

Information on submitting an application under section 28b(1) of the Energy Industry Act

– First-time application –

I. General requirements

1. Submit the application documents for the procedure, including the necessary expert opinions, in both German and English. Insofar as these documents contain trade and operating secrets, please submit an additional set of documents in each language with the trade and operating secrets either removed or blacked out; this additional set is intended for the Member States concerned and the traceability of the documents must be ensured.
2. The application and the necessary supporting documentation must be received by the Bundesnetzagentur/ruling chamber by 13 January 2020.
3. First, please enter the details of the person submitting the application. Then describe the pipeline project in detail, specifically the gas pipeline between Germany and a third country. Article 49a of Directive 2009/73/EC provides for the possibility of derogation with respect to gas transmission systems between a Member State and a third country. The object of the examination, and thus also the object of the applicant's presentation, is the pipeline in its entirety¹.

Please also take the following points into account for the purposes of a general project description:

- a. presentation of the applicant, including name, position in the enterprise, name of the enterprise, enterprise's registered place of business, shareholders and group structure, excerpts from registers;
- b. detailed presentation of the connection point;
- c. documents regarding the applicant's corporate governance;
- d. location/route of the pipeline;
- e. connected gas fields/sources;
- f. the pipeline's capacity;
- g. volumes transported (volumes planned may be entered);
- h. investment volume;

¹ Any possible decision on derogation in accordance with Article 49a of Directive 2009/73/EC or section 28b of the Energy Industry Act will only be taken with respect to the specific section of a gas transmission system located within the territory and territorial waters of the Member State.

- i. term of investment (the useful life in economic and technical terms);
- j. presentation of the pipeline financing and of the economic concept;
- k. date of completion and of commissioning of the pipeline;
- l. presentation of the actual use of, or the concept for the use of, the pipeline;
- m. presentation of the marketing strategy, the marketing of capacity and the existing capacity agreements for the pipeline;
- n. the users of the pipeline.

In addition, demonstrate that the pipeline was completed prior to 23 May 2019. Provide suitable documentation as evidence showing that completion was as of the relevant date. Supporting documentation may include technical expert opinions or location plans, acceptance certificates, or evidence or notifications required by statute or in the secondary provisions of the necessary approvals of the competent authorities. Insofar as commissioning has already taken place, this must likewise be demonstrated with suitable documentation (for example the notifications required vis-à-vis the licensing or supervisory authorities).

4. Possible duration of derogation (section 28b(4) Energy Industry Act)

State the period for which the derogation is being requested and explain the reasons why on the basis of one or more objective criterion/criteria (see below), under section 28b(1) sentence 1 para 3 Energy Industry Act. The duration of the derogation is limited to a maximum of 20 years.

An extension of the derogation beyond the period stated above is possible by virtue of section 28b(2) Energy Industry Act where justified. A relevant application in addition to the necessary evidence must be submitted to the Bundesnetzagentur no later than one year prior to the expiration of the derogation granted.

5. Extent of the derogation

Please provide details of the regulatory duties (in particular unbundling duties under sections 8 to 10 Energy Industry Act; arrangements regarding network access in sections 20 to 28 Energy Industry Act) for which derogation is being requested.

II. Special requirements

1. The object of the application (section 28b(1) sentence 1 para 1 and para 2 Energy Industry Act)

Demonstrate that the object of the application concerns an existing pipeline between Germany and a third country whose first connection point with the

European gas transmission system pursuant to section 28b(1) sentence 1 para 1 Energy Industry Act is located in Germany.

2. Objective criteria for a derogation (section 28b(1) sentence 1 para 2 Energy Industry Act)

Provide evidence that an objective criterion exists pursuant to section 28b(1) para 2 Energy Industry Act. In support of this, also submit the expert opinions listed in section 28b(2) Energy Industry Act. The submission of one objective criterion is sufficient. The possibility of providing evidence of and listing several objective criteria is not excluded. The list of criteria in section 28b(2) Energy Industry Act is not exclusive. Therefore it is also conceivable that the application be based on a criterion not listed. Any such criterion must be comparable to the criteria listed in section 28b(1) sentence 1 para 2 Energy Industry Act. In any such case, please also demonstrate comparability with the criteria listed in section 28b(1) sentence 1 para 2 Energy Industry Act.

To demonstrate the existence of one or more objective criterion or criteria, the period of validity of the requested derogation must always be considered (from the date of being granted for up to 20 years, section 28(4) Energy Industry Act).

a. The possibility of the investment being paid back (section 28b(1) sentence 1 para 3(a) in conjunction with section 28b(2) Energy Industry Act.

Please demonstrate in a suitable and transparent manner whether and to what extent the requested derogation enables payback of the pipeline investment. Include with the application the expert opinions prepared by sufficiently qualified and independent experts, which should also give an opinion on whether secondary conditions could help meet the requirements stated above.

Provide separate evidence of the expertise and independence of the experts (section 28b(2) sentence 4 Energy Industry Act).

With respect to the possibility of payback of the investment, please give details of the situation when applying or when not applying the regulatory regime and, in doing so, demonstrate to what extent the requested derogation protects the investment and the investor's justified (provide evidence) financial interests. This may take the form of a payback calculation in line with standard market practices. Please illustrate, by using appropriate scenarios, the effect the requested derogation has on the outcome of this calculation. In doing so, please also address any possible risk regarding the use of capacity.

b. Security of supply criteria (section 28b(1) sentence 1 para 3(b) in conjunction with section 28b(2) Energy Industry Act)

Please provide evidence of the pipeline's positive contribution to security of supply in an appropriate and traceable manner. Include with the application the

expert opinions prepared by sufficiently qualified and independent experts, which should also give an opinion on whether secondary provisions could help meet the requirements stated above.

Provide separate evidence of the expertise and independence of the experts (section 28b(2) sentence 4 Energy Industry Act).

With respect to security of supply, please address the diversification of supply sources and the acquisition of new transport routes.

The following information, in particular, should be prepared by experts:

- details of the current and expected ratio of supply and demand on the national/regional markets that are to be supplied, including an estimate of what part of market demand can be covered by the project;
- grounds for the project dimensional design (total capacity) based on a supply and demand analysis and taking account of existing supply routes.

3. No negative impact on competition or security of supply from the derogation (section 28b(1) sentence 1 para 4 in conjunction with section 28b(2) Energy Industry Act)

Provide evidence that the granting of a derogation would not have a negative impact on competition in and the effective functioning of the internal market for natural gas in the European Union and that security of supply in the European Union would not be affected. Include with the application the expert reports prepared by sufficiently qualified and independent experts, which should also give an opinion on whether secondary conditions could assist in meeting the requirements stated above.

The following information, in particular, should be prepared by experts:

- derivation, delimitation and definition of the relevant product market(s) and the relevant geographical market(s);
- an illustrative comparison of the situation with and without the derogation from regulation of the pipeline to be decided upon; in this respect, and in particular, there should be an expert assessment of how secondary provisions (specifically the "use it or lose it" rule, trading on the secondary market, capacity release program or gas release program) can counteract, as necessary, the hoarding of capacity or a dominant market position for booking shippers on the relevant market.