostsee LNG facility can therefore make it easier to deliver gas to other Member States in the event of a crisis. In the case of the Deutsche Ostsee LNG facility, the fact that the OPAL and EUGAL pipeline links can be used means that the Czech Republic, the Slovak Republic, Hungary and the Republic of Austria, in particular, could also benefit from the gas volumes regasified at the terminal.

139 The applicant's quantitative analyses rightly cover the period up to 2033. The exemption is valid for 20 years and therefore until after the end of this period. However, limiting the analyses to the period up to 2033 is reasonable and adequate in order to be able to assess whether the LNG facility will contribute to enhancing security of supply because the further into the future that forecasts are made, the more uncertain the forecasts become and because of the lack of reliable data (see section 3.2.).

140 According to the Commission staff working document on Article 22 of Directive 2003/55/EC (superseded by Article 36 of Directive 2009/73/EC), security of supply is enhanced by any diversification of supply, in particular when access to a new source of supply is facilitated or a new route of supply to the relevant markets is opened (see Commission staff working document, loc cit, para 25.1). Accordingly, the regulatory authority is required by Article 36(8) sentence 4 point (e) of Directive 2009/73/EC as part of the exemption procedure to provide the European Commission with information about the contribution of the infrastructure to the diversification of gas supply. In accordance with these requirements, the European Commission stated in various documents relating to exemption procedures that security of supply is enhanced if an investment provides a new route to the relevant market or connects new upstream sources of gas to the market (see European Commission Decision of 19 August 2022 on the Stade LNG facility, (C(2022) 6098 final, para 48 et seq); Commission Decision of 11 August 2022 on the EemsEnergyTerminal (C(2022) 5947 final, para 57 et seq); Commission Decision of 21 May 2021 on the Brünsbuttel LNG terminal (C(2021) 3814 final, para 46 et seq); European Commission document of 8 February 2008 on the

Nabucco pipeline (CAB D(2008)/142), para 41 et seq; re diversification of routes see: European Commission document of 22 May 2008 on the Poseidon pipeline (SG-Greffe(2007) D/203046, page 2); re diversification of sources of gas by an LNG facility see: Commission Decision of 8 December 2020 on the LNG Terminal South Hook, C(2020) 8948 final, para 35-36; Commission Decision of 25 November 2020 on the Alexandroupolis LNG Terminal, C(2020) 8377 final, para 28; Commission Decision of 4 June 2013 on the LNG facility on the Isle of Grain (C(2013) 3443 final), para 29). The relevant aspects enhancing security of supply are therefore a diversification of energy sources and also the creation of redundancies through additional transport opportunities (see Däuper, in: Theobald/Kühling, Energierecht Kommentar, 116th supplement, May 2022, section 28a EnWG, margin no 8; Arndt, in: Britz/Hellermann/Hermes: Energiewirtschaftsgesetz, 3rd ed 2015, section 28a, margin no 6).

141 With respect to LNG facilities, the Commission staff working document states that the more flexibility of supply an infrastructure project adds for bringing additional gas to a market in the event of an emergency, the more it enhances security of supply. As a result, the contribution to security of supply of LNG terminals, for example, could be greater as they provide a much wider choice of sources of gas worldwide (see Commission staff working document, loc cit, para 26).

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

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

143 Recent developments have shown that Russia is no longer a reliable energy supplier. It is now urgently necessary for Germany and the EU to become independent of Russian gas imports, as shown by Russia's recent suspension of deliveries to European partner countries and various halts to gas supplies to available pipelines in the course of the year as well as, most recently, the stopping of gas deliveries to Germany (see https://www.dw.com/de/russland-stoppt-gas-lieferungen-an-niederlande/a-61989218 and https://www.tagesschau.de/ausland/europa/russland-north-stream-103.html, both accessed on 14 October 2022. Moreover, the current massive damage to the Nord Stream 1 pipeline and one line of Nord Stream 2 mean that it is not possible to restore the supply of natural gas through these pipelines quickly in the foreseeable future.

144 In 2021 imported Russian gas met 55% of German and 40% of European demand. According to the REPowerEU communication, as explained in section 3.2, the EU intends to become completely independent of natural gas imports from Russia. Natural gas imports from Russia to the EU are expected to fall 30% by the end of 2022. They are to be replaced by more imports of LNG via existing and new LNG facilities as well as by pipeline imports from Norway, the expansion of renewable energies and energy efficiency measures (see REPowerEU). The Deutsche Ostsee LNG facility, with its annual import capacity of about 4.5bn $m^3$, and 13.5bn $m^3$ from summer 2024, will be able to cover about 15% of German demand for natural gas (based on total demand for 2021, assuming an annual import capacity of about 13.5bn $m^3$, see Frontier Economics, economic report, page 37). On 1 June 2022 a law to speed up planning approvals for the construction of LNG infrastructure with the aim of securing the energy supply entered into force (LNG Acceleration Act, LNGG). It acknowledges that the rapid creation of LNG infrastructure is essential for security of supply in Germany, All the projects mentioned in the law, including this one in Lubmin, are in the overriding public interest and in the interest of public safety due to their contribution to securing the energy supply. Owing to the urgent need to meet national gas demand, in 2022 the German government chartered five floating LNG terminals that are to replace deliveries of pipelined gas in the short to medium term (see https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2022/09/20220901-bwmk-sichert-sich-fuenftes-schwimmendes-fluessigerdgasterminal-plus-anlandung-gruener-wasserstoff.html, accessed on 24 October 2022).

145 In accordance with the above, the Deutsche Ostsee LNG facility will strengthen security of supply in Germany and the EU by facilitating access to gas from sources worldwide that were previously not directly available to the German supply area for gas supply in Germany without transiting neighbouring countries. The natural gas, when cooled and liquefied, has a significantly smaller volume, allowing large quantities of the gas in its liquid form to be transported over longer distances by ship. This facilitates the use of sources located far away, for example in North America, Qatar and Australia, to supply Germany and north-west Europe with gas that can technically only be transported to Europe by ship.

146 In conclusion, it may be said that the Deutsche Ostsee LNG facility will make an essential contribution to guaranteeing security of supply in Germany and the EU in the face of the absence of Russian gas imports by opening up new sources of gas and the possibility of additional imports in the short term.

#### 3.2.2.3 Redundancy through diversification of transport routes

147 The Deutsche Ostsee LNG facility will enhance security of supply in Germany in the very near future by opening new routes for the direct transport of LNG to Germany this winter (2022/2023).

It will enable the direct importation of LNG into Germany without the need for importation via LNG facilities in neighbouring countries such as the Netherlands, Belgium and France. It will therefore offer an alternative to transporting natural gas by pipeline or other LNG facilities. This will increase the redundancy of the gas supply in the event of an emergency because it would be possible to import replacement gas volumes via the Deutsche Ostsee LNG facility in the event that a transport route, such as an import pipeline or imports from Russia, were to be cut off. The larger the number of routes for the transport of additional volumes of gas to Germany and Europe, the higher the security of supply. This is all the more relevant in the light of recent events and the efforts to replace Russian gas imports.

148 The applicant also provided conclusive empirical proof of this in independent quantitative analyses (see Frontier Economics, economic report, page 37 et seq). The situation with the Deutsche Ostsee LNG facility was compared with the situation without it (counterfactual scenario). Various indicators were used to assess the diversification of supply and the resilience of the system. The applicant used data from the Gas NDP 2022 database for the analyses. Additionally, data from the Federal Ministry for Economic Affairs and Climate action (BMWK) regarding the state-chartered FSRUs and the 2022 scenario report Global Ambition for biomethane and the development of demand (see Frontier Economics, economic report, page 41). All the analyses show that the Deutsche Ostsee LNG facility will contribute to the enhancement of security of supply in Germany in the very near future.

149 The import route diversification (IRD) indicator measures the diversification of gas import routes. A high level of concentration indicates a high level of dependency on one or a small number of routes, while a low level of concentration indicates a high level of diversification of routes. The lower the value, the higher the security of supply. The calculations in the report showed a relatively good level of diversification for the import routes into Germany (from 2023), with values constantly below 0.2 on a scale from 0 to 1. In the analysis, the additional technical capacity at the Deutsche Ostsee LNG facility enhanced route diversification by about 7% for 2023 and 13% for 2025 compared with the counterfactual scenario without the Deutsche Ostsee LNG facility. Compared to the counterfactual scenario, the difference will continue to increase until 2029, followed by a constant index difference of about 14% (see Frontier Economics, economic report, page 43).

150 The applicant thus provided conclusive proof that the additional technical capacity provided by the Deutsche Ostsee LNG facility will result in a decrease in the level of dependency on current import routes. It will also allow additional gas volumes to be imported at very short notice and thus compensate for the Russian gas imports not currently being provided.

#### 3.2.2.4 Increase in the resilience of the gas supply infrastructure

151 The applicant provided conclusive proof using the N-1, residual supply index (RSI) and system adequacy index (SAI) indicators that the Deutsche Ostsee LNG facility will enhance the resilience and therefore the security of gas supply in Germany and thus ultimately the EU (see Frontier Economics, economic report, page 43 et seq).

152 The N-1 indicator measures whether the daily peak demand can still be met in the hypothetical event of disruption of the single largest infrastructure that directly or indirectly contributes to the supply of gas on the market. The applicant's calculations from (see Frontier Economics, economic report, page 44 et seq) took account of the entry capacity from domestic conventional, biogas and hydrogen production and storage facilities in addition to the import capacity. The applicant based the daily peak demand on the peak day demand in the Best Estimate scenario in the ENTSOG TYNDP 2022. The single largest infrastructure was defined as the cross-border interconnection point/border with the largest entry capacity into Germany. In the calculations submitted, this was the sum of the cross-border interconnection points from Norway with their respective entry capacities. According to ENTSOG, for the single largest infrastructure the sum of the cross-border interconnection points from a non-EU supplying country are regarded as one import route, because it is assumed that they could go out of use simultaneously. In this case, there are various pipelines connecting Germany to Norway. While some of the upstream production infrastructure of these pipelines is different, there are interdependencies meaning that a simultaneous failure cannot be completely ruled out, so the consideration of the N-1 criterion is based on the total import capacity from Norway (see Frontier Economics, economic report, pages 44-45). A value of exactly 100 for the N-1 criterion means that the capacity without the single largest infrastructure is just enough to meet daily peak demand. A value of 200, by contrast, means that twice the daily peak demand can be met without the single largest infrastructure.

153 The applicant's calculations showed that in the short term, Germany is heavily dependent on its largest infrastructure. As shown in section 3.2, if Russian import points are left out of the analysis, the N-1 criterion for 2022 is barely over 100. From 2023 onwards, this value does rise more or less continually even without the Deutsche Ostsee LNG facility, which is the subject of these proceedings. In the counterfactual scenario, it rises to 130 in 2033, ie the peak load can then theoretically be met 1.3 times even without the single largest infrastructure. As the Deutsche Ostsee LNG facility itself will not be the single largest infrastructure, it will at least be available to provide additional capacity to meet demand in the assumed N-1 scenario, so it would be possible to reach a value of 130 as early as 2025, when the maximum capacity of the Deutsche Ostsee LNG facility is reached. In the counterfactual scenario, there would only be a value of 120 at that time. An improved resilience of the system applies similarly for the following years (see Frontier Economics, economic report, page 45).

154 The applicant also used the RSI to calculate the level of dependency of gas supply in Germany on the largest supplier (see Frontier Economics, economic report, page 45 et seq). This indicator measures the degree to which the system can still meet the daily peak demand in the event that the largest supplier (via one or more infrastructure(s)) cannot supply gas. The analysis used Equinor/Petoro as the largest supplier of natural gas to Germany (not including capacity for Russian gas), even though it must be noted that capacity may be booked by other parties or the gas may be controlled by other parties before crossing the border to Germany, so that this capacity would not be available anymore in the event of disruption and the corresponding transport capacity could not be provided. The calculations showed that it would still be possible to meet the peak demand even without the largest supplier figure in the counterfactual scenario (value > 100). This level actually rises over time since it is assumed that the peak load will fall due to falling demand (see section 3.2) (see Frontier Economics, economic report, page 45 et seq).

155 The calculations using the RSI indicator for the scenario with the Deutsche Ostsee LNG facility showed a further decrease in the level of dependency of gas supply on the largest supplier as a result of the additional capacity of the LNG facility and therefore a further enhancement of security of supply in Germany and thus the EU. The scenario with the Deutsche Ostsee LNG facility resulted in an RSI of 125 for 2025, with a lower value of 118 in the counterfactual scenario (see Frontier Economics, economic report, page 47).

156 The calculations using the SAI (see Frontier Economics, economic report, pages 47-48) also showed that the Deutsche Ostsee LNG facility would have a positive effect on security of supply in Germany. The SAI gives an indication of the size of the remaining gas supply buffer on peak days. The applicant's calculations in the counterfactual scenario showed a further improvement in the balance between capacity and peak demand as a result of the addition of the Deutsche Ostsee LNG facility. In 2025, for example, the SAI would rise from 0.32 in the counterfactual scenario to 0.39 in the scenario with the Deutsche Ostsee LNG facility (see Frontier Economics, economic report, page 47).

157 In conclusion, the calculations in the report presented by the applicant using the different indicators (N-1, RSI and SAI) show an enhancement of the resilience and therefore security of gas supply in Germany and thus the EU as a result of the addition of the Deutsche Ostsee LNG facility.

#### 3.2.2.5 Increase in the flexibility of gas supply

158 The Deutsche Ostsee LNG facility will also increase the flexibility and thus the security of gas supply in Germany and the EU.

159 The European Commission has pointed out that the more flexibility of supply an infrastructure project adds for bringing additional gas to a market in the event of an emergency, the more it

enhances security of supply. As a result, the contribution to security of supply of LNG terminals, for example, could be greater as they provide a much wider choice of sources of gas worldwide (see Commission staff working document, loc cit, para 26).

160 This is the case in this instance. It is true that the flexibility of an LNG facility can be restricted by long-term contractual commitments along the value-added chain of liquefaction, transport and regasification, depending on capacity allocation. In this case, however, flexibility of supply by the Deutsche Ostsee LNG facility is ultimately guaranteed by the requirement for a reserve quota equal to 10% of the annual throughput capacity, the UIOLI procedure and secondary marketing. This ensures that 10% of the annual throughput capacity will be available to third parties each year irrespective of any existing long-term supply commitments.

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

#### 3.2.2.6 Short-term marketing rules to enhance the contribution to security of supply

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

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

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

165 The European Commission has also stressed in these proceedings (see European Commission Decision of 20 December 2022, C(2022) 9902 final, para 61) and in other exemption proceedings, such as those for the Brunsbüttel LNG facility, the importance of the provisions for the non-discriminatory, transparent initial allocation of long-term capacity and the provisions to prevent capacity hoarding (operative parts 6. to 8.), in particular to ensure permanent, secure access for a large number of new market participants (short-term marketing permitted by the reserve quota)

to the improvement of security of supply. This is particularly significant given the long duration of the exemption (Commission Decision of 25 May 2021 C(2021) 3814 final, para 58). Long exemption periods which monopolise access to critical infrastructure in the hands of a small number of market participants could bring negative impacts on security of supply (Commission Decision C(2021) 3814 final, para 57). The European Commission considers that one element of security of supply is having access to different sources of supply, including via different suppliers (Commission Decision C(2021) 3814 final, para 59). The aforementioned provisions for non-discriminatory allocation of long-term capacity and to prevent capacity hoarding are suitable to ensure access to the LNG facility for new market participants and thus to reduce dependence on individual market participants, which can enhance security of supply (Commission Decision C(2021) 3814 final, para 59).

#### 3.2.2.7 Summary

166 The Deutsche Ostsee LNG facility will enable additional volumes of gas to be brought to Germany and the EU, replacing Russian imports at very short notice. It will enhance security of supply in Germany and the EU by diversifying the gas supply with respect to both new sources of gas and new transport routes. The current political situation makes the Deutsche Ostsee LNG facility essential to guarantee the energy supply in Germany and the EU in the very near future.

167 In addition, the applicant proved by means of quantitative analyses (IRD indicator) that the Deutsche Ostsee LNG facility will increase the redundancy of gas supply in Germany. At the same time, the additional capacity provided by the Deutsche Ostsee LNG facility will strengthen the resilience of the gas supply. The applicant provided conclusive proof of this by means of independent calculations using various indicators (N-1, RSI and SAI). Moreover, the Deutsche Ostsee LNG facility will create more flexibility in the gas supply. Firstly, it will open up the possibility of accessing a wide range of sources of gas worldwide. Secondly, it will facilitate non-discriminatory access to the Deutsche Ostsee LNG facility for various importers, in particular for the whole duration of the exemption on a short-term basis. This is guaranteed by the capacity management and allocation rules laid down in operative parts 5. to 8..

### 3.3. Major new infrastructure

168 The Deutsche Ostsee LNG facility constitutes a major new infrastructure within the meaning of section 28a(1) para 2 EnWG in conjunction with Article 36(1) of Directive 2009/73/EC.

169 According to Article 2 point 33 of Directive 2009/73/EC an infrastructure is new if it has not been completed by 4 August 2003, while according to section 3 para 29a EnWG an infrastructure is new if it starts operation after 12 July 2005. As the Deutsche Ostsee LNG facility was not

completed by 4 August 2003 and will start operation after 12 July 2005, it qualifies as a new infrastructure according to both definitions and the deviation between the deadlines does not need to be addressed here. Both criteria are met in this instance.

170 The Deutsche Ostsee LNG facility constitutes a "major" infrastructure within the meaning of section 28a(1) para 2 EnWG in conjunction with Article 36(1) of Directive 2009/73/EC. This criterion is hardly amenable to interpretation, however, because it remains unclear what serves as a comparison and how the difference in size is to be determined.

171 The applicant has explained that the planned Deutsche Ostsee LNG facility will be able to inject 4.5bn $m^3$ per year into the German gas transmission system in phase I and 13.5bn $m^3$/a once phase II is completed. This corresponds to at least about 15% of Germany's total annual consumption (see application of 28 July 2022, page 19). Ultimately, whether this is a relevant reference quantity may be left open. Given the planned annual throughput capacity of 13.5 bn $m^3$ and the comparison with the annual throughput capacities of other LNG facilities already exempt from regulation, and with a view to the costs of about €[redacted] planned by the applicant until the project is complete (including the applicant's share of the costs of connection to the German transmission system or for its construction; a precise breakdown of the costs may be found in annex 10 to the Frontier Economics risk report, page 6), it may be assumed that the Deutsche Ostsee LNG facility is of a certain size. According to the expert report, once a final investment decision has been taken, the great majority of the total costs are irreversible (see annex 10, Frontier Economics, risk report, page 6).

172 The ruling chamber does not doubt that the planned Deutsche Ostsee LNG facility is a major infrastructure, both in terms of investment and capacity volume. The European Commission shared this understanding in its Decision of 20 December 2022 (see European Commission Decision of 20 December 2022, C(2022) 9902 final, para 47).

### 3.4. Investment risk

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

### 3.4.1. General principles

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

### 3.4.2. Relevant risks

175 Not every risk can be classed as a relevant risk for the assessment within an exemption decision but, for normative reasons, only those risks that are usually attached to an investment decision (see, for example, decision BK7-18-063-final of 21 June 2021, page 52 et seq).

176 The main risks are, on the one hand, a utilisation risk or risk of non-use of the investment and, on the other, the risk of a change in costs and/or revenues in the future (see Commission staff working document, para 41; European Commission Decision on the OPAL decision, C(2009) 4694, para 32; Thole, in: Säcker, Berliner Kommentar zum Energierecht, 4th ed 2019, section 28a EnWG, margin no 11; Arndt, in: Britz/Hellermann/Hermes, Energiewirtschaftsgesetz, 3rd ed 2015, section 28a, margin no 7). In particular, the assessment can take account of the costs of the project, the length of the payback period, consumption forecasts, other alternative competing investment projects or changes in global market conditions for primary fuels (see Commission staff working document, para 41; Däuper, in: Theobald/Kühling, Energierecht, 116th supplement, May 2022, section 28a EnWG, margin no 10).

