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COMMISSION DECISION

of 25.5.2021

on the exemption of the German LNG Terminal in Brunsbüttel, Germany, from the requirements regarding third party access and tariff regulation

(Only the German version is authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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/EC¹, and in particular Article 36 thereof,

Whereas:

1. DESCRIPTION OF THE PROJECT

- (1) The German LNG Terminal GmbH (‘GLNG GmbH’) intends to construct and operate a liquefied natural gas (‘LNG’) regasification terminal (‘GLNG’ or ‘the terminal’) in Brunsbüttel, Germany. The terminal is planned next to a former nuclear power plant and nearby the entrance to the Kiel Canal linking the North Sea to the Baltic Sea as well as the Brunsbüttel harbour facilities. The gasification capacity of the terminal is planned to be of 8 billion m³ (bcm) of natural gas per year. After changes to the initial planning, the terminal is planned to include two storage tanks of 165000 m³ capacity each, thus a total storage capacity of 330000 m³. The terminal discharging capacity is bigger than the regasification and transit capacity, thus allowing for parallel loading of LNG directly onto ships, trucks or trains. Planned start of operation for the terminal is in [REDACTED].
- (2) GLNG GmbH is a joint venture of Gasunie LNG Holding B.V., Oiltanking GmbH and Vopak LNG Holding B.V. All three shareholders have equal shares and voting rights in the joint venture. Gasunie LNG Holding B.V. is a subsidiary of N.V. Nederlandse Gasunie (‘Gasunie’). Gasunie is operating gas transmission infrastructure in the Netherlands, Germany and the United Kingdom, and is a shareholder in Gate Terminal B.V., operator of the Gate LNG Terminal in the port of Rotterdam. Oiltanking GmbH is a subsidiary of Marquard & Bahls AG, Hamburg, active in energy supply, energy trading and logistics. Marquard & Bahls AG owns and operates 63 oil tank storage facilities in 23 countries worldwide, with a total capacity of 20 million m³. Vopak LNG Holding B.V. is a subsidiary of Royal VOPAK N.V., which owns and operates a global tank storage network as well as two LNG terminals: the Gate LNG Terminal in Rotterdam (jointly with Gasunie) and the Altamiral terminal in Mexico.
- (3) To gauge market interest, GLNG GmbH conducted an ‘open season’ procedure from January to April 2018. During this phase, it [REDACTED]

¹ OJ L 211, 14.09.2009, p. 94.

[REDACTED]

2. NATIONAL PROCEDURE

- (4) On 30 July 2018, GLNG GmbH submitted a request for exemption from the requirements on third party access and tariff regulation for a duration of 25 years as of start of commercial operation to the German national regulatory authority Bundesnetzagentur ('BNetzA'). During communication with the BNetzA, GLNG GmbH submitted further documentation and information. After verifying completeness of the requested documentation, the BNetzA informed the Commission of the exemption request by email of 7 May 2019.
- (5) On 15 May 2019, the BNetzA shared with GLNG GmbH draft rules on capacity management and capacity allocation to give the opportunity for comments. Those draft rules notably contained provisions on initial non-discriminatory long-term allocation of capacity, on reservation quota for short-term allocation or alternative capacity release mechanisms, on secondary markets and on use it or lose it ('UIOLI') requirements. GLNG GmbH commented on these draft rules by reply of 29 May 2019. The BNetzA set out the rules used as basis for running the market test by letter of 16 October 2019. The market test was run on this basis from 29 October to 28 November 2019. When summarizing the outcome of the market test, GLNG GmbH voiced concerns regarding the delays applicable in the UIOLI requirements and the reservation of capacity for short-term allocation.
- (6) On 8 October 2019, RWE Supply & Trading GmbH ('RWE') requested to be admitted to the BNetzA procedure, which was granted by the BNetzA by decision of 19 December 2019. On 30 January 2020, RWE provided comments, notably arguing that it would be disproportionate to require both UIOLI provisions and a capacity reservation for short term bookings.
- (7) On 7 and 15 July 2020 respectively, the BNetzA shared a draft decision for comments with GLNG GmbH and RWE. GLNG GmbH commented on 28 July 2020 that

[REDACTED]

[REDACTED] Thus, rather than one tank of 240000 m³, the terminal was now supposed to include two tanks with a total capacity of 330000 m³. GLNG GmbH alleged that [REDACTED]

[REDACTED]

In its comments, RWE argued in particular that short term bookings involved less risk for the client and should not be offered at prices below the long term bookings. Furthermore, all clients, including those in the initial booking round for long term capacity, should be able to book short term capacity on equal footing.

