Bundesnetzagentur

Ruling Chamber 9

BK9-19/612

DECISION

In the administrative proceedings pursuant to

section 29(1) of the Energy Industry Act (EnWG) in conjunction with section 56(1) sentence 1 para 2, sentences 2 and 3 EnWG in conjunction with section 72 EnWG in conjunction with Article 6(11) and Article 7(3) of Regulation (EC) No 715/2009 in conjunction with Article 41(6)(a) of Directive 2009/73/EC in conjunction with Article 28 of Regulation (EU) 2017/460

concerning the determination of the level of multipliers, the determination of a discount at entry points from LNG facilities and at entry points from and exit points to infrastructure developed with the purpose of ending the isolation of Member States in respect of their gas transmission systems and the determination of the level of discounts for interruptible standard capacity products at all interconnection points for the calendar year 2021 ("MARGIT 2021")

Party summoned:

Gazprom export LLC, Ostrovskogo Sq. 2a letter “A“, St Petersburg 191023, Russia, represented by its Director General,

Legal representatives of the party summoned: Gleiss Lutz Hootz Hirsch PartmbB Rechtsanwälte, Steuerberater (HQ Stuttgart, AG Stuttgart PR 136)

Ruling Chamber 9 of the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, Tulpenfeld 4, 53113 Bonn,

represented by

the Chair	Dr Christian Schütte,
the Vice Chair	Dr Ulrike Schimmel
and the Vice Chair	Roland Naas

decided on 11 September 2020:

1. The following determinations in this decision are effective from 1 October 2021 to 31 December 2021.
2. Reserve prices for standard capacity products for interruptible capacity at interconnection points must be calculated by multiplying the reserve prices for the respective standard capacity products for firm capacity calculated as set out in Articles 14 and 15 of Regulation (EU) 2017/460 and Determination BK9-19/612 ("REGENT 2021") by the difference between 100% and the level of an ex-ante discount applicable at every interconnection point for the respective standard capacity product in accordance with Annex II.
3. This final decision replaces the provisional order set out in operative part 4 of the determination of 27 May 2020 (BK9-19-612)
4. The right to order payment of costs is reserved.

Rationale

I.

1 The ruling chamber has opened own-initiative proceedings for the determination of the level of multipliers, the level of any discount at entry points from LNG facilities, and at entry points from and exit points to infrastructure developed with the purpose of ending the isolation of Member States in respect of their gas transmission systems, and the level of discounts for interruptible standard capacity products at all interconnection points.

2 Notification of the opening of proceedings was given in the Official Gazette 09/2019 of 15 May 2019 and simultaneously on the Bundesnetzagentur's website.

3 The background to these proceedings is the Network Code on Harmonised Transmission Tariff structures for gas (Regulation (EU) 2017/460), which entered into force on 6 April 2017 and which constitutes directly applicable European law yet also requires several implementing acts from the national regulatory authority. These acts need to undergo comprehensive consultation processes.

4 The draft decision in German and in English was published on the Bundesnetzagentur website on 18 December 2019 for consultation. The publication was accompanied by a brief statement that the consultation pursuant to Article 28(1) of Regulation (EU) 2017/460 would run for two months. Legally binding, however, is solely the German version.

5 This publication and the consultation, by analogy with section 73(1a) sentence 1 EnWG and section 28(2) para 4 of the Administrative Procedure Act (VwVfG), took the place of the individual hearing required under section 67(1) EnWG for each party addressed.

6 On 20 December 2019, the consultation documents were submitted to the Agency within the meaning of Article 1(1) of Regulation (EC) No 713/2009 (hereinafter "ACER"). The national regulatory authorities of the neighbouring Member States were informed of the impending start of the consultation in a letter dated 20 December 2019.

7 On 11 October 2019, the Bundesnetzagentur notified the regulatory authorities of the federal states of the opening of proceedings in accordance with section 55(1) sentence 2 EnWG and gave the authorities the opportunity to comment on the intended determination in accordance with section 58(1) sentence 2 EnWG. Likewise, the Bundeskartellamt was given the opportunity to state its views on the intended determination in accordance with section 58(1) sentence 2 EnWG.

8 The Committee of representatives of the federal state regulatory authorities was given the opportunity to comment in accordance with section 60a(2) sentence 1 EnWG on 13 February 2020.

9 Eight responses to the draft determination of 18 December 2019 were received. They were published on the Bundesnetzagentur website in a version from which any business and trade

secrets had been removed. Please see the summary provided in the decision of 27 May 2020 for more information on the contents of the responses.

10 On 27 May 2020, the ruling chamber issued an arrangement that was provisional as regards operative part 4 with reference to the period from 1 October 2021 to 31 December 2021. This was due to the fact that, as an exception, the reference prices have to be adjusted during the year due to the merger on 1 October 2021 of the two German market areas in accordance with section 21 of the Gas Network Access Ordinance (GasNZV). Now that the full decision is final, the administrative proceedings BK9-19/612 (MARGIT 2021) are concluded.

11 The draft decision for the definitive arrangement for the content of operative part 4 declared as provisional for the period from 1 October 2021 to 31 December 2021 was published on the Bundesnetzagentur website for consultation on 5 August 2020.

12 This publication and the consultation, by analogy with section 73(1a) sentence 1 EnWG and section 28(2) para 4 VwVfG, took the place of the individual hearing required under section 67(1) EnWG for each party addressed.

13 The consultation documents were submitted to ACER on 5 August 2020. The national regulatory authorities of the neighbouring Member States were informed of the impending start of the consultation in a letter dated 5 August 2020.