177 In this respect, the applicant stated that, in its opinion, the main relevant risks in this instance were the risk of non-use of the investment and the risk of a change in costs and/or revenues in the future. The applicant also provided proof of this in the course of the administrative proceedings with a report (see Frontier Economics, risk report)

178 (1) There is a risk of non-use of the investment or of a low level of use in this instance because investments for LNG facilities can frequently lead to sunk costs in the event of a low level of use or non-use. The costs are irreversible because the investment costs cannot be recovered once the facility has been constructed. This is particularly true for fixed, onshore terminals and is not necessarily equally relevant to non-fixed, floating FSRUs. However, the applicant did show in the report that investing in the non-fixed Deutsche Ostsee LNG terminal was associated with significant, irreversible investment costs, especially resulting from take-or-pay commitments for the leasing of the FSRU and costs for the port infrastructure as well as connection and construction costs (see Frontier Economics, risk report, pages 5-6). It can probably be ruled out that the infrastructure, at least, and the connection costs could be used for a purpose other than the one

planned. In the case of project financing, as an established financial instrument in particular for capital-intensive assets such as pipelines or LNG facilities, this means that the assets of an LNG facility project as such can hardly be accepted as security for the required credit. In the case of project financing, any debt is paid back solely from the cashflow generated by the project during the operational phase; lenders therefore assess such a project on the basis of the risk factors that have a direct influence on the cashflow expected in the future. Any significant change that affects the cashflow of such a project has an effect on the conditions for financing and thus on the investment decision. In order to make an economically rational investment decision, it must be possible in principle to make a reliable forecast as to whether the LNG facility will be used to a sufficient extent during the payback period and it will be possible to levy charges for its use that enable refinancing. Long-term capacity contracts are suitable to give investors the required planning certainty about capital recovery (see Commission staff working document, para 42).

179 The applicant conclusively demonstrated that securing long-term capacity contracts strongly depends on, among other things, the framework conditions for the use of capacity and the calculation of charges being predictable and reliable for potential customers throughout the payback period (see application of 28 July 2022, page 21 et seq and Frontier Economics, risk report, page 15 et seq). The risk of non-use or utilisation therefore decreases when, due to the exemption, the risk of a change in costs and/or revenues in the future decreases to such an extent that the applicant can create sufficient certainty about capital recovery for investors by securing long-term contracts. Thus without the exemption there would be a relevant risk of non-use or low level of use of the Deutsche Ostsee LNG facility.

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

This risk of a change in costs and/or revenues in the future can result from a planned use of the LNG facility not being realised (utilisation risk). In the past, as stated above, the level of use of existing north-west European LNG facilities has tended to be rather low. Overall, it may be said that the LNG is in a sustained phase of major change, partly due to the current geopolitical situation. While global LNG transport volumes fluctuated slightly around a level of about 330bn m³ in the period from 2011 to 2015, volumes increased at an average annual rate of about 9% from 2016 to 2018 (see https://de.statista.com/statistik/daten/studie/28976/umfrage/lng-transport-weltweit-seit-1970/, retrieved 03 November 2022). The European Commission expects volumes to increase further to 505bn m³ in the period up to 2023 (see https://germany.representation.ec.europa.eu/news/eu-usa-handel-einfuhren-von-flussigerdgas-lng-die-europaische-union-steigen-2018-08-09_de, accessed 3 November 2022). In light of the large increase in liquefaction capacity (in 2019 projects with a total annual liquefaction capacity of 170bn m³ were approved, see IEA: Global Gas Security Review 2019), profound changes in the

LNG market are also to be expected in the future (see IEA: Global Gas Security Review 2019). In such a situation, in particular, longer-term capacity contracts serve as security for financial contracts and reduce cashflow volatility. As stated above, concluding such contracts is therefore decisive for secure project financing.

181 The risk of a change in costs and revenues in the future can also result from a change in the legal framework. The applicant demonstrated to the ruling chamber's satisfaction that a guaranteed legal framework is decisive for its potential users wishing to conclude a long-term capacity contract. The applicant stated that the possibility of changes to or burdens on the fundamental regulatory framework for access to or charges for LNG facilities after the conclusion of long-term capacity contracts could not be ruled out. This results in uncertainty about capital recovery and the conditions for using the acquired capacity for both contracting parties, namely the applicant and potential users. Uncertainty about charges and access conditions over the long period of validity of contractual commitments and the long payback period for the Deutsche Ostsee LNG facility can ultimately lead to long-term bookings not being made. The applicant also stated that any change in the provisions for network access or charges after the conclusion of long-term bookings would have an effect on the costs and revenues. It was therefore important for a stable regulatory framework to be in place for the duration of the binding, long-term capacity bookings (see application of 28 July 2022, page 21 et seq and Frontier Economics, risk report, page 15 et seq).

182 (3) The war in Ukraine and its effect on the market environment are likely to have increased the utilisation risk and the risk of a change in costs and/or revenues in the medium to long term, even though especially in the short term, the need to diversify gas sources means that higher demand for regasification capacity may be expected.

183 When assessing the investment risk necessary for an exemption, in particular the risk of a change in costs and/or revenues, a charge to the market situation, for example caused by falling demand, must be taken into account (see Commission staff working document, para 41).

184 In light of the current situation, it is possible that demand for natural gas/LNG could drop more sharply and more quickly in future owing to greater legislative and price-driven energy efficiency measures and a much faster expansion of renewables. These processes have already got underway on a large scale, both at the European level (Fit for 55, REPowerEU) and at the national one. The current considerable price rises for natural gas are also likely to create incentives for energy efficiency measures. Moreover, it does not seem completely ruled out that a political decision may be made to phase out energy supply using natural gas before 2050. The LNGG aleady envisages an end to the use of natural gas by 2043 (section 5(2) LNGG). These circumstances could lead to a shorter usage period for the Deutsche Ostsee LNG facility and

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

185 The German government is currently supporting a huge drive to get a series of other projects for LNG facilities underway in the country (see the LNGG, for example) in order to guarantee the security of supply in Germany and the EU and to become more independent from Russian gas imports as quickly as possible. This will indeed probably lead to higher demand for regasification capacity at German LNG facilities in the short and medium term. On the other hand, while the regasification capacity will in all likelihood become much greater, competition from other customers will remain in the global LNG market, in particular the Asian market, due to the higher demand for LNG especially from Europe. The competing projects in Germany and north-west Europe raise the risk of non-use of the investment and the risk of a change in costs and/or revenues in the future for this project (see also Commission staff working document, para 43).

186 In light of the dynamic market situation caused by the current geopolitical situation (increased demand for the creation of regasification capacity and supply chain issues), it seems possible that the overall investment costs could also rise, which would also lead to an increased risk of a change in costs and/or revenues.

187 In sum, it may be said that the investment risks have risen considerably overall as a result of the current geopolitical situation and its influence on the market environment (possibly shorter usage period/falling demand for natural gas, competing projects, possible rise in overall investment costs). The European Commission confirmed this understanding (European Commission Decision of 20 December 2022, C(2022) 9902 final, para 114 et seq).

### 3.4.3. Causality

188 The applicant demonstrated to the ruling chamber's satisfaction that the exemption is necessary for the final investment decision in that the investment would not take place unless an exemption was granted.

189 There is no causality between the risk and the investment decision if the investment decision has already been taken without reservation or if a decision in favour of the investment is expected to be taken even in the event that the exemption is not granted. Section 28a EnWG does not serve to enable deadweight effects, thus the particular risk alone is not sufficient if the investor is still prepared to realise the project within a regulated framework regardless of the risk. The dependency of the investment decision on the granting of the exemption is a subjective criterion that must be met at the time the decision on exemption is made and must be proved by the applicant. Of no relevance is whether the investor nevertheless decides to invest in the project in

the light of new findings or a new assessment of the economic environment after the request for exemption has been refused.

190 The applicant credibly demonstrated that potential customers are only prepared to conclude a long-term contract with the applicant if an exemption has been granted and there is therefore certainty about stable conditions for the use of capacity and the calculation of charges. In the absence of such long-term capacity bookings, however, there is no longer any basis for the decision to invest in the Deutsche Ostsee LNG facility. The applicant has explained to the ruling chamber's satisfaction that it would not invest in the construction of the Deutsche Ostsee LNG facility in the absence of long-term capacity contracts (see application of 28 July 2022, pages 21 et seq and Frontier Economics, risk report, page 15 et seq).

191 The applicant also credibly declared that no final investment decision had yet been taken and [redacted]. The measures and decisions taken so far were merely preparatory, according to the applicant, and the "point of no return" had not yet been passed. [redacted] Any costs incurred due to the preparatory measures for wasted expenditure of contracting parties or contractual penalties amounted to less than [redacted] of the investment amount. As for any material orders for the expansion of the port in Lubmin, this material could easily be resold (see application of 28 July 2022, page 24). Where maintenance and upgrading work had started on the Lubmin port, the applicant stated (in a letter of 30 September 2022) that this was for a project that was legally separate from the Deutsche Ostsee LNG terminal organised by a different project promoter.

192 Thus the required causality between the exemption and the investment decision to be taken exists in this instance and the exemption takes due account of the existing particular investment risk. The risk of non-use of the investment or of a low level of use and the risk of a change in costs and revenues in the future constitute particular risks that are relevant to the exemption decision within the meaning of section 28a(1) para 2 half sentence 2 EnWG and that justify an exemption for a period of 20 years from the start of commercial operation of phase I.

193 In the exemption proceedings for the Stade LNG facility, the European Commission stressed the durations of capacity booking contracts as a particular indication of the appropriate duration of an exemption (see European Commission, Decision of 19 August 2022, C(2022) 6098 final, para 129).

194 However, the exemption period is also justified in view of the fact that the longest booking requests in the binding expression of interest procedure carried out by the applicant were [redacted]

[redacted] The exemption period granted thus ensures that even longer contracts can be concluded, in particular for the capacity of the LNG facility in phase II. Moreover, in the exemption proceedings for the Stade LNG facility, the European Commission also confirmed that the exemption should not be granted for less than 20 years since this corresponded to the normal depreciation periods for tax purposes and was at the lower end of the range that had been granted to other LNG facilities (see European Commission, decision of 19 August 2022, C(2022) 6098 final, para 130).

195 The European Commission has confirmed that an exemption duration of 20 years is justified in this case, [redacted] The European Commission therefore views the depreciation and leasing periods of the FSRUs and the assumed length of validity of the tariffs as major factors for the duration of the exemption (European Commission Decision of 20 December 2022, C(2022) 9902 final, para 126 et seq).

### 3.5. Unbundling

196 The applicant currently satisfies the special unbundling requirement laid down in section 28a(1) para 3 EnWG. Section 28a(1) para 3 EnWG states that the infrastructure that is to be granted the exemption must be owned by a natural or legal person that is separate in accordance with sections 8 to 10e EnWG from the system operators in whose systems the infrastructure will be built.

197 The unbundling requirement laid down in section 28a(1) para 3 EnWG requires the operator of the infrastructure that is to be granted the exemption to be legally separate from the system operators to whose systems the new infrastructure will be connected. The requirement serves to prevent cross-subsidisation between regulated and non-regulated systems (see Thole, in: Säcker, Berliner Kommentar zum Energierecht, 4th ed 2019, section 28a EnWG, margin no 12; Däuper, in: Theobald/Kühling, Energierecht Kommentar, 116th supplement, May 2022, section 28a EnWG, margin no 11; Arndt, in Britz/Hellermann/Hermes, Energiewirtschaftsgesetz, 3rd ed 2015, section 28a, margin no 8). It can therefore only be met if system operation is transferred to a separate company. The aim and purpose beyond the strict wording of the provision is that not only the owner of the exempt infrastructure is required to be legally separate from the operator of the regulated system but also, and in particular, the operator of the new infrastructure.

198 The prerequisites for legal unbundling are met because the applicant is not at the same time the operator of the existing regulated system within the company group to which the Deutsche Ostsee LNG facility is to be connected. The transmission system operators to which the Deutsche Ostsee LNG facility is to be connected, according to the applicant, are the certified TSOs NEL Gastransport GmbH, GASCADE Gastransport GmbH, Gasunie Deutschland Transport Services GmbH and Fluxys Deutschland GmbH for the NEL plus Lubmin-Brandov Gastransport GmbH and OPAL Gastransport GmbH & Co. KG for the OPAL for phase I. As part of phase II, the applicant has stated that there could be an additional connection to the EUGAL, which is operated by the certified TSOs GASCADE Gastransport GmbH, Gasunie Deutschland Transport Services GmbH and ONTRAS Gastransport GmbH.

199 The additional reference in section 28a(1) para 3 EnWG to the provisions concerning functional unbundling, information unbundling and unbundling of accounts (sections 8-10e EnWG) equally serves to ensure unbundling between the existing regulated system and the new infrastructure for which an exemption is requested.

200 The applicant stated that, as the future operator of the Deutsche Ostsee LNG facility, it is separate from the above-mentioned TSOs in terms of function, information and accounts in accordance with sections 8 to 10e EnWG (see application of 28 July 2022, page 28 and response dated 11 November 2022).

201 Furthermore, the applicability of the unbundling requirement depends on the exemption being granted; it is therefore sufficient for these special requirements to be met once the exemption has been granted. The decisive point in time is the operation of the new infrastructure. Accordingly, the ruling chamber has attached a right to withdraw the exemption in the event that the special unbundling provisions of section 28a(1) para 3 EnWG are not met once the Deutsche Ostsee LNG facility has started operation (operative part 12. c)). This is necessary but also adequate to guarantee compliance with these requirements.

### 3.6. Levying of charges

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

203 Not least, merely the request for an exemption would conflict with not levying charges for the service provided. This is because one of the applicant's objectives in requesting an exemption is specifically to ensure a stable and adequate income from charges for as long a period as possible. In its application of 28 July 2022, the applicant explained that it would conclude capacity contracts with the users of the Deutsche Ostsee LNG facility. These contracts are based on usage charges

that ensure the recovery of the invested capital and the operation of the LNG facility. There is no indication from these explanations that an exemption from charges for all or even just individual customers had been discussed. Equally, there is no indication that individual services offered by the applicant would be excluded from charges.

204 Section 28a(1) para 4 EnWG does not lay down any further requirements concerning the level and structure of the charges. The applicant did not provide any explanation about the method that was to provide the basis for charging. However, the applicant gave an assurance that its charges would be appropriate, non-discriminatory and transparent (see application of 28 July 2022, page 28). In order to ensure that these prerequisites are met, the present decision imposes the requirement on the applicant to levy charges on its users (see operative part 4.). Furthermore, the reporting requirement laid down in operative part 11, also with respect to the obligation to levy charges, and the right to amend or withdraw the exemption set out in operative part 12. b) ensure that the ruling chamber can monitor and enforce these requirements effectively.

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

205 In accordance with section 28a(1) para 5 EnWG, an exemption may only be granted if it is not detrimental to competition on the markets which are likely to be affected by the investment, (see section 3.7.1.) to the effective functioning of the internal market in natural gas (see section 3.7.2) or to the efficient functioning of the regulated system to which the infrastructure is connected (see section 3.7.3.), or to security of gas supply in the EU (see section 3.7.4.). These conditions have been met, taking into consideration the secondary provisions in the operative part (in particular, operative parts 5. to 8.).

206 Whereas section 28a(1) para 1 EnWG focuses on the "investment", in section 28a(1) para 5 EnWG the effect of the exemption approval, and thus above all the use of the investment as described in the exemption request, is the focus. This is based on the idea that investments generally promote market access, and thus competition on the gas markets, by enlarging infrastructure capacity. This means that a new piece of infrastructure generally has positive effects on competition per se. However, this does not necessarily apply to the conditions under which it can be used or to its specific use by particular market participants.

207 The main point of relevance to its competitive significance is whether, and to what extent, a company with a dominant market position is the beneficiary of the exempt infrastructure. As in general competition law, cases in which a dominant company is the main beneficiary of the exemption are particularly problematic.

208 The market definition is the accepted tool used to determine upon which markets competition is affected or upon which markets competition could be affected by the infrastructure. Based on the general explanations in section 3.2.1 up . to the defining of the relevant markets, this section contains a competition analysis that examines the effect of the exemption on the relevant north-west European market (see section 3.7.1.3). There is also a further analysis relating to a more narrowly defined national market (see section 3.7.1.4). This takes account of the decision-making practice of the Bundeskartellamt, according to which the wholesale gas market must be defined geographically as at least Germany-wide (see Bundeskartellamt, B8-69/14, margin no 97 et seq). Moreover, the European Commission also considered in the exemption proceedings for the planned Brunsbüttel LNG facility (decision of 21 June 2021, BK7-18-063-final) in its Decision of 25 May 2021 (C(2021) 3814 final, para 69 et seq) and in the proceedings for the planned Stade LNG facility (Commission Decision of 19 August 2022, C(2022) 6098 final, para 86 et seq) a more narrowly defined national market relevant in the assessment of whether the prerequisites of Article 36(1)(e) of Directive 2009/73/EC and section 28a(1) para 5 EnWG have been met.

### 3.7.1. Effect on competition of the exemption

209 As discussed in section 3.2.1.1, the analysis of the effect of the exemption on competition draws on a counterfactual scenario of a situation without the Deutsche Ostsee LNG facility. As the applicant has requested exemption from the application of sections 20 to section 26(1) EnWG, the analysis correspondingly examined whether an exemption from charges regulation and an exemption from the regulated third-party access to the Deutsche Ostsee LNG facility could cause a detrimental effect on competition that would lead to a worse competitive situation than if there were no Deutsche Ostsee LNG facility.

210 The granting of a (limited) exemption from charges and access regulation will not be detrimental to competition on the markets which are likely to be affected by the investment, taking into account the positive effect on competition of the secondary provisions set out in operative parts 5. to 8. with the transparent and non-discriminatory long-term allocation of capacity, a reserve quota, secondary marketing and a UIOLI procedure (see section 3.8.4, especially 3.8.4.2, 3.8.4.3 and 3.8.4.4).

#### 3.7.1.1 No detriment caused by the exemption from charges regulation

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

212 In this regard, it may be concluded that there is no cause for concern about a worsening of competition. The aim of charges regulation is to prevent a monopolistic provider imposing

excessive prices to increase its monopoly rents. If this kind of pricing occurred at the LNG facility, the facility might be little used, because potential customers have sufficient opportunities elsewhere. There would be no worsening of competition, however, because the extreme scenario of a completely unused LNG facility would ultimately be a situation comparable to that without an LNG facility.

213 The European Commission explained in the exemption proceedings for the Brunsbüttel LNG facility (decision of 21 June 2021, BK7-18-063-final) and in the exemption proceedings for the Stade LNG facility (decision of 19 September 2022, BK7-20-107) that the exemption from charges regulation is not detrimental to competition since the tariffs of the LNG facility do not discriminate between the different capacity holders, and increases after the initial allocation are limited to 10% of the basic tariff (Commission Decision of 25 May 2021, C(2021) 3814 final, para 99 and Commission Decision of 19 August 2022, C(2022) 6098 final, para 110). This was confirmed in these proceedings (see Commission Decision of 20 December 2022, C(2022) 9902 final, para 111).

#### 3.7.1.2 No detriment caused by the exemption from access regulation

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

215 A hypothetical negative effect on competition could at most result from the exemption from regulated third-party access in accordance with section 20 EnWG. The aim of the access regulation pursuant to section 20(1) EnWG is to enable all potential interested parties to acquire access capacity on a non-discriminatory basis. As LNG facilities are energy supply networks (see section 3 para 16 and para 20 EnWG), the provisions of section 20 EnWG apply. Associated with these may be, among other things, rules limiting the time period for which capacity may be booked in advance. For the pipeline sector, this period is currently 15 years. If an exemption is granted from the access regulation, no such limits would apply, enabling customers of the LNG facility to acquire capacity for the entire duration of the exemption. From a competition perspective, the risk would be one single customer booking the maximum capacity of the LNG facility for the entire period. An analysis of the effect on competition based on the assumption of this extreme scenario concludes that the competitive situation would not be worse, which also applies to all other scenarios, such as those in which several customers book capacity or capacity is not acquired for the entire duration of the exemption. The report on which this is based includes, as well as the counterfactual scenario "the Deutsche Ostsee LNG facility is not built", alternative scenarios

examining the effect on competition if the sole booking customer is either the largest market participant in the north-west European market (scenario 1 with Equinor/Petoro as the largest LNG provider in 2023/2024 and QatarEnergy in 2030) or the second-largest market participant (scenario 2 "second-largest market participant"). It will therefore be examined if, in the event that the capacity of the largest market participant has to be restricted, whether and to what extent this should also apply to the second-largest market participant.

