Bundesnetzagentur

- Ruling Chamber 7 -

Contains trade and business secrets!

Decision

Ref: BK7-22-129

In the administrative proceedings

concerning: application for exemption from regulation

from Deutsche Grüngas und Energieversorgung GmbH, Emsstraße 20, 26382 Wilhelmshaven, legally represented by its management board,

the applicant,

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 21 March 2024:

1. The capacity created at the liquefied natural gas (LNG) facility at the Wilhelmshaven site, Am Tiefen Fahrwasser, Voslapper Groden Nord in 26388 Wilhelmshaven (hereinafter referred to as the Wilhelmshaven LNG facility) 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, Deutsche Grüngas und Energieversorgung GmbH, in accordance with the following:

Bundesnetzagentur für
Elektrizität, Gas, Telekommunikation,
Post und Eisenbahnen

Headquarters: Bonn
Tulpenfeld 4
53113 Bonn
☎ +49 (0)2 0228 14-0

Fax Bonn
+49 (0)228 14-8872

Email
poststelle@bnetza.de
Internet
http://www.bundesnetzagentur.de

Please note new bank details
Bundeskasse Weiden
Dt. Bundesbank – Filiale Regensburg
BIC: MARKDEF1750
IBAN: DE08 7500 0000 0075 0010 07

a) The exemption applies to an annual throughput capacity of 15 billion cubic metres (bn m^3/a) for the importation, offloading, temporary storage and regasification of LNG within the meaning of section 3 para 26 EnWG or liquefied synthetic natural gas (SNG) within the meaning of section 3 para 26 EnWG in conjunction with Article 1(2) of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (Directive 2009/73/EC).

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

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

3. The applicant is required to levy tariffs on users of the exempt infrastructure.

4. 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 at most 1bn m^3/a of natural gas or synthetic methane per year of throughput capacity.

(4) The minimum booking duration shall be five years.

(5) The booking year is the calendar year.

b) Long-term initial allocation of capacity

(1) A period of at least 10 working days shall be allowed for the submission of booking requests for the long-term initial allocation of capacity. All requests received within this booking period shall be considered as having been received at the same time. The start of the initial allocation shall be made known, drawing attention to the requirement for registration, at least 10 working days in advance. The registered 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 bookers. Booking requests with a longer booking duration and/or a larger booking volume can be given priority in the allocation.

(3) The basic tariff applied to the initial allocation shall refer to bookings with a duration of 20 years (basic service product). For bookings with shorter durations, it is permissible to impose mark-ups on the basic tariff depending on the duration. For contracts with a duration of 15 to 19 years, mark-ups may not be more than 10% of the basic tariff. The mark-ups shall be made known to all potential users before the initial allocation.

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.

5. 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 enable the slot holder to unload at least 175,000 m^3 of LNG or liquefied SNG.

d) At least 12 slots per year shall be provided for the short-term allocation.

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

f) The slots shall initially be allocated in an ascending clock auction or another non-discriminatory, transparent, multi-stage auction procedure. The start of the auction shall be announced publicly four weeks in advance.

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

(1) date for the unloading slot

(2) arrival window

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

(4) available regasification capacity

(5) regasification period

(6) starting price for the slot (see operative part 5. h))

(7) price step (see operative part 5. i)).

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

$$\text{max. start price}_{\text{K-Slot}} = \text{basic tariff} \times \frac{\dot{V}_{\text{K-Slot}}}{\dot{V}_{\text{basic tariff}}} \times 600 \frac{\text{Nm}^3}{\text{m}^3\ \text{LNG}} \times 10.6 \frac{\text{MWh}}{1000\ \text{Nm}^3} \times 1.1$$

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 ("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 applicant can deviate from the above requirements for the slot product in the non-yearly allocation of slots as follows:

   (1) The fixed minimum unloading amount of LNG or liquefied SNG for a non-yearly slot can be smaller in individual cases in derogation of operative part 5. 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 5. 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 5. h). Further fees or costs (such as a handling fee) must not be charged.

n) Flexibilisation instruments can be applied as part of the short-term marketing. They must be applied 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 and/or in the so-called non-regulated area. The applicant shall state the reasons why capacity has not been marketed in the non-yearly short-term allocation of capacity set aside.

p) When landing liquefied, renewable SNG, the customer shall receive a discount of 5% on the tariff for the basic product based on the proportion of SNG in the total volume offloaded. The renewable SNG must meet the German and European definitions of

renewable gas valid at the time of offloading. The slot holder is responsible for providing evidence of this.

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

   a) Capacity holders can transfer all or part of their capacity to other registered users, with "part" referring to volume and duration.

   b) The capacity holder shall inform the applicant of the volume, duration and timing of the trading on the secondary market in good time before the trading on the secondary market. The applicant shall inform all market participants registered with it without undue delay about the scope and timing of trading on the secondary market that is due to take place. This is without prejudice to further rules and transparency requirements from other legal acts, to the extent that they apply to LNG facilities that are exempt from regulation.

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

   d) Where capacity has been transferred successfully, the original capacity holder shall be freed from the relevant rights and obligations arising from the capacity contract vis-à-vis the applicant for the period and scope of the capacity transfer. In other cases, in particular in which the transfer is only temporary, the terminal operator 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 five days before the date of the unloading slot whether and to which registered user an unused slot has been transferred. No secondary marketing shall take place during a use it or lose it (UIOLI) procedure (see operative part 7).

7. 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 20 days before the date of a particular unloading slot, a user has not notified a landing or states that it will not use the

unloading slot and does not name another registered user to whom the unloading slot has been transferred.

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 unloading slot from the 19th day preceding the date of the slot. Unloading 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 unloading 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 unloading slot not marketed to the original holder at the end of three days. However, this release from the rights and obligations does not include the original capacity holder's payment obligations vis-à-vis the applicant. Any marketing revenues made must be paid to the original capacity holder. The applicant may charge the original capacity holder an appropriate fee for the marketing.

8. 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 3. to 7. being affected.

9. 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 2. to 7. 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 3. to 7.; or

c) the applicant is not separate from the system operation of Open Grid Europe GmbH or that of a third-party system operator in whose system the infrastructure is built as required by sections 8 to 10e EnWG after the LNG facility that is the subject of this application has been put into operation; or

d) the European Commission Decision on this exemption decision is amended, revoked or becomes ineffective.

10. 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.

11. The exemption applies subject to the condition that construction of the LNG facility is started no later than two years after the European Commission Decision is issued and the LNG facility is put into commercial operation no later than five years after the European Commission Decision is issued, 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 both the date of the start of construction and the date of the start of commercial operation without undue delay in writing to the ruling chamber.

12. The exemption also applies in the event that ownership of the Wilhelmshaven 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.

13. In other respects, the application is rejected.

14. The decision in accordance with section 28a(3) sentence 4 EnWG is subject to a final decision by the European Commission in accordance with Article 36(9) of Directive 2009/73/EC. The exemption decision shall be amended or withdrawn where necessary in accordance with such a final decision. Sections 48 and 49 of the Administrative Procedure Act (VwVfG) remain unaffected.

15. 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 planned LNG facility in Wilhelmshaven that is the subject of this application (hereinafter referred to as "Wilhelmshaven LNG facility"), which is to be constructed and operated as an onshore import facility for LNG and SNG at the Wilhelmshaven site.

2 The planned Wilhelmshaven LNG facility is to be located on the site of the also planned WH2V Wilhelmshaven Green Energy Hub ("the hub") being constructed by Tree Energy Solutions GmbH (TES). The Wilhelmshaven LNG facility to be constructed by the applicant is part of the future hub.

3 The hub is being built on a 145-hectare site in the region of Voslapper Groden-Nord, Wilhelmshaven. The Wilhelmshaven LNG facility will take up about 260,000 m^2 of this site (plot 19, sub-plot 1/11 of the district of Sengwarden). TES, the landowner, and the applicant have concluded a leasing contract for this part of the site [redacted]

4 The address of the Wilhelmshaven LNG facility is: Am Tiefen Fahrwasser 12, 26388 Wilhelmshaven.

5 The applicant plans for the Wilhelmshaven LNG facility to have an annual throughput capacity of 15bn m^3/a.

6 The planned Wilhelmshaven LNG facility will have four jetties, each designed for the largest type of LNG ship currently available, the Q-Max (266,000 m^3). The planned Wilhelmshaven LNG facility will also have two storage tanks, with a working volume of about 220,000 m^3 each, and a regasification facility. Users of the facility will be offered different services. These are planned to be: a basic service product; service products with longer or shorter durations than the basic service product; service products with longer storage times than the basic service product; and a short-term service product. Regasified LNG/SNG will be injected into the transmission system of Open Grid Europe GmbH (OGE) through the already completed Wilhelmshaven transmission link WAL II.

7 The hub will be home to two different business ventures in the form of the applicant's planned LNG facility (in what is known as the "regulated sector") and TES' energy park (the "non-regulated sector") and will offer various services related to LNG, CO_2 and green hydrogen in clearly distinguishable areas of activity.

8 The Wilhelmshaven LNG facility will be an LNG facility for the loading/offloading, temporary storage, regasification and subsequent injection into the transmission system of LNG and SNG, including electric natural gas (e-NG). The applicant further plans the simple offloading and redistribution of LNG for third parties, including TES, in the "non-regulated" service sector. [redacted]

[redacted].

9 TES, for its part, plans to undertake the following services/business activities in the hub: storage of LNG and regasification of it without injection into the gas system (directly connected final customers); conversion of methane into hydrogen; electricity generation from regasified methane; the capture, liquefaction, temporary storage and loading of carbon dioxide by ship, pipeline and train; and hydrogen generation by electrolysis. TES will only provide services in the "non-regulated sector". Separate storage tanks and also regasification facilities can be set up for the activities in the "non-regulated sector". These will be technically separate from the planned LNG facility. The "non-regulated sector" is to have a connection to the hydrogen pipeline system and the electricity transmission system but will not be connected to the natural gas transmission system.

10 The Wilhelmshaven LNG facility will in principle be able to receive liquefied SNG as well from the time it goes into operation. In line with the requirements of the LNG Acceleration Act (LNGG), the operation of the planned Wilhelmshaven LNG facility will be converted to the importation of climate-neutral hydrogen or derivatives, SNG or biomethane, by 2044 at the latest. It will therefore be possible to operate the facility beyond 2044.

11 The applicant was founded on 6 July 2022. The majority owner, with a 70% stake, is TES, while Netherlands Fortescue Future Industries Holdings B.V. (FFI) holds a minority stake of 30%.

12 TES is an undertaking focused on the use of green hydrogen on an industrial scale. Its main objective is to produce green e-NG from renewable electricity on a large scale and to liquefy it, load it onto ships, regasify it and then supply it, primarily to industrial customers. FFI is part of the Australian Fortescue Group, which is active in the areas of green technology, energy and metals. Neither TES nor FFI is currently active in the fields of transmission, distribution, operation of an LNG facility, storage, production or sale of natural gas.

13 The future owner and operator of the Wilhelmshaven LNG facility will be the applicant. The applicant's headquarters are at Emsstraße 20, 26382 Wilhelmshaven. The Wilhelmshaven LNG facility is currently due to start commercial operation in [redacted]

14 The applicant originally applied for 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 23 November 2022. However, during the course of 2023, factors including the volatility of the LNG market, demand for long-term LNG import capacity and possible future developments on the LNG/SNG market led to changes in the project planning and consequently the need to update the application.

15 The applicant therefore requested an amendment to the application in writing on 1 November 2023 and is now seeking an exemption from regulation under section 28a(1) and (3) EnWG in conjunction with Article 36 of Directive 2009/73/EC in relation to an annual

throughput capacity of 15bn m^3/a. The applicant submitted extensive documentation in connection with its application. The documentation included in particular information describing the project, the project planning and financing, the corporate structures and the facility's services. The applicant also provided an analysis of the investment risks and the impact on competition and security of supply. The applicant further submitted an expert opinion on the substitutability of LNG and SNG.

16 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 tariffs would be levied on users of the facility and that there would be no detriment to competition or to the effective functioning of the internal market in natural gas.

17 The application submitted by the applicant was initially incomplete. The applicant was therefore requested to submit missing documents and information in emails, letters and telephone calls, in particular on 23 November 2023, 12 January 2024, 23 January 2024, 30 January 2024 and 7 February 2024. The applicant met these requests, in particular in emails and letters dated 14 December 2023, 27 January 2024, 31 January 2024 and 15 February 2024.

18 The applicant requested

19 the granting of an exemption from the provisions of sections 20 to 26(1) EnWG and the LNGV issued on the basis of section 118a EnWG for the maximum annual throughput capacity of the planned LNG facility of 15bn m^3/a for a period of 20 years beginning with the date of the start of commercial operation.

20 The Bundeskartellamt and the regulatory authority of Lower Saxony were notified by email of the opening of proceedings on 1 December 2022.

21 The ruling chamber, having checked the documents for completeness, sent the application documents to the European Commission on 19 January 2024.

22 On 22 January 2024 the ruling chamber sent the applicant a written draft of rules and mechanisms for the management and allocation of capacity for the purpose of consultation. These included in particular requirements for the non-discriminatory long-term initial allocation, the short-term allocation of capacity on the basis of a reserve quota, trading on the secondary market, and a UIOLI procedure.

23 It had to be taken into account that the applicant had, in line with other exemption proceedings in which a similar course of action was taken (see European Commission Decision of 11 August 2022, C(2022) 5947 final, paras 14-15 and 52, on the exemption for the EemsEnergy

Terminal B.V. in Eemshaven), initiated and partially carried out a multi-stage expression of interest procedure on the allocation of long-term primary capacity before submitting this application on the basis of the existing rules and mechanisms from other exemption proceedings. Phase I (non-binding expressions of interest) and Phase II (binding long-term initial allocation of capacity and conclusion of heads of agreement)) of the expression of interest procedure were already completed in 2022 and led to heads of agreement (HoAs) with potential customers of the LNG facility. Phase III of the expression of interest procedure (conclusion of terminal use agreements) was still ongoing when the application was submitted in November 2023. It was aimed for this to be concluded [redacted] Specifically:

24 To determine booking interest and identify possible customers, the applicant first carried out a non-binding expression of interest procedure from 25 April 2022 to 25 May 2022 (Phase I). [redacted] undertakings then submitted expressions of interest amounting to [redacted] The requested capacity was for durations of [redacted].

25 The applicant subsequently carried out a binding expression of interest procedure for the binding, long-term, initial allocation of capacity and conclusion of HoAs with potential terminal users from 1 June 2022 to 10 November 2022 (Phase II).

26 In the course of Phase II, [redacted].

27 In the HoAs, the applicant has already drawn attention to the following conditions placed on binding bookings made under terminal use agreements:

- The applicant can unilaterally amend the contract terms and conditions that have to be changed as a result of the final decision of the Bundesnetzagentur on the rules and mechanisms for the management and allocation of capacity on the basis of the expression of interest procedure. The applicant can unilaterally amend the contract terms and conditions that have to be changed as a result of the final decision of the

Bundesnetzagentur and the European Commission on this application for exemption pursuant to Article 36(6) of Directive 2009/73/EG and section 28a EnWG.

- The applicant will carry out the initial allocation of long-term capacity under the expression of interest procedure again if necessary to meet the requirements of the Bundesnetzagentur given below.
- Final investment decision.

28 Phase III of the process to conclude terminal use agreements started in July 2022 and is currently ongoing. As already stated, the aim is to conclude terminal use agreements by the end of [redacted]

29 The ruling chamber has examined the rules and mechanisms for the management and allocation of capacity upon which the expression of interest procedure was based for any need for amendment. It considered amendments necessary, for example with regard to the minimum number of slots and the pricing of capacity allocated as part of the reserve quota, and informed the applicant of this with the abovementioned draft rules and mechanisms for the management and allocation of capacity in writing on 22 January 2024. The applicant responded to the draft in a letter of 31 January 2024, in particular on the return of unused capacity and possible mark-ups on the basic tariff for long-term primary capacity of less than 15 years.

30 The ruling chamber then drew up the final rules and mechanisms for capacity management and allocation and sent them to the applicant in a letter of 19 February 2024.

31 The ruling chamber held a consultation from 1 February to 15 February 2024. The regulatory authorities of the European Member States plus the regulatory authorities of the UK and Norway were given the opportunity to respond to the applicant's planned project during the consultation process. The regulatory authorities of Spain, Denmark and Sweden took this opportunity. No comments were made on the content of the planned LNG project.

32 The ruling chamber drafted a decision. The draft was sent to the applicant for consultation on 4 March 2024. The applicant was given the opportunity to comment in numerous letters, emails, telephone calls and meetings, most recently on 13 March 2024. The applicant responded to the consultation on the draft decision in a letter of 13 March 2024. The subjects of its letter were the start of construction and regasification capacity.

33 The ruling chamber submitted the draft decision to the Bundeskartellamt on 4 March 2024 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 as required by section 58(1) EnWG in an email on 18 March 2024.