14 In accordance with section 58(1) sentence 2 EnWG, on 5 August 2020 the Bundesnetzagentur gave the regulatory authority of the federal states another opportunity to comment on the intended determination. Likewise, the Bundeskartellamt was given another opportunity to state its views on the intended determination in accordance with section 58(1) sentence 2 EnWG. On 12 August 2020, the Bundeskartellamt stated that it did not wish to provide a response.

15 The Committee of representatives of the federal state regulatory authorities was given the opportunity to comment in accordance with section 60a(2) sentence 1 EnWG on 11 August 2020.

16 Twelve market participants sent responses to the draft of 5 August 2020 in the course of the consultation. In addition to statements made in earlier consultations, the responses of market participants may be summarised as follows:

17 Shell Energy Europe Ltd wrote that it shared the concerns of the ruling chamber regarding growing uncertainties caused by the merger of the market areas but, without clear evidence, could not support the raising of the discount for standard capacity products for interruptible capacity and the related price increase for firm capacity products. Instead, the discount for standard capacity products for interruptible capacity should be reviewed at all network points after the market area merger.

18 bayernets GmbH was able to understand in principle the reasoning behind the raising of the discount for standard capacity products for interruptible capacity, against the background of the merger of the market areas. It argued that, because the discount for standard capacity products

for interruptible capacity would also simultaneously affect dynamically allocable capacity (DZK) products and conditionally firm capacity (bFZK)products, the increase in combination with the restriction to cross-border interconnection points would largely affect the dynamically allocable capacity used for transit, with the result that the cost burden for the captive customers of firm, freely allocable capacity (FZK) products - ie distribution system operators and final customers - would increase. Moreover, the favouring of the DZK transports would lead to unequal treatment of the DZK products used at the connection points for gas-fired power plants.

19 According to the BDEW Bundesverband der Energie- und Wasserwirtschaft e.V., it had not been possible to agree on a common position on all points within the association owing to the tight time frame of the consultation. It therefore decided not to send a full statement. However, the BDEW pointed out that there was a broad consensus across all levels of the value chain that, if a larger discount for standard capacity products for interruptible capacity were to be applied, the increase of the contingency mark-up at interconnection points must also be extended to other points of transmission system operators and distribution system operators with entry-exit systems in accordance with the determination BEATE 2.0 (BK9-18/608), because of the equivalence of the circumstances.

20 The Bundesverband Neue Energiewirtschaft (bne) took the view that the tariff structures would be greatly distorted by the increase in the contingency mark-up for standard capacity products for interruptible capacity, with the doubling of the discount increasing tariffs for other capacity products; these additional costs would then have to be borne by all other shippers. This approach would only be justifiable if it were to be expected that the merger of the market areas would actually lead to a greater probability of interruption at all bookable points, but this was not the case. The bne was opposed to the increase because it would bring only disadvantages and seemed only to be aiming for a questionable improvement for individual capacity products (bFZK and DZK) of individual transmission system operators.

21 EFET Deutschland did not believe the proposed general increase in the contingency mark-up for the prices for standard capacity products for interruptible capacity (uFZK) would be expedient. It could in principle follow the ruling chamber's assumption that the probability of interruption of uFZK would tend to increase with the market area merger, but could not understand why the reduction in capacity caused by the merger could be calculated for each point but the probability of interruption could not. Appropriate calculations for each point were necessary for the market; this also applied to the consideration based on historical data. The current calculation on a yearly basis led to the specific risk at storage points, for example, not being appropriately reflected in the discount; there, only 50% of the historical interruption was regularly reflected in the discount. More, the formula did not adequately reflect how the value of interruptible capacity falls as the risk of interruption rises. In this context, it was not possible to understand why transmission system operators could not be required to record involuntary interruption via re-nomination. It was also not possible to understand why, contrary to the practice up to now, different calculations should

be carried out for points within Germany as per BEATE and for cross-border interconnection points as per MARGIT; no objective reasoning had been provided for this. EFET Deutschland therefore called for equal treatment, ie the same calculation of the discount for uFZK in BEATE and MARGIT. This harmonisation would bring the risk of a further rise in the other tariffs, causing competitive disadvantages for the German market.

22 Equinor Deutschland GmbH shared the concerns expressed by EFET, among other things. Additionally, it explained that the doubled contingency mark-up would benefit not just uFZK but also bFZK and DZK at cross-border interconnection points. For the DZK products, in particular, only those cross-border transports that were made via point-to-point connections and not via the central trading point would benefit, causing the wrong kind of incentives. The trading point and its liquidity would be weakened because gas flows would be transported around it and, at the same time, the entry tariffs for the hub would get more expensive. Equinor thus called for the proposed general doubling of the contingency mark-up to be subjected to critical scrutiny.

23 EnBW Energie Baden-Württemberg AG maintained that the general increase in the contingency mark-up for the discount in standard capacity products for interruptible capacity, and thus also the discounting leeway for bFZK and DZK, was not comprehensible, as the revenue that was lost in this way would have to be covered by all other shippers. This would be justifiable if it were to be expected that the merger of the market areas would actually lead to a greater probability of interruption at all bookable points, but this was not the case. The reduction of capacity at the German H-gas entry points was already showing that not all points were affected. EnBW took the view that a greater probability of interruption was not to be expected at L-gas entry/exit points, at exit points in the market-based instrument (MBI) zone with a surplus of gas or at entry points in the MBI zone within Germany. EnBW further criticised the already comprehensive level of the discount, which did not lead to an appropriate range of fluctuation and did not appropriately reflect the value of interruptible and conditional capacity. It therefore suggested examining whether a risk clustering for the individual points could be derived directly from the capacity model, noting that the publication of such an assessment would in itself lead to greater transparency for all market participants. Clustering would allow the discount to be based more closely on the real market value. However, if the ruling chamber were to decide on a general increase of the contingency discount, this should at least be applied in a non-discriminatory manner for all points, which would require the BEATE determination to be amended.