3. THE NOTIFIED EXEMPTION DECISION

- (8) On 30 November 2020, the BNetzA adopted an exemption decision subject to further amendments pending a decision of the Commission, granting the requested exemption from third party access and tariff regulation requirements ('the notified decision'). The exemption is granted over the full period of 25 years from start of operations, for an annual capacity of 8 bcm, and made subject to a number of conditions.
- (9) The conditions are notably as follows:
1. GLNG GmbH needs to charge tariffs on the users of the terminal.
 2. GLNG GmbH needs to apply a non-discriminatory and transparent procedure for long-term allocation of capacity, including at minimum the following:
 - (a) all potential users of capacity need to be pre-registered at GLNG GmbH;
 - (b) minimum volume requirements imposed for capacity bookings may not exceed 1 bcm/a;
 - (c) minimum duration requirements imposed for capacity bookings may not exceed 10 years.
 - (d) bookings are by calendar year.
 - (e) For the first allocation of long-term capacity, bookings received during a predefined period of 10 business days need to be treated as received at the same point in time. This booking period needs to be announced 10 business days in advance, providing all the required information. Should there be excess demand for capacity, capacity shall be allocated at an equal ratio to the different buyers.
 - (f) For long-term bookings after the first allocation a maximum surcharge of 10 % compared to the tariff in the first allocation ('base tariff') may be applied. No further requirements on allocating additional capacity after the first allocation are defined.
 3. A minimum of 10 % of the maximum annual capacity needs to be reserved for short term bookings. For those short term bookings, the following minimum requirements apply:
 - (a) all potential users of capacity need to be pre-registered at GLNG GmbH;
 - (b) The short-term capacity is to be allocated in slots which shall be as equally as possible distributed over the calendar year. Each slot shall allow for the off-loading of at least 150000 m³ of LNG. There shall be a minimum of six slots per year;
 - (c) Slots shall be allocated at the latest on 8 December of the year preceding the year the slot applies to. Allocation of slots shall occur via auction, which shall be announced at least 4 weeks in advance. At least two weeks in advance, relevant information on the slots and pricing needs to be available;
 - (d) the starting price for a slot auction may be a maximum of 10 % over the base tariff;
 - (e) In the first auction for short-term capacity, only market participants which registered with GLNG GmbH but did not book any long term capacity yet may participate. Should capacity remain after this first auction, a second auction shall allow for the participation of all registered market participants;
 - (f) slots not sold in the two auctions shall be allocated on a first come first served basis over the course of the year, with differences in technical requirements.
 4. Contracts on capacity bookings need to allow the market participants to resell their capacity rights on a secondary market to other registered market participants. Such a transfer may be rejected only on duly justified basis, in particular where there are justified doubts on the financial or technological capabilities of the prospective capacity holder.
 5. Contracts on capacity bookings need to contain a UIOLI provision, applicable if the capacity holder announces at the latest 20 days prior to the slot that it will not use the slot and does not nominate another registered market participant to which the slot has been transferred. At the latest 19 days before a slot, all registered market participants shall be able to book the freed slot based on a non-discriminatory procedure to be established by GLNG GmbH.
 6. Commercial operation needs to start at the latest on 30 November 2025.