34 The decision produced in agreement with the Bundeskartellamt was sent to the European Commission together with all the documents from the proceedings relevant to the decision on 21 March 2024 for comment and the final decision.

35 For further details reference is made to the files.

II.

36 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. The exemption was issued with the exercise of due discretionary powers and conditions and secondary provisions were attached.

37 Owing to the amount of information to be presented, the reasons for the decision are preceded by a structural overview:

1. Legal basis

38 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.

39 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

40 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

41 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

42 The provisions governing the procedure have been adhered to.

43 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 19 February 2024 before granting the exemption. The ruling chamber included in the congestion management rules contained therein, 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).

44 Taking account of the European Commission Decision of 11 August 2022 (C(2022) 5947 final), the applicant carried out an expression of interest procedure in 2022 (Phase I and Phase II, non-binding expressions of interest and binding long-term initial allocation of capacity and conclusion of heads of agreement) as set out in the third subparagraph of Article 36(6) of Directive 2009/73/EC. The expression of interest procedure was conducted on the basis of existing/known rules and mechanisms for the management and allocation of capacity from other exemption proceedings. In the first phase of the expression of interest procedure, all potential users of the infrastructure were able to indicate their interest in contracting capacity in a non-binding manner. In the second phase of the expression of interest procedure, the applicant concluded HoAs with those users that were still interested subject to the rules and mechanisms for the management and allocation of capacity determined by the ruling chamber. The applicant notified the ruling chamber of the results of this procedure in its application of 1 November 2023.

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

2.3. Involvement of other authorities

46 The regulatory authority of the federal state, in this instance Lower Saxony, was notified of the opening of proceedings in accordance with section 55(1) sentence 2 EnWG.

47 The participation of the regulatory authority of Lower Saxony 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).

48 The ruling chamber submitted the draft decision to the Bundeskartellamt in accordance with section 58(1) sentences 1 and 2 EnWG, giving the Bundeskartellamt the opportunity to provide a statement and with a view to obtaining the Bundeskartellamt's agreement. The Bundeskartellamt gave its agreement in an email of 18 March 2024.

49 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.

50 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 1 February 2024 to 15 February 2024. This gave the regulatory authorities of the Member States of the European Union and the regulatory authorities of the UK and Norway the opportunity to respond. No responses dealing with the content of the planned project were received.

51 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 originating from or ending in one or more third countries.

2.4. Hearing

52 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

53 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 decision BK7-07-013 of 27 August 2007). The applicant will have the role of operator of the planned LNG facility in future. Therefore, 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

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

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

55 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

56 The decision is also substantively lawful, because the prerequisites for exemption are met in the case of the Wilhelmshaven LNG facility. The planned facility in Wilhelmshaven 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 for the 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 tariffs 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 the management and allocation of capacity were defined before the exemption was granted (see section 3.8 below).

57 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).

3.1. Subject of the application

58 Under section 28a EnWG, LNG facilities, as major new infrastructure, can be exempted from regulation for a limited period of time. The facility in Wilhelmshaven that is planned by the applicant constitutes an LNG facility within the meaning of section 28a(1) EnWG (see sections 3.1.1., 3.1.2. and 3.1.3. below; re classification as major new infrastructure see section 3.3.).

59 The planned facility is a stationary, onshore facility for the importation, offloading, temporary storage and regasification of LNG and liquefied SNG (including e-NG) for subsequent injection into the transmission system (see application of 1 November 2023, page 6 and pages 8-9). The LNG facility will be one facility in a larger complex known as the WH_2V Wilhelmshaven Green Energy Hub, which will offer other LNG/SNG-related services in addition to those offered by the applicant, but not including the injection of regasified LNG/SNG into the transmission system (see application of 1 November 2023, pages 6-7 and letter of the applicant of 31 January 2024, page 5).

60 The LNG facility will have an annual throughput capacity of 15.0bn m^3/a of natural gas. It will have two LNG tanks with a planned total capacity of 440,000 m^3 (220,000 m^3 per tank), a regasification facility and an island jetty with four jetties designed for vessels up to 350 m long and 12.5 m deep (see project description of 27 November 2023, page 2). This will make it possible to offload Q-max tankers (266,000 m^3).

61 The applicant plans to finish constructing the LNG facility by [redacted] and to start commercial operation of it in the same year (see letter of 31 January 2024, page 1).

62 The facility will in principle be able to receive liquefied SNG as well in any proportion of volume to fossil LNG from the time it goes into operation. The bringing onshore and regasification of liquefied SNG is a firm part of the project plan and is to be increased gradually after the start of operation (see application of 1 November 2023, pages 4-5). Moreover, in line with the requirements of section 5 LNGG, the operation of the facility is to be fully converted to the importation of SNG/e-NG from 2044 (see applicant's letter of 14 December 2023, page 3).

63 The applicant plans as services in what it calls the "regulated sector" the offloading of LNG and liquefied SNG, their temporary storage, regasification and injection into the transmission system. The applicant plans as services of its facility in what it calls the "non-regulated sector" the offloading of LNG and further transmission of LNG without injection into the gas network. Other services, in particular those known as "small-scale" services, such as loading LNG onto tankers or bunkering vessels with LNG as fuel, will not be offered according to the applicant's current plans (see application of 1 November 2023, pages 7-8 and letter from the applicant of 31 January 2024, page 5).

64 In these proceedings, it was necessary to determine how the services were to be classified in regulatory terms in order to define the possible scope of the exemption. The applicant has comprehensibly demonstrated that its planned services in the "regulated sector" 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) and that liquefied SNG is in this regard equivalent to fossil LNG (see section 3.1.2 below). The services in the "non-regulated sector"/any small-scale services without

injection into the gas network are, by contrast, not subject to regulation and, as such, are not covered by the exemption (see section 3.1.3 below).

65 Specifically:

3.1.1. LNG facility

66 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.

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

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

69 The applicant's planned LNG facility in Wilhelmshaven 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.

In this instance, as explained in section 3.1.2 below, the fact that the applicant has stated that it plans to use the facility in Wilhelmshaven that is the subject of this application for the import of both LNG and liquefied SNG, including e-NG, is not an argument against classifying the facility as an LNG facility within the meaning of section 3 para 26 EnWG.

The applicant's intention to offer both "regulated" and "non-regulated" services and thus possibly to use parts of the facility, such as the jetties or storage tanks, for various of the abovementioned services is not an argument against classifying the facility as an LNG facility within the meaning of section 3 para 26 EnWG either.

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

as defined in section 3 para 26 EnWG. In addition, the purpose enables a distinction to be made from any storage functions and services that do not fall within the scope of the EnWG.

If the same storage tank is used for different storage purposes, it is decisive that a distinction can be made between the tank's different uses in order to enable the tank to be attributed to, for example, an LNG facility, a storage facility or the "non-regulated" service or small-scale sector.

70 The services and associated storage purposes planned by the applicant for the Wilhelmshaven LNG facility that is the subject of this applicant and described above are either attributable to the LNG facility or, as "non-regulated" services, are not subject to regulation, as explained in section 3.1.3 below.

3.1.2. Equivalence of LNG and SNG for the purpose of an LNG facility

71 A facility that imports, regasifies and injects into the transmission system liquefied SNG, including e-NG, is also covered by the term "LNG facility". Specifically:

72 In accordance with the wording of Article 1(2) of Directive 2009/73/EC, the rules relating to LNG also apply in a non-discriminatory way to other types of gas in so far as such gases can technically and safely be injected into, and transported through, the natural gas system. This applies to SNG, including e-NG, as the explanation below shows.

73 SNG is the general term for artificially produced methane, as opposed to methane with a biological origin, and may have various sources. e-NG, which the applicant plans in future to be a core product of the facility in Wilhelmshaven that is the subject of this application, is a type of SNG denoted by its source: e-NG is a chemical combination of carbon and hydrogen made in a methanation process by combining "green" hydrogen (hydrogen generated by water electrolysis with electricity from renewable sources) and recycled carbon dioxide (chemical formula CO_2). SNG, by contrast, may be derived from various sources (such as synthetic gas from coal gasification as well as the methanation of hydrogen and CO_2) (see applicant's letter of 14 December 2023, page 1).

74 The applicant plans to inject in SNG, in particular e-NG, in addition to LNG continually from the start of operation of the planned facility. The LNGG sets out that approvals for LNG facilities must be limited to 31 December 2043 at the latest in line with Germany's climate targets. Facilities can only be operated beyond this date if they are used for climate-neutral hydrogen and its derivatives or SNG or biomethane (section 5 LNGG). As the duration of the exemption for the Wilhelmshaven LNG facility goes beyond 2043 in this case, the applicant plans to have converted the facility fully to SNG, including e-NG, by 1 January 2044 at the latest.

75 In its letter of 14 December 2023, the applicant states that e-NG, like other types of SNG, consists of nearly pure methane, which is practically identical with natural gas, so it can seamlessly replace fossil molecules. It is therefore possible to inject regasified e-NG, like all other types of SNG, into the transmission system safely and without technical restrictions. The injection of regasified SNG, including e-NG, into the gas supply system must meet applicable legal requirements as to the gas quality and compatibility as part of the network access. It is not part of these proceedings to monitor compliance with the legal requirements regarding the relationship between shipper and network operator.

76 A facility that is (also) operated with SNG, including e-NG, as "another type of gas" within the meaning of Article 2 point 11 of Directive 2009/73/EC (and Article 2(3) of the new Gas Directive as part of the EU Gas Package 2024 in its consolidated draft of 29 February 2024) thus comes under the term "LNG facility" for the purpose of an interpretation of section 3 para 26 EnWG that conforms with the Directive. An exemption from regulation pursuant to section 28a EnWG and Article 36 of Directive 2009/73/EC is possible in this case for an LNG facility (also) with regard to liquid SNG, including e-NG.

3.1.3. Delimiting non-regulated/small-scale services

77 The storage of LNG, including liquefied SNG, for the purpose of redistribution in liquid form in the "non-regulated" service sector or for any small-scale services is not subject to regulation and is therefore not covered by the exemption. This conclusion is based on the following considerations.

78 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 sector.

79 The applicant intends to offer "non-regulated" services in its planned facility, in this case the offloading and further distribution of LNG without injection into the transmission system (see application of 1 November 2023, page 6). If it is necessary to store the LNG put into the tank(s), this temporary storage will be for the purpose of further transmission and not for the purpose of regasification and subsequent injection into the gas network.

80 Any temporary storage for the purpose of further transmission or redistribution of the LNG in the "unregulated" service sector does not constitute storage as covered by the regulatory provisions of the EnWG. This is because storage tanks in the "unregulated" service sector or small-scale sector 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 possible in this instance, for example for "unregulated" services/any small-scale services, a pipeline connection and therefore the applicability of the EnWG may 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 apply to such storage tanks for the abovementioned service sector that are connected to a gas supply network.

81 This is supported by the wording of section 3 para 26 and para 19c EnWG: the distinction between an LNG facility and a storage facility is explicitly based on the storage purpose. Temporary storage that is necessary for the regasification process and subsequent delivery to the transmission system is attributable to an LNG facility as defined in section 3 para 26 EnWG. A storage tank that is solely used for "storage" (re the legislative wording "storage": for example Hellermann, in: Bourwieg/Hellermann/Hermes: Energiewirtschaftsgesetz, 4th ed 2023, section 3, margin no 52) is attributable to a regulated storage facility within the meaning of section 3 para 19c EnWG. If the possible (temporary) storage of LNG is, as in this instance, for the purpose of further transmission or redistribution, the “unregulated”/small-scale sector 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 and thus, in the absence of statutory arrangements, is not subject to regulation under the EnWG

82 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.

83 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 and greenhouse-gas neutral as possible (see section 1(1) EnWG). However, the storage of LNG for further transmission without injection into the gas supply system specifically serves the non-network-based provision of LNG and not the network-based supply.

84 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 “unregulated”/small-scale sector) 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 does not serve the purpose of network-based supply for the general public.

85 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.

86 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 a network-based supply for the general public. However, the applicant has stated plausibly that it intends to maintain separate financial accounts for the use of "regulated" and "non-regulated" services in order to avoid cross-subsidisation (see application of 1 November 2023, page 7). There is therefore no evidence in this instance of the risk of cross-subsidisation as described above.

87 In conclusion, the use of LNG in the "non-regulated"/small-scale sector is not subject to regulation under the EnWG.

3.2. Enhancement of competition and security of supply

88 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.

89 The applicant satisfied the ruling chamber of compliance with all the criteria through the submission of the Frontier Economics report "Economic report in the context of the application for exemption for the planned LNG/SNG terminal in Wilhelmshaven – analysis of the investment risks and the impact of the terminal on security of supply and competition commissioned by Tree Energy Solutions GmbH" (Frontier Economics, economic report). As well as the security of supply analysis and the competition analysis for the upstream wholesale market, the economic report includes the competitive analysis and assessment of the downstream market levels. In other exemption proceedings, the European Commission considered it necessary to look at the whole downstream market in order to permit an assessment of the competitive situation as a whole.

90 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 therefore 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.

91 In carrying out the analyses, Frontier Economics focused on the current situation on the northern European and on the German gas 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 of and demand for natural gas. Forecasts about the development of the gas market are thus subject to considerable risks (see Frontier Economics, economic report, page 34).

92 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 22 February 2024). 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 planned to lead to a long-term reduction in natural gas consumption (see Frontier Economics, economic report, page 28). Moreover, the current damage to the Nord Stream and Nord Stream 2 pipelines, along with Russia's decision to stop deliveries via the undamaged pipeline systems as well, mean there is no longer any direct supply to the German market.

93 Considerable changes in the provider structure of natural gas may be observed. Domestic gas production will reduce drastically, both in the northern 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 37 and 43). The reduction in north-west Europe is partly due to the reduction of natural gas production in the Netherlands. The end to production of the Groningen gas field as of 1 October 2023 means 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. The decline in gas production in the UK, as the gas fields there are increasingly depleted, is a further reason for the decline in regional natural gas production (Frontier Economics, economic report, page 37). As far as the German market is concerned, it is in particular the reduction/cessation of gas production in the Netherlands that is leading to the loss of a source of gas that has been important in the past. It is therefore to be expected that the German market will see lower imports from the Netherlands to Germany. The calculations and analyses of security of supply and competition are therefore based on a complete end to exports from the Netherlands by 2030 (see Frontier Economics, economic report, page 43).

94 The calculations and analyses for suppliers of pipeline gas to north-west Europe are subject to further restrictions. For example, it is assumed that in the short term, Norwegian gas will make a significant contribution to supplying north-west Europe, including Germany. However, after a short-term rise in Norwegian gas exports to Europe of 10%, official statements indicate that a further increase from existing production fields will not be possible. In the medium term, gas volumes from Norway are expected to decline, partly due to the increasingly depleted fields, but also to a reduction in demand (see Frontier Economics, economic report, pages 37-38). 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 22 February 2024). The economic report was therefore 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 37 and 43).

95 According to the REPowerEU communication (a Joint European Action for more affordable, secure and sustainable energy; Communication from the Commission to the European Parliament, the European Council, the Council, the Economic and Social Committee and the Committee of the Regions of 8 March 2022, COM/2022/108 final; "REPowerEU"), the EU intends to become completely independent of natural gas imports from Russia. Natural gas imports from Russia to the EU are expected to fall 30% by the end of 2022. The geopolitical developments in summer 2022 – the reduction/cessation of volumes from Russia and sabotage on the Nord Stream and Nord Stream 2 pipelines – have led Frontier Economics to assume that in [redacted] when the Wilhelmshaven LNG facility is planned to be taken into operation, and beyond, no more Russian pipeline gas will flow to Germany or north-west Europe. According to the report, this assumption is bolstered by the political objectives set in the core countries of the north-west European gas market (Frontier Economics, economic report, pages 38 and 43). Owing to the high level of uncertainty, Russian gas imports were not included at all in the analyses undertaken of security of supply (see Frontier Economics, economic report, page 69).

96 The reduction of piped gas imports makes it necessary to roll out LNG infrastructure to cover national demand for gas. As well as the LNG infrastructure projects from the private sector, the German federal government commissioned additional non-fixed, floating LNG facilities in the country. Several LNG facilities have gone into operation in Germany in the last year and a half. The first floating LNG facility was opened in Wilhelmshaven in December 2022 (see https://www.merkur.de/wirtschaft/erstes-gas-an-lng-terminal-wilhelmshaven-in-netz-eingespeist-zr-91988049.html, accessed on 22 February 2024). The first privately operated LNG facility, belonging to Deutsche ReGas GmbH & Co. KGaA, was opened in Lubmin in January 2023 (see https://www.bundesregierung.de/breg-de/themen/klimaschutz/lng-terminal-eroeffnet-2157792,

accessed on 22 February 2024). The floating LNG facility in Stade injected gas into the pipeline network for the first time in March 2023 (see https://www.hamburger-energietisch.de/gas/lng-terminals/lng-terminal-in-brunsbuettel/#:~:text=23.,Sprecher%20Jan%20Peter%20Cirkel%20mit, accessed on 22 February 2024). There are other floating LNG facilities planned for the short to medium-term in Stade and Wilhelmshaven (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 22 February 2024), as well as a fixed, onshore LNG facility in Stade (see Frontier Economics, economic report, page 44) and a fixed, onshore LNG facility in Brunsbüttel. The expert calculations thus take account of corresponding assumptions on the expansion of LNG infrastructure and imports of LNG.