24 FNB Gas e. V. wrote on behalf of all transmission system operators except bayernets GmbH that the increase in the contingency mark-up was appropriate, reasonable and comprehensible. It met the expectations of transmission system operators that the probability of interruption would increase when the market area merger was carried out. This was due to the fact that only about 22% of the total entry-direction FZK currently offered would be able to be provided following the market area merger without the use of additional MBIs. This securing mechanism would be required by 78% of the offered entry-direction FZK. In accordance with the KAP+ determination

(BK7-19-037), transmission system operators would first exhaust all other system-related and market-related measures pursuant to section 16(1) para 2 EnWG to combat the transportation congestion, which would also include the interruption of interruptible capacity. The transmission system operators also concurred with the explanations of the ruling chamber regarding the issue of re-nominations due to announced or foreseeable interruptions. They stated that the method put forward by the ruling chamber was not just sensible but indeed necessary. The association expressed full agreement with the considerations of the ruling chamber. It also pointed out that it was urgently necessary to apply an increased contingency mark-up similarly for the points coming within the scope of the BEATE 2.0 determination and that the basis of and rationale for the increase applied equally to them. Finally, it argued that the reasoning for increasing the contingency mark-up for L-gas was not completely correct, in that an exact demarcation of user groups was not appropriate.

25 The Initiative Erdgasspeicher e. V. (INES) welcomed the fact that the ruling chamber was seeking to mitigate the greater uncertainties associated with the market area merger by increasing the discounts on standard capacity products for interruptible capacity. It stated that an increase in the general contingency mark-up for the Pro factor was a pragmatic yet effective approach. However, the amendment of the MARGIT determination only applied the general discount for interconnection points, even though all the uFZK available in the market area was subject to the same increased uncertainty. It was therefore not appropriate to discriminate against the other types of points apart from the interconnection points. INES thus proposed that the same general discount be determined for all uFZK in the market area.

26 OMV Gas Marketing & Trading GmbH also welcomed the increase of the discounts on standard capacity products for interruptible capacity despite the fact that the lack of historical data meant that it was not currently possible to calculate the probability of interruption more exactly. The level of the contingency mark-up should definitely be evaluated in 2021 in the interests of tariff security. OMV Gas welcomed a harmonisation of the discounts for interruptible capacity for all durations at each point, but pointed out that an increase of the FZK reserve price of 3.8% seemed considerable.

27 Uniper Global Commodities SE was in agreement that the risk of interruptions could increase with the merger of the market areas but did not see the necessity of increasing the discount generally without exact knowledge of the effects on individual interconnection points, in particular if this would lead to a huge increase in costs for tariffs. The existing contingency mark-up of 10% would already cover any differences between the calculation based on historical data and the current situation. Uniper criticised the fact that other interruptible capacity not located at the borders of market areas would have different pricing under the current BEATE determination and argued that equal treatment was essential to prevent any discrimination.

28 vp Energieportfolio UG wrote that there was no reason to increase the contingency mark-up. The uncertainties caused by the market area merger given as the reason for the increase by the ruling chamber were mere speculative assumption and not based on firm evidence. In any case, the increase did not seem to be based on an analytical model. In order to obtain at least an initial assessment as to whether the probability of interruptions would increase, the ruling chamber could project the cumulated interruption events at the market area interconnection points (MÜP) between the market areas in the past to the boundaries of the market area Trading Hub Europe (THE). It might be possible to weaken or even revise the assumption of the ruling chamber. This was because the consolidation of cooperation obligations in one market area also enhanced internal opportunities for optimising load flow. It seemed to be of central importance to the ruling chamber to ensure the protection of transport customers who have booked interruptible capacity. However, precisely those transport customers would also benefit from the merged market areas as there would be higher liquidity in the procurement of interrupted volumes. In the event that the ruling chamber has the historical interruptions available to it, an evaluation would be highly appropriate and should of course include interruption events of bFZK and the allocation events of DZK, as MARGIT also indirectly determines the range for these products. The decision would therefore not only affect uFZK, but would also have an impact on the market by extending the range for bFZK and DZK and possibly even have a considerable impact on the European gas market. The consulted amendment would also have an impact on the tariff for FZK, putting FZK shippers at a disadvantage in comparison.

29 For further details, reference is made to the content of the file.

II.

30 In accordance with Article 41(6)(a) of Directive 2009/73/EC in conjunction with Article 28(1) of Regulation (EU) 2017/460, the Bundesnetzagentur is issuing a motivated decision on the points mentioned in Article 28(1) sentence 1 of Regulation (EU) 2017/460 by means of this determination.

31 The decision taken falls under the responsibility of the Bundesnetzagentur as provided for by section 29(1) EnWG in conjunction with section 56(1) sentence 1 para 2, sentences 2 and 3 in conjunction with Article 6(11) and Article 7(3) of Regulation (EC) No 715/2009 in conjunction with Article 41(6)(a) of Directive 2009/73/EC in conjunction with Article 28(1) of Regulation (EU) 2017/460. The responsibility of the ruling chamber ensues from section 59(1) sentence 1 EnWG.