216 The ruling chamber has drawn on the analyses in the report to assess the effect on the competitive situation (see Frontier Economics, economic report, page 75 et seq). As explained in section 3.2, the ruling chamber, having checked the sources and examined the calculations for plausibility, considers the Frontier Economics report to be a comprehensible economic analysis of competition. The explanations of the ruling chamber below are thus based on the analyses and calculations set out in the report. The ruling chamber is in agreement with the conclusions made there unless otherwise stated. The specific results will be examined in more detail in their context below.

217 The report looks at the change in market shares of the market participants and concentration indices for the two alternative scenarios mentioned above and compares these with provisions from the Competition Act (GWB) and the guidelines of the European Commission (European Commission 2004/C31/03, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, margin nos 19-20).

218 Pursuant to section 18(4) and (6) GWB, an undertaking is considered to be dominant if it has a market share of at least 40%. Two or three undertakings are presumed to be jointly dominant on a market if they have a combined market share of 50%. If there are four or five undertakings, the threshold is two thirds. It must therefore be examined if, in the alternative scenarios, one of these thresholds would be surpassed and there would thus be a difference compared to the counterfactual scenario of the Deutsche Ostsee LNG facility not being built. The relevant concentration ratios are abbreviated CR1 (market share of the largest market participant) to CR5 (combined market share of the five largest market participants).

219 Market concentration is identified using the market shares of all participants (not just the largest ones) based on the Herfindahl-Hirschmann index (HHI). In the course of its merger controls, the European Commission has defined thresholds for when a change in the HHI may be classed as potentially detrimental to competition. This may be applied to the issue at hand by comparing the HHI with an exemption to the value of the index in the counterfactual scenario: if the exemption does not lead to a "worsening" of the HHI as far as these thresholds are concerned (which are also used for considerations during merger control procedures), it may be assumed that the exemption for the Deutsche Ostsee LNG facility will not have negative effects on competition. The relevant threshold values are as follows:

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

#### 3.7.1.3 Analysis of the relevant upstream north-west European market

221 The assessments carried out do not indicate any detrimental effect on competition on the upstream wholesale market for north-west Europe. The ruling chamber considers this statement particularly relevant as it views the north-west European market as the relevant competitive market from a geographic perspective.

222 As stated above, the analysis is carried out for the first year after the planned commissioning of phase I in December 2022, 2023, the year of the capacity increase in phase II, 2024, and 2030.

[redacted]

Having conducted its own analysis of the utilisation of LNG facilities in recent years, the ruling chamber came to a similar conclusion as the report, so it considers the assumption of a 70% utilisation to be a conservative one in comparison to the levels of utilisation at north-west European LNG facilities in recent years. A further argument in favour of this assumption is the fact that, as discussed in section 3.2, demand for natural gas is likely to fall due to increased efforts to introduce energy efficiency measures and expand renewable energies at the European level (Fit for 55 and REPowerEU) and at the national level. It is also likely that several LNG facilities will be constructed in Germany (see LNGG and the German government's information "Securing national energy supplies" of 1 June 2022, https://www.bundesregierung.de/breg-en/service/secure-gas-supply-2038906, accessed 9 January 2023). This underpins the procurement strategy of the federal government, which has now chartered a fifth floating LNG terminal (see BMWK press release 1 September 2022, https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2022/09/20220901-bwmk-sichert-sich-fuenftes-schwimmendes-fluessigerdgasterminal-plus-anlandung-gruener-wasserstoff.html, accessed 3 November 2022). The supply of regasification capacity in Germany and north-west Europe is likely to increase while liquefaction capacity is limited/scarce (see IEA, Gas Market Report, Q2-2022, April 2022, pages 6-7, https://iea.blob.core.windows.net/assets/cfd2441e-cd24-413f-bc9f-eb5ab7d82076/GasMarketReport%2CQ2-2022.pdf and Barbara König, KfW/IPEX-Bank, Flash Analysis, Credit Analysis, Maritime Industries – LNG tankers, How the Russia-Ukraine war is changing the outlook for LNG tanker shipping, 29 April 2022, ttps://www.kfw-ipex-bank.de/PDF/Analysen-und-Meinungen/Marktanalysen/2018-10-KfW-IPEX-Bank-Blitz-Licht-

Analyse-Maritime-Industrie-%E2%80%93-LNG-Tanker.pdf both accessed 31 October 2022). At the same time, there is still strong global competition, especially with Asian markets.

223 To sum up, on the basis of the analyses carried out it can be stated that an exemption is neutral as far as competition is concerned. This relates to both scenario 1, "largest market participant" (assumed to be Equinor/Petoro in 2023 and 2024 and QatarEnergy in 2030), in which the largest market participant books and uses the long-term capacity and scenario 2, "second-largest market participant" (assumed to be QatarEnergy in 2023 and 2024 and Equinor/Petoro in 2030), in which the second-largest market participant books and uses the long-term capacity.

Specifically:

224 (1) Scenario 1: "largest market participant"

First the effects on competition are shown for scenario 1 "largest market participant", if the largest market participant booked and used all long-term capacity in the relevant market. In this scenario, the wholesale market for natural gas does not show a high concentration of competition effects either in 2023 or 2030 (see Frontier Economics, supplementary report, page 76 et seq). As well as the major market players Gazprom, Equinor/Petoro and QatarEnergy, a number of smaller suppliers are active too. A small effect on competition is identified for 2024, the year of the capacity increase, in scenario 1.

Similarly to the explanations in section 3.7.1.2, the indicators used to calculate competition effects (market shares and concentration indices) were used to evaluate this scenario. In this scenario, Equinor/Petoro would increase its market shares in the years under consideration of 2023 and 2024 by 2% and 5% respectively. QatarEnergy would increase its market share by 5% in the year 2030 in this scenario. With regard to the indicators for calculating competition effects, the change for the years 2023 and 2030 against the background of the critical thresholds (see section 3.7.1.2) is inconspicuous. However, an anomaly was noticed for 2024. In the year under consideration of 2024, the HHI shows that the market concentration grows to 258 points (see Frontier Economics, supplementary report, page 78, table 2), above the relevant threshold of 250 points.

225 Nevertheless, the ruling chamber does not consider that this fact alone leads to the conclusion that the exemption for the Deutsche Ostsee LNG facility would have a negative effect on competition, based on the following considerations.

226 First, it should be noted that the HHI in this scenario rises from 1,032 to 1,291 points (increase of 258). A rise of over 250 points could indicate detrimental effects on competition. On the other hand, relevance to competition is only even checked from a value of 1,000 points upwards. In this case, the competition concentration rises from 1,032 to 1,291 points, in a range of 1,000 to 2,000 points, where growth of over 250 points could indicate detrimental effects on competition, so it may be classed as being at the lower end of the range.

227 Even through the threshold is only exceeded slightly and at the lower end of the range, a further analysis of the market shares was carried out. It came to the conclusion that Equinor/Petoro does not attain a dominant market position. In 2024, Equinor/Petoro's market share rises from 27% to 32% in scenario 1, corresponding to a rise of 5% in this scenario. The market share CR1 would therefore be well below the critical threshold of 40% in that year. Moreover, Frontier Economics concludes that Equinor/Petoro would be below the threshold of 250 points for HHI if it only booked and used 90%, rather than the assumed 100%, of the capacity - regardless of which other provider booked and used the remaining 10%. The ruling chamber can follow Frontier Economics' explanation that to this extent, the small effect means there is almost competitive neutrality in the year 2024 and, if the booking of the largest market participant were to fall below 100%, this would actually be full competitive neutrality.

228 The ruling chamber additionally looked at the likelihood of this scenario occurring in order to further classify and assess it. In scenario 1 for the year 2024, (Equinor/Petoro as "largest market participant"), the largest market participant Equinor/Petoro books and uses 100% of the capacity upon which this scenario is based. This assumption is unlikely for several reasons. For one, Equinor/Petoro only produces small amounts of LNG and imports natural gas to Europe mostly via pipelines. The Norwegian prime minister has publicly stated that Norwegian natural gas imports are already at their capacity limits (see prime minister Jonas Gahr Store in an interview with ZDF on 18 January 2022, available at https://www.zdf.de/nachrichten/politik/norwegen-regierungschef-store-russland-gas-100.html, accessed 26 October 2022), so it is unlikely that they will increase significantly. Similarly, experts say that Norwegian gas production is at the limits of production capacity (tagesschau background "Woher Deutschland nun sein Gas bekommt" from 23 August 2022, see https://www.tagesschau.de/wirtschaft/gaslieferungen-deutschland-101.html, accessed 26 October 2022). Moreover, the report points to other sources, according to which it may be assumed Norwegian imports could even decline between 2020 and 2030. For these reasons, it seems highly unlikely that Equinor/Petoro would book and use the whole long-term throughput capacity of the Deutsche Ostsee LNG facility.

229 In the meantime, the applicant has carried out an expression of interest procedure for which binding booking requests for the capacity in phase I and non-binding booking requests for the capacity in phase II have already been submitted. The result of this procedure confirms that Equinor/Petoro booking 100%, or even 90%, is not realistic.

230 The slight increase in competition concentration in scenario 1 for the year 2024 may be qualified or even invalidated by these explanations. Market dominance as set out in the provisions of the GWB or the European Commission is not to be expected.

231 The European Commission also concludes that no detrimental effect on competition may be identified in this scenario even if the HHI figure of 250 for 2024 is slightly exceeded, because this

would not result in Equinor/Petoro having a market share that would indicate a dominant market position on the north-west European market that would be detrimental to competition (European Commission Decision of 20 December 2022, C(2022) 9902 final, para 93).

232 (2) Scenario 2: "second-largest market participant"

The report further examines in scenario 2 ("second-largest market participant") the effects on competition if the second-largest market participant (in the counterfactual scenario) booked and used all long-term bookable capacity at the Deutsche Ostsee LNG facility. It can therefore be examined if, in the event that the capacity of the largest market participant is restricted, whether and to what extent this should also apply to the second-largest market participant(see Frontier Economics, economic report, page 71). Following the determination that in scenario 1, the booking by the largest market participant was neutral in terms of competition for 2023 and 2030 and almost neutral for 2024, for scenario 2 and the booking by the second-largest market participant it was found, as expected, that the exemption would also be competitively neutral. This means that even if the second-largest market participant were to book all capacity in all three years under consideration, similar to the explanations in section 3.7.1.2, the indicators used to calculate competition effects (market shares and concentration indices) do not give rise to any signs for concern regarding competition (see also the explanations on the expression of interest procedure in section 3.7.1.4). The European Commission shared this conclusion (European Commission Decision of 20 December 2022, C(2022) 9902 final, para 96).

#### 3.7.1.4 Analysis of the upstream German market (more narrowly defined geographic market)

233 This section looks at a competition analysis for the theoretical case of a more narrowly defined upstream wholesale market that is just Germany. This more narrow analysis, in geographic terms, of the relevant market takes into consideration the decision-making practice up to now of the Bundeskartellamt, according to which the wholesale gas market must be defined geographically as at least Germany-wide (see Bundeskartellamt, B8-69/14, margin no 97 et seq) and the requirements of the European Commission as set out in its Decision of 25 May 2021 (C(2021) 3814 final, para 83 et seq). In this case, there would be no significant cross-border trade (other than imports). German market participants would be unaffected by price differences on adjacent markets and would not use the available transport capacity at the cross-border interconnection points. The aim of the European Union to achieve a single internal market in natural gas would thus be far off.

234 For the more narrowly defined market, it may be said that competitive effects are more evident overall, owing to the greater concentration on the German market as compared to the north-west

European one. The competitive effect would be greater for the same volume effects. The report's analysis is based on the assumption that even without the Deutsche Ostsee LNG facility, imports would arrive in the market, narrowly defined as Germany, via the other planned LNG terminals in Germany. The assumptions on the composition of the future north-west European LNG imports in the competition analysis thus also apply to the more narrowly defined German market.

235 Frontier Economics sees the calculation of the German market as an alternative assessment (see supplementary report, pages 10-11) that does not, however, reflect the real market and competition situation in north-west Europe. The report therefore includes this additional consideration for the unlikely event that there are massive backward steps in the integration of the European internal market. The ruling chamber agrees with this line of argumentation, however working rather on the opposite assumption that there will be future further European market developments (see decision of 21 June 2021, BK7-18-063-final, page 70 et seq and decision of 19 September 2022, BK7-20-107-final, page 64).

236 Nevertheless, the ruling chamber has examined the results of the study for the more narrowly defined national market and included the alternative analyses in its considerations. Frontier Economics examined both supplier scenarios (scenario 1 "largest market participant" and scenario 2 "second-largest market participant") for their competitive effect on the more narrowly defined national market. While in scenario 2, no competition concerns are induced even if the second-largest market participant books 100% of the capacity in the narrowly defined national market, for the result to be competitively neutral in scenario 1 the largest market participant would be able to book no more than 60% of the capacity for the years 2024 and 2030. In that case, however, the remaining 40% would probably be booked completely by the second-largest market participant and then there would only be a slight implication for the year 2030, as with the anomaly described above in the relevant north-west European market.

237 For scenario 1, therefore, Frontier Economics works on the basis that the largest market participant will not book the entire long-term capacity of the Deutsche Ostsee LNG facility but will book and use no more than 60% of the capacity. Scenario 2, "second-largest market participant" assumes that the second-largest market participant books and uses 100% of the long-term capacity without a booking limitation.

Specifically:

238 (1) Scenario 1: "largest market participant"

239 In the first scenario, "largest market participant", no significant increase in market concentration was recorded, presuming that the largest market participant in the years under consideration 2024 and 2030 did not book more than 60% of long-term capacity. There are also no competition concerns in this scenario if the remaining 40% of capacity is booked by the second-largest market

participant. The booking of 100% of capacity by the largest market participant would not raise competition concerns for the year 2023. The analyses have shown for the first scenario – ie for the market shares of the largest market participant – that there would be a rise of 5% to 21% for the year 2023, of 7% to 24% for the year 2024 and of 4% to 29% for the year 2030 (see Frontier Economics, economic report, page 82, figure 19). If the largest market participant were to import 60% of the volumes of long-term capacity, the market concentration would still rise slightly but there would be a 250 point difference in the HHI for the year 2024, exactly on the threshold. For the year 2030, there would be an increase of 257 points, surpassing the threshold slightly, by seven points. For 2023, similar to the explanations in section 3.7.1.2, the indicators used to calculate competition effects (market shares and concentration indices) remain below the specified thresholds. The report (Frontier Economics, economic report, page 76 et seq) shows that in extreme scenarios in the more narrowly defined national market, the booking of all or most capacity by the largest provider could lead to greater market concentration.

240 According to the report, this negative effect could be prevented by introducing a restriction on bookable capacity by the largest provider. However, it also pointed out that as it was unlikely that the more narrowly defined market would occur owing to the integration of the European single market, such a restriction on long-term bookings would not be necessary. Given the geopolitical situation and the current supply situation, it must be borne in mind with respect to a capacity booking limitation for certain market participants that the other participants – with the exception of Gazprom – must be able to cover the demand for gas and thus book the capacity. If the limitation made them unable to do so, there would be a risk that the demand could not be met at all.

241 The ruling chamber did not consider it necessary to impose a booking limitation for undertakings (in this case a booking cap of 60% for the largest market participant). There are several important reasons in favour of this argument.

242 First, the ruling chamber considers it necessary to take account of the above-mentioned low likelihood of a market that is purely national, ie Germany only. This market is, as already stated, more concentrated than the north-west European one. Conclusions from this scenario, therefore, cannot necessarily simply be used to argue for the imposition of a booking limitation, as it is a hypothetical extreme scenario that, as stated above, may be classed as rather unlikely to occur owing to the ongoing establishment of the internal market (see Frontier Economics, economic report, pages 81-82).

243 On the other hand, it must be taken into account that a booking limitation could impact security of supply and competition in the view of the end to Russian gas deliveries in the current geopolitical situation. The war in Ukraine has fundamentally changed the assessment of the dependence on Russian gas deliveries in terms of energy and security policy. Russia is no longer a reliable energy supplier. The EU emphatically shares the view that it is necessary to become independent of

Russian gas deliveries (REPowerEU). Russia has halted deliveries to Germany and other Member States. Moreover, a direct supply from Russia is only possible to a limited extent in the short term owing to the massive damage to the Nord Stream 1 and 2 pipelines. One of Germany's few options to procure alternative volumes of gas on the global market in the short term is by purchasing LNG. although it must be noted that the supply of LNG on the world market is currently limited/scarce, owing to the current situation. This is partly due to the limited liquefaction capacities but also to the continued strong demand for LNG from other regions, such as Asia and South America. Moreover, the majority of LNG volumes available annually are tied up in long-term trading contracts (see IEA, Gas Market Report, Q2-2022, April 2022, https://iea.blob.core.windows.net/assets/cfd2441e-cd24-413f-bc9f-eb5ab7d82076/GasMarketReport%2CQ2-2022.pdf and Barbara König, KfW IPEX-Bank, Flash Analysis, Credit Analysis, Maritime Industries – LNG tankers, How the Russia-Ukraine war is changing the outlook for LNG tanker shipping, 29 April 2022, https://www.kfw-ipex-bank.de/PDF/Analysen-und-Meinungen/Marktanalysen/2018-10-KfW-IPEX-Bank-Blitz-Licht-Analyse-Maritime-Industrie-%E2%80%93-LNG-Tanker.pdf, both accessed 31 October 2022).). A booking limitation would therefore go against the aim of replacing Russian gas imports and, as such, jeopardise security of supply. Given that there would only be an effect detrimental to competition in a purely national market in the highly unlikely event of a backward step in the establishment of a single market, it was not necessary to impose booking limitations.

244 Moreover, for various reasons it is extremely unlikely that one customer would book the majority of the facility capacity. [redacted] The market shares of these two largest market participants, therefore, would change in a competitively neutral framework according to the analysis of the expression of interest procedure.

245 In this context, the non-discriminatory design of the capacity allocation in this exemption decision (see section 3.8.5.) will also ensure that the facility capacity will not be mostly booked by one single customer in the long term. This will apply particularly in the event of excess demand, [redacted]

246 Last but not least, there are massive ongoing efforts at European and at national level, as explained in section 3.2, to greatly reduce the consumption of natural gas in the medium to long term up to the phase out of natural gas for energy supply by 2050 at the latest. The ruling chamber

expects further diversification and the focus on climate-neutral energy with energy efficiency measures and the accelerated expansion of renewables to lead to lower demand for natural gas. Over the years, a decline in demand and diversification in production (biomethane/hydrogen) should lead to a less concentrated market. This is a further reason why a booking requirement is not necessary.

247 In its Decision, the European Commission also concludes for the scenario in a market purely limited to Germany in which QatarEnergy books 100% of the facility capacity that no detrimental effect on competition can currently be identified despite the HHI threshold of 250 being exceeded in 2023, 2024 and 2030 because the relevant market share would not indicate a dominant market position (European Commission Decision of 20 December 2022, C(2022) 9902 final, para 97).

248 (2) Scenario 2: "largest market participant"

249 The report further examines in scenario 2 ("second-largest market participant") the effects on competition if the second-largest market participant booked and used all long-term bookable capacity at the Deutsche Ostsee LNG facility (in the counterfactual scenario). It can therefore be examined if, in the event that the capacity of the largest market participant is restricted, whether and to what extent this should also apply to the second-largest market participant (see Frontier Economics, economic report, page 71). Unlike in scenario 1, even with a booking of 100% of the capacity in the more narrowly defined national market, the exemption would not influence competition in any of the years under consideration, 2023, 2024 or 2030, Frontier Economics analysed. This means that even if the second-largest market participant were to book all capacity in all three years under consideration, similar to the explanations in section 3.7.1.2, the indicators used to calculate competition effects (market shares and concentration indices) do not give rise to any signs for concern regarding competition.

250 Apart from the reasons given above for scenario 1 ("largest market participant"), which largely also apply in this case, in the specific case of Equinor/Petoro it can be said that the import capacity from Norway is already limited, as started above, owing to the limited production capacity in that country. It may currently be assumed that it is unlikely that Norwegian production, and therefore exports to Europe, will increase.

251 Moreover, the European Commission correctly points out that even if the HHI threshold of 250 were exceeded in 2024 and 2030, no detriment effect on competition can be identified in this scenario since the related market share for Equinor/Petoro does not indicate a dominant market position in this scenario either (European Commission Decision of 20 December 2022, C(2022) 9902 final, para 94).