97 The temporal focus of the competition analysis is on 2027. In addition, a closer look is taken at the year 2033 to take account of the effects of future developments on results (see Frontier Economics, economic report, page 82). The report considers security of supply in the period from 2023 to 2033. This is the time for which the highest validity of the data may be assumed for the analyses carried out (see Frontier Economics, economic report, page 67).

98 The report essentially bases the forecast on the network development plans available at the time the report was drawn up – the network development plans developed by the German transmission system operators (Gas NDP 2022-2032, draft as at 31 March 2024) 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 67). Conversely, the periods/years under consideration by Frontier Economics offer the most useful data.

99 It is true that an assessment of the whole period of the exemption may be relevant, both to the analysis of the effect on competition and the security of supply, but, as stated above, forecasts of market developments over a longer period are highly uncertain (see Frontier Economics, economic report, page 67 and page 82). The ruling chamber shares this view.

100 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, pages 31-32). The ruling chamber can follow the logic of this decision, even though it has identified a very high level of integration of the French market with the German one in its analysis of price correlation in recent years (see also the more detailed explanation under section 3.2.1.3).

101 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 Wilhelmshaven LNG facility will also enhance security of supply. Firstly, it will facilitate access to new sources of gas worldwide and thus replace Russian gas deliveries. Secondly, it will create redundancies with respect to existing import routes by opening up a large number of new transport routes. Last but not least, it will increase the flexibility of gas supply by facilitating access to a large number of transport routes connecting a wide range of sources of gas worldwide. The applicant confirmed this finding with various comparative and quantitative analyses of supply security with and without the specific LNG facility (the latter is known as the counterfactual scenario) (see section 3.2.2 below).

3.2.1. Enhancement of competition in gas supply

102 The Wilhelmshaven LNG facility that is the subject of this application 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

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

104 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.

105 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:

106 "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).

107 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.

108 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).

109 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.

110 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.

111 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.

112 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.

113 "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).

114 "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).

115 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

116 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, pages 85-86).

117 At the LNG facility that is the subject of this application, 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:

118 "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 – Equinor/Hydro of 3 May 2007).

119 Another substitute is locally produced natural gas, so it may 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.

120 SNG is not a substitute for LNG at the moment and is not part of the relevant market for natural gas. It is currently difficult to make predictions about whether SNG will be able to be named as a substitute in future (see Frontier Economics, report on the substitutability of SNG and natural gas of 17 May 2023, page 4 et seq). SNG is currently only available in small quantities and is not a cost-efficient alternative for consumers. However, it should be noted that the German government is aiming for climate neutrality by 2045 and the future development of SNG is heavily dependent on the government's regulatory instruments employed to achieve climate neutrality.

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

3.2.1.3. Relevant geographic market

122 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.

123 In this instance, the planned LNG facility of the applicant is located in the single German market area (THE); the relevant market for the gas imported to Wilhelmshaven 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. 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 started planning for this and the first LNG facilities have been connected to the transmission system. The floating, non-fixed LNG facilities in Wilhelmshaven and Lubmin, for example, have been connected (see https://oge.net/de/pressemitteilungen/2022/wilhelmshavener-anbindungsleitung-mit-letzter-schweissnaht-fertiggestellt-lng-kann-jetzt-kommen-in-zukunft-auch-wasserstoff; accessed on 22 February 2024) as has the floating, non-fixed "Deutsche Ostsee" LNG facility (see https://www.gascade.de/ presse/presseinformationen/pressemitteilung/gascade-stellt-ersten-lng-anschluss-an-deutsches-ferngasnetz-fertig, accessed on 22 February 2024). 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) and is expected to further contribute to the rapid rollout of LNG infrastructure in Germany. The current geopolitical situation does not provide a reason to call the developments of recent years and the increasing market integration into question, however – 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.

124 In summary, it can be said that despite the current geopolitical situation, the ruling chamber does not see any reason to question that there will be sufficient capacity for transport in the medium term between the market area to which LNG is imported and adjacent market areas and therefore the relevant geographic market should be defined more broadly than the original market area. In fact, the ruling chamber considers it necessary for the calculations on the competitive effects to be based on the existing, integrated, north-west European market in order for the analysis to be as realistic as possible. Looking at a hypothetically 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.

125 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: obviously, a sufficient number of market players 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 91-92). 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, page 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.

126 The ruling chamber, by contrast, identified a very high level of integration of the French and German markets in its analysis of price correlation. As already stated in other proceedings (see decisions BK7-22-140-final, BK7-20-107-final and BK7-22-086-final), the ruling chamber views the relevant geographic market as north-west Europe, comprised of Germany, France, the Benelux countries, Denmark and the UK. This view is supported by market players that were consulted by the European Commission in connection with the Gazprom/Wintershall/Target Companies merger

probe and that identified in particular Germany, Belgium, the Netherlands and the UK as Member States forming part of a regional market (see Case No COMP/M6910 – Gazprom/Wintershall/Target Companies, paras 88 to 90).

127 The ruling chamber believes that the degree of market integration in north-west Europe described above will increase further given the aim of creating an internal market in natural gas in accordance with Directive 2009/73/EC. No conflicting trend is to be expected in particular during the period of validity of the exemption. In support of this argument, it is explained in the report that a future integration of the French market into the north-west European market is not unlikely owing to the recent increases in transportation capacity between Germany and France and the alignment in their supply structure that has been observed (see Frontier Economics, economic report, page 98).

128 Nevertheless, the ruling chamber does not consider it necessary to recalculate the competition analysis, because, as far as the market definition is concerned, the analysis without including France in the relevant north-west European market is a more conservative perspective as possible (negative) effects on competition would be overestimated. Including France in the north-west European market would lead to a lower market concentration, so a negative impact of the exemption would be even less likely.

129 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. Geopolitical events caused the absolute amount of the price between the market areas THE and PEG to lead to a price spread. In the opinion of the ruling chamber, the price spread from the beginning of April 2022 only reflected a short-term market shock caused by these events. A look at extreme market situations in the past shows that in some cases, short-term market shocks led to even greater price spreads. Prices stabilised and re-aligned in the course of 2023. The ruling chamber thus considers that the enormous price spread may be classed as an extreme market event with a short-term effect. The ruling chamber concludes that an integrated north-west European market may be assumed for the long term with a view to the duration of the exemption granted.

3.2.1.4. Summary

130 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 83). The ruling chamber does not see any possible negative effects on competition resulting from the existence of the applicant's planned 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

131 The Wilhelmshaven 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.

132 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 Wilhelmshaven 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.

133 The Wilhelmshaven LNG facility will diversify the gas supply by facilitating access to new sources. In the light of recent geopolitical events, the diversification of gas sources using LNG facilities and the substitution of Russian gas imports has become a central, urgent requirement to ensure security of supply in Germany and the EU (see section 3.2.2.2). The Wilhelmshaven 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 Wilhelmshaven 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"

134 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, 122nd supplement, August 2023, section 1 EnWG, 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.

135 In geographic terms, it is necessary to look at the German and European gas market and the forecast development of the market in the next few years. The applicant understandably based its quantitative analyses on Germany because the effect of an infrastructure on security of supply will often be most relevant locally. As the forecast developments in north-west Europe are similar, this should not result in any major differences (see Frontier Economics, economic report, pages 66-67).

136 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 Wilhelmshaven LNG facility will be connected to the German and thus also the European transmission system and therefore directly affect the supply situation in Germany and Europe. An enhanced supply situation in Germany as a result of the addition of the Wilhelmshaven LNG facility may therefore make it easier to deliver gas to other Member States, not just in the event of a crisis.

137 The applicant's quantitative analyses rightly cover the period up to 2033. It is true that the duration of the exemption granted is longer than this analysis 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.).

138 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, New Infrastructure Exemptions of 6 May 2009, SEC(2009)642 final, 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 Commission Decision of 2 June 2023 on the Brunsbüttel LNG facility, C(2023) 3743 final, para 56 et seq; Commission Decision of 20 December 2022 on the Deutsche Ostsee LNG terminal, C(2022) 9902 final, para 55 et seq; Commission Decision of 19 August 2022 on the Stade LNG terminal, 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; 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, 122nd supplement, August 2023, section 28a EnWG, margin no 8; Arndt, in Bourwieg/Hellermann/Hermes: Energiewirtschaftsgesetz, 4th ed 2023, section 28a, margin no 6).

139 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, New Infrastructure Exemptions of 6 May 2009, SEC(2009)642 final, para 26).

140 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, New Infrastructure Exemptions of 6 May 2009, SEC(2009)642 final, 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

141 Recent developments have shown that Russia is no longer a reliable energy supplier. It is now necessary for Germany and the EU to become independent of Russian gas imports, as shown by Russia's suspension of deliveries to European partner countries in 2022 and various halts to gas supplies to available pipelines in the course of the year as well as, ultimately, the stopping of gas deliveries to Germany in 2022 (see https://www.dw.com/de/russland-stoppt-gas-lieferungen-an-niederlande/a-61989218 and https://www.tagesschau.de/wirtschaft/weltwirtschaft/gasmarkt-nord-stream-1-wartung-101.html, both accessed on 22 February 2024). Moreover, the 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.

142 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. 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 Wilhelmshaven LNG facility, with its annual import capacity of about 15bn m^3/a, will be able to cover about 16% of German demand for natural gas (based on total demand for 2021, see Frontier Economics, economic report, page 65). On 1 June 2022 the 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 Wilhelmshaven, are in the overriding public interest and in the interest of public safety due to their contribution to securing the energy supply. Owing to the urgent need to meet national gas demand, the German government also chartered floating LNG terminals to replace deliveries of pipelined gas (see section 3.2).

143 In accordance with the above, the Wilhelmshaven 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.

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

3.2.2.3. Redundancy through diversification of transport routes

145 The Wilhelmshaven LNG facility will enhance security of supply in Germany by opening new routes for the direct transport of LNG to the country, enabling the direct importation of LNG 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 Wilhelmshaven 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.

146 The applicant also provided conclusive empirical proof of this in independent quantitative analyses (see Frontier Economics, economic report, page 65 et seq). The situation with the Wilhelmshaven LNG facility was compared with the situation without the facility (counterfactual scenario). Various indicators were used to assess the diversification of supply and the resilience of the system. The applicant used data from the Gas NDP 2022 database for the analyses. Additionally, data from the Federal Ministry for Economic Affairs and Climate Action (BMWK) regarding the state-chartered FSRUs as well as the 2022 scenario report Global Ambition for biomethane and the development of demand were used (see Frontier Economics, economic report, pages 68-69). All the analyses show that the Wilhelmshaven LNG facility will contribute to enhancing security of supply in Germany.

147 The import route diversification (IRD) indicator measures the diversification of gas import routes. A high level of concentration indicates a high level of dependency on one or a small number of routes, while a low level of concentration indicates a high level of diversification of routes. The lower the value, the higher the security of supply. The calculations in the report showed a relatively

good level of diversification for the import routes into Germany (from 2023), with values constantly below 0.2 on a scale from 0 to 1. The additional technical capacity at the Wilhelmshaven LNG facility enhanced route diversification in the analysis by about 2% (2027), in the subsequent years by up to 7% (from 2025) and in 2033 the difference compared with the counterfactual scenario without the Wilhelmshaven LNG facility rose to 13% when the state-owned FSRUs are no longer available (see Frontier Economics, economic report, page 71).

148 The applicant thus provided conclusive proof that the additional technical capacity provided by the Wilhelmshaven LNG facility will result in a decrease in the level of dependency on current import routes. Moreover, the Wilhelmshaven LNG facility will be able to maintain the level of diversification of transport routes when the state-owned FSRUs are no longer available.

3.2.2.4. Increase in the resilience of the gas supply infrastructure

149 The applicant provided conclusive proof using the N-1, residual supply index (RSI) and system adequacy index (SAI) indicators that the Wilhelmshaven 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 72 et seq).

150 The N-1 indicator measures whether the daily peak demand can still be met in the hypothetical event of disruption of the single largest infrastructure that directly or indirectly contributes to the supply of gas on the market. The applicant's calculations (see Frontier Economics, economic report, pages 72-73) took account of the entry capacity from domestic conventional, biogas and hydrogen production and storage facilities in addition to the import capacity. The applicant based the daily peak demand on the peak day demand in the Best Estimate scenario in the ENTSOG TYNDP 2022. The single largest infrastructure was defined as the cross-border interconnection point/border with the largest entry capacity into Germany. The calculations provided showed import capacity from Norway at the Dornum cross-border interconnection point as the biggest import route. According to ENTSOG, for the single largest infrastructure the sum of the cross-border interconnection points from a non-EU supplying country are regarded as one import route, because it is assumed that they could go out of use simultaneously. In this case, there are various pipelines connecting Germany to Norway. The expert report thus takes a different approach to the one recommended by ENTSOG, but it also seems conceivable and suitable as the failure of the single largest infrastructure is measured for the N-1 criterion. It does not in fact matter which approach is taken, as they both lead to the same result. In both cases – that is, in the event of a halt to imports via the Dornum cross-border interconnection point or in the event of an end to all imports from Norway – the Wilhelmshaven LNG facility would improve security of supply in Germany (see Frontier Economics, economic report, pages 73-74).

151 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.

152 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 2023 is barely over 120. This value does rise more or less continually in the following years, even without the Wilhelmshaven LNG facility that is the subject of these proceedings. The Wilhelmshaven LNG facility itself will have a positive effect on the resilience of the system as, with a capacity of 27.8 GWh/h, it is nearly as large as the largest infrastructure at the Dornum cross-border interconnection point. This will provide additional capacity (almost) allowing the largest infrastructure to be replaced, ultimately leading to a considerable improvement in system resilience. The Wilhelmshaven LNG facility will lead to a value of about 144 in 2030 compared to a figure of just 135 in the counterfactual scenario. This improvement applies correspondingly for the other years in the period under review (see Frontier Economics, economic report, pages 74-75).

153 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, pages 75-76). This indicator measures the degree to which the system can still meet the daily peak demand in the event that the largest supplier (via one or more infrastructure(s)) cannot supply gas. The analysis used Equinor/Petoro as the largest supplier of natural gas to Germany (not including capacity for Russian gas), even though it must be noted that capacity may be booked by other parties or the gas may be controlled by other parties before crossing the border to Germany, so that this capacity would not be available anymore in the event of disruption and the corresponding transport capacity could not be provided. The calculations show that it would still be possible to meet the peak demand even without the largest supplier figure 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 76).

154 The calculations using the RSI indicator for the scenario with the Wilhelmshaven 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 Wilhelmshaven LNG facility resulted in an RSI of 143 for 2030, with a lower value of 134 in the counterfactual scenario (see Frontier Economics, economic report, page 76).

155 The calculations using the SAI (see Frontier Economics, economic report, pages 77-78) also showed that the Wilhelmshaven 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 Wilhelmshaven LNG facility. In 2030, for example, the SAI would rise from 0.49 in the counterfactual scenario to 0.58 in the scenario with the Wilhelmshaven LNG facility (see Frontier Economics, economic report, page 78).

156 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 Wilhelmshaven LNG facility.

3.2.2.5. Increase in the flexibility of gas supply

157 The Wilhelmshaven LNG facility will also increase the flexibility and thus the security of gas supply in Germany and the EU.

158 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, New Infrastructure Exemptions of 6 May 2009, SEC(2009)642 final, para 26).

159 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 Wilhelmshaven 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.

160 The Wilhelmshaven 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

161 The rules imposed on the applicant in operative parts 4. to 7. 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.

162 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, New Infrastructure Exemptions of 6 May 2009, SEC(2009)642 final, para 26).

163 The ruling chamber has imposed effective rules on the applicant that guarantee that 10% of the Wilhelmshaven 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 trading on the secondary market 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 Wilhelmshaven LNG facility on a yearly basis. This prevents the possible foreclosure of the Wilhelmshaven LNG facility through long-term capacity contracts over the whole duration of the exemption and enhances the flexibility and security of gas supply.

164 The European Commission also stressed, for example in the first exemption proceedings 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 5. to 7.), in particular to ensure permanent, secure access for a large number of new market participants (short-term marketing permitted by the reserve quota) to the improvement of security of supply. This is particularly significant given the long duration of the exemption (Commission Decision of 25 May 2021, C(2021) 3814 final, para 58). Long exemption periods which monopolise access to critical infrastructure in the hands of a small number of market participants could bring negative impacts on security of supply (Commission Decision of 25 May 2021, C(2021) 3814 final, para 57). The European Commission considers that one element of security of supply is having access to different sources of supply, including via different suppliers (Commission Decision of 25 May 2021, C(2021) 3814 final, para 59). The aforementioned provisions for non-discriminatory allocation of long-term capacity and to prevent capacity hoarding are suitable to ensure access to the LNG facility for new market participants and thus to reduce dependence on individual market participants, which can enhance security of supply (Commission Decision of 25 May 2021, C(2021) 3814 final, para 59).