32 Article 2(1) sentence 1 of Regulation (EU) 2017/460 shows that the consultation and decision pursuant to Article 28(1) of Regulation (EU) 2017/460 refer to interconnection points, ie to cross-border and market area interconnection points of transmission system operators (see Article 3 point 2 of Regulation (EU) 2017/459). Pursuant to Article 2(1) sentence 2 of Regulation (EU) 2017/460, the regulatory authority can take a decision that the provisions of Chapter III also apply to entry points from third countries or exit points to third countries, or both. In its determination of 14 August 2015 (BK7-15/001 – "KARLA Gas 1.1"), the Bundesnetzagentur's Ruling Chamber 7 ruled that the provisions of the Network Code on Capacity Allocation Mechanisms (NC CAM) also applied to entry points from third countries and exit points to third countries within the meaning of Article 2(1) sentence 2 NC CAM from 1 November 2015. The consultation and decision pursuant to Article 28 of Regulation (EU) 2017/460 therefore also refer to these points.

33 Pursuant to Article 28(1) of Regulation (EU) 2017/460, the national regulatory authority must consider the positions of national regulatory authorities of directly connected Member States in its decision. No responses from other national regulatory authorities on the content of the determination of 27 May 2020 or on the content of this determination were received by the Bundesnetzagentur.

1. Period of validity and replacement of the provisional order

34 The requirements are to be implemented pursuant to operative part 1 as from 1 October 2021 and hence included in the publication referred to in Article 29 of Regulation (EU) 2017/460. Under Article 38 of Regulation (EU) 2017/460, Chapters II, III and IV of the Regulation will apply as from 31 May 2019; thus Articles 13 to 16 of the Regulation are also covered, coming as they do under Chapter III and forming the basis of this decision. Accordingly, the transmission system operators had to apply the motivated decision pursuant to Article 28 of Regulation (EU) 2017/460 for the first time in respect of the tariff year 2020, ie from 1 January 2020. In accordance with Article 28(2) of Regulation (EU) 2017/460, the subsequent consultations will be conducted every tariff period as

from the date of the decision. After each consultation and as set out in Article 32(a) of Regulation (EU) 2017/460, the national regulatory authority takes and publishes a motivated decision on the aspects referred to in Article 28(1)(a), (b) and (c) of Regulation (EU) 2017/460. Pursuant to Article 3 sentence 2 point 23 of Regulation (EU) 2017/460, "tariff period" means the time period during which a particular level of reference price is applicable, which minimum duration is one year and maximum duration is the duration of the regulatory period; in this case it is the calendar year or, in the case of the content that is here finally determined, the last quarter of 2021. The ruling chamber thus takes and publishes a motivated decision on the aspects referred to in Article 28(1)(a), (b) and (c) each year and the decision is effective for a calendar year. The effectiveness of this decision thus ends at the end of the calendar year 2021.

35 The decision issued on this day replaces the provisional order of 27 May 2020.

2. General

36 In taking this decision, the ruling chamber has taken account of the fact that it is an administrative act that, in accordance with Article 28 of Regulation (EU) 2017/460, is to be consulted on and issued independently of other determinations issued or to be issued in accordance with this Regulation. This independence is shown partly by the fact that decisions in accordance with Article 26 in conjunction with Article 27 of Regulation (EU) 2017/460 have to be made every five years at the latest, while decisions in accordance with Article 28 have to be made in every tariff period.

3. Level of discounts for standard capacity products for interruptible capacity

37 The decision pursuant to operative part 2 on the level of discounts for standard capacity products for interruptible capacity is based on section 29(1) EnWG in conjunction with section 56(1) sentence 1 para 2, sentences 2 and 3 EnWG in conjunction with Article 6(11) and Article 7(3) of Regulation (EC) No 715/2009 in conjunction with Article 28(1) in conjunction with Article 16 of Regulation (EU) 2017/460.

38 Pursuant to Article 12(1) sentence 2 of Regulation (EU) 2017/460, for both yearly and non-yearly standard capacity products for interruptible capacity, the reserve prices must be calculated as set out in Chapter III of Regulation (EU) 2017/460.

39 Article 16(1) of Regulation (EU) 2017/460 lays down that the reserve prices for standard capacity products for interruptible capacity must be calculated by multiplying the reserve prices for the respective standard capacity products for firm capacity calculated as set out in Articles 14 or 15, as relevant, by the difference between 100% and the level of an ex-ante discount. As an alternative to this, in accordance with Article 16(1) of Regulation (EU) 2017/460, the national regulatory

authority may decide to apply an ex-post discount. The ruling chamber has not made use of this option.

40 The ex-ante discount determined as per operative part 2 ($D_{iex\text{-}ante}$) was calculated in accordance with Article 16(1) of Regulation (EU) 2017/460 separately for each standard capacity product using the following formula:

$Di_{ex\text{-}ante} = Pro \times A \times 100\ \%$

a. *Pro* factor

41 *Pro* is the factor for the probability of interruption which is set or approved in accordance with Article 41(6)(a) of Directive 2009/73/EC and in line with Article 28, and which refers to the type of standard capacity product for interruptible capacity.

42 The *Pro* factor is calculated for each, some or all interconnection points per type of standard capacity product for interruptible capacity offered in accordance with Article 16(3) of Regulation (EU) 2017/460. The ruling chamber has decided in a first step to calculate the *Pro* factor separately for each interconnection point using the prescribed formula. This approach ensures to the greatest extent possible that the probability of interruption, which can vary from point to point, is specifically reflected in the level of *Pro*. In a second step, the *Pro* calculated for each point will be standardised per standard capacity product at all entry and all exit points to the same entry-exit system or comparable systems for each gas quality (L-gas and H-gas). To do this, the weighted average of the *Pro* factors calculated per standard capacity product for all interconnection points in the respective entry-exit system is calculated. The standardisation of the *Pro* factor per standard capacity product at all entry and all exit points of the same entry-exit system or comparable systems is based on the fact that within each gas quality the affected entry and exit points are interchangeable for the network user. Moreover, Article 21 of Regulation (EU) 2017/460 provides for a standardisation of the tariffs there.