252 (3) Interim conclusion for the upstream wholesale market

The ruling chamber thus concludes that there are no competitive concerns with respect to the upstream wholesale market that would prevent the issuing of the exemption. Neither the analysis of the northern European market nor the analysis of the more narrowly defined national market give rise to any relevant negative effects on competition. The European Commission came to the same conclusion in its Decision (European Commission Decision of 20 December 2022, C(2022) 9902 final, para 98). The allocation mechanisms specified for long-term allocation in this exemption provide an effective means of preventing bookings by one or two customers that would be detrimental to competition. It should also be taken into account that effective congestion mechanisms to combat the hoarding of capacity have been imposed on the applicant, guaranteeing, in particular, permanent, non-discriminatory third-party access to 10% of the annual throughput capacity on a short-term basis for the entire duration of the exemption (see section 3.8, in particular 3.8.5.).

#### 3.7.1.5 Analysis of effects on competition in downstream markets

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

254 Frontier Economics has added three points to the evaluation in the supplementary report. Firstly, it shows comprehensibly that holders of capacity at the LNG facility are neither able nor incentivised to weaken competition on downstream markets or influence it to their advantage by foreclosing the market. The argument for this is that the existence of liquid wholesale markets means that direct access to LNG facility capacity for the import of gas does not constitute a relevant advantage for the activities of providers on downstream markets. Therefore, the expert report states that even theoretically, there are no negative effects on competition on downstream markets (see Frontier Economics, supplementary report, page 3 et seq).

255 In the second point, in a simplified analysis Frontier Economics saw sufficient indication of undiminished, intense competition on the sales side of the wholesale market. It carried out a simplified analysis rather than an empirical one owing to limited data. The comprehensible result of the simplified analysis, nevertheless, was that the high level of competition on the sales side of the wholesale market was not in jeopardy, even if hypothetically based on an illiquidity of wholesale markets and the existence of advantages for capacity holders in the downstream markets. Frontier Economics carried out a simple analysis with conservative assumptions (see Frontier Economics, supplementary report, page 7 et seq).

256 Adding to its line of argument, it presents in a comprehensible manner that the national markets for the supply of final customers undoubtedly have intense competition and there is no indication that an exemption for the LNG facility could have negative effects on competition on final customer markets (see Frontier Economics, supplementary report, page 15 et seq).

257 The supplementary report included an analysis of the wholesale market in which three different scenarios were examined for potential competition concerns. Frontier Economics based this analysis on information from the applicant about which wholesalers had expressed a general interest in booking capacity (see Frontier Economics, supplementary report, pages 11-12). The calculations were carried out for two periods: 2023, the first year after the planned commissioning, and the time from 2024 onwards, the year in which the total capacity is to reach 13.5bn $m^3$/a.

258 The first scenario is a "best case" scenario in which two wholesale market participants each book 50% of the LNG facility capacity. [redacted] In conclusion, in all three scenarios Frontier Economics determined that, even with conservative assumptions for the LNG facility, no detrimental effect on competition in the wholesale market could be identified. The results in the "best case" scenario are actually beneficial to competition, as with two new players on the German market the HHI falls 97 points from 1,754 to 1,657 in 2023 and even more, 191 points, to 1,564 in 2024. In the "conservative" scenario, the analysis shows that for 2023, the HHI remains unchanged at 1,754, while for 2024 with the increased capacity of 13.5 $m^3$/a there is a slight rise of 13 points to 1,767 points. In the "worst case" scenario, there is a 96 point increase in HHI from 1,754 to 1,851 points for the year 2023 with 4.5 $m^3$/a of facility capacity. In 2024 the HHI value rises 217 points to 1,917 and is therefore, even in this conservative scenario, below the critical threshold of a 250 point change, provided the concentration figure is between 1,000 and 2,000 points. This is the case in the "worst case" scenario both in the initial situation and following the calculation of the changed competition figures.

259 The ruling chamber is able to follow the conclusions of the experts and does not see any indication of a detrimental effect on competition in downstream markets either. In its Decision, the European Commission also comes to the conclusion that no detrimental effect is to be expected on the downstream German or north-west European wholesale market (European Commission Decision of 20 December 2022, C(2022) 9902 final, para 99 et seq).

#### 3.7.1.6 Result of the competition analyses and safeguard clause

260 The ruling chamber and the European Commission (European Commission Decision of 20 December 2022, C(2022) 9902 final, para 103) come to the conclusion that, based on current assumptions, there are no concerns about a detrimental effect on competition.

261 Nevertheless, in light of the difficulty of making reliable long-term forecasts under the current geopolitical and market conditions, the European Commission has required the ruling chamber to add a safeguard clause to the exemption decision to ensure that negative competitive effects are ruled out for the many years of the exemption period (European Commission Decision of 20 December 2022, C(2022) 9902 final, para 103).

262 To this end, the European Commission has required the ruling chamber to include a two-stage notification and assessment procedure in the exemption decision that can lead to a booking limitation (European Commission Decision of 20 December 2022, C(2022) 9902 final, para 104 and Article 1). The ruling chamber has fully met this requirement in operative parts 9. and 10.

263 These parts require the applicant to notify the ruling chamber without delay of an intended booking or the acquisition of capacity by a market participant of the upstream and/or downstream German wholesale market that would lead to the market participant in question acquiring at least 65% in total of the annual throughput capacity intended for long-term bookings at the Deutsche Ostsee LNG facility (see section 3.8.6.).

264 In the first stage, the ruling chamber has to determine the market share of the relevant undertaking on the upstream or downstream German wholesale gas market. If this assessment shows a market share of at least 30%, the ruling chamber has to follow a second stage in which it assesses the possible effect on competition of the booking that has to be notified or the acquisition of capacity that has to be notified under operative part 9. and consults the Bundeskartellamt. In connection with the application of Article 36(1)(3) of Directive 2009/73/EC, the European Commission assumes that there is a risk of achieving or strengthening a dominant market position if a booking at any time during the booking duration would lead to a market share of at least 40% on the part of the respective undertaking(s) (see European Commission Decision of 20 December 2022, C(2022)9902 final, Article 1(d)).

265 The ruling chamber must restrict the scope and/or the duration of the booking in the event that negative effects on competition can be identified. The booking process may come to a binding

conclusion without restrictions if the ruling chamber comes to the conclusion that no negative competitive situation can be identified and has notified the applicant of this (see section 3.8.6. and the European Commission Decision of 20 December 2022, C(2022)9902 final, para 104 and Article 1).

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

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

267 As explained in section 3.2.1, an investment in physical infrastructure that facilitates access to additional sources or volumes of gas in itself enhances competition and thus also promotes the effective functioning of the internal market in natural gas, the main aim of which is the promotion of cross-border trade (see recital 1 of Regulation (EC) No 715/2009). The planned Deutsche Ostsee LNG facility will allow additional gas volumes to be imported from outside the EU, increasing the liquidity at European trading points, at least at the German Trading Hub Europe (THE). In light of the war in Ukraine and the associated need to become independent of Russian gas imports, it will make a significant contribution to diversification. The offer of new capacity at an LNG facility will enable new market participants to enter the European natural gas market, enhancing competition, all the more so since the largest gas importer so far, Gazprom, is no longer regarded as reliable at the political level owing to the current situation and has halted its gas deliveries to Germany and other EU Member States. The ability to have permanently secured, short-term access to 10% of annual throughput capacity of the Deutsche Ostsee LNG facility (see operative part 5. and section 3.8.4.) will help to diversity gas imports. The applicant has shown that the investment will not take place without the exemption being granted (see section 3.4.). The exemption thus does not only not have a negative effect on the effective functioning of the internal market in natural gas but is actually a prerequisite for the positive effects described above to occur.

268 The principle of energy solidarity, which, in a judgment of 15 July 2021 (Case C-848/19), the Court of Justice of the European Union (CJEU) ruled is to be taken into consideration in the granting of an exemption, is not breached in this case with regard to the effective functioning of the internal market in natural gas either (on the principle of energy solidarity with regard to the security of supply of other Member States, see section 3.7.4). At the same time, the examination carried out under the principle of energy solidarity also covers the possible detriment to the efficient functioning of the regulated systems concerned, which was added to Article 36(1)(e) third and fourth alternatives of Directive 2009/73/EC by the amending Directive (EU) 2019/692 (see section 3.7.3).

269 In the judgment of 15 July 2021 (Case C-848/19, para 53 and 71 et seq), the CJEU argues that the principle of energy solidarity laid down in Article 194(1) TFEU obliges the EU and Member States to make efforts to take into account the interests of other Member States and to balance those interests where there is a conflict. This principle is not breached in this case, as it is not to be expected that the Deutsche Ostsee LNG facility will weaken competition in other Member States.

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

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

272 There is therefore no indication that the Deutsche Ostsee LNG facility would be detrimental to competition and the effective functioning of the energy internal market in the EU or other Member States, taking account of the principle of energy solidarity specified in the CJEU judgment of 15 July 2021 (Case C-848/19). No arguments to the contrary were made during the consultation of the regulatory authorities of the Member States carried out in October 2022 either.

273 The European Commission, in its decision of 20 December 2022, (C(2022) 9902 final, para 136 et seq), also assumed that the CJEU requirements on the principle of solidarity under Article 194 TFEU are met.

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

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

275 In June 2022 the applicant made an application for capacity expansion in accordance with section 39 of the Gas Network Access Ordinance (GasNZV) to NEL Gastransport GmbH und der GASCADE Gastransport GmbH; the applicant further made applications for connection of the Deutsche Ostsee LNG facility in Lubmin and an application for capacity reservation pursuant to section 38 GasNZV. The entry capacity to the transmission system that the applicant views as necessary is currently available since the regasified volumes from the Deutsche Ostsee LNG facility in phase II can, according to the applicant, replace up to 24.5% of the gas volumes previously imported via the Nord Stream 1 pipeline. Since it currently seems unlikely, particularly given the severe damage to Nord Stream 1, that Russia will restart its gas deliveries to Europe in

the near future, the capacity necessary to transport the gas from the Deutsche Ostsee LNG facility is available without the need to specially expand the network. The already existing, currently unused infrastructure designed to take off the volumes from the Nord Stream 1 and 2 (NEL, OPAL and EUGAL) could therefore be used efficiently.

276 Negative effects on the efficient functioning of the regulated systems concerned cannot therefore be identified at this time. On the contrary, the use of the existing and currently unused infrastructure (NEL, OPAL, EUGAL) would be beneficial. There are no indications that could support an opposing view, nor were any put forward in the consultation of the regulatory authorities of the Member States. There is therefore no assumption of a negative impact on the principle of energy solidarity confirmed by the CJEU in its judgment of 15 July 2021 (Case C-848/19) with regard to the regulated systems concerned. The European Commission ultimately shares this view (European Commission Decision of 20 December 2022, C(2022) 9902 final, para 138 et seq).

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

277 Granting the exemption for the Deutsche Ostsee LNG facility does not have negative effects on the security of energy supply of the EU or the security of supply in the other EU Member States and is thus not in breach of the principle of energy solidarity laid down in Article 194(1)(a) and (b) TFEU as described by the CJEU in its judgment of 15 July 2021 (Case C-848/19). The applicant also provided proof of this in the course of the administrative proceedings with a report (see Frontier Economics, economic report, page 48 et seq).

278 According to the CJEU judgment of 15 July 2021 (see Case C-848/19, para 53 and 71 et seq) the principle of solidarity laid down in Article 194(1)(a) and (b) TFEU entails a general obligation on the part of the EU and the Member States, in the exercise of their respective powers in the field of energy policy, to take into account the interests of the other stakeholders and to balance those interests where there is a conflict. This does not mean that energy policy must never, under any circumstances, have negative impacts for the particular interests of a Member State in the field of energy. However, the EU and the Member States must endeavour to avoid adopting measures liable to affect the interests of the EU and the other Member States as regards security of supply, its economic viability, and the diversification of supply or of sources of supply.

279 It has already been established that the Deutsche Ostsee LNG facility will enhance the supply situation in Germany (see section 3.2.2.). This enhancement will also benefit the other Member States because in the event of a crisis additional volumes will be available that can also be delivered to other Member States. The possibility of using the OPAL pipeline link to transport the gas brought onshore and regasified at the Deutsche Ostsee LNG facility means that this is particularly the case for Czechia, Slovakia, Hungary and Austria. By contrast, a negative impact

on the supply situation in the other Member States cannot be identified. It is, for example, not evident that the Deutsche Ostsee LNG facility would absorb volumes that would otherwise be available to LNG facilities in other Member States. The global LNG market with an annual trading volume of 485bn $m^3$ LNG (2019) is sufficiently large compared with the maximum capacity of the Deutsche Ostsee LNG facility of 13.5bn $m^3$/a in phase II. Thus it cannot be assumed that the additional demand from the Deutsche Ostsee LNG facility will have a significant impact on the supply and demand balance. In addition, it can be assumed that Member States with a higher level of dependency on LNG imports typically secure volumes relevant for security of supply through long-term contracts. To achieve independence from Russian gas imports, Member State governments and the European Commission's REPowerEU plan envisage an expansion of LNG infrastructure. Furthermore, in light of the current situation, it cannot be assumed that the addition of the Deutsche Ostsee LNG facility will result in infrastructure projects that are relevant to security of supply in other Member States not being implemented because of the implementation of the Deutsche Ostsee LNG facility. Further negative effects on the supply situation in other Member States are not evident.

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

281 Granting the exemption is therefore not in breach of the principle of energy solidarity as described in the CJEU judgment of 15 July 2021 (Case C-848/19) and is not detrimental to security of supply of natural gas in the European Union (section 28a(1) para 5 EnWG and Article 36(1)(e) of Directive 2009/73/EC). The European Commission came to the same conclusion (European Commission Decision of 20 December 2022, C(2022) 9902 final, para 66 et seq).

### 3.8. Discretion and implementation of the European Commission Decision

282 In accordance with section 28a(1) EnWG ("may"), the decision to grant an exemption is at the discretion of the regulatory authority. Having weighed up the arguments for and against an exemption and taken into account the purpose of the exemption provision and the principle of proportionality (section 40 of the Administrative Procedure Act, VwVfG), the ruling chamber has decided to grant the exemption as set out in the operative part (see section 3.8.1. and 3.8.2) with the secondary provisions and obligations set out in the operative part (see section 3.8.3 to 3.8.11).

283 By contrast, the amendments to the original exemption decision of 17 November 2022 required by the Decision of the European Commission of 20 December 2022 (C(2022) 9902 final) are not subject to the discretion of the ruling chamber. Pursuant to Article 288(4) TFEU, these are binding on the ruling chamber, which is bound to implement them in accordance with section 28a(3) EnWG

and the third subparagraph of Article 36(9) of Directive 2009/73/EG (see Thole, in: Säcker, Berliner Kommentar zum Energierecht, 4th ed 2019, section 28a, margin no 30; Arndt, in: Britz/Hellermann/Hermes, EnWG, 3rd ed 2015, section 28a, margin no 18 et seq; Siegel, in: Kment, Energiewirtschaftsgesetz, 2nd ed 2019, margin no 12).

284 The following aspects are relevant to the discretionary decision. In accordance with section 28a(3) sentence 2 EnWG in conjunction with the second and third subparagraphs of Article 36(6) of Directive 2009/73/EC, secondary provisions may/shall be attached to the decision. These may relate to a limit on the duration of the exemption or to non-discriminatory access, management and allocation of capacity. As can be seen from the reference to national circumstances in the second subparagraph of Article 36(6) of Directive 2009/73/EC, the determination of further secondary provisions in accordance with general administrative procedure law is unaffected.

285 On this basis, the ruling chamber has issued the exemption with a series of restrictions that satisfy these requirements.

286 This is based on the following considerations.

287 The fact that the Deutsche Ostsee LNG facility will contribute to the creation of new LNG infrastructure in Germany and enable LNG to be imported directly to Germany is an argument in favour of an exemption. It will open up new sources of natural gas and transport routes. In this way, it will make an important contribution to the diversification and security of natural gas supplies in Germany and north-west Europe in light of the current geopolitical situation. The Deutsche Ostsee LNG facility offers the possibility, which is urgently needed, of importing additional volumes to Germany and north-west Europe and thus replacing the lost Russian gas imports. In this way, it will enhance competition and the European internal market (see section 3.2.1.). It is ultimately essential because of the situation arising from the Ukraine war in order to ensure security of supply in Germany and the European Union (see section 3.2.2.).

288 In this context, an argument against an unrestricted exemption is the fact that the LNG market is developing dynamically and forecasts about its future development are uncertain. The best way to promote competition and also security of supply in this dynamic environment is to ensure that the infrastructure remains open for new market participants at least partially (10% of the annual throughput capacity) even during the exemption, which applies for many years, by guaranteeing long-term, non-discriminatory third-party access. Otherwise, the Deutsche Ostsee LNG facility would be reserved for the exclusive use of just a few customers on the basis of long-term capacity contracts for the long exemption period. In view of its considerable significance for competition and security of supply and of the dynamic developments on the LNG market, this foreclosure of the new LNG infrastructure for such a long time is unjustified. This fact is also highlighted in the European Commission staff working document, which states that effective congestion measures are more likely to be necessary if the exemption permits long-term capacity contracts. In such

cases, it may be necessary to mitigate the foreclosure effect of such contracts in order to ensure that competition and security of supply are enhanced (see Commission staff working document, para 42).

289 Various aspects must be taken into consideration in this discretionary decision (see section 3.8.4.), in particular the duration of the exemption and the effectiveness and proportionality of the measures imposed. It should also be noted that the working document refers to the old Directive 2003/55/EC, in which the provisions for rules and mechanisms for the management and allocation of capacity were considerably less strict. In the old Directive 2003/77/EC, the decision about whether such rules were needed was at the discretion of the regulatory authority ("may decide upon"). Moreover, the discretion of the regulatory authority was explicitly restricted by the addition that the implementation of long-term contracts could not be prevented. The current Directive 2009/73/EC no longer includes such a restriction. What is more, the decision about whether rules for the management and allocation of capacity are needed is no longer at the discretion of the regulatory authority but is mandatory ("shall decide upon"). Moreover, unlike its predecessor, the current Directive 2009/73/EC sets out that the regulatory authority must require a procedure to combat the hoarding of capacity (UIOLI) and to enable secondary marketing. In accordance with Directive 2009/73/EC, only the issue of how and which rules for a UIOLI procedure and secondary marketing are necessary and appropriate in the individual case are at the discretion of the regulatory authority.

290 On the other hand, the fact that major new infrastructure requires huge investments that are subject to considerable risks needs to be taken into consideration. The background to section 28a EnWG shows that the aim and purpose of the provision is to create a stable framework by granting exemption from regulation for a limited period for individual new infrastructure projects that would not come to fruition if the regulatory provisions of sections 20 to 29 EnWG had to be complied with (see Bundesrat printed paper 613/04 (decision) of 24 September 2004, page 25). The investment is to take account both of the principle of competition and of the security of supply on an increasingly unified European energy market (see section 28a(1) para 1 in conjunction with section 1(1) and (2) EnWG). The aim is not to make it economically impossible to build new interconnectors or major LNG and storage facilities because of network access requirements that might change over time. Investors need planning certainty, which is often secured using long-term capacity contracts (see section 3.4.). As the contribution of the infrastructure to the diversification of transport routes and sources of supply and the possibility of replacing Russian gas imports by importing additional volumes lead to an enhancement of competition and security of supply (see section 3.2), it is justified for section 28a EnWG in conjunction with Article 36 of Directive 2009/73/EC to permit a deviation from the provisions on non-discriminatory access (rules for the allocation and management of capacity, provisions on charges, transparency provisions and unbundling provisions) for a limited period of time. Nevertheless, it is appropriate to restrict

the exemption so as not to weaken the effectiveness of the general access regime too much (see Commission staff working document, paras 11 and 17; Arndt, in: Britz/Hellermann/Hermes, Energiewirtschaftsgesetz, 3rd ed, section 28a, margin no 2). The exemption provision was thus designed as a discretionary provision in order to enable these concerns to be adequately taken into account and weighed up against the individual circumstances of the case (see Bundesrat printed paper 613/04 (decision) of 24 September 2004, page 25). In accordance with the second subparagraph of Article 36(6) of Directive 2009/73/EC, in the discretionary decision on the duration, scope and conditions regarding non-discriminatory access to the new infrastructure, account also needed to be taken of the additional capacity to be built, the time horizon of the project and national circumstances.

291 With this in mind, the ruling chamber has only imposed provisions regarding the duration of the exemption and conditions for the allocation and management of capacity where and to the extent necessary and appropriate, to the best of its knowledge, to enable the investment, to enhance competition in gas supply and security of gas supply due to the investment (Article 36(1)(a) of Directive 2009/73/EC), to prevent a detrimental effect to competition, the efficient functioning of the internal market in gas or the regulated systems and security of gas supply in the EU due to the exemption decision (Article 36(1)(e) of Directive 2009/73/EC) and to ensure non-discriminatory access to the new infrastructure (second subparagraph of Article 36(6) of Directive 2009/73/EC).