3.2.2.7. Summary

165 The Wilhelmshaven LNG facility will enable additional volumes of gas to be brought to Germany and the EU. 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 Wilhelmshaven LNG facility relevant to guarantee the energy supply in Germany and the EU.

166 In addition, the applicant proved by means of quantitative analyses (IRD indicator) that the Wilhelmshaven LNG facility will increase the redundancy of gas supply in Germany. At the same time, the additional capacity provided by the Wilhelmshaven 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 Wilhelmshaven 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 Wilhelmshaven 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 4. to 7.

3.3. Major new infrastructure

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

168 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 Wilhelmshaven LNG facility that is the subject of this application has not yet been completed and will start operation after 12 July 2005, it qualifies as a new infrastructure according to both definitions and the deviation between the deadlines does not need to be addressed here. Both criteria are met in this instance.

169 The Wilhelmshaven 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.

170 The applicant plans for the Wilhelmshaven LNG facility to have an annual throughput capacity of 15bn m³/a. This corresponds to about 16% of Germany's gas consumption in 2022 (see application of 1 November 2023, page 33). Ultimately, whether this is a relevant reference quantity may be left open. Given the planned annual throughput capacity of 15bn m^3/a and the comparison with the annual throughput capacities of other LNG facilities that have already been exempted from regulation, and in view of the costs of [redacted] stated by the applicant for the construction and commissioning of the project (see explanation of investments in application documents of 12 February 2023, page 1, and Frontier Economics, supplementary report of 15 February 2024, page 3), it may be assumed that the Wilhelmshaven 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 Frontier Economics, supplementary report of 15 February 2024, page 4).

171 The ruling chamber does not doubt that the Wilhelmshaven LNG facility is a major infrastructure, both in terms of investment and capacity volume.

3.4. Investment risk

172 The applicant proved to the ruling chamber's satisfaction that the investment risk for the Wilhelmshaven 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

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

3.4.2. Relevant risks

174 Not every risk can be classed as a relevant risk for the assessment within an exemption decision but, for normative reasons, only those risks that are usually attached to an investment decision (see, for example, decision BK7-22-140-final of 19 June 2023, page 54 et seq).

175 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, New Infrastructure Exemptions of 6 May 2009, SEC(2009)642 final, para 41; 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: Bourwieg/Hellermann/Hermes, Energiewirtschaftsgesetz, 4th ed 2023, 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, New Infrastructure Exemptions of 6 May 2009, SEC(2009)642 final, para 41; Däuper, in:

Theobald/Kühling, Energierecht, 122nd supplement, August 2023, section 28a EnWG, margin no 10).

176 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, section 6).

177 (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. It can be ruled out that the infrastructure and the connection costs, at least, 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 tariffs for its use that enable refinancing. Long-term capacity contracts are suitable to give investors the required planning certainty about capital recovery (see Commission staff working document, New Infrastructure Exemptions of 6 May 2009, SEC(2009)642 final, para 42).

178 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 1 November 2023, page 34 et seq and Frontier Economics, risk report, page 56 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 Wilhelmshaven LNG facility.

179 (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 market is in a sustained phase of major change, partly due to the current geopolitical situation. While LNG made up a 12% share in total gas demand in the EU in 2010, it rose to 35% by 2022, making LNG a base source of supply for Europe (see IEA, World Energy Outlook 2023, page 86). As liquefaction capacity is rising sharply (projects that have started construction or taken final investment decision are set to add 250bn m^3 per year of liquefaction capacity by 2030, see IEA, World Energy Outlook 2023, pages 20-21), great changes and developments on the LNG market continue to be expected in future (see IEA, Global Gas Security Review 2023, page 38). 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.

180 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 tariffs for LNG facilities after the conclusion of long-term capacity contracts could not be ruled out. The level of permissible tariffs is already subject to annual adjustments under section 14 LNGV. 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 tariffs and access conditions over the long period of validity of contractual commitments and the long payback period for the Wilhelmshaven LNG facility may ultimately lead to long-term bookings not being made. The applicant also stated that any change in the provisions for network access or tariffs after the conclusion of long-term bookings would have an effect on the costs and revenues. It was therefore important for a stable regulatory framework to be in place for the duration of the binding, long-term capacity bookings (see application of 1 November 2023, page 34 and Frontier Economics, risk report, page 58 et seq).

181 (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.

182 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, New Infrastructure Exemptions of 6 May 2009, SEC(2009)642 final, para 41).

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

184 In the LNGG, the German government has also taken measures 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, New Infrastructure Exemptions of 6 May 2009, SEC(2009)642 final, para 43).

185 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 rise. This would also lead to an increased risk of a change in costs and/or revenues.

186 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).

3.4.3. Causality

187 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.

188 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, so 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.

189 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 tariffs. In the absence of such long-term capacity bookings, there is no basis for the decision to invest in the Wilhelmshaven LNG facility. The applicant has explained to the ruling chamber's satisfaction that it would not invest in the construction of the Wilhelmshaven LNG facility in the absence of long-term capacity contracts (see application of 1 November 2023, page 34 and Frontier Economics, risk report, page 58 et seq).

190 The applicant also credibly declared that no final investment decision had yet been taken and that such a decision would not be taken until the exemption proceedings had been concluded and unless an exemption was granted.

191 Consequently, 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.

3.4.4. Duration of the exemption

192 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.

193 In other exemption proceedings, the European Commission has pointed out that, when considering the question of whether the exemption period is justified in view of the risks related to the project, contractual arrangements should be taken into account. It has also stated that the duration of the exemption should be equal to or less than the expected period for cost recovery of the new infrastructure (see Commission Decision of 20 December 2022, C(2022) 9902 final,

para 126 and Commission Decision of 2 June 2023, C(2023) 3743 final, para 147). In the exemption proceedings for the Deutsche Ostsee LNG facility in Lubmin, the European Commission determined that an exemption duration of 20 years was justified even though it went beyond the binding durations of the capacity contracts. Major factors for the duration of the exemption may also be the depreciation and tariff validity periods (Commission Decision of 20 December 2022, C(2022) 9902 final, para 126).

194 On this basis, the period of exemption of 20 years requested by the applicant is justified.

195 For one thing, the applicant has credibly shown that the depreciation period of the Wilhelmshaven LNG facility is 20 years from the planned start of commercial operation in [redacted] (see supplementary letter to application of 15 February 2024, supplementary report of 15 February 2024). Moreover, in the exemption proceedings for the Stade LNG terminal, 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 also at the lower end of the range that had been granted to other LNG terminals (see Commission Decision of 19 August 2022, C(2022) 6098 final, para 130). According to the applicant, the business case for the Wilhelmshaven LNG facility that is the subject of these proceedings was based on a depreciation period of 20 years since a full depreciation would not be possible profitably in a shorter period owing to the total investment amount of [redacted]. The applicant's financial accounts envisage no residual value of the facility after the end of the 20-year exemption period, because only renewable methane will be able to be imported as of 1 January 2044, when the law requires the facility to no longer be operated with LNG (section 5(1) para 4 LNGG) and the development of the SNG market is still highly uncertain at the moment. Although the applicant has planned the Wilhelmshaven LNG facility that is the subject of these proceedings in such a way that it can technically regasify SNG and inject it into the transmission system without the need for conversion or modification from the start, there is not yet any market for SNG and its appearance is dependent on various factors, not least a framework that requires political implementation. It is therefore generally uncertain whether there will be demand for SNG in the EU after 2043 (see Frontier Economics, report on the substitutability of SNG and natural gas of 17 May 2023). With this in mind and owing to significantly higher construction costs for the planned LNG facility in conjunction with a much longer construction time and consequently higher tariffs, which bring an increased commercial risk as regards the marketing of capacity, the depreciation period had to be updated to [redacted] calculated based on a start of commercial operation in [redacted] (see application documents of 12 February 2024, page 1).

196 The applicant is further able to show binding market interest in such a long period of exemption.

[redacted]

[redacted]. The ruling chamber is convinced by the latest investment calculation credibly presented by the applicant, showing that the conclusion of the long-term contracts running for up to 20 years is still a key condition for a positive investment decision (see letter of 31 January 2024, pages 1-2). Returns have to be secured by long-term capacity contracts in order for the investors to make a positive investment decision. It may further be assumed that customers' readiness to conclude long-term contracts largely depends on the access and tariff conditions being reliably in place for the duration of the contract thanks to an exemption. Without the bookings of [redacted] desired by the companies mentioned above, there would be considerable uncertainty in the project's income structure that would make taking the investment decision at least less likely .

197 In light of the significant rise in total investment costs from [redacted] to [redacted] the applicant has shown that the internal rate of return (IRR) will only be [redacted] over the total period of the exemption of 20 years applied for, even assuming that the LNG facility will operate at full capacity. The European Commission Decision of 25 May 2021 (C(2021) 3814 final, para 105) acknowledged that even an IRR of 7% per annum was not excessive in view of the risk associated with the investment in the LNG facility. These risks – of lower demand for natural gas caused by energy savings and climate change policies, competing LNG infrastructure projects in Germany, shorter useful lives because of the provisions of the LNGG, possibly higher total investment costs caused by inflation and supply chain issues – have probably even risen as a result of the current geopolitical situation.

198 Given all these factors, the exemption period requested by the applicant is justified.

3.5. Unbundling

199 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.

200 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, 122nd supplement, August 2023, section 28a EnWG, margin

no 11; Arndt, in Bourwieg/Hellermann/Hermes, Energiewirtschaftsgesetz, 4th ed 2023, 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.

201 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 Wilhelmshaven LNG facility is to be connected. The operator of the transmission system to which the Wilhelmshaven LNG facility is to be connected, according to the applicant, is Open Grid Europe GmbH, which is a certified ownership unbundled company.

202 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.

203 The applicant stated that, as the future operator of the Wilhelmshaven LNG facility, it is separate from the above-mentioned TSO to whose network the LNG facility will potentially be connected in terms of function, information and accounts in accordance with sections 8 to 10e EnWG and the same applies to TES and FFI, the owners of the applicant (see application of 1 November 2023, page 34).

204 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 Wilhelmshaven LNG facility has started operation (operative part 9.). This is necessary but also adequate to guarantee compliance with these requirements.

3.6. Levying of tariffs

205 Section 28a(1) para 4 EnWG requires tariffs to be levied on users of the infrastructure. The applicant demonstrated to the ruling chamber's satisfaction that it would offer its customers use of the Wilhelmshaven LNG facility against payment of relevant capacity tariffs (see application of 1 November 2023, page 12 et seq and page 35).

206 Merely the request for an exemption would conflict with not levying tariffs 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 tariffs for as long a period as possible. In its application

of 1 November 2023, the applicant explained that it would conclude capacity contracts with the users of the Wilhelmshaven LNG facility. There is no indication from these explanations by the applicant that an exemption from tariffs 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 tariffs.

207 Section 28a(1) para 4 EnWG does not lay down any further requirements concerning the level and structure of the tariffs. The applicant has given an assurance in this case that its tariffs will be appropriate, non-discriminatory and transparent (see application of 1 November 2023, page 35). In order to ensure that these prerequisites are met, the present decision imposes the requirement on the applicant to levy tariffs on its users (see operative part 3.). Furthermore, the notification requirement laid down in operative part 8., also with respect to the obligation to levy tariffs and the right to amend or withdraw the exemption set out in operative part 9., 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

208 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 4. to 7.).

209 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 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.

210 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.

211 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 3.7.1.3.2). This takes account of the decision-making practice of the Bundeskartellamt, according to which the wholesale gas market must be defined geographically as at least Germany-wide (see Bundeskartellamt, B8-69/14, margin no 97 et seq). Moreover, the European Commission also considered a more narrowly defined national market relevant in various other exemption proceedings for LNG facilities in the assessment of whether the prerequisites of Article 36(1)(e) of Directive 2009/73/EC and section 28a(1) para 5 EnWG had been met (see Commission Decision of 2 June 2023, C(2023) 3743 final, para 73 et seq; Decision of 20 December 2022, C(2022) 9902 final, para 71 et seq; Decision of 19 August 2022, C(2022) 6098 final, para 86 et seq).

3.7.1. Effect on competition of the exemption

212 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 Wilhelmshaven LNG facility. In line with the applicant's request, the analysis examined whether an exemption from tariff regulation and an exemption from the regulated third-party access to the Wilhelmshaven LNG facility could cause a detrimental effect on competition that would lead to a worse competitive situation than if there were no Wilhelmshaven LNG facility.

213 The granting of a (limited) exemption from tariff and access regulation will not be detrimental to competition on the markets which are likely to be affected by the investment, taking into account the positive effect on competition of the secondary provisions set out in operative parts 4. to 7. with the transparent and non-discriminatory long-term allocation of capacity, a reserve quota, trading on the secondary market 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 tariff regulation

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

215 In this regard, it may be concluded that there is no cause for concern about a worsening of competition. The aim of tariff regulation is to prevent a monopolistic provider imposing excessive prices to increase its monopoly rents. If this kind of pricing occurred at the LNG facility, the facility

might be little used, because potential customers have sufficient opportunities elsewhere. There would be no worsening of competition, however, because the extreme scenario of a completely unused LNG facility would ultimately be a situation comparable to that in which the LNG facility did not exist.

216 The European Commission explained in the exemption proceedings for the Brunsbüttel LNG facility (decision of 19 June 2023, BK7-22-140-final), in the exemption proceedings for the planned Lubmin LNG facility (decision of 12 January 2023, BK7-22-086-final) and in the exemption proceedings for the Stade LNG facility (decision of 19 September 2022, BK7-20-107-final) that the exemption from tariff regulation is not detrimental to competition since the tariffs of the terminal do not discriminate between different capacity holders, and increases after the initial allocation are limited to 10% of the basic tariff (see Commission Decision of 2 June 2023, C(2023) 3743 final, para 127 et seq; Commission Decision of 20 December 2022, C(2022) 9902 final, para 111 and Commission Decision of 19 August 2022, C(2022) 6098 final, para 110). The same applies to these proceedings.

3.7.1.2. No detriment caused by SNG

217 There will be no detriment to competition from the exemption in this case caused by the equation of LNG and SNG, including e-NG, as shown above from the regulatory/legal perspective. It is not evident how the inclusion of SNG in the market could negatively influence the results of the competition analysis undertaken as part of the exemption approval (see Frontier Economics, report on the substitutability of SNG and natural gas of 17 May 2023, page 2).

218 Independent of the regulatory/legal assessment above, SNG could represent a (market) substitute for LNG and thus for conventional natural gas. In that case, the competitive situation in the SNG/natural gas market would probably rather improve compared to the assessment of the natural gas market alone. SNG and natural gas have different production processes, which means it is likely that SNG would be produced by additional or even completely different providers, leading to a greater diversity of market players. The SNG transported via the facility would thus actually promote competition. This would lead to greater competitive pressure for providers of conventional natural gas (see Frontier Economics, report on the substitutability of SNG and natural gas of 17 May 2023, page 3).

219 The same applies to possible future SNG market developments. In the event that SNG becomes a substitute for LNG and thus for conventional natural gas in the future, it may be assumed that the competitive situation in the SNG and natural gas market would actually improve compared to the assessment of the natural gas market alone (see Frontier Economics, report on the substitutability of SNG and natural gas of 17 May 2023, page 3).

220 An assessment of whether a single product market will develop for SNG and natural gas and, if so, when, is currently still speculation. It is true that price forecasts indicate that SNG prices will not be higher than natural gas prices from about 2035 onwards, so LNG and SNG could potentially be market substitutes from 2035, making SNG part of the relevant product market. However, if potential political developments such as a possible ban on conventional natural gas, including LNG, are also taken into account, SNG might not be a substitute for LNG in the subsequent years but would form its own SNG market (see Frontier Economics, report on the substitutability of SNG and natural gas of 17 May 2023, page 8). It is evident that it is hard to make a clear statement about the substitutability of SNG and LNG. There are currently only forecasts about substitutability, the likelihood of which depend on technological developments as well as political and regulatory measures and their effectiveness.

221 All things considered, there is no evidence of a negative effect and an improvement of the competitive situation is conceivable.

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

222 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 4. to 7.), which guarantee in particular permanent third-party access to 10% of the annual throughput capacity on a short-term basis.

223 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. The currently applicable rules of the LNGV restrict 20% of the annual throughput capacity for long-term allocation to a maximum of 15 years (section 5(5) LNGV). Moreover, at least 10% of the annual throughput capacity has to be allocated on a short-term basis in the regulated sector (section 8(1) LNGV). If an exemption is granted from the access regulation, no such limits would apply, enabling customers of the LNG facility to acquire capacity for the entire duration of the exemption.