43 The calculation of the *Pro* factor for the individual interconnection points, broken down by standard capacity product, is carried out in accordance with Article 16(3) on the basis of forecast information related to the individual components of the formula below:

$$Pro = \frac{N \times D_{int}}{D} \times \frac{CAP_{av.int}}{CAP}$$

Where:

N is the expectation of the number of interruptions over *D*.

D_{int} is the average duration of the expected interruptions expressed in hours.

D is the total duration of the respective type of standard capacity product for interruptible capacity expressed in hours.

$CAP_{av.int}$ is the expected average amount of interrupted capacity for each interruption where such amount is related to the respective type of standard capacity product for interruptible capacity. In determining this value, the fact is taken into account that within-day capacity will be interrupted before day-ahead capacity, day-ahead capacity before monthly capacity, monthly capacity before quarterly capacity, and quarterly capacity before yearly capacity. This is because, in accordance with Article 35(1) of Regulation (EU) 2017/459, the order in which interruptions are performed is determined on the basis of the contractual time stamp of the relevant transport contracts for interruptible capacity. It follows from Article 9 in conjunction with Articles 11 to 15 of Regulation (EU) 2017/459 that yearly capacity will be auctioned before quarterly capacity, quarterly capacity before monthly capacity, monthly capacity before day-ahead capacity, and day-ahead capacity before within-day capacity; given that the order of interruptions is based on the time stamp, it can therefore be assumed that capacity will be interrupted in the reverse order to which contracts were concluded. *CAP* is the total amount of interruptible capacity for the respective type of standard capacity product for interruptible capacity.

The discount calculated using the above formula is rounded up to the full percent.

44 Expected values from N, D_{int} and $CAP_{av.int}$ contribute to the calculation of the Pro factor. The ruling chamber takes the view that sufficiently reliable forecast figures can only be derived from examining a period in the past. The past values can be used as the basis to indicate the probability of a future interruption. However, it is not appropriate to use a reference period that goes back too far. That could lead to distortions, for example if changes to the actual conditions at a connection point that occurred long ago (eg due to network expansion) affect the probability of interruption in the present. In addition, for reasons of practicability a reference period that is too long should not be used, because network operators cannot easily identify interruptions from the distant past. On the other hand, a reference period that is too short is not appropriate either, because of the possibility of distortions and special circumstances that occur in the short term and are not representative of the general probability of interruption. The ruling chamber takes the view that a reference period of three years is appropriate. The variables N, D_{int} and $CAP_{av.int}$ must therefore be calculated on the basis of interruptions in interruptible capacity over a period of three years. This reference period is expected to minimise the risk of, on the one hand, taking account of conditions that no longer correspond to the actual circumstances and, on the other, distortions caused by an insufficient and unrepresentative data basis. A reference period of three years therefore provides an appropriate balance. The last three completed gas years will be used. In derogation of this, this second consultation and decision pursuant to Article 28 of Regulation (EU) 2017/460 uses the data from the last two completed gas years because there are currently no reliable and comparable values for a longer period owing to the changes resulting from the revision of the NC CAM in Regulation (EU) 2017/459. The ruling chamber will extend the reference period to three gas years in the course of the annual consultations next year.

45 Since the values for N, D_{int} and $CAP_{av.\ int}$ are based on data referring to the past, the ruling chamber has included a contingency mark-up of 10 percentage points in the calculation of the *Pro* factor for the period from 1 January 2021 to 30 September 2021. This ensures that the provisions of Article 16(3) of Regulation (EU) 2017/460 are applied with regard to the use of forecast values. The contingency mark-up is necessary because a period in the past is used to calculate the probability and it cannot be guaranteed that the probability of interruption in the present can be calculated with absolute accuracy by looking at the previous year. The framework conditions could have changed, affecting the actual probability of interruption. In any case, it cannot be ruled out that the calculation would not fully correspond to the real conditions. Moreover, the values calculated for N, D_{int} and $CAP_{av.\ int}$ are only forecast values, indicated by past experience. The contingency mark-up thus covers any differences between the calculation based on historical data and the current situation. The wording of Article 29(b)(ii) point 3 of Regulation (EU) 2017/460 ("historical or forecasted data, or both, used for the estimation of the probability of interruption referred to in point (2)") also indicates that it is appropriate to combine past and forecast values to calculate the probability of interruption appropriately. In its decision of 27 May 2020, the ruling chamber made a (final) determination on a contingency mark-up of 10 percentage points for the period of 1 January 2021 to 30 September 2021. It left open the question of whether the system of calculating the discounts was to be continued for the period after the merger of the market areas on 1 October 2021. With this decision, which is final for the period from 1 October 2021 to 31 December 2021 as well, the ruling chamber has changed the system of calculating discounts by raising the contingency mark-up for interconnection points in the H-gas network to 20 percentage points.

46 The market area merger planned for 1 October 2021 is a significant event on the gas market. It will change the configuration of the market areas considerably and expand the allocability, and thus the possible use, of capacity products due to the many new combinations of entry and exit points. The great expansion of free allocation options will, if no further measures are taken, lead to a reduction in the amount of FZK compared to the amount in the separate (smaller) market areas. According to calculations by the transmission system operators, only about 22% of the total entry-side FZK currently offered in the two German market areas will be able to be provided on the basis of the physical infrastructure following the market area merger. These practical changes are accompanied by regulatory processes. In one of these, the Bundesnetzagentur's Ruling Chamber 7 approved the oversubscription and buy-back scheme developed by the transmission system operators for the offer of additional capacity in the single German market area ("KAP+") in a ruling dated 25 March 2020 (BK7-19-037). This scheme allows additional firm capacity to be offered on the entry side that could not be provided in the single market area with the current physical infrastructure.