292 Ultimately, the decisive argument for the granting of the exemption for a limited period and subject to conditions and secondary provisions was that the construction of the Deutsche Ostsee LNG facility is also in the interest of the economy as a whole as it will diversify sources of supply and transport routes (see Bundesrat printed paper 613/04 (decision) of 24 September 2004, page 25). This is particularly true because of the current situation caused by the Ukraine war, as the Deutsche Ostsee LNG facility will be an essential element in replacing Russian gas imports starting in winter 2022/2023. Owing to the particular risk related to investment in the Deutsche Ostsee LNG facility and bearing in mind that the investment decision has not yet been made, the argument that the Deutsche Ostsee LNG facility would not be built if the exemption were not granted seems, at the current time, convincing (see section 3.4.).

293 However, having examined the circumstances of the individual case, it seems suitable, necessary and appropriate to limit the exemption to 20 years from the start of operation of phase I and to attach conditions regarding the allocation and management of capacity and congestion management in order to enhance competition and security of gas supply due to the investment (Article 36(1)(a) of Directive 2009/73/EC), to prevent a detrimental effect on competition or the efficient functioning of the internal market in gas or the regulated systems concerned or of security of gas supply in the Union (Article 36(1)(e) of Directive 2009/73/EC), to take into consideration the principle of energy solidarity under EU law and to ensure non-discriminatory access to the new

infrastructure (second subparagraph of Article 36(1) of Directive 2009/73/EC) without preventing the enabling of the investment.

Specifically:

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

294 The revocation of the original exemption decision issued on 17 November 2022 and the amendment and reissuing in accordance with the Commission Decision of 20 December 2022 (C(2022) 9902 final) pursuant to operative part 1 is based on section 28a(3) EnWG and the third subparagraph of Article 36(9) of Directive 2009/73/EC, pursuant to which the regulatory authority has to comply with the Commission Decision within one month and amend or revoke the exemption decision in accordance with the Commission Decision. Under Article 288(4) TFEU, the Commission Decision is binding upon the ruling chamber in its entirety. There is, as such, no scope of discretion (see Thole, in: Säcker, Berliner Kommentar zum Energierecht, 4th ed 2019, section 28a, margin no 30; Arndt, in: Britz/Hellermann/Hermes, EnWG, 3rd ed 2015, section 28a, margin no 18 et seq; Siegel, in: Kment, Energiewirtschaftsgesetz, 2nd ed 2019, margin no 12).

295 On 20 December 2022, the European Commission issued a Decision (C(2022) 9902 final) pursuant to Article 36 of Directive 2009/73/EC on the original exemption decision of 17 November 2022. The European Commission Decision essentially confirms the scope and duration of the original exemption but also requires the ruling chamber to make substantive changes and additions. In accordance with these requirements, the ruling chamber requires the applicant to notify the ruling chamber without delay any time that a market participant of the upstream or downstream German wholesale market (sellers' or buyers' side) intends to book or acquire capacity that would lead to the acquisition of at least 65% in total of the annual throughput capacity of the Deutsche Ostsee LNG facility intended for long-term bookings for at least five years. This includes binding capacity contracts for the second phase and any capacity later added or made available and capacity bookings on the secondary market (see section 3.8.6.). In such a case, the European Commission Decision requires the ruling chamber to assess whether this market participant holds a market share of at least 30% on the upstream or downstream German wholesale gas market (see section 3.8.6. a)). In the event that the market share of the undertaking calculated by the ruling chamber is at least 30% on the upstream or downstream German wholesale gas market in Germany, the European Commission further requires the ruling chamber to assess the possible effect on competition of the booking that has to be notified or the acquisition that has to be notified under operative part 9. and, where necessary, to impose booking limitations on the scope or duration of the booking (see section 3.8.6. b)). The European Commission Decision also requires the ruling chamber to monitor the implementation of the conditions set out in the decision (C(2022) 9902 final) and to report on it to the European Commission upon request.

The monitoring of the conditions imposed by the European Commission is ensured by the reporting requirement pursuant to operative part 11 and the right of amendment and withdrawal set out in operative part 12. a) and b) (see sections 3.8.8 and 3.8.9). The European Commission Decision also requires the ruling chamber to set a specific expiry date with regard to the period of validity of the exemption, which is linked to the start of construction and the start of commercial operation of the LNG facility (see section 3.8.11.).

296 This amended exemption decision implements the request for amendment of the Commission of 20 December 2022 in full in accordance with section 28a(3) sentence 3 EnWG and the third subparagraph of Article 36(9) of Directive 2009/73/EC. It does not contain any other changes from the original exemption of 17 November 2022.

### 3.8.2. Granting of the exemption (operative part 2)

297 In operative part 2., an annual throughput capacity of 13.5bn m³/a at the Deutsche Ostsee LNG facility is exempted from the application of sections 20 to 26(1) EnWG. It includes the application of a determination in accordance with section 26(1) EnWG. Operative part 2 clarifies that this includes the application of an ordinance pursuant to section 118a EnWG for the transition period until 31 December 2027.

298 It includes exemption from both access and charges regulation. By way of derogation from the broader wording of section 28a(1) half-sentence 1 EnWG, there is no need for an exemption from the unbundling provisions of sections 8 to 10e EnWG. These provisions are not relevant to LNG system operators, so there is no need for an exemption. Sections 8 to 10e EnWG apply to the relationship between transmission system operators and their vertically integrated energy supply undertakings. Correspondingly, the certification requirement and thus the ex ante check on compliance with sections 8 to10e EnWG in accordance with sections 4a and 4b EnWG only apply to transmission system operators. Although LNG facilities are classed as gas supply networks and energy supply networks pursuant to section 3 paras 16 and 20 EnWG, they do not come under the definition of transmission systems within the meaning of section 3 para 19 EnWG and are thus not transmission systems within the meaning of section 3 para 31f EnWG. The applicant is therefore not a transmission system operator or addressed by the unbundling provisions of sections 8 to 10e EnWG.

299 There is also no need for an exemption from sections 26(2) to 28 EnWG, as these are not relevant in this case either. The Deutsche Ostsee LNG facility qualifies neither as an upstream pipeline network (sections 26 and 27 EnWG) nor as a storage facility (section 28 EnWG). Although section 26(1) EnWG relates to LNG facilities, the provision includes a competence to make determinations that is only addressed to the Bundesnetzagentur.

300 The ruling chamber took the view, by contrast, that a partial exemption, limited to either access or charges regulation, did not come into question. As shown in the analysis of the utilisation risk (see section 3.4.2.), this would not sufficiently absorb the risk. The applicant needs an exemption for both charges and access in order to ensure a recovery of the investment made that secures the construction and operation of the LNG facility. The exemption from the access provisions was restricted by the conditions on the allocation and management of capacity to the extent necessary to take account of the nature of the exemption provision but without presenting excessive obstacles to investment.

301 It was possible to issue the exemption for a total of 13.5bn $m^3$/a, even though the full capacity will only be achieved in two consecutive phases, because the planned increase in capacity for the Deutsche Ostsee LNG facility in phase II with a second FSRU is already firmly in the planning stage. For instance, the applicant has submitted an applicant under section 39b GasNZV to the TSOs GASCADE Gastransport GmbH and NEL Gastransport GmbH and an application for capacity reservation of a total of [redacted] under section 38 GasNZV to take on the regasified LNG for both project phases. The applicant is already in detailed negotiations about concluding a term sheet agreement for the chartering of the second FSRU for use in this phase. The fact that the two FSRUs are planned by the applicant to go into operation successively is primarily due to the fact that this will allow the missing Russian gas imports to be replaced at short notice, as early as winter 2022/2023, in order to ensure security of supply. The further increase in volumes in phase II, on the other hand, is not as fast to implement since it requires additional construction measures (see application of 28 July 2022, page 8).

302 The exemption also covers interruptible capacity. For clarity's sake, it should be noted that it must be ensured that the marketing of the capacity set aside with the reserve quota (see operative part 6.) is unaffected by the marketing of interruptible capacity. In other respects, the allocation and management of interruptible capacity is subject to the freedom of contract between the applicant and the users, in compliance with the applicable legal requirements, in particular non-discrimination in accordance with section 11(1) sentence 1 EnWG.

303 Storage services within the meaning of section 3 para 19c EnWG, by contrast, are not covered by the exemption. In accordance with section 3 para 26 EnWG, "LNG facility" is legally defined as a terminal which is used for the liquefaction of natural gas or the importation, offloading, and regasification of LNG. This includes ancillary services and temporary storage necessary for the regasification process and subsequent delivery to the transmission system. However, it specifically does not include any part of LNG terminals used for storage. The parts of LNG facilities used for storage are legally classed as gas storage facilities. Using the tanks of the LNG facility for storage thus requires a separate approval in accordance with section 28a EnWG. However, this is not intended in this case and has not been applied for (see section 3.1.1.).

304 Provided that the tank is only used for temporary storage for redistribution to the small-scale area, it is not subject to regulation under the EnWG (see section 3.1.2.). Such services are therefore not covered by the exemption either. Regulation under the EnWG relates solely to the network-based energy supply (section 1(1) EnWG). Accordingly, the definition of an LNG facility in the EnWG only subjects the storage of LNG in the tank of an LNG facility to regulation to the extent that it is used for subsequent injection into a transmission system.

Moreover, capacity created by future significant increases of capacity is not covered by the exemption (see operative part 2. b)). Section 28a(2) EnWG provides further details on when an increase of capacity is considered "significant". This provision sets out that the significant nature of the capacity increase is to be determined with regard to the investment volume and the additional capacity volume using an objective approach. Capacity increases that open up new sources of gas supply are always to be regarded as significant. In the view of the ruling chamber, there was no question of an exemption for such significant increases of capacity because these could themselves become the subject of a new exemption in accordance with section 28a(2) EnWG in conjunction with Article 36(6) of Directive 2009/73/EC. Granting an exemption to have "in reserve" is out of the question. Rather, owing to the scope of such a capacity increase, a new examination and assessment of the grounds for exemption and conditions regarding the duration of the exemption and the non-discriminatory access to the additionally created capacity is necessary (see second subparagraph of Article 36(6) of Directive 2009/73/EC).

### 3.8.3. Time limit (operative part 3)

305 In accordance with section 28a(1) EnWG and the corresponding provision in Directive 2009/73/EC, Article 36(1), an exemption from the network access regime of the EnWG may only be granted for a defined period of time. Operative part 3. thus limits the exemption to a period of 20 years from the start of commercial operation of phase I. This period corresponds to what was requested. It is thus certainly sufficient to take account of the particular investment risk and to create a sufficiently stable investment climate. It also corresponds to the usual range of exemptions, which are generally granted for periods of between 20 and 25 years. It is true that in the exemption proceedings for the Stade LNG facility, the European Commission stressed that durations of capacity booking contracts are a particular indication of the appropriate duration of an exemption, see European Commission, Decision of 19 August 2022, C(2022) 6098 final, para 129). However, the exemption period is also justified in this case in view of the fact that the longest booking requests in the non-binding expression of interest procedure carried out by the applicant in October 2022 were [redacted]

[redacted] Moreover, in the exemption proceedings for the Stade LNG facility, the European Commission also confirmed that the exemption should not be granted for less than 20 years since this corresponded to the normal depreciation periods for tax purposes and was at the lower end of the range that had been granted to other LNG facilities (see European Commission, decision of 19 August 2022, C(2022) 6098 final, para 130).

306 The European Commission has also confirmed that an exemption duration of 20 years is justified in this case, [redacted] The European Commission therefore views the depreciation and leasing periods of the FSRUs and the assumed length of validity of the tariffs as major factors for the duration of the exemption (European Commission Decision of 20 December 2022, C(2022) 9902 final, para 126 et seq).

307 Pursuant to operative part 11., the start of commercial operation of phase I of the Deutsche Ostsee LNG facility is to be notified in writing to the ruling chamber to ensure that the period of the exemption is clear.

For clarity's sake, it should be noted here that the exemption decision does not constitute an operating licence. Thus the exemption period also has no significance as to how long the facility is actually used or may be used. The exemption merely lays down the regulatory framework for the period of 20 years. Any other provisions on the basis of national (in particular the LNGG and the Federal Climate Change Act (KSG)) or European (in particular Fit for 55) regulations for the move away from fossil fuels must be observed by the applicant and taken into account in the contracts concluded with the users. In accordance with the LNGG, the approvals for LNG facilities falling under the scope of the law are also to be limited to 31 December 2043 at the latest to ensure conformity with Germany's climate targets. The facilities can be operated beyond this date, however, if they are used for climate-neutral hydrogen and its derivatives. This ensures that the target of climate neutrality by 2045 set by the KSG can still be achieved. Since in particular synthetically produced methane and green gases such as hydrogen can fall under the term "gas" as defined in the EnWG (section 3 para 19a), insofar as they are injected into a gas supply network, a period of application for the exemption beyond 2043 is also conceivable in this respect in harmony with the LNGG and the KSG.

### 3.8.4. Requirements regarding charges (operative part 4.)

308 In accordance with operative part 4., the applicant is required to levy charges on users of the exempt infrastructure. This ensures that the requirement of section 28a(1) para4 EnWG is met in the long term. It is at most a formal condition for the applicant, since the applicant intended to levy charges anyway and needs to do so to refinance its investment.

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

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

310 (1) Discretionary decision

With regard to the examination of the procedure, section 28a(3) sentence 2 EnWG refers to Article 36(3) to (9) of Directive 2009/73/EC. The German version of the second subparagraph of Article 36(6) of Directive 2009/73/EC states that in each case, the regulatory authority must take into account the need to impose conditions regarding the duration of the exemption and non-discriminatory access to the new infrastructure (*"...wird in jedem Einzelfall der Notwendigkeit Rechnung getragen, Bedingungen für die Dauer der Ausnahme und den nichtdiskriminierenden Zugang zu der neuen Infrastruktur aufzuerlegen"*). According to the wording of the German version, this seems to be a non-discretionary decision, with conditions for non-discriminatory access necessary in each case. However, according to the formulation in the English original it is a discretionary decision to be made on a case-by-case basis. The English version reads: "In deciding to grant an exemption consideration shall be given, on a case by case basis, to the need to impose conditions regarding the duration of the exemption and non-discriminatory access". As the English original was the basis of negotiations in the European Parliament, it is presumably to be given precedence over the German translation. In favour of this argument is the fact that the French version also assumes a discretionary decision ("En décidant d'octroyer une dérogation, il convient de prendre en compte, au cas par cas, la nécessité d'imposer des conditions concernant la durée de la dérogation et l'accès sans discrimination à l'infrastructure"). It may therefore be assumed that it is, in principle, within the discretion of the regulatory authority (for restrictions see point (2) below) whether, in a specific case, there is a need to impose conditions regarding non-discriminatory access to infrastructure and which conditions are suitable, necessary and appropriate in that case (see also Thole, in: Säcker, Berliner Kommentar zum Energierecht, 4th ed 2019, section 28a EnWG, margin no 21).

311 (2) Restriction of discretion

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

312 (3) Limits of exercise of discretion

In accordance with section 40 VwVfG, the ruling chamber paid attention in the exercise of its discretion to the purpose of section 28a EnWG in conjunction with Article 36 of Directive 2009/73/EC (see in particular section 3.8.5 (4)) and the legal limits of discretion, in particular the principle of proportionality and the principle of equal treatment. In accordance with the second subparagraph of Article 36(6) of Directive 2009/73/EC, account must, in particular, be taken of the additional capacity to be built and its significance to gas supply, the time horizon of the project and national circumstances.

313 (4) Exercise of discretion

The ruling chamber has exercised the discretion conferred upon it by section 28a(1) and (3) sentence 2 EnWG in conjunction with the second and third subparagraphs of Article 36(6) of Directive 2009/73/EC by not issuing the exemption from the access obligations of sections 20 to 26 EnWG and the legal acts providing more detail on these requirements in accordance with section 118a EnWG for the transition period up to 31 December 2027 without restrictions, but only to the extent necessary for it to enable the investment.

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

This approach corresponds to the restrictive nature of the exemption in the approval criterion in section 28a EnWG. Due to the nature of the exemption, the handling of exemptions from the access obligations of sections 20 to section 26(1) EnWG running for many years is to be restrictive in order not to unjustifiably limit the applicable network access regime. The established access regime designed to guarantee non-discriminatory access to network infrastructure plays a key role in the liberalisation of the energy market. In line with the purpose of the exemption provision, therefore, long-running exemptions from the access obligations of sections 20 to section 26(1) EnWG are only justified if and insofar as they are necessary to achieve this purpose (see Commission Decision C(2021) 3814 final, para 110; Commission staff working document, paras 11 and 17; see also Arndt, in: Britz/Hellermann/Hermes, Energiewirtschaftsgesetz, 3rd ed 2015; section 28a, margin no 2).

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

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

This result is confirmed by the requirement, set out in section 11(1) sentence 1 EnWG, of operators of energy supply networks to operate such networks in a non-discriminatory manner. In accordance with section 3 para 16 EnWG, energy supply networks are defined as gas supply networks. In accordance with section 3 para 20 EnWG, LNG facilities are included as gas supply networks. LNG system operators are thus required to operate LNG facilities in a non-discriminatory manner. The non-discriminatory operation of the infrastructure serves to ensure competition on the upstream and downstream levels of the value chain of production and distribution of gas to customers. Barriers to market entry and exit need to be low for as many competitors as possible to be active on the market. A core element of non-discriminatory operation is therefore the possibility of being able to use the infrastructure without disadvantaging other market participants (non-discriminatory access to infrastructure). An exemption from regulation in accordance with section 28a EnWG in conjunction with Article 36 of Directive 2009/73/EC cannot simply exempt an LNG system operator from the basic obligation set out in section 11(1) EnWG, because this provision is not one of those for which an exemption may be granted. Therefore, section 28a(1) EnWG in conjunction with Article 36(1) of Directive 2009/73/EC also mentions the principle of non-discriminatory operation and makes a prerequisite for the exemption from certain regulatory provisions the fact that the investment enhances competition in gas supply (section 28a(1) para 1 EnWG) and that the exemption must not be detrimental to competition or to the efficient functioning of the internal market in natural gas (section 28a(1) para 5 EnWG) or to the efficient functioning of the regulated systems concerned and the security of supply of natural gas in the European Union (section 28a(1) para 5 third and fourth alternatives EnWG, new version). In addition, in accordance with the second subparagraph of Article 36(6) of Directive 2009/73/EC, the regulatory authority must give consideration, on a case-by-case basis, to the need to impose conditions regarding non-discriminatory access to the infrastructure. Accordingly, the European Commission, in these proceedings (European Commission Decision

of 20 December 2022, C(2022) 9902 final, para 61) and in previous exemption proceedings (the Decision of 25 May 2021, C(2021) 3814 final, para 58-59, in the exemption proceedings for the Brunsbüttel LNG facility and the Decision of 19 August 2022, C(2022) 6098 final, para 55, in the exemption proceedings for the Stade LNG facility), also highlights the importance of provisions for the non-discriminatory allocation of long-term capacity and the secure access to 10% of total annual capacity of the LNG facility from the reserve quota to enhance security of supply and competition.

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

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

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

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

319 The ruling chamber analysed various key figures from the LNG market for the period from 2012 to 2019 in order to assess whether, and in what form, conditions for non-discriminatory access to the LNG facility (second subparagraph of Article 36(6) of Directive 2009/73/EC) were necessary. The sources used were the "GIIGNL Annual Reports" from 2020 and 2021 from the International Group of Liquefied Natural Gas Importers (GIIGNL), an organisation that seeks to promote the development of activities in the field of LNG. Both these reports are publicly accessible (see https://giignl.org/resources2/, accessed 04 November 2022).

320 In the course of this assessment, the ruling chamber noted that essentially the volume of LNG imports is increasing significantly worldwide. In the light of recent events, this trend is likely to continue as pipeline imports to Europe from Russia have to be replaced by other gas sources, particularly LNG. As the overall amount of LNG imports rose, the type of transactions made has also changed. While 75% of all LNG trades by volume were long-term (ie with a contractual duration of more than four years) in 2012, in 2019 this proportion had fallen to 66% and in 2020

to 60%. The proportion of short-term (with a contractual duration of no more than four years) LNG trades by volume rose accordingly from 25% in 2012 to 40% in 2020 (35% spot volumes plus 5% other short-term volumes).