224 From a competition perspective, one risk could 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 compares the counterfactual scenario "the Wilhelmshaven LNG facility is not built", with the conservative factual scenario in which the sole booking customer of the Wilhelmshaven LNG facility is the largest market participant in the north-west European market (scenario 1 with Equinor/Petoro as the largest LNG provider in 2027, see Frontier Economics, economic report, pages 107-108) and QatarEnergy in 2033 (see Frontier Economics, economic report, pages 109-110). This is intended to quantify the impact on competition caused by the exemption.

225 The ruling chamber has drawn on the analyses in the report to assess the effect on the competitive situation of the Wilhelmshaven LNG terminal in the upstream wholesale market (see Frontier Economics, economic report, page 82 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.

226 The report looks at the change in market shares of the market participants and concentration indices for the scenario 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, paras 19-20).

227 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 scenario, one of these thresholds would be surpassed and there would thus be a difference compared to the counterfactual scenario of the Wilhelmshaven 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).

228 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 Wilhelmshaven LNG facility will not have negative effects on competition. The relevant threshold values are as follows:

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

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

230 The assessments carried out do not indicate any negative effects on competition in north-west Europe. The ruling chamber considers this statement particularly relevant as it views this market as the relevant competitive market.

231 As stated above, the analysis applies to the years 2027 and 2033. The report was based on a utilisation of 70% in 2027 and 2033 for the terminal in the north-west European context. 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 terminals in recent years. A further argument in favour of this assumption is the fact that, as discussed in section 3.2 above, 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 22 February 2024). This underpins the procurement strategy of the federal government, which has now chartered several floating LNG terminals (see BMWK press release1 September 2022, https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2022/09/20220901-bwmk-sichert-sich-fuenftes-schwimmendes-fluessigerdgasterminal-plus-anlandung-gruener-wasserstoff.html, accessed 22 February 2024). The supply of regasification capacity in Germany and north-west Europe is likely to increase while liquefaction capacity is limited/scarce (see IEA, Gas Market Report, Q2-2022, April 2022, pages 6-7, https://iea.blob.core.windows.net/assets/cfd2441e-cd24-413f-bc9f-eb5ab7d82076/GasMarketReport%2CQ2-2022.pdf and Barbara König, KfW/IPEX-Bank, Flash Analysis, Credit Analysis, Maritime Industries – LNG tankers, How the Russia-Ukraine war is changing the outlook for LNG tanker shipping, 29 April 2022, https://www.kfw-ipex-bank.de/PDF/Analysen-und-Meinungen/Marktanalysen/2018-10-KfW-IPEX-Bank-Blitz-Licht-

Analyse-Maritime-Industrie-%E2%80%93-LNG-Tanker.pdf, both accessed on 5 February 2023). At the same time, there is still strong global competition, especially with Asian markets. In annex C of the economic report, Frontier Economics attached a highly conservative analysis, from the competition point of view, assuming a full utilisation of 100% of the terminal capacity.

232 To sum up, on the basis of the analyses carried out assuming a terminal utilisation of 70%, it can be stated that an exemption is neutral as far as competition is concerned. When assuming a full utilisation of the terminal, the change in HHI also remains below the threshold and no competition concerns arise, provided that the largest market participant controls a maximum of 60% of capacity (see Frontier Economics, economic report, page 134 et seq).

233 Specifically:

234 (1) Largest market participant holds 100% of capacity in 2027

235 First, the effects on competition are shown for the year of commissioning if the largest market participant, Equinor/Petoro, which has a market share of 26%, booked all the long-term capacity in the relevant market. In this scenario, the wholesale market for natural gas in north-west Europe does not have an unusually high level of concentration. Although the three largest providers - Equinor/Petoro, Qatar Energy and Cheniere - together serve about 50% of the market, there are also many smaller suppliers active on the market (see Frontier Economics, economic report, page 107). Only a small effect on competition is identified for 2027 in this scenario.

236 As in the explanations in section 3.7.1.3, the indicators used to calculate competition effects (market shares and concentration indices) were used to evaluate this scenario. If Equinor/Petoro were to book all the capacity and the terminal was 70% utilised as assumed, its market share would rise from 5% to 32%, still below the 40% that is the definition of a dominant market position. The 239-point increase in the HHI would be moderate and not justify competition concerns. Overall, then, none of the relevant thresholds for determining possible negative effects on competition are exceeded.

237 (2) Largest market participant holds 100% of capacity in 2033

238 The expert report has also examined the effects on competition for 2033 if the largest market participant in the relevant market, Qatar Energy, booked all the long-term capacity of the Wilhelmshaven LNG facility. In this scenario, there would be a considerable drop in the market share of the largest market participant in the year under consideration, Equinor/Petoro. Frontier Economics judges the primary factor in this development to be the sharp drop in supplies from Equinor/Petoro caused by the decline in Norwegian production (economic report, page 109). The market shares of Equinor/Petoro shrink in favour of other market participants, as shown in particular by the HHI of less than 1,000 in the counterfactual scenario, indicating greater competition in 2033. In the factual scenario, there is only a slight rise in the HHI to 1,019. A high

level of competition may still be assumed. The market share of the largest market participant, Qatar Energy, rises to 23% in the factual scenario compared to 19% in the counterfactual scenario. Overall, none of the relevant thresholds for determining possible negative effects on competition are exceeded in this case, either, and there are no indications of competition concerns.

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

239 This section looks at a competition analysis for the theoretical case of a more narrowly defined upstream wholesale market that is just Germany. This more narrow analysis, in geographic terms, of the relevant market takes into consideration the decision-making practice up to now of the Bundeskartellamt, according to which the wholesale gas market must be defined geographically as at least Germany-wide (see Bundeskartellamt, Ref. B8-69/14, margin no 97 et seq) and the requirements of the European Commission (see Decision of 25 May 2021, C(2021) 3814 final, para 83 et seq and, most recently, Decision of 20 December 2022 (C(2022) 9902 final, paras 94, 97 and 103-104). In this case, there would be no significant cross-border trade (other than imports). German market participants would be unaffected by price differences on adjacent markets and would not use the available transport capacity at the cross-border interconnection points. The aim of the European Union to achieve a single internal market in natural gas would thus be far off.

240 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 Wilhelmshaven LNG facility, imports would arrive in the market, narrowly defined as Germany, via the other planned LNG terminals in the country. The assumptions on the composition of the future north-west European LNG imports in the competition analysis thus also apply to the more narrowly defined German market.

241 Frontier Economics sees the calculation of the German market as an alternative assessment (see economic report, pages 111-112) that does not, however, reflect the real market and competition situation in north-west Europe. The report therefore includes this additional consideration for the unlikely event that there are massive backward steps in the integration of the European internal market. The ruling chamber agrees with this line of argumentation, working rather on the opposite assumption that there will be future further European market developments (see Ruling Chamber 7 decision of 21 June 2021, BK7-18-063-final, page 70 et seq and decision of 19 September 2022, BK7-20-107-final, page 64).

242 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. Three scenarios were compared by Frontier Economics for their effect on competition in the more narrowly defined national market and compared with the counterfactual scenario of no terminal: scenario 1, "Largest market participant holds 60% of capacity and second-largest market participant holds 40%"; scenario 2, "Largest market participant holds 60% of capacity and third-largest market participant holds 40%, and scenario 3, "Third-largest market participant holds 100% of capacity", each of these for the years 2027 and 2033 with a terminal utilisation of 70%.

243 Essentially, Frontier Economics concludes that even if the largest provider, Qatar Energy, held 60% of the terminal capacity, negative effects on competition could be ruled out with a high level of certainty. This is even more true for the second-largest market participant, Cheniere. It may also be seen that allocating all the terminal capacity to the third-largest market participant, Equinor/Petoro, or to all the smaller market participants, does not give rise to significant competition concerns (Frontier Economics, economic report, page 111-112), although it is true that the combined market shares CR3 and CR5 are slightly over the thresholds above which joint dominance is presumed set out in section 18(6) GWB in all scenarios examined. However, the exceeding of these thresholds results from an assessment of an artificially narrowed national market and cannot, therefore, illustrate the real market and competitive situation. Moreover, the HHI figures do not indicate a negative effect on competition, either in their amount or in the respective change from the counterfactual to the factual scenario. The ruling chamber does not therefore consider the exceeding of the combined market shares to be a decisive factor in assessing the effect on competition of the exemption for the Wilhelmshaven LNG facility.

244 Specifically:

245 (1) Scenario 1: "Largest market participant holds 60% of capacity and second-largest market participant holds 40%"

246 This scenario initially shows different results for the two periods under consideration. For 2027 (see Frontier Economics, economic report, page 112 et seq), the effect on competition is examined if Qatar Energy booked 60% of terminal capacity and Cheniere the remaining 40%. The HHI value rises 216 points to 1,338. This rise is well below the threshold of a 250-point increase. The market share of the largest player (CR1) is also clearly below the threshold of 40% above which a dominant market position may be assumed; here, Qatar Energy has 26%.

247 For 2033 (see Frontier Economics, economic report, page 116 et seq), the rise in HHI if the largest market participant, Qatar Energy, booked 60% of capacity and at the same time the remaining 40% was allocated to the second-largest market participant, Cheniere, would be 286 points, above the threshold of 250. Nevertheless, the ruling chamber does not consider that this

fact alone leads to the conclusion that the exemption for the Wilhelmshaven LNG facility would have a negative effect on competition. For one thing, the relevant north-west European market was hypothetically restricted to Germany. For another, it is assumed that Cheniere would alter its business model. Up to now, Cheniere's business has been in the liquefaction of natural gas and sale of it for export to shippers. Even in the event of a potential allocation of capacity from the Wilhelmshaven LNG facility to shippers acquiring their volumes of LNG from Cheniere, there would be no reason for competition concerns related to Cheniere's market position. If, contrary to expectations, Cheniere were to stop supplying LNG, the shippers could source the necessary volumes from the liquid global market, so Cheniere's exploitation of its market power here seems theoretical and artificially constructed (see Frontier Economics, economic report, page 116).

248 With regard to the market share of Qatar Energy, a maximum of 29%, it should be noted that this is also under the threshold regarded as critical in competition terms in the factual scenario. The ruling chamber thus takes the view that the scenario described here is one in which, while competition concerns cannot be completely ruled out from the start, the likelihood of them occurring may be classed as very low.

249 (2) Scenario 2: "Largest market participant holds 60% of capacity and third-largest market participant holds 40%"

250 In scenario 2, Frontier Economics examined the effects on competition for the same years, 2027 (see Frontier Economics, economic report, page 112 et seq) and 2033 (see Frontier Economics, economic report, page 116 et seq). It judged the likelihood of this scenario occurring as much greater than for scenario 1. As in scenario 1, Qatar Energy's market share is below the critical threshold at no more than 29%. There is no rise in HHI of over 250 points in either of the years under consideration. There is thus no cause for competition concerns, even if the remaining 40% of capacity was allocated to other market participants that have even smaller market shares than Equinor/Petoro (see Frontier Economics, economic report, page 116).

251 (3) Scenario 3: "Third-largest market participant holds 100% of capacity"

252 Frontier Economics further examined the effects on competition in scenario 3 if Equinor/Petoro held 100% of terminal capacity. For 2027 (see Frontier Economics, economic report, page 112 et seq), the result is an HHI increase of 267 points, slightly over the 250-point threshold. However, as soon as 2028 the threshold would not be exceeded any more, according to the report. In fact, the HHI would see a rise of only 204. The negative trend in the HHI delta continues up to 2033, for which a rise of only 128 points is calculated (see Frontier Economics, economic report, page 115). This decline may partly be explained with the decline in Norwegian imports between 2020 and 2030. It seems rather unlikely that Equinor/Petoro would book and use the whole long-term throughput capacity of the Wilhelmshaven LNG facility. Equinor/Petoro only produces small volumes of LNG as it primarily imports piped natural gas to Europe. Frontier

Economics considers that competition concerns can be ruled out for this scenario (economic report, page 117). The ruling chamber shares this view.

3.7.1.3.3 Interim conclusion for the upstream wholesale market

253 The ruling chamber thus concludes that there are no relevant competitive concerns with respect to the upstream wholesale market that would prevent the issuing of the exemption. Neither the analysis of the north-west European upstream wholesale market nor the analysis of the more narrowly defined market give rise to any relevant negative effects on competition.

254 In addition, it can be assumed that market concentration in the natural gas market will weaken anyway because of energy efficiency measures and the expansion of renewable energies. It should also be taken into account that effective congestion mechanisms to combat the hoarding of capacity have been imposed on the applicant, guaranteeing, in particular, permanent, non-discriminatory third-party access to 10% of the annual throughput capacity on a short-term basis for the entire duration of the exemption (see section 4.8.).

3.7.1.4. Analysis of effects on competition in downstream markets

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

256 Frontier Economics carried out an analysis of the downstream market to determine whether detrimental effects on competition in downstream markets were to be expected (Frontier Economics, economic report, page 150 et seq). This analysis, like the one of the wholesale market, compared the effects on the competitive situation of an LNG facility exempt from regulation with the counterfactual scenario in which the terminal is not implemented at all. Two scenarios were again used to quantify the possible effect on competition on the basis of competition indices. In scenario 1, known as the "best guess" scenario, it is assumed that the current HoAs completely turn into binding bookings. In scenario 2, the "worst case" scenario, it is assumed that the largest market participant, [redacted], increases its existing booking to 60% of capacity for long-term allocation and the remaining 40% is controlled by the second-largest undertaking, [redacted] or [redacted]. This scenario is intended to show the remaining uncertainty about the use of the terminal and identify a potential detrimental effect on competition. The calculations were made for the year 2027.

257 Frontier Economic concluded that the Wilhelmshaven LNG facility with an exemption would not have a negative, but rather a positive, effect on competition on the sales side of the wholesale market. In scenario 1, which reflects the expected bookings, there is a very small increase of just

[redacted] By contrast, the market shares of the other large market participants, such as [redacted] This result is reflected in the reduction of the CR4 value by up to 5% and the contrary growth in the market shares of the smaller market participants. Overall the reduction in the HHI value by more than 100 points indicates a lower market concentration and thus a positive competitive effect of the Wilhelmshaven LNG facility (see Frontier Economics, economic report, page 164 et seq). Even in scenario 2, in which control of the capacity by the two largest market participants is assumed, an exemption would be neutral in competition terms since the HHI would not rise by more than the threshold of 250 points (see Frontier Economics, economic report, pages 166-167). Negative effects on competition are thus not to be expected in either scenario.

258 Frontier Economics also presents in a comprehensible manner that the national markets for the supply of final customers undoubtedly have intense competition and there is no indication that an exemption for the LNG facility could have negative effects on competition on final customer markets (see Frontier Economics, economic report, page 169 et seq).

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.

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

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

261 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 Wilhelmshaven LNG facility that is the subject of this application 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 Russian gas deliveries to Germany and other EU Member States have been halted as a result of the war in Ukraine. The ability to have

permanently secured, short-term access to 10% of annual throughput capacity of the LNG facility that is the subject of this application (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.

262 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).

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

264 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.

265 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.

266 There is therefore no indication that the Wilhelmshaven 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 February 2024 either.

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

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

268 The applicant plans to direct the LNG/SNG it has regasified via a connection to the already completed WAL II transmission link and then via the transmission system of Open Grid Europe GmbH. To this end, an application for capacity expansion in accordance with section 39 of the Gas Network Access Ordinance (GasNZV) was made to Open Grid Europe GmbH in June 2022, so that the latter can provide the entry capacity into the transmission system that the applicant considers necessary as soon as the LNG facility goes into operation. TES originally made the application in accordance with section 39 GasNZV, because at that time the applicant was still being founded. The procedure was transferred to the applicant by TES on 4 December 2023.

269 The transmission system operators took the entry capacity required for the operation of the Wilhelmshaven LNG facility into consideration in their modelling when drawing up the Network Development Plan (NDP) 2022-2032. In addition, the Etzel-Wardenburg-Drohne transmission line, which is planned to transport the capacity volumes out of Wilhelmshaven in future, is included in the accelerated procedure for construction set out in the LNGG pursuant to section 2(1) and (2) LNGG in conjunction with para 2.8 of the annex to section 2 LNGG.

270 The NDP aims to identify measures for the needs-based (and thus efficient) optimisation of the system and the needs-based and efficient expansion of the system. It is essentially the job of the transmission system operators to identify long-term capacity requirements and ensure that this demand can be met with suitable and economically reasonable measures. The drawing up of the scenario framework and the network development plan play a key role in this. Market players have the opportunity to participate in the consultation. In addition, market demand is indicated at the cross-border interconnection points every two years and may result in incremental capacity processes under Regulation (EU) 2017/459. Ultimately, available capacity has to be offered to network users under appropriate, non-discriminatory conditions. This also applies to capacity that technically can be provided at different network points but is only available in the network once.

271 Taking account of the entry capacity needed by the Wilhelmshaven LNG facility in the NDP thus ensures that potential inefficiency (eg creating and operating unnecessary, duplicated structures) of the regulated system to which the Wilhelmshaven LNG facility is connected will be avoided.