47 The transmission system operators need a securing mechanism in order to offer additional firm capacity to the market without upgrading the congestion-prone, physical infrastructure. The

existing congestion could cause the actual use of additional firm capacity – that cannot be provided physically – to lead to transportation congestion. To solve this problem, the KAP+ procedure has given the transmission system operators the ability to remove congestion by making use of MBIs. However, the use of MBIs in this context should be kept to a minimum. The approved concept thus also envisages that the transmission system operators must exhaust all other system-related and market-related measures within the meaning of section 16(1) para 2 EnWG to combat the transportation congestion first, before using MBIs. These measures include interrupting interruptible capacity. In the event of transportation congestion, (where effective) the used interruptible capacity must be interrupted first (with the exception of interruptible capacity for internal bookings) before other MBIs are used to the extent necessary. An effective removal of transportation congestion by the interruption of interruptible capacity may therefore also occur with the use of interruptible exit capacity, even though the KAP+ determination only envisages an increase in the offer of firm entry capacity.

48 Applying the KAP+ determination, the transmission system operators are offering to the market approximately 113m kWh/h of FZK at the entry points for the period from 1 October 2021 to 1 October 2022 in addition to the approximately 58m kWh/h that can be provided by the network infrastructure. As a result, about two thirds of the FZK on offer as of 1 October 2021 will no longer be secured by the physical infrastructure alone. If it were to be used, transportation congestion could occur. In that event interruptible capacity would first be interrupted as a priority, provided this would have an effect on the congestion, and then the MBIs would be used if necessary.

49 These circumstances make it impossible to rule out a greater probability of interruptions in the single market area in the H-gas network. Ruling Chamber 9 has responded to these developments by determining a higher contingency mark-up for interconnection points in the H-gas network to take account of the uncertainties posed by the market area merger and the offer of additional firm capacity that cannot be provided by the network infrastructure alone. There are as yet no firm findings on the likely interruptions. Unlike in the determination proceedings BEATE 1.0 (BK9-14/608), BEATE 2.0 (BK9-18/608) and MARGIT 2020 (BK9-18/612), there are no past values for the single market area upon which to make a representative assessment. These findings will only become available gradually once the market area merger has taken place. These uncertainties provide an argument in favour of increasing the contingency mark-up.

50 All the transmission system operators, the traders' association EFET, Equinor and Uniper Global Commodities all shared the ruling chamber's expectation that the probability of interruptions could increase in the single market area in the H-gas network. On the other hand, three market participants cast doubt on this view and consequently rejected the increase of the contingency mark-up to 20 percentage points.

51 Nearly all the transmission system operators judged the increase of the contingency mark-up to 20 percentage points ahead of the market area merger to be appropriate, reasonable and

comprehensible. INES and OVM Gas Marketing & Trading also welcomed the increase. OVM Gas Marketing & Trading also suggested reviewing the increase in 2021.

52 Four market participants called for the discount to be adjusted only if past values later showed that the merger of the market areas had actually led to more interruptions. Three more called for a discount that was more heavily based on the actual interruptions instead of the contingency mark-up being doubled generally.

53 The text and annex II of this decision have been amended to take account of the fact, as pointed out, that the KAP+ determination, which approved an oversubscription and buy-back scheme for the offer of additional capacity in the single German market area, ultimately only affects the H-gas network infrastructure and the congestion between the former market areas there. The criticism that the increase of the contingency mark-up was not differentiated enough has thus been taken into account. The ruling chamber took into consideration that it makes sense to have certain harmonisations in a dual-quality market area, as these contribute to increased liquidity. On the other hand, Article 16 of Regulation (EU) 2017/460 sets out differentiation according to different points or types of points, so a distinction is not ruled out and is appropriate here because of the mechanisms in the single market area.

54 The absolute size of a contingency mark-up cannot be calculated with complete certainty and is always the result of a process of weighing up the facts. The increase in general uncertainty caused by the merger of the market areas along with the possibly greater probability of an interruption in the H-gas network are factors that already point towards a higher contingency mark-up.

55 Taking into account the responses submitted and weighing up the arguments put forward, and owing to the considerable uncertainties, an increase to 20 percentage points is appropriate for this short period of time from 1 October 2021 to 31 December 2021. While the increase of 10 percentage points is a significant one from the previous arrangement, it is initially only for a short period of three months. As the proceedings are to be carried out annually in accordance with Article 28 of Regulation (EU) 2017/460, such issues can always be re-examined on the basis of new findings. As such, the calls from some market participants for the increase of the contingency mark-up to be evaluated and more closely based on actual interruptions can already be met under existing procedural law.

56 The increase also takes account of the fact that, as of 1 October 2021, the implementation of the KAP+ procedure will mean that about two thirds of the firm FZK offered by the transmission system operators on the entry side will no longer be provided by the physical network infrastructure alone.

57 The ruling chamber further considered the fact that any increase in the contingency mark-up results in a rising reference price for FZK that has to be borne by all network users. It must also be taken into account mathematically and practically that the increased contingency mark-up will lead to an increase in the permissible leeway for tariffs of conditional, firm capacity products at interconnection points due to the intended arrangement in the REGENT 2021 determination (BK9-

19/610), which sets out that discounting must not reduce capacity tariffs for bFZK and DZK to below the capacity tariff for the completely interruptible standard capacity product with the lowest discount at this point. The range for the conditional, firm capacity products is still to be limited at the upper end by the FZK and at the lower end by the uFZK product. However, this range will be broader as of 1 October 2021 because of the higher uFZK discount.