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

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

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

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

324 As far as the legal consequences are concerned, it is then at the discretion of the regulatory authority to decide to what extent the exemption is to be approved and how the rules and mechanisms for the management and allocation of capacity are to be designed to meet the competing goals of the exemption as far as possible. The standard here is not the same as for the

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

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

326 However, the ruling chamber took the view that booking limitations for the – in the absence of Russian gas supplies – probably largest LNG market participant Equinor/Petoro in 2024 or QatarEnergy in 2030 were not necessary or may possibly even be detrimental to security of supply because of the current geopolitical situation.

327 The forecasts indicate high market concentrations in only two scenarios: firstly if the largest market participant (in 2024 Equinor/Petoro) were to book 100% on a market defined as north-west Europe and secondly if the largest market participant (in 2024 Equinor/Petoro and in 2030 QatarEnergy) were to book over 60% on a market narrowly defined as Germany. There are a range of reasons against imposing booking limitations despite this increase in market concentration above certain competition-relevant thresholds (see section 3.7.1.4 (1)). Firstly, it is unlikely that these scenarios will occur for various reasons and in many respects. Owing to the results of the expression of interest procedure and the binding contracts already concluded for the phase I capacity, high bookings are unlikely or impossible. [redacted] Not least, high bookings by one single customer or two customers are unlikely also because of the rules for a non-discriminatory allocation procedure in the event of excess demand laid down by the ruling chamber in operative part 5.. In addition, the occurrence of the second critical case mentioned is unlikely not least because it is based on a purely national market. As has been stated several times, such a market is unlikely because it would involve backward steps in the realisation of the internal market. The probability of occurrence is therefore extremely low in many respects in both critical cases.

328 Booking limitations could impede the rapid reduction in Russian gas imports required in light of the current geopolitical situation and in line with the REPowerEU Plan. The REPowerEU Plan also aims for Russian import volumes to be replaced in the near future, mainly with Norwegian and LNG imports. The supply of natural gas and LNG is, however, restricted because of the current situation. All import volumes available in the LNG market for Germany must therefore be used in order to be able to achieve the aim set in the REPowerEU Plan of replacing Russian gas imports as quickly as possible. In light of this, booking limitations may be detrimental to the safeguarding of security of supply. In addition, it can be assumed that market concentration in the natural gas market will weaken anyway because of energy efficiency measures and the expansion of renewable energies.

329 The European Commission has also determined that currently no detrimental effects on competition will arise from the Deutsche Ostsee LNG facility or the issuing of an exemption (European Commission Decision of 20 December 2022, C(2022) 9902 final, paras 98 and 103 et seq). At the same time, the European Commission also required in its Decision of 20 December 2022 (C(2022) 9902 final, para 104) a notification and assessment procedure intended to rule out the possibility of detrimental effects on competition for the entire period of the exemption in light of the uncertain forecasts about future market developments. To this end, the

ruling chamber has required the applicant to notify the ruling chamber without delay any time that a market participant of the upstream or downstream German wholesale market (sellers' or buyers' side) intends to book or acquire capacity that would lead to the acquisition of at least 65% of the annual throughput capacity of the Deutsche Ostsee LNG facility intended for long-term bookings for at least five years. This includes binding capacity contracts for the second phase and any capacity later added or made available and capacity bookings on the second market (see section 3.8.6.). In such a case, the European Commission Decision requires the ruling chamber to assess in a first stage whether this market participant holds a market share of at least 30% on the upstream or downstream German wholesale gas market (see section 3.8.6. a)). In the event that the market share of the undertaking calculated by the ruling chamber is at least 30% on the upstream or downstream German wholesale gas market in Germany, the European Commission further requires the ruling chamber in a second stage to assess the possible effect on competition of the booking that has to be notified or the acquisition that has to be notified under operative part 9. and, where necessary, to impose booking limitations on the amount or duration of the booking (see section 3.8.6. b)). The ruling chamber has fully met this requirement in operative parts 9. and 10.

330 (10) Proportionality

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

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

332 The conditions in the operative part are also appropriate. They take into account the benefits of the planned Deutsche Ostsee LNG facility for competition and security of supply and mitigate the regulatory risks to the extent that the investment is made possible. The exemption thus permits 90% of the total capacity to be marketed in long-term contracts. Investors and lenders can

therefore record calculable, long-term capital recovery, leading to a sufficiently secure, stable investment climate. What is more, the ruling chamber took account of the individual technical and operational specifications of the Deutsche Ostsee LNG facility in its determination of the rules and mechanisms for the allocation and management of capacity.

#### 3.8.5.1 Long-term capacity allocation (operative part 5.)

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

334 The principle of non-discrimination thus also applies to capacity allocation under the exemption. This is not contrary to the exemption from the access obligations set out in section 20 EnWG. As explained above (see sections 3.8. and 3.8.5.), the discretionary decision to grant the exemption and impose conditions for non-discriminatory access has to take account of the extent to which an exemption is necessary to enable the investment. There is no indication that the rules set out in operative part 5. on the long-term allocation of capacity make the investment plans impossible, nor does the applicant claim this.

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

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

Specifically:

336 (1) Registration

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

potential users, as long as the principle of non-discrimination is maintained and the assessments do not constitute unreasonable barriers to market entry.

337 (2) Offer of different products

The rules in operative part 5. a) (2) cover the possibility of the applicant offering different products to interested LNG facility users. However, the offer of products and services, including with infrastructure that may be exempted from regulation, is subject to the principles of non-discrimination and transparency. The applicant must therefore guarantee the non-discriminatory design of the products and services at all times. These rules cover all design variables, irrespective of whether the product is a bundled or an unbundled product. The provisions of operative part 5. a) (2) likewise apply to all products and services offered, irrespective of their duration. To achieve sufficient market transparency, all descriptions giving more detailed information on the design of the products or services offered must be made available transparently to the market and, in the event of any changes, communicated a reasonable time in advance.

The applicant offers capacity products on a firm basis for the annual throughput capacity. These comprise the following large-scale LNG services: accepting and unloading LNG cargoes coming ashore from facility users; interim storage of the LNG for the purpose of regasification; LNG regasification and subsequent injection into the German transmission system. [redacted] The booking is separate from the specific dates for unloading slots.

338 A broad product portfolio offers facility users the possibility of booking products and services individually depending on their own requirements and, in this way, optimising their portfolio to a high degree. On the other hand, however, a broad product portfolio also involves the risk of possible discrimination if products are inadequately designed. Insufficient transparency of the different design options can also lead to unequal treatment. Although the applicability of the principles of transparency and non-discrimination for the long-term allocation of capacity is already set out in operative part 5. sentence 1, it was necessary for the sake of clarity to explicitly reiterate that the products and services offered must be subject to the principle of non-discrimination at all times.

339 The applicant is free to offer further products. The ruling chamber does not see the need for additional regulation here. This does not, however, rule out the possibility of the applicant making further rules.

340 (3) Minimum booking amount

Operative part 5. a) (3) allows the applicant to set a minimum booking amount of 15% of the total annual throughput capacity to be allocated in its capacity contracts.

In exercising its discretion, the ruling chamber took into consideration the applicant's legitimate interest in limiting the number of initial bookers. This pursues the permissible aim of being able to manage the long, complex process of initiating contracts and determining annual service plans in the subsequent operational phase of the LNG facility with a reasonable amount of effort. Setting a minimum booking amount limits the possible number of customers if the LNG is at full capacity and is thus a suitable means of achieving this aim. However, a high minimum booking amount would limit the number of potential customers too much and could present an impermissible barrier to access for other smaller, potential market participants. Taking into account the planned annual throughput capacity of 13.5 bn m³ of natural gas per year (following the conclusion of phase II of the project) and based on the applicant's plans for the initial allocation of capacity, the ruling chamber considers that a minimum booking amount of 15% of the total annual throughput capacity to be allocated per phase is appropriate to pursue the applicant's legitimate interest in reducing the complexity to ensure the capabilities of facility operations but not create impermissibly high barriers to access. Based on the total annual throughput capacity of each project phase, that means a minimum booking amount of 0.6075bn $m^3$ from 1 December 2022 (phase I); 0.945bn $m^3$ from 1 December 2023 (phase II); 0.270bn $m^3$ from 1 October 2024 (phase II). Creating an upper limit for the minimum booking amount permits the applicant to set a lower minimum booking amount if the operational and technical conditions of the LNG facility allow. Setting a minimum booking amount does not prevent bookings of more than 15% of the total annual throughput capacity to be allocated. This provision thus contributes to a supportive investment environment because it does not limit the amount individual customers can book, per se, unless demand exceeds supply.

341 (4) Minimum booking duration

Operative part 5 a)(4) sets out that the minimum booking duration must be at most ten years. This is based on the following considerations. Major new infrastructure facilities, such as LNG facilities, essentially serve to enhance competition and security of supply in the gas industry by opening up new sources of gas supply and enable additional volumes to be imported in the absence of Russian imports. Constructing major new infrastructure facilities like these requires large investments. The applicant and its lenders need some certainty about their future revenues in order to make the final investment decision to construct the LNG facility. They can achieve this aim if the initial bookers book long-term capacity. As for the minimum booking amount, it should also be taken into account here that a minimum booking duration that was too long could pose an impermissible obstacle to access. It could put off potential customers with more short-term planning, which would be contrary to the aim pursued in the second subparagraph of Article 36(6) of Directive 2009/73/EC and laid down in section 11(1) sentence 1 EnWG of ensuring third-party access to the infrastructure that is as non-discriminatory as possible.

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

343 (5) Booking year

The provision that the booking year is identical with the calendar year (operative part 5. a) (5)) ensures that all parties involved have the same understanding. The clarification is necessary so that all market participants know that the rule is different to, for example, the transmission sector (where the gas year is the booking year). In line with the statement of the applicant in its letter of 4 October 2022, the ruling chamber would also like to point out that this provision does not prevent a booking or duration for capacity products beginning in the course of the year.

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

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

Specifically:

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

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

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

346 (2) Provisions in the event of excess demand

347 Operative part 5. b) (2) contains provisions for a non-discriminatory procedure in the event of excess demand. It is based on the following considerations. With a uniform booking period, there is the possibility that demand may exceed supply, so it must be decided how any excess demand is to be resolved. The procedure for resolving excess demand should not impact the aims related to the setting of a uniform booking period. The point of determining a uniform booking period is to give as many potential users as possible equal opportunity to take part in the allocation procedure, regardless of how much information they have at the time. This guarantees non-discriminatory access (second subparagraph of Article 36(6) of Directive 2009/73/EC) to the LNG facility, including with regard to the capacity to be allocated on a long-term basis. Barriers to market entry that are as low as possible ultimately serve to enhance competition (section 28a(1) para 1 EnWG). The provision that, in the event of excess demand, the available capacity will be allocated on a pro-rata basis serves the above-mentioned goals, because as many potential users as possible are taken into consideration in a non-discriminatory and equal manner. Each user must do without the same percentage of the capacity it originally wanted. The ruling chamber has further determined that the allocation may be made taking account of the respective booking duration and the booking volume of the booker. Booking requests for a longer booking duration and a larger booking volume (a larger number of slots) may be given priority in the allocation. This provision is suitable both to enable a positive investment decision to be made – which is also in the interests of security of supply in Germany and the European Union – and to establish a non-discriminatory procedure for the event of excess demand that does not create excessive barriers to market entry. The ruling chamber is still adhering to the application of the pro-rata principle as the starting point for the allocation of long-term capacity. The ruling chamber takes the view that allocation on a pro-rata basis is a particularly important element of the rules and mechanisms for the management and allocation of capacity because it enables lower bids to be considered as well and not ruled out from the outset. This means barriers to access are not too high and competition is enhanced.

348 (3) Basic tariff, mark-ups and discounts depending on the booking duration

Operative part 5. b) (3) allows the basic tariff applied to the initial allocation to refer to a booking duration of 20 years. The mark-ups and discounts may not be more than 10% of the basic tariff.

For reasons of transparency, these mark-ups and discounts must be made known to all potential users before the initial allocation.

349 These provisions enable the applicant [to impose] mark-ups on the basic tariff for shorter durations and [to grant] discounts for longer durations in the initial allocation of capacity depending on the booking duration. These adjusted tariffs based on the booking duration take account of the overall need for sufficient recovery of the capital invested and the need to pass on the operating costs of the LNG facility beyond the duration of these contracts and until the end of the longest contracted duration.

350 However, since account needs to be taken both of the applicant's interest in planning certainty when making its investment decision and of safeguarding access for customers wanting shorter booking durations, these mark-ups and discounts on the basic tariff, which relates to a duration of 20 years, must be designed in a transparent and non-discriminatory manner.

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

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

352 (1) Determination of the maximum price mark-up over the initial allocation

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

353 The ruling chamber takes the view that a price mark-up of 10% on the contract price applicable at the time for initially allocated capacity is appropriate. It is suitable to improve the marketing opportunities at the time of the initial allocation, increasing the likelihood that the investment will actually be realised. A positive view should be taken of this, since the opening up of new sources of gas can promote both competition and security of supply (section 28a(1) para 1 EnWG). In particular, LNG facilities can make a significant contribution in light of the current situation towards safeguarding security of supply by enabling additional volumes to be imported in the absence of Russian gas imports. On the other hand, the maximum price mark-up is small enough not to inappropriately disadvantage potential users of the remaining capacity (second subparagraph of

Article 36(6) of Directive 2009/73/EC). It may be assumed not to be an inappropriate obstacle to access. The ruling chamber's view is based on the Commission Decision of 25 May 2021 (C(2021) 3814 final, para 99) on the ruling chamber's exemption decision for the Brunsbüttel LNG facility, which caps price mark-ups after the first auction round to 10% of the basic tariff. The cap prevents the exemption from having a detrimental effect on competition.

354 (2) No provisions on the allocation mechanism

The aim of the ruling chamber in setting rules and mechanisms for the management and allocation of capacity in operative part 5. c) (2) is to ensure non-discriminatory initial access and permanently secure, useful and non-discriminatory third-party access (second subparagraph of Article 36(6) of Directive 2009/73/EC). The ruling chamber considers the provisions on the initial allocation and the rules on the congestion mechanism to be sufficient to achieve these goals without the need for further provisions regarding the long-term allocation of the free capacity remaining after the initial allocation. The applicant is thus free to choose the allocation mechanism to be applied for such capacity, provided that the general requirements of non-discrimination and transparency are fulfilled. The ruling chamber takes the view that this applies to, for example, a first-come, first-served (FCFS) procedure just as much as to an allocation auction.

#### 3.8.5.2 Reserve quota (operative part 6.)

355 Operative part 6. requires the applicant to set aside a reserve quota equal to at least 10% of the annual throughput capacity for a short-term allocation of capacity. According to the applicant, this corresponds to 0.45bn $m^3$ for capacity durations beginning 1 December 2022 (phase I), 0.7bn $m^3$ for capacity durations beginning 1 December 2023 (phase II) and 0.2bn $m^3$ for capacity durations beginning 1 October 2024 (phase II).

356 In a letter of 4 October 2022, the applicant pointed out that it was possible to allocate more than 10% of the annual throughput capacity in the short term. It should therefore be noted for clarity's sake here that the 10% reserve quota is a minimum requirement. The ruling chamber deliberately refrained from imposing a requirement for the long-term marketing of capacity so as not to prevent any additional marketing on a short-term basis.

357 The ruling chamber has exercised its discretion to issue this provision. The provision guarantees permanently secure access to the LNG facility on a short-term basis for potential new market participants. It thus prevents a foreclosure of the new LNG infrastructure caused by long-term capacity contracts for the long period of validity of an exemption. At the same time, the level of the quota has been chosen so as not to present an insurmountable obstacle to investment and to appropriately take into account the interests of the applicant and its lenders in being able to plan the recovery of capital based on long-term capacity contracts. It also had to be imposed for

reasons of equal treatment because a corresponding provision is included in the decision for the Brunsbüttel LNG facility (decision of 21 June 2021, Bk7-18-063-final) and in the exemption proceedings for the Stade LNG facility (decision of 19 September 2022, BK7-20-107-final). It was necessary for reasons of equal treatment to create comparable usage conditions for LNG facilities exempted from regulation.

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

359 (1) Purpose of the reserve quota

The applicant has stated that it plans to allocate all capacity in long-term contracts. The reserve quota determined by the ruling chamber of at least 10% of the total capacity and the provisions for the allocation of short-term capacity set aside serve to guarantee non-discriminatory initial access and permanently effective and non-discriminatory third-party access in accordance with the provisions of section 11(1) sentence 1 EnWG and section 28a EnWG in conjunction with Article 36 of Directive 2009/73/EC.

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

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

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

The reserve quota of 10% of the total capacity is suitable to ensure permanent third-party access to the LNG facility. Under the allocation rules issued by the ruling chamber, 10% of the total

capacity is marketed on a short-term basis (year-ahead or non-yearly). Given the trend on the LNG spot market towards increased demand for short-term products in Europe, as described above, (see Trinomics/REKK/enquidity: Study on Gas market upgrading and modernisation – Regulatory framework for LNG terminals, study for the European Commission, May 2020, pages 22 et seq, 39 and 95), this kind of short-term product could be attractive for potential traders with this focus.

362 In addition, the reserve quota contributes to diversification. It is necessary to reduce one-sided, new dependence on just a few LNG importers or import countries. Otherwise, the infrastructure would remain reserved for the next 15 to 20 years for just a few LNG importers on the basis of long-term capacity contracts.

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

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

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

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

365 Neither the UIOLI procedure nor the right to secondary marketing offer secure short-term capacity, because the possible offer is in the control of the primary capacity holder.

366 Moreover, the UIOLI procedure may only generate available capacity with a very short lead time (for a further critical view of this issue, see Trinomics/REKK/enquidity: Study on Gas market upgrading and modernisation – Regulatory framework for LNG terminals, study for the European Commission, May 2020, page 95).

367 To determine appropriate lead times in short-term marketing and in a UIOLI procedure, the ruling chamber carried out assessments of lead times of transactions on the LNG spot market and on the time required for the relevant steps in the LNG transport cycle. In the LNG transport analysis, the focus was on transports between the export and import ports, which take a lot of time. The calculation of the transport times is based on the data and assumptions in "The LNG Shipping Forecast: cost rebounding, outlook uncertain" from the University of Oxford's Institute for Energy

Studies (https://www.oxfordenergy.org/publications/lng-shipping-forecast-costs-rebounding-outlook-uncertain/, March 2018, accessed 9 January 2023) and on the shipping routes given on the website https://sea-distances.org. The assumptions on lead times for transactions on the LNG spot market are based on various press reports (including a Reuters report of 26 February 2019 on Bontang LNG's offer of two spot cargoes for delivery in April and May 2019; Reuters report of 8 May 2019 on Angola LNG's offer of a spot cargo in the second half of May 2019, Reuters report of 24 May 2019 on offers of the Tangguh LNG project in Indonesia for three spot cargoes with delivery in August and September 2019, Brunei LNG's offer for a spot cargo with delivery in late June 2019 and the offer from Norway's DEA Norge for a spot cargo with delivery in July 2019). The ruling chamber's assessments showed that spot transactions are usually traded with at least a month, and often several months, of lead time. The transactions also often offer several spot deliveries at different times in the upcoming months. Lead times for the charter of the LNG tanker have to be factored in, depending on the transport arrangements agreed. LNG trading makes a distinction between two types of transport contract (GIIGNL annual report 2019). One type arranges for the buyer to take the LNG from the liquefaction plant and be responsible for the transport to the receiving plant itself (Free on Board, FOB). The other type arranges for the seller to deliver the LNG to the agreed port of arrival (Delivered Ex Ship, DES). In addition, travel times ranging from 11 days (modern LNG tankers with dual-fuel, diesel-electric drive transporting from Sabine Pass in the US) to more than 30 days (older drive technology and transport from Australia) have to be taken into account as well, depending on the location of the liquefaction plant. It will not generally be possible to complete these spot trades within a UIOLI deadline of 30 days or fewer.

368 Moreover, the UIOLI procedure, whether it has a lead time of, for example, 20 or even more days before the date of the unloading slot, only generates capacity that is available at very short notice and is, at most, suited to redirect a tanker that is already planned or even already on its way to Europe to another destination port. It is not suitable for a complete spot delivery.