272 Negative effects on the efficient functioning of the regulated systems concerned cannot therefore be identified at this time. There are no indications that could support an opposing view. In particular, the Wilhelmshaven LNG facility is not in direct competition for the network capacity needed to transport regasified LNG and SNG with the gas volumes intended for the cross-border interconnection point at Ellund or the two planned and yet to be built stationary LNG facilities in

Stade and Brunsbüttel. 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.

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

273 Granting the exemption for the Wilhelmshaven LNG facility will not have negative effects on the security of energy supply of the EU or the security of supply in the other EU Member States and is thus not in breach of the principle of energy solidarity laid down in Article 194(1)(a) and (b) TFEU as described by the CJEU in its judgment of 15 July 2021 (Case C-848/19). The applicant provided proof of this in the course of the administrative proceedings with a report (see Frontier Economics, economic report, page 79 et seq).

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

275 It has already been established that the Wilhelmshaven 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. This applies particularly to the landlocked nations of Czechia, Slovakia, Hungary and Austria, which are not able to set up their own inland LNG import infrastructure. 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 Wilhelmshaven 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 479bn m^3 (2022 data, see IEA, World Energy Outlook 2023, page 135, table 3.6.) is sufficiently large compared with the maximum capacity of the Wilhelmshaven LNG facility of 10bn m^3/a. Thus, it is not to be assumed that the additional demand from the Wilhelmshaven 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 Wilhelmshaven 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 Wilhelmshaven LNG facility. Further negative effects on the supply situation in other Member States are not evident.

276 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.

277 Granting the exemption is therefore not in breach of the principle of energy solidarity as described in the CJEU judgment of 15 July 2021 (Case C-848/19) and is not detrimental to security of supply of natural gas in the Union (section 28a(1) para 5 EnWG and Article 36(1)(e) of Directive 2009/73/EC).

3.8. Discretion

278 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.).

279 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.

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

281 This is based on the following considerations:

282 The fact that the LNG facility in Wilhelmshaven will contribute to the creation of new LNG infrastructure in Germany and enable LNG to be imported directly to Germany is an argument in favour of an exemption. It will open up new sources of natural gas and transport routes. In this

way, it will make an important contribution to the diversification and security of natural gas supplies in Germany and north-west Europe in light of the current geopolitical situation. The LNG facility 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.). Because of the situation arising from the Ukraine war, it is relevant to ensuring security of supply in Germany and the European Union (see section 3.2.2.).

283 In this context, an argument against an unrestricted exemption is the fact that the LNG market is developing dynamically and forecasts about its future development are uncertain. The best way to promote competition and also security of supply in this dynamic environment is to ensure that the infrastructure remains open for new market participants at least partially (10% of the annual throughput capacity) even during the exemption, which applies for many years, by guaranteeing long-term, non-discriminatory third-party access. Otherwise, the LNG facility would be reserved for the exclusive use of just a few customers on the basis of long-term capacity contracts for the long exemption period. In view of its considerable significance for competition and security of supply and of the dynamic developments on the LNG market, this foreclosure of the new LNG infrastructure for such a long time is unjustified. This fact is also highlighted in the European Commission staff working document, which states that effective congestion measures are more likely to be necessary if the exemption permits long-term capacity contracts. In such cases, it may be necessary to mitigate the foreclosure effect of such contracts in order to ensure that competition and security of supply are enhanced (see Commission staff working document, New Infrastructure Exemptions of 6 May 2009, SEC(2009)642 final, para 42).

284 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 allocation and management of capacity were considerably less strict. In the old Directive 2003/55/EC, the decision about whether such rules were needed was at the discretion of the regulatory authority ("may decide upon"). Moreover, the discretion of the regulatory authority was explicitly restricted by the addition that the implementation of long-term contracts could not be prevented. The current Directive 2009/73/EC no longer includes such a restriction. What is more, the decision about whether rules for the allocation and management of capacity are needed is no longer at the discretion of the regulatory authority but is mandatory ("shall decide upon"). Moreover, unlike its predecessor, the current Directive 2009/73/EC sets out that the regulatory authority must require a procedure to combat the hoarding of capacity (UIOLI) and to enable trading on the secondary market. In accordance with Directive 2009/73/EC, only the issue of how and which rules for a

UIOLI procedure and trading on the secondary market are necessary and appropriate in the individual case are at the discretion of the regulatory authority.

285 On the other hand, the fact that major new infrastructure requires huge investments that are subject to considerable risks needs to be taken into consideration. The background to section 28a EnWG shows that the aim and purpose of the provision is to create a stable framework by granting exemption from regulation for a limited period for individual new infrastructure projects that would not come to fruition if the regulatory provisions of sections 20 to 28 EnWG had to be complied with (see Bundesrat printed paper 613/04 (decision) of 24 September 2004, page 25). The investment is to take account both of the principle of competition and of the security of supply on an increasingly unified European energy market (see section 28a(1) para 1 in conjunction with section 1(1) and (2) EnWG). The aim is not to make it economically impossible to build new interconnectors or major LNG and storage facilities because of network access requirements that might change over time. Investors need planning certainty, which is often secured using long-term capacity contracts (see section 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 tariffs, transparency provisions and unbundling provisions) for a limited period of time. Nevertheless, it is appropriate to restrict the exemption so as not to weaken the effectiveness of the general access regime too much (see Commission staff working document, New Infrastructure Exemptions of 6 May 2009, SEC(2009)642 final, paras 11 and 17; Arndt, in: Bourwieg/Hellermann/Hermes, Energiewirtschaftsgesetz, 4th ed 2023, 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.

286 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).

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

288 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 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.

289 Specifically:

3.8.1. Granting of the exemption (operative part 1)

290 In operative part 1., an annual throughput capacity of 15bn m³/a at the Wilhelmshaven LNG facility is exempted from the application of sections 20 to 26(1) EnWG. This covers both the application of a determination pursuant to section 26(1) EnWG and an ordinance pursuant to section 118a EnWG, currently the LNGV.

291 It includes exemption from both access and tariff regulation. By way of derogation from the broader wording of section 28a(1) half-sentence 1 EnWG, there is no need for an exemption from the unbundling provisions of sections 8 to 10e EnWG. These provisions are not relevant to LNG system operators, so there is no need for an exemption. Sections 8 to 10e EnWG apply to the relationship between transmission system operators and their vertically integrated energy supply undertakings. Correspondingly, the certification requirement and thus the ex ante check on compliance with sections 8 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 31h EnWG. The applicant is therefore not a transmission system operator or addressed by the unbundling provisions of sections 8 to 10e EnWG.

292 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 LNG facility in Wilhelmshaven 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.

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

294 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 5.) 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.

295 The exemption also covers the operation of the facility with SNG, including e-NG, instead of LNG, as SNG and e-NG are, as explained above (see section 3.1.2) nearly pure methane, which in turn is nearly identical with natural gas and is thus interchangeable with fossil molecules. It is therefore possible to inject regasified SNG and e-NG into the transmission system safely and without technical restrictions (Article 1(2) of Directive 2009/73/EC).

296 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.).

297 Moreover, capacity created by future significant increases of capacity is not covered by the exemption (see operative part 1. 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).

298 This exemption does not cover the use of the facility with hydrogen, since any legal requirements for hydrogen infrastructure and the possibility of temporarily exempting hydrogen infrastructure from regulation are only now being introduced in the announced EU Gas Package 2024 and thus there is currently neither a corresponding national regulatory regime for hydrogen nor a corresponding exemption provision for facilities with services related to hydrogen.

3.8.2. Time limit (operative part 2.)

299 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 2 thus limits the exemption to a period of 20 years from the start of commercial operation. 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.

300 In European Commission has explained the circumstances to be considered in determining the period of exemption in recent exemption proceedings. The risks related to the project must be taken into account (see section 3.4). Against this background, the contractual agreements and durations of long-term contracts must be considered. The European Commission also considers that the duration of the exemption should be equal to or less than the expected period for cost

recovery of the new infrastructure. In the exemption proceedings for the Deutsche Ostsee LNG facility in Lubmin, the European Commission determined that an exemption duration of 20 years may be justified even though it goes beyond the binding durations of the capacity contracts. Major factors for the duration of the exemption may also be the depreciation and tariff validity periods (see Commission Decision of 20 December 2022, C(2022) 9902 final, para 126).

301 On this basis, the period of exemption of 20 years requested by the applicant is [redacted]. However, the European Commission has also pointed out that a major factor for the determination of the period of exemption is the depreciation period. The applicant has shown that the depreciation period of the LNG facility is 20 years (see explanation in application documents of 15 February 2024, page 1 et seq and Frontier Economics, supplementary report of 15 February 2024, page 2 et seq). In the exemption proceedings for the Stade LNG facility, the European Commission 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 also 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).

302 Pursuant to operative part 11., the start of commercial operation of the Wilhelmshaven LNG facility is to be notified in writing to the ruling chamber to ensure that the period of the exemption is clear.

303 For clarity's sake, it should be noted here that the exemption decision does not constitute an operating licence. For this reason, the exemption period also has no significance as to how long the facility is actually used or is allowed to 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.

3.8.3. Requirements regarding tariffs (operative part 3.)

304 In accordance with operative part 3., the applicant is required to levy tariffs on users of the exempt infrastructure. This ensures that the requirement of section 28a(1) para 4 EnWG is met in the long term. It is at most a formal condition for the applicant, since the applicant intended to levy tariffs anyway and needs to do so to refinance its investment.

3.8.4. Rules and mechanisms for the allocation and management of capacity (operative parts 4. to 7.)

305 Operative parts 4. to 7. set out the conditions for non-discriminatory access to the LNG facility that is the subject of this application within the meaning of the second and third subparagraphs of Article 36(6) of Directive 2009/73/EC.

306 (1) Discretionary decision

307 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).

308 (2) Restriction of discretion

309 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.

310 (3) Limits of exercise of discretion

311 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 (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.

312 (4) Exercise of discretion

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

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

315 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 26(1) EnWG are only justified if and insofar as they are necessary to achieve this purpose (see Commission Decision of 25 May 2021, C(2021) 3814 final, para 110; Commission staff working document, New Infrastructure Exemptions of 6 May 2009, paras 11 and 17; see also Arndt, in: Bourwieg/Hellermann/Hermes, Energiewirtschaftsgesetz, 4th ed 2023; section 28a, margin no 2).

316 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 26(1) EnWG is intended to create a stable investment environment for a limited period of time, in particular by enabling the conclusion of 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.

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

318 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 the production and distribution of gas to customers. Barriers to market entry and exit need to be low for as many competitors as possible to be active on the market. A core element of non-discriminatory operation is therefore the possibility of being able to use the infrastructure without disadvantaging other market participants (non-discriminatory access to infrastructure). An exemption from regulation in accordance with section 28a EnWG in conjunction with Article 36 of Directive 2009/73/EC cannot simply exempt an LNG system operator from the basic obligation set out in section 11(1) EnWG, because this provision is not one of those for which an exemption may be granted. Therefore, section 28a(1) EnWG in conjunction with Article 36(1) of Directive 2009/73/EC also mentions the principle of non-discriminatory operation and makes a prerequisite for the exemption from certain regulatory provisions the fact that the investment enhances competition in gas supply (section 28a(1) para 1 EnWG) and that the exemption must not be detrimental to competition or to the effective functioning of the internal market in natural gas (section 28a(1) para 5 EnWG) or to efficient functioning of the systems concerned and the security of supply of natural gas in the European Union (section 28a(1) para 5 third and fourth alternatives EnWG, new version). In addition, in accordance with the second subparagraph of Article 36(6) of Directive 2009/73/EC, the regulatory authority must give consideration, on a case-by-case basis, to the need to impose conditions regarding non-discriminatory access to the infrastructure. Accordingly, in, for example, the Decision of 19 August 2022 in the exemption proceedings for the Stade LNG facility and in the Decision of 25 May 2021 in the exemption proceedings for the Lubmin LNG facility, the European Commission 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 in the

reserve quota to enhance security of supply and competition (see Commission Decision of 19 August 2022, C(2022) 6098 final, para 55 and Commission Decision of 19 August 2022, C(2022) 9902 final, para 61).

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

320 In making its discretionary decision, the ruling chamber considered the fact that the LNG facility that is the subject of this application will advance the roll-out of LNG infrastructure. This will enable new, overseas sources of gas for Germany to be opened up and transport routes directly to the country to be created. In light of the current geopolitical situation as well, the possibility created by LNG facilities to import additional volumes of LNG is of great importance in the energy market. In this way, the LNG facility will be able to 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).

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

322 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.

323 The ruling chamber analysed various key figures from the LNG market for the period from 2012 to 2023 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, 2021 and 2023 from the International Group of Liquefied Natural Gas Importers (GIIGNL), an organisation that seeks to promote the development of activities in the field of LNG. Both these reports are publicly accessible (see https://giignl.org/resources2/, accessed on 22 February 2024).

324 In the course of this assessment, the ruling chamber noted that essentially the volume of LNG imports is increasing significantly worldwide. In light of the current situation, LNG imports were up 60% in 2022 from 2021 in Europe due to the need to replace piped imports from Russia with other sources of gas, especially 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. This high level was not fully maintained in 2022 but dropped slightly to 35%.

325 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, an ongoing trend of rising LNG imports to Europe may be observed. 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 – Regulatory framework for LNG terminals, study for the European Commission, May 2020, page 18 et seq). Continued efforts are also being made to expand the LNG infrastructure, especially in north-west Europe. LNG imports continue to gain importance significantly in light of the energy transition in Germany and in particular because of the current geopolitical situation 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 – Regulatory framework for LNG terminals, study for the European Commission, May 2020, pages 22-23, 39).

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

327 The ruling chamber therefore set conditions for non-discriminatory access to the LNG facility that is the subject of the application in operative parts 4. to 7. In light of the background described, these conditions ensure that the LNG facility can make the greatest possible contribution to the enhancement of competition and security of supply (section 28a(1) para 1 EnWG) and 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, New Infrastructure Exemptions of 6 May 2009, SEC(2009)642 final, para 42).

328 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.

329 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 of 25 May 2021, 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 of 25 May 2021, C(2021) 3814 final, para 110). For one thing, the exemption must be of a limited duration (section 28a(1) EnWG). An exemption may cover all or part of the capacity of the new infrastructure, or only certain parts of the infrastructure (first subparagraph of Article 36(6) and Article 36(8)(c) of Directive 2009/73/EC). In addition, the regulatory authority is to determine rules and mechanisms for the management and allocation of capacity before issuing approval for the exemption. The regulatory authority has discretion to decide which rules are necessary and appropriate to achieve the aims of the exemption in addition to the mandatory right to trade on the secondary market 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 5. 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.

330 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.

331 The ruling chamber did not, however, consider it necessary to impose booking limitations for dominant undertakings. Given the HoAs concluded for the Wilhelmshaven LNG facility, the facility will contribute to the diversification of supply sources and will not be detrimental to competition, since the likely long-term bookers do not hold dominant positions on either the producer or the downstream levels in the natural gas market in Germany and north-west Europe (Frontier Economics, economic report, page 162 et seq).

332 [redacted]

[redacted].

333 [redacted] Negative effects on competition are thus not to be expected.

334 It is not to be expected that the exemption will cause detriment to competition related to downstream markets either. [redacted]

335 In addition, it may be assumed that market concentration in the natural gas market will weaken anyway because of energy efficiency measures and the expansion of renewable energies.

336 (10) Proportionality

337 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 Wilhelmshaven 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.

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

339 The conditions in the operative part are also appropriate. They take into account the benefits of the planned LNG facility for competition and security of supply and mitigate the regulatory risks to

the extent that the investment is made possible. The exemption thus permits 90% of the total capacity to be marketed in long-term contracts. Investors and lenders can therefore record calculable, long-term capital recovery, leading to a sufficiently secure, stable investment climate. What is more, the ruling chamber took account of the individual technical and operational specifications of the LNG facility that is the subject of the application in its determination of the rules and mechanisms for the allocation and management of capacity.

3.8.4.1. Long-term capacity allocation (operative part 4.)

340 In operative part 4., 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 4. 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 4. b). More detailed rules on the long-term allocation of the free capacity remaining after the initial allocation are set out in operative part 4. c).

341 Additional rules that provide further detail on a non-discriminatory procedure are permissible. The principle of non-discrimination thus also applies to capacity allocation under the exemption. This is not contrary to the exemption from the access obligations set out in section 20 EnWG. As explained above (see section 3.8.), 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 4. on the long-term allocation of capacity make the investment plans impossible, nor does the applicant claim this.

342 a) Booking requirements for long-term bookers (operative part 4. a))

343 Operative part 4. a) sets out the booking requirements long-term bookers have to meet in the interests of a smooth, non-discriminatory operational allocation procedure.