58 Some market participants confirmed these consequences. Some respondents believed that the increase of the contingency mark-up to 20 percentage points would raise the risk of reduced market liquidity, competitive disadvantages and costs being shifted from one group of network users to another.

59 If this leeway were to be fully made use of, it would lead to an indicative tariff increase of 3.9% (with an indicative reference price of €3.67 per kWh/h/a rather than €3.53 per kWh/h/a; explanations are included in the REGENT 2021 determination about the systematic deviation of the indicative reference price of €3.67 per kWh/h/a from the probably lower reference price that will actually be published by the transmission system operators for the fourth quarter of 2021). These figures relate to the new, single German market area (THE) based on the assumption that the leeway will be fully made use of for all capacity products at H-gas interconnection points (including bFZK and DZK). In these calculations, the ruling chamber has already taken account on an indicative basis of a corresponding amendment to the BEATE 2.0 determination (BK9-18/608, ruling of 29 March 2019) with regard to H-gas points, although these indicative effects are only marginal (about €0.01 per kWh/h/a for the reference price). This indicative calculation does not prejudice the actual amendment to the BEATE determination, which will be the subject of separate determination proceedings. However, this increase is still within a range that is not so extreme that issues of falling liquidity would provide a conclusive argument against a corresponding increase in the contingency mark-up, particularly as it would be accompanied by expanded discounting leeway for conditional, firm capacity products that should reduce the much-discussed volume risk (see Article 7(d) of Regulation (EU) 2017/460), if this were to occur in the future. Moreover, if the increased contingency mark-up should turn out not to be appropriate, it could be adjusted in the course of the annual decisions in accordance with Article 28 of Regulation (EU) 2017/460.

60 Taking into account the responses to the consultation, the ruling chamber views these effects as still moderate, particularly as the indicative tariff increase calculated in the preceding paragraph is based on the assumption that full use will be made of the discount range for all capacity products at interconnection points (including bFZK and DZK). However, in practice the maximum discount range is not currently used by all transmission system operators. The ruling chamber therefore considers that the actual tariff increase might turn out to be lower than the indicative calculation.

61 In this determination, the ruling chamber has increased the contingency mark-up as of 1 October 2021 with regard to the interconnection points in the H-gas network. The BEATE 2.0

determination (BK9-18/608, ruling of 29 March 2019) sets out a contingency mark-up of 10 percentage points for the period after 1 October 2021 as well with regard to the other points of the transmission system operators (mostly storage points and internal order points) and distribution system operators with entry-exit systems. The ruling chamber intends to open proceedings in the near future to hold a consultation on the increase of the contingency mark-up to 20 percentage points for the other points well. The ruling chamber has thus taken consideration of the calls to this effect in the responses received. However, this is not the subject of these proceedings.

62 In determining the contingency mark-up of 10 percentage points (in the L-gas network) and 20 percentage points (in the H-gas network), the ruling chamber has also taken into account that, even if a discount of 10 or 20 percentage points, respectively, were not sufficient in individual cases to cover the costs of an interruption completely, it would still be more than sufficient especially considering the entire trading portfolio.

63 In the view of the ruling chamber, the contingency mark-up of 10 percentage points (in the L-gas network) and 20 percentage points (in the H-gas network) is also an adequate means of taking into account any inaccuracies arising from not assessing re-nominations as interruptions for the calculation of the probability of interruption. It is true that it might be possible to assume that such re-nominations, which are undertaken by the network user at the request of the transmission system operator for the very purpose of not being interrupted, do at least partially correspond to actual interruptions in terms of their effect from the perspective of the transmission system operator. However, the ruling chamber is of the opinion that it would be disproportionate to make a general requirement of every transmission system operator to factor the "involuntary" re-nominations into the calculation of the probability of interruption of the respective entry and exit points. The practice of carrying out interruptions and re-nominations is not dealt with in the same way by all market participants. Owing to the way they process data, some market participants cannot class re-nominations as interruptions following the announcement of an interruption but can only distinguish between an actual interruption and a re-nomination, whether voluntary or not. A determination requiring network operators to record "involuntary" re-nominations only, and not voluntary ones, would cause great difficulties for some network operators and their electronic data-processing systems. Any effects resulting from this non-consideration in the form of "too low probabilities of interruption" will in fact be absorbed as a precaution by the contingency mark-up of 20 percentage points.

b. Adjustment factor *A*

64 As well as *Pro*, *A* is the other factor in the calculation of the ex-ante discount. *A* is the adjustment factor which is set or approved by the regulatory authority in accordance with Article 41(6)(a) of Directive 2009/73/EC and pursuant to Article 28 and that reflects the estimated economic value of

the type of standard capacity product for interruptible capacity. The ruling chamber sets the value of *A* for all standard capacity products at 1. This complies with Article 16(2) of Regulation (EU) 2017/460, pursuant to which *A* must be calculated for each, some or all interconnection points and must be no less than 1. While Article 16(2) of Regulation (EU) 2017/460 provides for the possibility of estimating the economic value of each standard capacity product to calculate *A*, The ruling chamber takes the view that this estimation is neither necessary nor appropriate. An estimate relating to standard capacity products would not take into account the fact that the adjustment factor would have to have very different economic values depending on the type of network user and the purpose of the booking. In this case, differentiating purely by standard capacity product would not be an appropriate way of forming an average. There is no indication that applying the *Pro* factor in conjunction with the contingency mark-up of 10 percentage points (in the L-gas network) or 20 percentage points (in the H-gas network) would lead to the calculation of inappropriate discounts, which would require adjustment using the adjustment factor *A*.