369 The ruling chamber therefore views the reserve quota as a mechanism that is additionally necessary overall to enable third-party access to the LNG facility, which will promote competition, as only this kind of short-term product allows customers to book capacity several months to a year ahead and thus offers the lead times needs to handle one or more spot deliveries. Moreover, this kind of offer is available and plannable every year with a lead time before the start of the booking year.

370 It should further be noted that the short-term product generated by the reserve quota, which has considerably longer lead times than the UIOLI procedure, can reach a much larger group of potential customers. Such a product is also available in a plannable, secure way, regardless of

which potential customers the primary capacity holder decides on. Therefore, only this kind of short-term product offers a permanent, secure and plannable third-party access.

371 (6) No foreclosure of the infrastructure in view of the duration of the exemption

In accordance with the second subparagraph of Article 36(6) of Directive 2009/73/EC, consideration must be given to the duration of the exemption in determining conditions for non-discriminatory access. The applicant has applied for an exemption with a duration of 20 years. The LNG market remains a highly dynamic, rapidly and strongly developing market whose development is difficult to predict, especially in light of the current geopolitical situation and with regard to the energy transition and climate change policy. Before the Ukraine war, there was a clear upwards trend of LNG imports, increasing utilisation of LNG facilities in Europe and increasing importance of LNG imports in the continent (see Trinomics/REKK/enquidity: Study on Gas market upgrading and modernisation – Regulatory framework for LNG terminals, study for the European Commission, May 2020, page 19 et seq). This trend is likely to be reinforced considerably in light of the current efforts to replace Russian gas imports in Germany and the European Union (see IEA, Gas Market Report, Q2-2022, April 2022, page 6 et seq, and Barbara König, KfW IPEX-Bank, Flash Analysis, Credit Analysis, Maritime Industries – LNG tankers, How the Russia-Ukraine war is changing the outlook for LNG tanker shipping, 29 April 2022). Before the Ukraine war, at least, there was also a growing LNG spot market and growing demand for short-term products (see Trinomics/REKK/enquidity: Study on Gas market upgrading and modernisation, pages 22 et seq, 39 and 95).

372 The Deutsche Ostsee LNG facility offers the possibility of opening up new, direct sources of gas for supply in Germany, in addition to the pipeline-supplied gas from countries like Norway. Additional volumes of LNG are urgently needed in order to become independent of Russian gas imports as quickly as possible. In Germany itself, there is as yet no LNG facility directly connected to a German transmission system. If this new infrastructure were to be restricted to a small group of initial bookers for a period of 20 years, its contribution to enhancing competition and security of supply in the gas sector would be reduced. The European Commission also specifically mentioned in the exemption proceedings for the Brunsbüttel LNG facility the significance of the reserve quota to reduce dependence on a few market participants and open up access to a large number of market participants in view of the long duration of the exemption (see Commission Decision C(2021) 3814 final, para 58-59). If just the two congestion mechanisms, secondary marketing and the UIOLI procedure, were introduced, there would only be short-term booking opportunities that could not be planned. A congestion management procedure that only used the two instruments of secondary marketing and a UIOLI procedure, therefore, would probably be largely ineffective in view of the currently identifiable time constraints on the LNG spot market described above.

373 For the reasons given, the ruling chamber considers it necessary to introduce an additional congestion mechanism to ensure the above-mentioned requirements of section 28a EnWG in conjunction with Article 36 of Directive 2009/73/EC are met and taking into consideration the restrictive character of the exemption of section 28a EnWG. Having weighed up the relevant points of view as discussed, the ruling chamber considers a secure, permanent, non-discriminatory third-party access over the whole duration of the exemption to be necessary for at least part of the capacity, in order to prevent the foreclosure of the Deutsche Ostsee LNG facility over the many years of the exemption, which would be detrimental to competition. The ruling chamber takes the view that such a congestion mechanism has to allow third-party market participants to securely obtain a booking of year-ahead capacity.

374 (8) Comparable rules for operators and users of import pipelines and other LNG facilities

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

375 Not least, the reserve quota of 10% also had to be imposed for reasons of equal treatment because a corresponding provision is included in the decision for the Brunsbüttel LNG facility (decision of 21 June 2021, BK7-18-063-final) and in the exemption proceedings for the Stade LNG facility (decision of 19 September 2022, BK7-20-107-final). The principle of equal treatment therefore makes it necessary to create comparable usage conditions for LNG facilities exempted from regulation.

376 (9) Level of the reserve quota

The level of the reserve quota of at least 10% of annual throughput capacity is thus based on the general provisions for the allocation of short-term capacity for the coming booking year in the pipeline sector (see Article 8(7) and (8) NC CAM, Regulation (EU) 2017/459). In the past, it could

be seen that there were also LNG facilities in the relevant north-west European market that only marketed about 90% of their capacity on a long-term basis (eg 90% at Zeebrugge and Fos Cavaou and 92% at Gate terminal, see Trinomics/REKK/enquidity: Study on Gas market upgrading and modernisation – Regulatory framework for LNG terminals, study for the European Commission, May 2020, page 40 et seq). Moreover, a significantly higher proportion of short-term marketing or even exclusive marketing on a short-term basis was seen in the past at the LNG facilities in Spain and Italy (see Trinomics/REKK/enquidity: Study on Gas market upgrading and modernisation – Regulatory framework for LNG terminals, study for the European Commission, May 2020, pages 40-41). The level of capacity to be allocated on a short-term basis, 10% of the total capacity, seems sufficient and suitable in order to make a positive contribution to the enhancement of competition at the LNG facility and at the same time not to present an excessive obstacle to investment.

377 (10) Reserve quota as the result of weighing up competing interests

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

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

Specifically:

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

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

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

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

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

382 c) Minimum unloading amount of 138,000 $m^3$ per slot (operative part 6. c))

In determining the rules and mechanisms for the management and allocation of capacity, the ruling chamber considers it necessary to ensure a permanently secure, useful and non-discriminatory third-party access (see section 3.8.5.). To ensure that this provision does not come to nothing and that an economically reasonable and useful product can be generated, the ruling chamber considers that a fixed minimum amount of LNG that has to be unloaded per slot needs to be determined as well.

383 Based on the ruling chamber's analysis of the forecast tanker sizes, low market entry barriers with regard to the attractiveness of possible short-term products rather argue in favour of slots of 170,000 $m^3$ or more of LNG, because if a slot for short-term marketing enables in the best case scenario an average LNG tanker with a capacity of about 170,000 $m^3$ of LNG to be unloaded, the greatest possible number of potential customers will receive access to the short-term products, taking into account the duration of the exemption and the trend towards larger tankers. It will thus be more likely that there will be demand for such a product.

384 By contrast, based on the applicant's information that the FSRU 1 "Neptune" has a total storage capacity of [redacted], it is determined that each slot should enable the slot holder to unload at least 138,000 $m^3$. The determined amount of at least 138,000 $m^3$ of LNG also takes account of the individual technical and operational conditions of the Deutsche Ostsee LNG facility in Lubmin.

385 As the amount is a minimum amount, the applicant is free to offer slots with an unloading amount greater than 138,000 $m^3$. A larger unloading amount of around [redacted] of LNG is to be offered in phase II provided it is technically feasible.

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

The number of slots to be offered for short-term capacity allocation each year has been set at at least five for phase I and at least 12 for phase II. The applicant must ensure for each year that the sum of the minimum unloading amount of all slots offered always equals at least 10% of the annual throughput capacity in $m^3$ of LNG.

387 With a short-term capacity to be allocated of 10% of the total annual throughput capacity and a minimum unloading amount of 138,000 m³ of LNG per slot, the result according to the applicant is at least five slots a year for short-term allocation in phase I and at least 12 slots a year in phase II.

388 The applicant is therefore free to offer the market fewer slots in one year than in another year, for example, but with larger minimum unloading amounts. Equally, it can offer more slots provided it does not fall below the minimum unloading amount of 138,000 m³ per slot. Moreover, the minimum unloading amounts offered in the slots in a year do not have to be identical. The essential point is that no fewer than the minimum number of slots per year are offered. This takes adequate account of the interest of the applicant and its customers making long-term bookings in flexibility. The provision setting a minimum number of slots also ensures that the slots are spread as evenly as possible throughout the year so that there are also slots in attractive months in which the demand for natural gas is stronger. The provision therefore helps to secure effective third-party access.

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

Operative part 6. e) sets out the date by which the slots have to be allocated. This timing has to be compatible with the applicant's operational procedures. The ruling chamber has therefore accepted the applicant's proposal that the slots be allocated annually on a recurring date to be published. It is up to the applicant to set a specific date. This date should be communicated transparently to the market with sufficient notice.

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

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

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

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

In principle the applicant is free to structure the slot product description in a way it considers sensible with regards to marketing that is as successful as possible and effectively operating the LNG facility. The slot product description must be published no later than two weeks before the auction starts to give all market participants enough time to prepare for the auction.

393 The ruling chamber considers the provisions of operative part 6. g) (1) to (7) essential to ensure that potential users have clarity about the product they can acquire and that the slots have a minimum level of comparability.

394 The compulsory information includes the date for the unloading slot (operative part 6. g) (1)) and the arrival window (operative part 6. g) (2)). The amount of LNG in m³ that can be unloaded securely must also be specified (operative part 6. g) (3)). This provision does not apply to any amounts that may be additionally unloaded on an interruptible basis.

395 The provision for the secured regasification capacity (operative part 6. g) (4)) is based on data provided by the applicant, according to which in phase I there is at least 600,000 kWh/h/a (0.45bn $m^3$/a) and in phase II at least 1,710,000 kWh/h/a (1.35bn $m^3$/a) of regasification capacity available. Minor deviations from these figures caused by technical conditions are permissible. Setting a minimum figure allows the applicant to make larger regasification capacities available flexibly as well.

396 The regasification period of the offered slots is at least [redacted] for phase I (throughput capacity of regasification up to [redacted], offloading capacity of the LNG facility corresponds to the tank volume of the FSU, about [redacted]). In phase II, the regasification period is at least about [redacted] or [redacted] (throughput capacity of regasification up to about [redacted] or [redacted] (for both FSRUs)), offloading capacity of the LNG facility corresponds to the tank volume of the two FSRUs combined, ie about [redacted]).

397 The mandatory transparency information also includes the starting price for the slot (operative part 6. g) (6)), taking into account the provisions under point h), and the individual price steps (operative part 6. g) (7)), taking into account the provisions under point i). These transparency requirements are necessary to ensure that potential customers have effective third-party access.

398 h) Starting price (operative part 6. h))

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

$$\max \text{starting price}_{\text{K-Slot}} = \text{basic tariff} \times \frac{\dot{V}_{\text{K-Slot}}}{\dot{V}_{\text{basic tariff}}} \times 1.1$$

| | |
|---|---|
| $\text{basic tariff}$: | The highest price for capacity contracted on a long-term basis at the time of the start of the auction for capacity allocated on a short-term basis. |
| $\dot{V}_{K-Slot}$ : | The landing capacity to be auctioned in the auction for capacity allocated on a short-term basis. |
| $\dot{V}_{\text{basic tariff}}$ : | The standard landing capacity contracted for the basic tariff. |

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

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

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

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

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

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

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

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

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

405 Should slots still not be allocated after this second round auction, the slots must be offered by the applicant on a non-yearly basis to all registered users in accordance with the FCFS principle. The ruling chamber considers the possible non-yearly offer of individual remaining slots a clear part of the short-term allocation of capacity.

406 In the view of the ruling chamber, the non-yearly short-term allocation of capacity set aside helps to enhance competition and security of supply by providing additional non-yearly capacity while

also taking the specific technical and operational conditions of the Deutsche Ostsee LNG facility into account.

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

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

408 (1) For technical reasons, it may not be possible in individual cases for the applicant to provide non-yearly slots with a fixed minimum unloading amount of 138,000 m³ of LNG per slot. To take account of these technical restrictions and the applicant's contractual commitments, operative part 6. l) provides for the fixed minimum unloading amount of LNG to be reduced in individual cases for the non-yearly allocation of slots set aside. Nevertheless, the applicant must keep any required reduction in the fixed minimum unloading amount as small as possible.

409 (2) Operative part 6. l) permits the applicant to deviate from the minimum regasification capacity for a non-yearly slot. This is a minimum amount, and the applicant is free to offer a higher regasification capacity for non-yearly slots as long as it does so in a transparent and non-discriminatory manner.

410 m) Further fees and costs (operative part 6. m))

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

411 n) Offer of flexibilisation instruments (operative part 6. m))

The applicant is free to offer flexibilisation instruments, such as an early delivery mechanism or borrowing and lending, which enable the interim storage and the regasification units to be used efficiently and as well as possible. Facility users can thus adapt to current market developments. The LNG system operator can use such flexibilisation instruments to effectively manage the LNG facility. They must be applied in a transparent and non-discriminatory manner. No further provisions have been made on the selection and design of the flexibilisation instruments.

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

Operative part 6. o) sets out that the applicant must report in each case to the ruling chamber by 31 March of the following year on the amount of capacity not marketed in the procedure for the

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

#### 3.8.5.3 Secondary marketing (operative part 7.)

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

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

415 (1) Registration

Operative parts 5. a) (1) and 6. a) (1) already set out that potential users have to be registered with the applicant before acquiring capacity. Owing to the applicant's need for security and in the interests of smooth operations, this provision also applies to capacity transfer under secondary marketing.

416 (2) Term "transfer"

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

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

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

418 This requirement is ultimately derived from the European Commission Decision of 25 May 2021 (C(2021) 3814 final, Article 3, paras 93-94) in the exemption proceedings for the Brunsbüttel LNG facility. The Commission justified this requirement by noting that bilateral secondary market trades are very intransparent, which can render access to such capacity for new entrants difficult. On the other hand, the Commission does not consider it necessary to publish prices in light of trade and operating secrets that must be protected. The European Commission believes it is sufficient to, for example, require the capacity holder to notify the applicant sufficiently in advance of any sale of capacity, so that the applicant could provide the information on volume and timing of secondary capacity available to all pre-registered market participants. This would ensure that the exemption was not detrimental to competition.

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

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

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

secondary marketing from the facility operator is necessary in order to enable the LNG facility operator to enforce the obligations arising from the exemption. This is particularly relevant in this case to the notification requirement set out in operative part 9. and the duty to rule out bookings detrimental to competition or the acquisition of capacity by certain undertakings set out in operative part 10., which, according to Article 1 of the European Commission Decision of 20 December 2022 (C(2022) 9902 final) expressly covers the secondary marketing of capacity.

421 The applicant must in principle give its agreement and may only deny it if there is good cause not to transfer the capacity. Good cause would include in particular justified doubts about the financial and/or technical performance of the user wishing to take on the capacity, taking into consideration objective and non-discriminatory criteria, or, if the ruling chamber limits the size or duration or prohibits the intended transfer of capacity because it has identified a detrimental effect on competition under operative part 10.

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

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

423 e) Notification of the actual use of slots (operative part 7. e))

It is necessary to distinguish between secondary marketing and the UIOLI procedure. The applicant's explanations up to now show that secondary marketing is intended to take place before the UIOLI procedure, but that it can also take place if the UIOLI procedure was not applied or was not successful. The ruling chamber views this approach as sensible and has worded operative part 7. e) accordingly to keep the ability to use the two procedures separate. See the explanations on the UIOLI procedure (see operative part 8.) for more information on the wording.

A user's right to trade its contracted capacity on the secondary market may be exercised up to five days before the date of the unloading slot. The user shall inform the applicant no later than 5 days before the date of the unloading slot whether and to which user an unused slot has been transferred.

#### 3.8.5.4 Use it or lose it procedure (operative part 8.)

424 Operative part 8. contains a requirement for the applicant to include special congestion management rules in its capacity contracts that require unused capacity to be offered on the

market in accordance with the UIOLI procedure. The provision requiring the applicant to offer unused capacity on the market serves to implement the third subparagraph of Article 36(6) of Directive 2009/73/EC, pursuant to which the ruling chamber is to require congestion management rules to include the obligation to offer unused capacity on the market.

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

426 a) Notification on the non-use of slots and relation to secondary marketing (operative part 8. a))

Operative part 8. a) sets out that the UIOLI procedure must be applied if a user does not notify a landing or states that it will not use a booked slot no later than 21 days before the date of the unloading slot and does not name another registered user to whom the slot has been transferred.

427 Operative part 8. a) further makes clear that no secondary marketing may take place during a UIOLI procedure.

428 (1) No notification of landing or notification in the event of non-use

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

429 This means that the UIOLI principle must be applied if a user has not notified ("nominated") use of a slot before the 21 lead time or has stated that it will not use a particular slot. However, if a user notifies a landing, the UIOLI procedure is not applied and the applicant assumes that the user will use the slot.

430 If the UIOLI procedure is applied, secondary marketing is ruled out. These circumstances show that secondary marketing and the UIOLI procedure are mutually exclusive and make a clear distinction between the two instruments. As soon as the UIOLI procedure is applied, it is no longer possible for the original capacity holder to offer the capacity on the secondary market. If the UIOLI procedure is unsuccessful, however, secondary marketing can then take place.

431 (2) Registration and setting of the lead time at 21 days

The lead time is set at 21 days.

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

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

434 Following the evaluations of the ruling chamber, the ruling chamber considers a deadline for the announcement of unused capacity in the UIOLI procedure of 21 days to be appropriate in this case. It still corresponds to the usual lead times for a UIOLI procedure at other European LNG facilities. These short lead times generally meet the interests of the primary capacity holders in using their acquired capacity as efficiently as possible. It is true that, given the short lead time and long journey times from the liquefaction facilities, this kind of short-term product will probably be requested only rarely, such as when a tanker already at sea can be diverted to the LNG facility because of attractive prices on the market.

435 The ruling chamber does acknowledge that a longer lead time of more than 21 days could make a long-term booking, and thus the investment in the LNG facility, more difficult or even prevent it. In this regard, the ruling chamber has also taken into account that the reserve quota means that a more attractive short-term product with longer lead times is permanently available on a yearly or non-yearly basis. This counteracts the foreclosure of the Deutsche Ostsee LNG facility for the entire period of applicability of the exemption and adequately ensures non-discriminatory third-party access to the LNG facility. For reasons of proportionality, therefore, a lead time of 21 days seems appropriate here despite the fact that, from the customer's point of view, this kind of short-term product is less attractive.

436 b) Marketing on the 20th and 19th days before the unloading slot and registration (operative part 8. b))

No later than 20 days before the actually planned date of the unloading slot, it must be marketed by the applicant in a non-discriminatory procedure designed by the applicant and directed at all registered users in order to enable all registered users to submit a booking request for the free slot from no later than the 19th day preceding the date of the unloading slot. Slots that have become free shall be allocated in a transparent and non-discriminatory procedure to be determined by the applicant. This provision is intended to ensure that all potential users have the opportunity to participate in the procedure for the allocation of the unused slot.

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

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

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

439 The ruling chamber is following the applicant's proposals for any marketing revenues to be paid to the original rights holder. Likewise, the ruling chamber is following the approach of allowing the applicant to charge the original capacity holder an appropriate fee for the marketing. Here, the ruling chamber reserves the right to review the provision should it emerge, following the conclusion of the proceedings, that this approach has prohibitive effects.

440 The ruling chamber welcomes the fact that unused capacity can essentially be returned irrespective of the timescale given here. The terms for this option are to be agreed contractually between the applicant and the facility user but must be non-discriminatory and transparent. An appropriate fee can be charged for any marketing revenue paid to the original rights holder.

### 3.8.6. Notification and assessment procedure for certain bookings and capacity transfers (operative parts 9. and 10.)

441 Operative parts 9. and 10. implement the safeguard clause required by the European Commission in Article 1 of the Decision of 20 December 2022 (C(2022) 9902 final).

442 The European Commission concluded that on the basis of the currently used forecasts there are no concerns about a detrimental effect on competition on the upstream or downstream wholesale market caused by the issuing of an exemption. In fact, the involvement of new market participants will have a positive effect on competition. Nevertheless, as the current geopolitical and market situation raise the forecast risk of long-term forecasts, the European Commission considers a two-stage notification and assessment procedure necessary in order to rule out future detrimental effects on competition throughout the many years of the exemption period (see European Commission Decision of 20 December 2022, C(2022) 9902 final, para 101).