344 Specifically:

345 (1) Registration

346 The provision of operative part 4. 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.

347 (2) Offer of different products

348 The applicant is free to offer different products in accordance with operative part 4. a) (2), but these are subject to the principle of non-discrimination. This is not an impermissible hurdle to free access to the relevant infrastructure.

349 The standard slot is set by the applicant at 175,000 m^3 of LNG or liquefied SNG, but landings of up to [redacted] of LNG or liquefied SNG are possible, as explained by the applicant in the applicant of 1 November 2023. Each unloading slot permits the unloading of 175,000 m^3 of LNG. For landings of less than 175,000 m^3 of LNG, the remaining volume is unused. For landings of between 175,000 and [redacted] of LNG, the use of another unloading slot and the prior agreement of the applicant are necessary. This agreement may only be refused for operational reasons such as insufficient temporary storage, regasification or pipeline connection capacity (see application, page 17).

350 The unloading slot gives the customer the right to 175,000 m^3 of temporary storage capacity for [redacted] (see application, page 18). The length of temporary storage may be adjusted at the customer's request (see application pages 20-21), but seasonal storage is not possible.

351 The applicant plans to offer capacity products with different durations (see application pages 18-19). The basic service product has a duration of 20 years. A broad product portfolio offers terminal 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. The products and services offered must therefore be subject to the principle of non-discrimination at all times.

352 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.

353 (3) Minimum booking amount

354 Operative part 4. a) (3) allows the applicant to set a minimum booking amount in the capacity contracts of no more than 1bn m^3/a of regasified natural gas or synthetic methane per year of throughput capacity.

355 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 facility is at full capacity and is thus a suitable means of achieving this aim. However, a high minimum booking amount could limit the number of potential customers to an inappropriate extent and might present an impermissible barrier to access for smaller, potential market participants. Taking into account the planned annual throughput capacity of 15bn m³/a of natural gas or synthetic methane, the ruling chamber considers that a minimum booking amount of no more than 1bn m^3/a is appropriate to pursue the applicant's legitimate interest in reducing complexity to ensure the capabilities of terminal operations while not creating impermissibly high barriers to access.

356 In the explanations included in the rules and mechanisms submitted, the applicant put a minimum booking amount of 1bn m^3/a. 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 potential customers from booking more than 1bn m^3/a of regasified natural gas or synthetic methane a year. 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.

357 (4) Minimum booking duration

358 Operative part 4. a) (4) sets out that the minimum booking duration must be no more than five years. This is based on the following considerations: major new infrastructure, 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. 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 terminal. 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.

359 Taking into consideration the explanations of the applicant, the ruling chamber views a minimum booking duration of no more than five 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.

360 (5) Booking year

361 The provision that the booking year is identical with the calendar year (operative part 4. a) (5)) ensures that all parties involved have the same understanding. The choice of the calendar year is based on the applicant's proposal. 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).

362 b) Long-term initial allocation of capacity (operative part 4. b))

363 Operative part 4. b) contains minimum requirements for a non-discriminatory and transparent procedure for the initial allocation of capacity on the basis of long-term contracts.

364 Specifically:

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

366 Operative part 4. 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.

367 (2) Provisions in the event of excess demand

368 Operative part 4. b) (2) contains provisions for a non-discriminatory procedure in the event of excess demand. This 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 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.

369 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 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.

370 (3) Basic tariff, mark-ups depending on the booking duration

371 Operative part 4. b) (3) allows the basic tariff applied to the initial allocation to refer to a booking duration of 20 years (basic service product). For bookings with shorter durations, it is permissible to impose mark-ups on the basic tariff depending on the duration. For contracts with a duration of 15 to 19 years, mark-ups may not be more than 10% of the basic tariff. For reasons of transparency, these mark-ups must be made known to all potential users before the initial allocation.

372 In its letter of 31 January 2024, the applicant explained that it was seeking to market the throughput capacity of its LNG facility on a long-term basis for 20 years. At the same time, it wanted to accommodate customers' desire for shorter durations.

373 The ruling chamber initially intended to cap the mark-ups for capacity bookings with a duration of less than 20 years at 10%. In its letter of 31 January 2024, the applicant argued that capacity bookings with a shorter duration than the basic service product meant a lower certainty of income and capping mark-ups at 10% of the basic tariff would not generate sufficiently certain capital recovery in the order of magnitude necessary for the project, which would have a direct effect on the profitability of the project.

374 The ruling chamber has accepted the applicant's proposals by permitting mark-ups depending on the booking duration. 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 on the basic tariff must be designed in a comprehensible and non-discriminatory manner. For reasons of transparency, these mark-ups must be made known to all potential users before the initial allocation. Moreover, the mark-ups may not be more than 10%, with the exception of contracts with a duration shorter than 15 years. These provisions enable the applicant to impose mark-ups on the basic tariff for shorter durations in the initial allocation of capacity. The ruling chamber understands, as stated by the applicant, that capping the mark-up on contracts with a duration shorter than 15 years would not generate sufficiently secure capital recovery to the extent required for the project financing. This approach means barriers to market entry are not too high overall and there is a reasonable balance of interests between all parties.

375 c) Long-term allocation of the free capacity remaining after the initial allocation (operative part 4. c))

376 Operative part 4 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 non-discrimination. In the course of its considerations, the ruling chamber has kept the rules to the minimum needed to ensure 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.

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

378 The ruling chamber takes the view that mark-ups in the course of further capacity allocation following the initial allocation, as planned by the applicant, are permissible. Operative part 4. 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.

379 The ruling chamber takes the view that a price mark-up of up to 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 contribution towards safeguarding security of supply by enabling additional volumes to be imported. 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.

380 (2) No provisions on the allocation mechanism

381 The aim of the ruling chamber in setting rules and mechanisms for the management and allocation of capacity in operative part 4. c) (2) is to ensure non-discriminatory initial access and permanently secure, useful and equally non-discriminatory third-party access (second subparagraph of Article 36(6) of Directive 2009/73/EC).

382 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.

383 The bookings made by the initial bookers in the initial allocation are unaffected by the carrying out of another allocation procedure for the capacity still available after the initial allocation.

384 If excess demand only occurs during a further procedure for the long-term allocation of capacity remaining after the initial allocation, a non-discriminatory allocation has to be carried out on a pro-rata basis only among the participants of the further allocation procedure.

3.8.4.2. Short-term capacity allocation – reserve quota (operative part 5.)

385 Operative part 5. 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. This requirement must be upheld as a proportion of the approval annual throughput capacity for the following year, even if slots that cannot be allocated on a non-yearly basis are transferred by the applicant to the “non-regulated” sector for the duration of the current business year (see application of 1 November 2023, page 22). The ruling chamber has decided to issue this provision in the course of its deliberations. It should be noted for clarity's sake here that the 10% reserve quota is a minimum requirement. The ruling chamber has deliberately refrained from imposing a requirement for the long-term marketing of capacity so as not to prevent any additional marketing on a short-term basis.

386 The provision of a reserve quota 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. In addition, the provision was necessary for reasons of equal treatment because it is also included in the – now final – decisions for the Brunsbüttel, Stade and Lubmin LNG facilities (BK7-20-107-final, BK7-22-086-final and BK7-22-140-final). It was necessary for reasons of equal treatment to create comparable usage conditions for LNG facilities exempted from regulation.

387 Moreover, a series of conditions have been placed upon the applicant (operative part 5. a) to p)) for the short-term allocation of capacity set aside in order to ensure effective access and a transparent and non-discriminatory allocation procedure.

388 The decision to set a reserve quota is based on the following considerations.

389 (1) Purpose of the reserve quota

390 The reserve quota determined by the ruling chamber of 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.

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

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

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

394 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, at least 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, (see Trinomics/REKK/enquidity: Study on Gas market upgrading and modernisation – Regulatory framework for LNG terminals, study for the European Commission, May 2020, pages 22-23, 39 and 95), this kind of short-term product could be attractive for potential traders with this focus.

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

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

397 The reserve quota set out in operative part 5. 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.

398 (5) Trading on the secondary market and the UIOLI procedure are not equally effective means of ensuring permanent access

399 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 – trading on the secondary market 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.

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

401 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).

402 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.

403 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.

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

405 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 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 strengthening in light of the efforts to replace Russian gas imports in Germany and the European Union (see IEA, Global Gas Security Review 2023 including Gas Market Report, Q3-2023, page 34 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, – Regulatory framework for LNG terminals, study for the European Commission, May 2020, pages 22 et seq, 39 and 95).

406 The 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. In Germany the first LNG facilities have been connected to the 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 had specifically mentioned in the original 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 of 25 May 2021, C(2021) 3814 final, paras 58-59). If just the two congestion mechanisms, trading on the secondary market 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 trading on the secondary market 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.

407 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 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.

408 (7) Comparable rules for operators and users of import pipelines and other LNG facilities

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

410 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 now final decisions for the Stade LNG facility (decision of 19 September 2022, BK7-20-107-final), the Lubmin LNG facility (decision of 12 January 2023, BK7-22-086-final) and the Brunsbüttel LNG facility (decision of 19 June 2023, BK7-22-104-final). The principle of equal treatment therefore makes it necessary to create comparable usage conditions for LNG facilities exempted from regulation.

411 (8) Level of the reserve quota

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

413 Based on the terminal's annual throughput capacity of 15bn m^3 of natural gas or liquefied SNG as stated in the application, the throughput capacity to be set aside each year in the reserve quota is at least 1.5bn m^3 of natural gas or liquefied SNG.

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

415 The intention of the design of the reserve quota set out in the provisions of operative part 5 a) to p) and the provisions on the short-term marketing of the capacity set aside is to meet the justified interests of the applicant in the necessary investment conditions and technical and operational feasibility as far as possible while at the same time ensuring a 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.

416 Furthermore, the applicant is free to offer more, not yet allocated capacity within this framework if it so desires. The wording "at least" in point I. 2 makes clear that the applicant may make additional arrangements provided that the provisions set out in any exemption decision are not affected.

417 Specifically:

418 a) Registration (operative part 5. a))

419 In accordance with operative part 5. 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 acquisition of capacity, whether in the first, initial allocation or when allocating remaining capacity after the initial allocation. As the short-term marketing takes place annually and must be announced publicly four weeks in advance (see operative part 5. f)), the registration requirement does not pose an inappropriate barrier to access.

420 b) Short-term allocation of capacity in the form of slots (operative part 5. b))

421 In operative part 5. 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.

422 The ruling chamber therefore 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 either. The slots to be allocated on a short-term basis are intended to give more potential users the opportunity to receive non-yearly access to the terminal at regular intervals. It has therefore been determined that the slots must be spread as evenly as possible over the booking year.

423 c) Minimum unloading amount of 175,000 m^3 of LNG or liquefied SNG per slot (operative part 5. c))

424 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 3.8.4.). 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 or liquefied SNG that has to be unloaded per slot needs to be determined as well.

425 The ruling chamber's analysis of the predicted tanker sizes indicates that there will be low market entry barriers with regard to the attractiveness of possible short-term products with slots of 170,000 m³ or more of LNG or liquefied SNG, because if a slot for short-term marketing enables in the best case scenario an average LNG tanker with a capacity of about 170,000 m³ 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 then be more likely that there will be demand for such a product.

426 By contrast, based on the applicant's information in its application of 1 November 2023, it is determined that each slot should enable the slot holder to unload at least 175,000 m³ of LNG or liquefied SNG. The determined amount of at least 175,000 m³ of LNG or liquefied SNG thus also takes account of the individual technical and operational conditions of the LNG facility. According to the applicant's application, unloading volumes of 175,000 m³ to [redacted] of LNG or liquefied SNG are also to be possible as part of the short-term capacity allocation as well (see application of 1 November 2023, pages 17 and 20). As the amount is a minimum one, the applicant is free to offer slots with an unloading amount greater than 175,000 m³ as well. Moreover, as with the explanations under point I. 2. l), the setting of a minimum unloading amount does not prevent potential customers from unloading smaller amounts if necessary, if this is technically and operationally possible as part of the operational process.

427 d) Minimum number of slots (operative part 5. d))

428 The number of slots to be offered for short-term capacity allocation each year has been set at at least 12. The applicant must ensure for each year that the sum of the minimum unloading amount of all slots offered always equals at least 10% of the maximum annual throughput capacity in m³ of LNG or liquefied SNG.

429 A maximum unloading amount of [redacted] of LNG or liquefied SNG per slot and short-term capacity to be allocated of at least 10% of the total annual throughput capacity (1.5bn m³ of natural gas or synthetic methane a year) would, mathematically, result in about [redacted] slots each year.

430 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 175,000 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 12 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.

431 The applicant itself put the minimum number of slots at [redacted] each year (see application of 1 November 2023, page 20), but the ruling chamber did not use the slot number provided by the applicant. The ruling chamber's calculation was also based on an unloading amount [redacted] of LNG or liquefied SNG per slot, while the applicant's submitted calculations were only based on the unloading amount of 175,000 m^3 of LNG or liquefied SNG per slot. The larger unloading amount resulted in a reduction of the slot number that the ruling chamber considered must be determined. At this point, however, it should be noted that the minimum number is a lower limit. The applicant has the choice to offer the market a larger number of slots if tankers with smaller sizes than [redacted] are landing. The applicant therefore has a certain amount of leeway to take strategic decisions for its business.

432 In the interests of transparency and non-discrimination, the ruling chamber took the view that it was still necessary to set a fixed minimum number of slots to be offered to potential shippers in the short-term marketing procedure, as in comparable proceedings.

433 e) Timing of the allocation (operative part 5. e))

434 Operative part 5. 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 slots shall be allocated annually on a recurring date to be published. It is up to the applicant to set a specific date. The date should be communicated transparently to the market with sufficient notice.

435 f) Allocation in auction (operative part 5. f))

436 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 multi-stage 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 terminal users with the applicant. Participation is limited to registered users without any products marketed on a long-term basis.

437 The wording "initially" in operative part 5. f) makes clear that for any slots not allocated in the auction, short-term allocation will take place using a further non-yearly procedure for the non-yearly allocation of short-term capacity set aside and not allocated in the course of the annual auction (see rationale on operative part 5. k)).

438 g) Transparency requirements (operative part 5. g))

439 These transparency requirements are necessary to ensure that potential customers have effective third-party access.

440 In principle the applicant is free to structure the slot product description in a way it considers sensible with regards to marketing that is as successful as possible and effectively operating the LNG facility. However, the ruling chamber considers the provisions made essential to ensure that potential users have clarity about the product they can acquire and that the slots have a minimum level of comparability. The slot product description must be published no later than two weeks before the auction starts to give all market participants enough time to prepare for the auction.

441 The compulsory information includes the date for the unloading slot (operative part 5. g) (1)) and the arrival window (operative part 5. g) (2)). The amount of LNG or liquefied SNG in m³ that can be unloaded securely must also be specified (operative part 5. g) (3)). This provision does not apply to any amounts that may be additionally unloaded on an interruptible basis.

442 The provision for the secure regasification capacity is, according to the applicant's data, 27.8 GWh/h (see application of 1 November 2023, page 9). These data refer to a regasification capacity for the entire facility; the regasification capacity for short-term marketing is, according to a letter of 13 March 2024, 6.95 GWh/h (operative part 5 g) (4)). This is a minimum requirement. Setting a minimum figure allows the applicant to make larger regasification capacities available flexibly as well. If technical restrictions of the facility require it, the applicant may deviate from the minimum regasification capacity in individual cases pursuant to operative part 5. l) (2).

443 The regasification period of the offered slot (operative part 5. g)(5)) is calculated from the quotient of the amount of LNG pursuant to operative part 5. g) (3) and the regasification capacity pursuant to operative part 5. g) (4).

444 The mandatory transparency information also includes the starting price for the slot (operative part 5. g) (6)), taking into account the provisions under point h), and the individual price steps (operative part 5. 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.

445 h) Starting price (operative part 5. h))

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

$$\text{max. start price}_{\text{K-Slot}} = \text{basic tariff} \times \frac{\dot{V}_{\text{K-Slot}}}{\dot{V}_{\text{basic tariff}}} \times 600 \frac{\text{Nm}^3}{\text{m}^3\,\text{LNG}} \times 10 - 6 \frac{\text{MWh}}{1000\ \text{Nm}^3} \times 1.1$$

With the following variables:

basic tariff :	The highest price for the basic service product contracted at the time of the start of the auction for short-term capacity.
$\dot{V}_{K-Slot}$:	slot volume of the landing capacity to be auctioned in the auction for short-term capacity.
$\dot{V}_{\text{basic tariff}}$:	the landing capacity contracted for the basic tariff.
$600\,\frac{\text{Nm}^3}{\text{m}^3\ \text{LNG}}$	conversion factor Nm^3 gas/m^3 LNG or liquefied SNG.
$10.6\,\frac{\text{MWh}}{1000\ \text{Nm}^3}$	conversion factor MWh/1,000 Nm^3.

446 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 or liquefied SNG underlying the basic tariff is relevant. As for the mark-up in operative part 4. 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 terminal capacity for the year ahead in the interests of promoting competition. A starting price that is low (as low as possible) is thus to be welcomed.