65 The suggestion from traders that the calculation formula should be adjusted so that the adjustment factor is increased from 1 to 2 and, in turn, the contingency mark-up is halved is mathematically understandable. However, the explanations in the consultation response show that risk costs increase in a linear manner. It is therefore unclear why the value of capacity should fall disproportionately. As explained above, the ruling chamber assumes that a discount of at least 10 percentage points (in the L-gas network) or 20 percentage points (in the H-gas network) is more than sufficient, especially when taking into account the whole portfolio. Also given the fact that the calculation formula used in the past worked well for the majority of market participants, the ruling chamber does not currently see any need for an adjustment. The financial strain on affected traders will be additionally relieved by the increase in the contingency mark-up to 20 percentage points in the H-gas network as of 1 October 2021, so it is not necessary to further adjust the adjustment factor.

66 The explanation of the effects of capacity changes on multipliers given in margin number 39 of the determination of 27 May 2020 applies accordingly to the change of an interruptible standard capacity product. In this case, too, the calculation of a discount (including its level) depends on the facts at the time the contract was concluded. The discount is not subsequently lost if an interruptible standard capacity product is converted into a firm one. It remains unchanged for the period that has already expired. However, for the firm capacity product that is then booked, the network user must pay the tariff for a firm standard capacity product without the discount that results from the probability of interruption, plus a multiplier where applicable.

67 The discounts for the period from 1 October 2021 to 31 December 2021 are set out in Annex II.

4. Order for payment of costs

68 Regarding costs, a separate notice will be issued as provided for by section 91 EnWG.

5. Public notification

69 Since the determination is issued in relation to all German transmission system operators within the meaning of section 3 para 5 EnWG, the ruling chamber is giving public notification of the determination in place of service pursuant to section 73(1) sentence 1 EnWG in accordance with section 73(1a) sentence 1 EnWG. According to section 73(1a) sentence 2 EnWG this public notification is effected by publication of the operative part of the determination, the notification of appellate remedies and a brief statement that the decision in full has been published on the regulatory authority's website in the Bundesnetzagentur's Official Gazette. In accordance with section 73(1a) sentence 3 EnWG the determination is considered to have been served on the day on which two weeks have elapsed since the date of public notification in the regulatory authority's Official Gazette.

6. Annexes

Annex II forms part of this decision.

Notification of appellate 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).

Bonn, 11 September 2020

Chair	Vice Chair	Vice Chair
Dr Christian Schütte	Dr Ulrike Schimmel	Roland Naas

Trading Hub Europe (THE)							
			$Di_{ex\text{-}ante}$				
Flussrichtung am Netzkopplungspunkt Flow direction at connection point	Name des angrenzenden Marktgebietes Name of adjacent market area	Gasqualität Gas quality	untertägige Kapazität within-day capacity	Tageskapazität daily capacity	Monatskapazität monthly capacity	Quartalskapazität quarterly capacity	Jahreskapazität yearly capacity
Entry	Czech Balancing Zone	H-Gas	21%	21%	21%	21%	21%
Exit	Czech Balancing Zone	H-Gas	21%	21%	21%	21%	20%
Entry	Austrian Balancing Zone	H-Gas	21%	21%	21%	21%	20%
Exit	Austrian Balancing Zone	H-Gas	23%	22%	21%	21%	21%
Entry	Voralberg	H-Gas	20%	20%	20%	20%	20%
Exit	Voralberg	H-Gas	20%	20%	20%	20%	20%
Entry	VIP Kiefersfelden-Pfronten	H-Gas	20%	20%	20%	20%	20%
Exit	VIP Kiefersfelden-Pfronten	H-Gas	20%	20%	20%	20%	20%
Entry	Belgian and Luxembourg Balancing Zone	H-Gas	20%	20%	20%	20%	20%
Exit	Belgian and Luxembourg Balancing Zone	H-Gas	21%	21%	21%	21%	20%
Entry	Dutch Balancing Zone	H-Gas	21%	20%	20%	20%	20%
Exit	Dutch Balancing Zone	H-Gas	21%	21%	21%	20%	20%
Entry	Dutch Balancing Zone	L-Gas	11%	11%	11%	11%	11%
Exit	Dutch Balancing Zone	L-Gas	11%	11%	10%	10%	10%
Entry	Danish Balancing Zone	H-Gas	21%	21%	20%	20%	20%
Exit	Danish Balancing Zone	H-Gas	21%	20%	20%	20%	20%
Entry	Norwegen	H-Gas	21%	21%	21%	21%	20%
Exit	Norwegen	H-Gas	20%	20%	20%	20%	20%
Entry	RC Thayngen-Fallentor	H-Gas	20%	20%	20%	20%	20%
Exit	RC Thayngen-Fallentor	H-Gas	20%	20%	20%	20%	20%
Entry	RC Basel	H-Gas	20%	20%	20%	20%	20%
Exit	RC Basel	H-Gas	20%	20%	20%	20%	20%
Entry	Wallbach	H-Gas	20%	20%	20%	20%	20%
Exit	Wallbach	H-Gas	21%	21%	21%	20%	20%
Entry	PEG North	H-Gas	20%	20%	20%	20%	20%
Exit	PEG North	H-Gas	21%	21%	20%	20%	20%
Entry	Polish E-gas Balancing Zone	H-Gas	20%	20%	20%	20%	20%
Exit	Polish E-gas Balancing Zone	H-Gas	20%	20%	20%	20%	20%
Entry	YAMAL (TGPS) Pipeline	H-Gas	20%	20%	20%	20%	20%
Exit	YAMAL (TGPS) Pipeline	H-Gas	20%	20%	20%	20%	20%
Entry	Russland	H-Gas	21%	21%	20%	20%	20%
Exit	Russland	H-Gas	20%	20%	20%	20%	20%