443 The notification and assessment procedure required by the European Commission is intended to ensure that the condition for an exemption to be issued under Article 36(1)(a) and (e) of Directive 2009/73/EC and section 28a(1) para 1 and para 5 EnWG is met for the entire exemption period. In accordance with Article 36(1)(a) and (e) of Directive 2009/73/EC and section 28a(1) para 1 and para 5 EnWG, a condition for the exemption to be issued is that the investment must enhance

competition in gas supply and the exemption must not be detrimental to competition on the relevant markets which are likely to be affected

444 Operative part 9. sets out the notification requirement of the applicant envisaged as part of this procedure. The related, two-stage assessment by the ruling chamber is covered in operative part 10. In the event that the assessments detailed under operative part 10. a) and b) indicate detrimental effects on competition caused by the booking or capacity transfer subject to the notification requirement, the ruling chamber is required under Article 1 d) of the European Commission Decision to limit the booking or acquisition of capacity (see European Commission Decision of 20 December 2022, C(2022) 9902 final). Operative part 10., which requires the applicant to rule out such bookings or acquisition of capacity, implements these requirements.

445 Specifically:

446 (1) Notification requirement

Operative part 9. requires the applicant to notify the ruling chamber without delay of booking requests by market participants or the intended acquisition of capacity by market participants of the upstream and/or downstream German wholesale gas market that would lead to the market participant in question acquiring at least 65% of the total capacity available for long-term bookings at the Deutsche Ostsee LNG facility for at least five years (see European Commission Decision of 20 December 2022, C(2022) 9902 final, Article 1 a)). When considering whether 65% of the total capacity available for long-term bookings at the Deutsche Ostsee LNG facility has been reached, Article 1 a) of the European Commission Decision sets out that binding capacity contracts for the second phase and any capacity later added or made available and capacity bookings on the secondary market must be taken into consideration (see European Commission Decision of 20 December 2022, C(2022) 9902 final). That means that regardless of the size of the booking/capacity, any intended booking/acquisition of capacity, including via secondary marketing, must be notified if it would lead to the relevant undertaking acquiring at least 65% of the total capacity available for long-term bookings at the Deutsche Ostsee LNG facility for at least five years, taking into account any binding capacity contracts already made (including via secondary marketing). This provision implements fully the notification requirement set out in Article 1 a) of the European Commission Decision (see European Commission Decision of 20 December 2022, C(2022) 9902 final).

447 (2) Exclusion of certain bookings and capacity transfers in accordance with operative part 10.

448 Operative part 10. implements the European Commission's requirements in Article 1 b) to e) of the Decision (see European Commission Decision of 20 December 2022, C(2022) 9902 final).

449 In accordance with Article 1 b) of the European Commission Decision, in the first stage the ruling chamber must assess whether the undertaking intending to make a booking or acquisition of

capacity that is subject to the notification requirement under Article 1 a) of the European Commission Decision (see European Commission Decision of 20 December 2022, C(2022) 9902 final) has a market share of at least 30% on the upstream or downstream German wholesale gas market. If the ruling chamber's assessment in this first stage shows that the market share on the upstream or downstream wholesale market is less than 30%, the booking process can be continued in a binding manner by the applicant at this time. There is no need for the assessment of a possible detrimental effect on competition as required in the second stage and set out in Article 1 c) of the European Commission Decision of 20 December 2022 (C(2022) 9902 final).

450 In the event that the assessment pursuant to Article 1 b) of the European Commission Decision of 20 December 2022 (C(2022) 9902 final) shows that the undertaking's market share on the upstream or downstream German wholesale market is at least 30%, the ruling chamber must assess in a second stage under Article 1 c) of the European Commission Decision of 20 December 2022 (C(2022) 9902 final) the possible effect of the intended booking on competition in light of the case-law of the Court of Justice of the European Union and the law enforcement practice of the European Commission and the German competition authority with regard to Articles 101 and 102 TFEU before the binding booking may take place. In line with the European Commission's requirements, the ruling chamber must in particular take the capacity and the duration of the intended booking into consideration in its assessment. A situation is deemed to be detrimental to competition if it brings the risk that one or more undertakings could attain a dominant position in the market or strengthen such a position. According to the European Commission, a relevant risk of attaining or strengthening a dominant market position within the meaning of Article 36(1)(e) of Directive 2009/73/EC may be assumed if the booking that has to be notified or the acquisition that has to be notified under operative part 9. would lead to a market share of the relevant undertaking of at least 40% at any time during the duration of the booking (see European Commission Decision of 20 December 2022, C(2022) 9902 final, Article 1 c) to d)).

451 If the ruling chamber concludes in this second assessment stage that the intended booking or the intended acquisition of capacity on the primary or secondary market would lead to a situation that was detrimental to competition, the ruling chamber must limit the scope and/or duration of the relevant capacity as required by the European Commission. Then the applicant may conclude the booking process in a binding manner taking into account the ruling chamber's requirements to limit the booking or the acquisition of capacity (see European Commission Decision of 20 December 2022, C(2022) 9902 final, Article 1 d)).

452 If, however, the ruling chamber concludes in this second assessment stage that the intended booking or the intended acquisition of capacity would not lead to a situation that was detrimental to competition, it informs the applicant accordingly in accordance with Article 1 e) of the European Commission Decision (European Commission Decision of 20 December 2022, C(2022) 9902

final). The applicant may then conclude the booking process in a binding manner without restrictions.

453 In accordance with Article 1 c) of the European Commission Decision of 20 December 2022 (C(2022) 9902 final), the ruling chamber is required to consult the German competition authority – the Bundeskartellamt – when carrying out any necessary assessment. Under section 28a(3) sentence 1 EnWG, it is the applicant that is required to provide evidence that the exemption prerequisite of Article 36(1)(a) and (e) of Directive 2009/73/EC and section 28a(1) para 1 and para 5 EnWG is met, pursuant to which the investment must enhance competition in gas supply throughout the whole period of the exemption and there may be no detrimental effect on competition arising from the exemption.

454 The ruling chamber has implemented the two-stage assessment procedure required by the European Commission in operative part 10. in such a way that obligations are placed on the applicant.

455 Accordingly, operative part 10. requires the applicant to ensure during the period of exemption that bookings or the acquisition of capacity leading to the acquisition of at least 65% in total of the annual throughput capacity intended for long-term bookings at the Deutsche Ostsee LNG facility for at least five years by one undertaking are, in accordance with the detailed rules set out in operative part 10. a) and b), ruled out or are adjusted before conclusion of the binding booking or capacity transfer in accordance with the rules imposed by the ruling chamber. The exclusion or adjustment of a booking or acquisition of capacity by an undertaking must occur in accordance with operative part 10. a) and b) if

456 a) the market share, to be determined by the ruling chamber, of the undertaking on the upstream or downstream German gas wholesale market in Germany is at least 30% at that time and

457 b) the analysis to be carried out by the ruling chamber shows that the booking that has to be notified or the acquisition of capacity that has to be notified under operative part 9. could have a detrimental effect on competition. This may be assumed in particular if the booking that has to be notified or the acquisition that has to be notified under operative part 9. would lead to a market share of the relevant undertaking(s) of at least 40% of the upstream or downstream German gas wholesale market in Germany at any time during the duration of the booking.

458 In assessing the requirements of operative part 10 a) and b), the ruling chamber must observe and apply the above-mentioned binding rules and the above-mentioned required procedure of the European Commission as per Article 1 of the European Commission Decision of 20 December 2022 (C(2022) 9902 final).

459 Sentence 2 of operative part 10. requires the applicant, in line with the requirements of the European Commission, to ensure that the booking process for the bookings that have to be notified

under operative part 9. or the acquisition of capacity that has to be notified under operative part 9. is only concluded in a binding manner when the ruling chamber informs the applicant that the assessment procedure is complete. It is still possible to conclude booking contracts provided that these include a corresponding clause requiring compliance with and implementation of any requirements imposed by the ruling chamber in the course of the assessment procedure in accordance with operative part 10. In the case of the transfer of capacity via secondary marketing, an unconditional consent to the capacity transfer pursuant to operative part 7. c) may, in accordance with operative part 10., only be given when the ruling chamber has informed the applicant of the result of the assessment procedure carried out pursuant to operative part 10.

460 The assessment procedure required by the European Commission serves to promote and guarantee competition. It does not absolutely rule out bookings totalling at least 65% of the annual throughput capacity for long-term allocation.

461 As explained above, the European Commission is currently of the view that none of the scenarios examined that are critical for competition would have a detrimental effect on competition (see European Commission Decision of 20 December 2022, C(2022) 9902 final, paras 98 and 102). On the contrary, the European Commission has pointed out that the capacity bookings of the [redacted] undertakings [redacted] will actually have a positive effect on the upstream wholesale market, despite the large size of the bookings. [redacted] previously been active on the German wholesale market (see European Commission Decision of 20 December 2022, C(2022) 9902 final, para 98). The safeguard clause required by the European Commission and the related notification and assessment procedure are merely intended to ensure that the exemption prerequisites are complied with over the many years of the exemption (20 years) owing to the difficulty of making reliable long-term forecasts (European Commission Decision of 20 December 2022, C(2022) 9902 final, para 103).

462 The point of the safeguard clause is not to rule out large capacity booking requests. Rather, the two-stage assessment procedure described must be followed in the event of bookings or capacity transfers that are subject to the notification requirement. The assessment procedure may be ended after the first stage, depending on the results. In particular, undertakings with a market share of less of 30% of the upstream and/or downstream gas wholesale market can make capacity bookings of 65% or more without any restrictions. This will promote competition by particularly benefiting new market participants and, [redacted], can open up the market to new players. It reduces market entry barriers for these players and positively influences competition in the internal market. The assessment of the competitive effect of a capacity booking of 65% or more does not rule out a capacity booking

even for an undertaking with a market share of at least 30% on the upstream or downstream wholesale market, however. If the ruling chamber does not identify any detrimental effect on competition in the second stage of the assessment, it is possible and desirable for such undertakings to make capacity bookings without limitations. Even in the event that detrimental effects on competition are identified, bookings are not fully ruled out but rather subject to limitations on the size and/or duration imposed by the ruling chamber to an extent that promotes competition.

463 The notification and assessment procedure required by the European Commission thus serves to strengthen competition and open up the LNG market, especially for new customers. The market intervention is reduced to a low level as bookings are not fully ruled out.

### 3.8.7. Reporting requirement (operative part 11.)

464 Operative part 11. requires the applicant to inform the ruling chamber without undue delay of any circumstances that may require a reassessment of the prerequisites set out in section 28a(1) paras 1 to 5 EnWG or result in compliance with the requirements laid down in operative parts 4. to 8. being affected.

465 The exemption prerequisites set out in section 28a(1) paras 1 to 5 EnWG could undergo changes over the long period of validity of the exemption of 20 years. The reporting requirement is therefore intended to enable the ruling chamber to undertake any reassessment of the exemption prerequisites that such changes make necessary and to evaluate it. In addition, the reporting requirement is intended to permit the ruling chamber to monitor the applicant's compliance with requirements insofar as obligations were placed upon its behaviour in operative parts 4 to 8.

466 "Circumstances" may mean any incidents that are within the applicant's control and those that are not. Incidents that are sufficiently likely to occur in the near future or are in a sufficiently specific stage of planning must also be reported. It may be assumed that this will be at the latest when the company management has made a decision. For reasons of proportionality, only those circumstances that could require a reassessment of the exemption prerequisites or affect compliance with the behavioural requirements laid down in operative parts 4. to 8. have to be reported, but it should be noted that just the possibility of a reassessment is enough to trigger the reporting requirement. The ruling chamber is then responsible for the actual assessment. The circumstances must be notified to the ruling chamber without undue delay, ie without culpable delay (section 121 of the Civil Code, BGB).

467 In the exemption proceedings for the Brunsbüttel LNG facility, the European Commission pointed out in particular that in the event of the applicant receiving any subsidy, the applicant would have to notify the ruling chamber as it could affect compliance with the exemption prerequisite about an investment risk justifying an exemption (section 28a(1) para 2 EnWG/Article 36(1)(b) of

Directive 2009/73/EC) and could make it necessary to reassess the scope and duration of the exemption decision (Commission Decision C(2021) 3814 final, para 111). This requirement is implemented in operative part 11. and 12. of the exemption decision.

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

468 The provision in operative part 12. permits the ruling chamber to revoke, amend or supplement in full or in part the secondary provisions in operative parts 3 to 10 and to withdraw the exemption or attach further secondary provisions and conditions to it subsequently. There are various circumstances in which secondary provisions or the exemption may be amended, supplemented or revoked under operative part 12.. The first situation in which an amendment or revocation comes into question is if a change in actual circumstances requires a reassessment of the exemption prerequisites set out in section 28a(1) paras 1 to 5 EnWG (operative part 12. a)). It is also possible to carry out an amendment or revocation if the applicant does not meet one or more of the conditions set out in operative parts 4. to 10. (operative part 12. b)). A further possibility of amendment or withdrawal occurs if the applicant is not separate from the system operation of NEL Gastransport GmbH, GASCADE Gastransport GmbH, Gasunie Deutschland Transport Services GmbH, Fluxys Deutschland GmbH, Lubmin-Brandov Gastransport GmbH, OPAL Gastransport GmbH & Co. KG, ONTRAS Gastransport GmbH or another system operator in whose system the infrastructure is built as required by section 28a(1) para 3 EnWG and in accordance with sections 8 to 10e EnWG after the LNG facility has been put into operation (operative part. 12. c)). The exemption decision explicitly states that it may be amended or revoked in the event that the European Commission Decision issued on this exemption is amended or revoked or becomes ineffective (operative part 12. d)).

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

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

470 This is in the interests of the applicant and its customers but also of potential market participants, in particular with regard to the rules and mechanisms for the allocation and management of

capacity set out in operative parts 5. to 8.. These rules are based on an analysis of the LNG market and forecast of its future development. Decisions based on forecasts are naturally associated with some forecasting risks, which become greater the further in the future the forecast looks. It might be necessary to amend the secondary provisions contained in operative parts 3. to 10., in particular the rules and mechanisms for the allocation and management of capacity, in order to adequately take account of future developments that differ significantly from forecasts throughout the long period of the exemption. For example, an economically efficient use of the capacity can be ensured if it turns out that developments on the LNG market make amendments necessary. The ruling chamber can, also for reasons of proportionality, repeal secondary provisions in full or in part if it subsequently becomes clear that they are not necessary (anymore).

471 The right of amendment and withdrawal also ensure compliance with the approval requirements over the long exemption period of 20 years. The European Commission stated in the exemption proceedings for the Brunsbüttel LNG facility that it could be necessary to reassess the approval prerequisite of the investment risk and possibly to examine and amend the exemption decision if subsidies for the construction of the LNG facility were granted (Commission Decision C(2021) 3814 final, Article 4 and paras 110-111). This situation could give rise to questions about the necessity of the exemption since the investment risk would be reduced by the granting of subsidies for investors. The European Commission takes the view that the applicant must notify the ruling chamber of any such subsidy under operative part 11. of this exemption decision. The ruling chamber would then have to reassess the exemption prerequisite of the investment risk justifying the exemption (section 28a(1) para 2 EnWG and Article 1(b) of Directive 2009/73/EC) and consider whether to change or withdraw the exemption decision. However, the European Commission takes the view that the granting of subsidies does not exclude per se the investment risk required for the granting of an exemption. Depending on the circumstances, such a case may possibly require limiting the exemption, for example to a part of the capacity or to a shorter duration, as exemptions should be limited to what is necessary (Commission Decision C(2021) 3814 final, paras 110-111).

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

Operative part 12. b) permits the monitoring of compliance with the secondary provisions of operative parts 4. to 10., which the ruling chamber considers necessary to establish the legal requirements for an exemption to be granted. The requirement in operative part 4., for example, ensures that the levying of charges for the use of infrastructure set out in section 28a(1) para 4 EnWG is complied with. Meanwhile, the rules and mechanisms for the allocation and management of capacity contained in operative parts 5. to 8. serve to enhance competition and security of supply in the gas sector pursuant to section 28a(1) para 1 EnWG by preventing foreclosure of the new infrastructure over the many years of the exemption and only allowing an exemption from the

access obligations of section 20 EnWG to the extent necessary to enable the investment. The notification and assessment procedure set out in operative parts 9. and 10. with regard to bookings or acquisition of capacity of at least 65% of the annual throughput capacity for long-term marketing is intended to ensure that such bookings will not cause detriment to competition throughout the entire exemption period, even if market conditions change. The right to amend or withdraw the exemption set out in operative part 9. enables the ruling chamber to respond appropriately if the provisions, which ensure the application can be approved, are not complied with.

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

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

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

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

475 (6) Response options

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

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

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

#### 3.8.10. Applicability of the exemption (operative part 14.)

477 Operative part 14. places a condition subsequent on the exemption, that construction on the LNG facility in Lubmin be started no later than two years after the European Commission Decision is issued, ie by 20 December 2024 at the latest, and the LNG facility is put into commercial operation no later than four years after the European Commission Decision is issued, ie by 20 December 2027 at the latest, with the date of the start of construction and the date of commercial operation each being notified in writing to the ruling chamber without undue delay.

478 As well as the date of the start of construction, the relevant reference for the condition subsequent corresponding to the exemption period set out in operative part 3. is the time when the commercial operation starts for phase I. As the date of the start of commercial operation is the reference for operative part 3., which limits the exemption to a period of 20 years, and for operative part 14., the notification requirement creates legal certainty about the period of validity of the exemption. The same applies for the notification requirement about the date of the start of construction.

479 The condition subsequent refers back to the European Commission Decision (Article 3 of the European Commission Decision of 20 December 2022 (C(2022) 9902 final)), pursuant to which the exemption should include a specific due date with regard to the deadlines connected to the start of construction and operation in the ninth subparagraph of Article 36(9) of Directive 2009/73/EC. In light of the time frame for the construction of the Lubmin LNG facility and the link to the system of NEL Gastransport GmbH, GASCADE Gastransport GmbH, Gasunie Deutschland Transport Services GmbH, Fluxys Deutschland GmbH, Lubmin-Brandov Gastransport GmbH, OPAL Gastransport GmbH & Co. KG and ONTRAS Gastransport GmbH, the lengths of time stated in the Directive seem adequate to allow for any delays arising from planning approval or technical problems. The applicant is thus granted a timespan of two years for the start of construction and five years for the start of operation. The timespans granted correspond with the periods of applicability mentioned in the fifth subparagraph of Article 36(9) of Directive 2009/73/EC and, to ensure that the national exemption and the Commission Decision are synchronised, are based on the date of issue of the Commission Decision. These times are also, incidentally, the longest period of applicability of planning permissions in many of the building codes of the German federal states. This provision prevents the applicant from merely keeping the decision "in reserve", thereby possibly discouraging other market participants from making progress with their own investment projects. The requirement to notify the date of the start of construction and of commercial operation creates clarity as to the period of applicability of the exemption from the provisions of the network access regime of sections 20 to 26(1) EnWG. In accordance with the fifth subparagraph of Article 36(9) of Directive 2009/73/EC, the condition subsequent does not take effect if the Commission decides that any delays are due to major obstacles beyond the applicant's control.

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

480 Operative part 15. enables ownership or operation of the Deutsche Ostsee LNG facility to be transferred and changes to be made to ownership structure without jeopardising the exemption.

481 Without this operative part, doubt would remain as to whether this would be possible, since the exemption in accordance with section 28a EnWG, which relates to a specific infrastructure, bears features of an administrative act related to an object but also, being based on the unbundling provisions and the competitive conditions, features of an administrative act related to a person.

482 Operative part 15. thus enables the legal acts mentioned without jeopardising the exemption but attaches certain conditions to them. It is necessary for the ruling chamber to be notified of the intended change in good time and for a third party to which the LNG facility operation is being transferred to commit to complying with the conditions of the exemption. This avoids a situation in which only the rights and not the obligations from the exemption would be transferred. Moreover,

the ruling chamber retains a right of withdrawal that can be made use of if, for example, the transfers mentioned would be detrimental to competition.

483 "Operation" within the meaning of these provisions is the taking on of the sector-specific responsibility for compliance with the provisions of energy legislation, in particular the responsibility under public law towards the regulatory authorities. The permissible performance of tasks and functions by third parties, eg within the framework of operating agreements, service agreements or planning activities, is unaffected. No general statement as to whether such activities are to be classed as the operation of LNG facilities in other legal contexts is made here.

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

484 Operative part 16. rejects the application in other respects. Because of the other provisions, the exemption granted falls short of what was requested.

#### 3.8.13. Ruling on costs (operative part 17.)

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

**Information on legal remedies**

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

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

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

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| Anne Zeidler | Dr Antje Peters | Dr Werner Schaller |
| Chair | Vice Chair | Vice Chair |