447 The formula submitted by the applicant was altered by the ruling chamber to include the ratio between the short-term slot and the slot size underlying the basic tariff as described above. In addition, the basic tariff is the highest price for the basic service product for capacity contracted on a long-term basis at the time of the start of the auction for short-term capacity. A specification of a five-year product (see explanations of the applicant in the application of 1 November 2023) was thus not necessary or justified in light of the abovementioned explanations.

448 i) Rules for excess demand (operative part 5. i))

449 Point I 2. 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).

450 The provision in operative part 5. i) also makes clear that it is up to the applicant to determine the level of the price step.

451 It is the applicant that has the necessary information to calculate a suitable amount. The requirement set out in operative part 5. i) to notify the level of the price step is necessary for it 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.

452 j) Undersell in an ascending clock auction (operative part 5. j))

453 Operative part 5. j) sets out the procedure in the event of an undersell in the auction for the allocation of short-term capacity.

454 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. The ruling chamber does not yet have any specific experience with slots for short-term marketing and the undersell issue at hand. The ruling chamber ultimately assumes that, owing to its proximity to users, the applicant will be able to determine a suitable, non-discriminatory allocation procedure in the event of an undersell among the most recent auction participants in the interest of maximising the marketing of slots. Apart from non-discrimination, therefore, the only requirement is for the slot to be allocated among the participants of the last auction round before the undersell. This is a logical provision because participants that had already exited the auction previously have signalled that they are not interested in acquiring the slot at the current price (slot price including applied premium). It is not clear why an undersell should lead to a situation in which such participants would be allowed to review their decision. It is therefore not necessary to apply a further provision to guarantee effective third-party access.

455 k) Phased allocation procedure and non-yearly, short-term allocation of capacity set aside (operative part 5. k))

456 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 registered users that do not yet have long-term capacity for the coming booking year.

457 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.

458 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.

459 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 LNG facility into account.

460 l) Deviations in the procedure for non-yearly allocation in the event of technical restrictions (operative part 5. l))

461 Operative part 5. l) permits deviations from the provisions on the slot product (operative part 5. c) for the non-yearly short-term allocation of unmarketed capacity set aside in order to meet the comprehensible, specific technical conditions of the Wilhelmshaven LNG facility. This option may only be used in the event of technical or operational restrictions.

462 (1) It may not be technically possible in individual cases for the applicant to provide non-yearly slots with a fixed minimum unloading amount of 175,000 m³ or more of LNG or liquefied SNG per slot without having to amend the binding annual service plan agreed with the users of the LNG facility the previous year. To take account of these technical restrictions and the applicant's contractual commitments, operative part 5. l) provides for the fixed minimum unloading amount of LNG or liquefied SNG 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.

463 (2) Operative part 5. l) permits the applicant to deviate from the minimum regasification capacity for a non-yearly slot. This is a minimum amount, so 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. In the event of technical or operational restrictions, the applicant may, in individual cases, offer a lower regasification capacity. Nevertheless, the applicant must keep any required quantitative and qualitative reduction in the regasification capacity as small as possible.

464 m) Further fees and costs (operative part 5. m))

465 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 5. h) fully covers the additional costs, in the view of the ruling chamber.

466 n) Offer of flexibilisation instruments (operative part 5. n))

467 The applicant is free to offer flexibilisation instruments, such as an early delivery mechanism or borrowing and lending. 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.

468 o) Reports on non-yearly short-term marketing (operative part 5. o))

Operative part 5. 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 and on the reasons for this. The report enables the provisions on the non-yearly short-term allocation to be monitored. These provisions are based on a forecast taking into account current 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 was 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 5. o). To minimise the administrative work involved, the notification requirement only applies in cases where marketing has not taken place.

469 p) Landing of liquefied, renewable SNG (operative part 5. p))

Operative part 5. p) sets out that when landing liquefied, renewable SNG, the customer shall receive a discount of 5% on the tariff for the basic product based on the proportion of SNG in the total volume offloaded (see application of 1 November 2023, page 17). Although the ruling chamber does not generally consider that the discounting of SNG requires a specific rule in these rules and mechanisms, but rather that it is the sole responsibility of the applicant to regulate, the ruling chamber does see the relevance of giving the landing of liquefied SNG preferential treatment over that of liquefied fossil natural gas in the interests of reducing carbon emissions.

470 The SNG must meet the German and European definitions of renewable gas valid at the time of offloading. The slot holder is responsible for providing evidence of this.

3.8.4.3. Trading on the secondary market (operative part 6.)

471 Operative part 6. 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 regulatory authority 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.

472 a) Right to trade on the secondary market and registration (operative part 6. a))

473 (1) Registration

474 Operative parts 4. a) (1) and 5. 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 in the course of trading on the secondary market.

475 (2) Term "transfer"

476 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.

477 b) Transparency requirement (operative part 6. b))

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

479 This is also set out in the Decision of the European Commission of 25 May 2021 (C(2021) 3814, Article 3, para 93 f.) The Commission justifies this by noting that bilateral secondary market trades can be 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 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 can 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.

480 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 trading on the secondary market 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 opportunities 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 trading and for potential customers to be given reliable information about the capacity holder's plans to use/conduct trading on the secondary market.

481 c) Agreement from the LNG facility operator (operative part 6. c))

482 In accordance with operative part 6. c), capacity transfers in the course of trading on the secondary market require the applicant's agreement. Transferring capacity/slots and granting the right to use capacity/slots both require the applicant's agreement. The applicant is responsible for making the annual service plan and coordinating any necessary adjustments in the course of the booking year. To be able to carry out these tasks, it is essential for the applicant to have reliable information about which users hold the capacity and how they plan to use it. This is also in line with the comments made by the European Commission in its Decision of 25 May 2021 (C(2021) 3814 final, para 88); the Commission takes the view that agreement to trading on the secondary market from the terminal operator is necessary in order to enable the terminal operator to enforce the obligations arising from the exemption, in particular the booking limitation.

483 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 the exceeding of a booking limitation set out in any exemption or 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.

484 d) Rights and obligations in the transfer of capacity (operative part 6. d))

485 Operative part 6. 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 for the period and scope of the capacity transfer. 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 for the period and scope of the capacity transfer. In other cases, and where merely a right to use capacity/slots is granted, the terminal operator can make other arrangements.

486 e) Notification of the actual use of slots (operative part 6. e))

487 It is necessary to distinguish between trading on the secondary market and the UIOLI procedure. The applicant's explanations up to now show that trading on the secondary market 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 point I 3. e) accordingly to keep the ability to use the two procedures separate. See the explanations on the UIOLI procedure (see operative part 7.) for more information on the wording.

488 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 five days before the date of the unloading slot whether and to which registered user an unused slot has been transferred.

489 No trading on the secondary market may take place for the duration of the UIOLI procedure.

3.8.4.4. Use it or lose it procedure (operative part 7.)

490 Operative part 7. 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 regulatory authority is to require congestion management rules to include the obligation to offer unused capacity on the market.

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

492 a) Notification on the non-use of slots and lead time of 20 days and relation to trading on the secondary market (operative part 7. a))

493 Operative part 7. 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 20 days before the date of the unloading slot and does not name another registered user to whom the slot has been transferred.

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

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

496 This means that the UIOLI principle must be applied if a user has not notified ("nominated") use of a slot before the 20-day lead time or has stated that it will not use a particular unloading 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.

497 If the UIOLI procedure is applied, trading on the secondary market is ruled out. These circumstances show that trading on the secondary market 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, trading on the secondary market can then take place.

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

499 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.

500 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 unloading slot will not be used. A longer lead time thus increases the chances that a new customer can request the product.

501 b) Booking period until no later than 20 days before the unloading slot and registration (operative part 7. b))

502 No later than 20 days before the originally planned unloading slot, the slot must be marketed by the applicant in a non-discriminatory procedure to be determined by the applicant and open to all registered users. 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.

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

504 c) Rights and obligations in the event of successful allocation and return of surrendered capacity (operative part 7. c))

505 Operative part 7. c) sets out that, as for trading on the secondary market, if the free unloading slot is allocated successfully, the original capacity holder is freed from the rights and obligations arising from the capacity contract vis-à-vis the applicant. If the capacity is not allocated, the applicant returns it to the original holder (return of surrendered capacity). The applicant envisages a window of three days for this process. 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.

506 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 these approaches have prohibitive effects.

507 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 terminal user but must be non-discriminatory and transparent. An appropriate fee can be charged for any marketing revenue paid to the original rights holder.

508 Where the applicant intends to conduct a procedure for the return of unused capacity in addition to the procedures for trading on the secondary market, procedures under operative part 6. or UIOLI procedures under operative part 7. for the users of its facility, as it has explained, the applicant must ensure at all times that the trading on the secondary market and the UIOLI procedure are not impacted by this and the procedure for the return of unused capacity upholds the principles of non-discrimination and transparency.

3.8.5. Reporting requirement (operative part 8.)

509 Operative part 8. 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 3. to 7. being affected.

510 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 3. to 7..

511 "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 3. to 7. 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).

512 In the original exemption proceedings for the Brunsbüttel LNG facility, the European Commission pointed out that, in particular that in the event of the applicant receiving any subsidy, the applicant would have to notify the ruling chamber as this 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 of 25 May 2021, C(2021) 3814 final, para 111). This requirement is implemented here in operative parts 8. and 9. of the exemption decision.

513 Moreover, operative part 8. requires the applicant to notify any permanent transfer of a larger amount of capacity that may occur later as part of trading on the secondary market to a dominant third-party, as this could affect compliance with the exemption requirements pursuant to section 28a(1) para 1 and 5 EnWG, according to which the exemption must not cause detriment to competition throughout its whole duration. The ruling chamber thus takes the view that limitations on booking by undertakings with potentially market-dominant positions are not currently necessary, [redacted]

514 However, to effectively rule out effects detrimental to competition in the event that larger amounts of capacity were transferred to a potentially dominant undertaking for a longer period of time at a later date in secondary trading, such transfers must be notified by the applicant under operative part 8. As any transfer of capacity that occurs in the course of trading on the secondary market requires the agreement of the applicant under operative part 6. c), the applicant is able to notify such capacity transfers. This agreement to the capacity transfer could then be refused following a notification to and examination by the ruling chamber with the involvement of the European Commission and the Bundeskartellamt. Any limitation on the capacity transfer could also be issued under operative part 9 a) of the exemption.

515 The ruling chamber considers that not all capacity transfers undertaken in the course of trading on the secondary market have to be notified, but only those carrying the risk that they could cause a detriment to competition (section 28a(1) para 1 and 5 EnWG). As to the question of which capacity transfers in the course of trading on the secondary market must be notified, the European

Commission Decision in the exemption proceedings for the Deutsche Ostsee LNG facility in Lubmin can offer some guidance (Commission Decision of 20 December 2022, C(2022) 9902 final, Article 1). Definitely requiring examination, and thus notification, would be a capacity transfer that led to a market participant holding 65% or more of the total capacity available for long-term booking (ie 65% of 90% of the annual throughput capacity) for five years or more, including first binding capacity contracts and any capacity added or made available thereafter as well as capacity bookings on the secondary market, and that led to the market participant achieving a market share of at least 30% on the upstream or downstream German gas wholesale market at any time during the booking duration.

516

3.8.6. Amendment, supplement or revocation of secondary provisions or the exemption (operative part 9.)

517 The provision in operative part 9. permits the ruling chamber to revoke, amend or supplement in full or in part the secondary provisions in operative parts 2. to 7. 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 9. 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 9. 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 3. to 7. (operative part 9. b)). A further possibility of amendment or withdrawal occurs if the applicant is not separate from the system operation of Open Grid Europe GmbH (OGE) or that of a third-party 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 9. 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 9. d)).

518 (1) Change in actual circumstances (operative part 9. a))

519 Operative part 9. 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 2. to 7. 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 8. and allows the ruling chamber to amend the exemption decision according to the new conditions in the event of changed circumstances.

520 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 4. to 7. 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 2. to 7., 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).

521 The right of amendment and withdrawal also ensure compliance with the approval requirements over the long exemption period of 20 years. The European Commission has stated in exemption proceedings that it could be necessary to reassess the approval prerequisite of the investment risk and possibly to examine and amend the exemption decision if subsidies for the construction of the LNG facility were granted (Commission Decision of 25 May 2021, 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 8. 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 of 25 May 2021, C(2021) 3814 final, paras 110-111).

522 (2) Breach of conditions (operative part 9. b))

523 Operative part 9. b) permits the monitoring of compliance with the secondary provisions of operative parts 3. to 7., which the ruling chamber considers necessary to establish the legal requirements for an exemption to be granted. The requirement in operative part 3., for example, ensures that the levying of tariffs for the use of infrastructure set out in section 28a(1) para 4

EnWG is complied with. Meanwhile, the rules and mechanisms for the allocation and management of capacity contained in operative parts 4. to 7. serve to enhance competition and security of supply in the gas sector pursuant to section 28a(1) para 1 EnWG by preventing foreclosure of the new infrastructure over the many years of the exemption and only allowing an exemption from the access obligations of section 20 EnWG to the extent necessary to enable the investment. The right to amend or withdraw the exemption set out in operative part 9. enables the ruling chamber to respond appropriately if the provisions, which ensure the application can be approved, are not complied with.

524 (3) Breach of unbundling requirement (operative part 9. c))

525 Operative part 9. 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, 122nd supplement, August 2023, margin no 11). The possibility of amending or withdrawing the granted exemption set out in operative part 9. 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.

526 (4) Amendment, revocation or loss of effect of the European Commission Decision (operative part 9. d))

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

528 (6) Response options

529 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.

3.8.7. Notification requirement to the European Commission in the event of amendment to or revocation of the exemption decision (operative part 10.)

530 The provision in operative part 10., like the provision in operative part 9. 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.

3.8.8. Applicability of the exemption (operative part 11.)

531 Operative part 11. places a condition subsequent on the exemption, that construction of the Wilhelmshaven LNG facility be started no later than two years after the European Commission Decision is issued and the LNG facility is put into commercial operation no later than five years after the European Commission Decision is issued, with the date of the start of construction and the date of commercial operation each being notified in writing to the ruling chamber without undue delay.

532 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 2. is the time when the commercial operation starts. As the date of the start of commercial operation is the reference for operative part 2., which limits the exemption to a period of 20 years, and for the condition subsequent pursuant to operative part 11., 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.

533 The condition subsequent refers back to the Commission Decision for the Stade LNG facility (Article 3 of the Commission Decision of 19 August 2022 (C(2022) 6098 final)), pursuant to which the exemption should include a due date with regard to the deadlines connected to the start of construction and operation in the ninth subparagraph of Article 36(9) of Directive 2009/73/EC. Operative part 11 thus uses the clear wording of the ninth subparagraph of Article 36(9) of Directive 2009/73/EC for the condition subsequent. In light of the time frame for the construction of the Wilhelmshaven LNG facility, the lengths of time stated in the Directive seem adequate to allow for any delays arising from planning approval or technical problems. The applicant is therefore 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 sufficient clarity as to the period of applicability of the exemption from the provisions of the network access regime of sections 20 to 26 EnWG and the LNGV issued on the basis of section 118a 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.

3.8.9. Applicability in the event of changes of ownership, operation or ownership structure (operative part 12.)

534 Operative part 12. enables ownership or operation of the Wilhelmshaven LNG facility to be transferred and changes to be made to ownership structure without jeopardising the exemption.

535 Without this operative part, doubt would remain as to whether a transfer of ownership 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.

536 Operative part 12. thus enables the legal acts mentioned without jeopardising the exemption but attaches certain conditions to them. It is necessary for the ruling chamber to be notified of the intended change in good time and for a third party to which the LNG facility operation is being transferred to commit to complying with the conditions of the approval. This avoids a situation in which only the rights and not the obligations from the approval would be transferred. Moreover, the ruling chamber retains a right of withdrawal that can be made use of if, for example, the transfers mentioned would be detrimental to competition.

537 "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.

3.8.10. Rejection of the application in other respects (operative part 13.)

538 Operative part 13. rejects the application in other respects. Because of the other provisions, the exemption granted falls short of what was requested.

3.8.11. Amendment or repeal due to a decision of the European Commission (operative part 14.)

539 Operative part 14. merely presents the applicable legal situation. It sets out that the decision in accordance with section 28a(3) sentence 4 EnWG is subject to a final decision by the European Commission in accordance with Article 36(9) of Directive 2009/73/EC. This decision is to be amended or withdrawn where necessary in accordance with a final decision by the European Commission. Sections 48 and 49 of the Administrative Procedure Act (VwVfG) remain unaffected. Without prejudice to the powers of the European Commission and the associated legal consequences, this decision is a decision and not merely a draft. It is therefore possible to file an appeal against the decision in accordance with the information on legal remedies below.

3.8.12. Ruling on costs (operative part 15.)

540 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. The appeal must be submitted to the Higher Regional Court of Düsseldorf (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 appeal and the grounds for appeal must be signed by a lawyer.

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

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