4. PROCEDURE AT THE COMMISSION

- (10) On 8 December 2020, the BNetzA submitted the notified decision to the Commission.
- (11) On 17 December 2020, the Commission published a notice on its website, inviting stakeholders for comments within two weeks. The deadline was thereafter prolonged until 12 January 2021.
- (12) On 8 February 2021, the Commission sent a number of questions to the BNetzA. Those questions notably concerned the need for a consultation of other regulatory authorities pursuant to Directive (EU) 2019/692 of the European Parliament and of the Council², the possibility of transparency requirements for trades on secondary markets, possible implications of capacity bookings by dominant undertakings, justifications for the 25 year duration of the exemption, non discrimination requirements for the booking of long term capacity after the first allocation, and the requirement of starting construction within two years.
- (13) On 24 February, Deutsche Umwelthilfe ('DUH') submitted comments to the Commission. DUH argues that the BNetzA incorrectly assessed the concept of security of supply, and that the BNetzA would have needed to include an environmental impact assessment in the analysis, based on reasoning under German and Union law. In particular, analysing the impact of the terminal on security of supply would, according to DUH, require an analysis of the environmental impact of the terminal. The BNetzA would have also needed to reflect the planned reduction in the use of fossil fuels for generating electricity during the planned exemption period.
- (14) DUH also quotes a letter from the German Minister of Finance to the Secretary of the Treasury of the United States of America, setting out amongst others the intent of the German government to financially support the construction of LNG terminals, including the GLNG. DUH argues that this would indicate the GLNG would be used to import LNG from the United States of America, arguing that such gas would be produced via environmentally harmful methods ('fracking') and that importing LNG produced in such a way would negatively impact the security of supply assessment due to environmental concerns.
- (15) DUH furthermore argues that, as other existing LNG terminals in the Union had sufficient free capacity available, there would not be a need for the terminal, due to a lack of demand. This would also follow from the decision of another project promoter to no longer pursue the project of creating an LNG terminal in Wilhelmshaven, Germany. DUH argues that to assess future gas demand, the BNetzA would have needed to conduct an independent assessment rather than relying on studies submitted by the project promoter. This would also be indicated by the German integrated national energy and climate plan, which assumed a reduction in gas consumption by 2030 and beyond.
- (16) Finally, DUH argues that environmental requirements also had a high legal value under the TFEU and TEU, and that the Commission needed to take these requirements into account when analysing draft exemption decisions under Article 36 Directive 2009/73/EC.

² Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (OJ L 117, 3.5.2019, p. 1).

- (17) By email of 24 February 2021, the Commission requested the BNetzA to also consider the arguments raised by DUH in their reply to the Commission's questions.
- (18) By email of 24 March 2021, the BNetzA submitted the answers to the Commission's questionnaire as well as the submissions received in the consultation of other national regulatory authorities. Two national authorities had answered the consultation.
- (a) the Swedish Energimarknadsinspektionen confirmed that it has no objections to the decision.
 - (b) the Danish Forsyngstilsynet finds that the LNG facility has the potential to increase competition and security of supply in the northwest-European gas markets, as well as enhancing the integration of the internal European gas market. However, the Forsyngstilsynet stresses the importance of ensuring sufficient southbound capacity at the German-Danish border, including non-discriminatory allocation of firm capacity between the interconnection point Ellund and the LNG facility after it becomes operational in 2025. The German National Development Plan 2018 had removed this firm capacity at the same time as integrating the (competing) capacity for the LNG facility.
- (19) In its answer to the questionnaire of the Commission, the BNetzA states the following:
- (a) the results of the consultation of other national regulatory authorities confirm, in view of the BNetzA, the decision. No changes to the decision are required following the consultation.
 - (b) The BNetzA argues that no further measures are required to ensure transparency on pricing of capacity on the secondary market. In comparison to the Commission Decision C (2020) 8948 final³ on the exemption of the LNG Terminal Hook terminal, its decision already contained more stringent requirements to avoid the hoarding of capacity. Notably, the UIOLI provisions are triggered 6 days earlier than in the case of South Hook terminal (19 instead of 13 days) and the requirement to reserve 10 % of capacity for short term bookings via auctions ensured transparent and non-discriminatory access to short term capacity. Furthermore, the planned capacity allocation differs significantly, as the South Hook Decision had assumed allocation to a single holder of primary capacity, whereas the GLNG terminal would from the initial auction on be expected to be used by several capacity holders.
 - (c) The BNetzA argues that it is very unlikely that dominant undertakings could strengthen their position via capacity bookings at the terminal. First, the BNetzA sees important grounds not to assume a geographical market limited to Germany, but rather competition in a wider northwest-European market. Second, even if Gazprom, as the only dominant undertaking in a German market, was willing to book a large share of capacity, the *pro rata* allocation would make it very unlikely that Gazprom could gain a share of the capacity sufficient to increase its market power. If Gazprom booked such a large share of capacity, this would, according to the BNetzA, be subject to a notification obligation based on section 8 of the

³ Commission Decision of 8 December 2020 on the exemption of the LNG Terminal South Hook from the requirements regarding third party access and tariff regulation under Article 36 of Directive 2009/73/EC, C (2020) 8948 final.

operative part of the BNetzA decision. If a booking limitation was seen as required, such a limitation should, in view of the BNetzA, be set at no less than 55 % of capacity, as this would be the expected market share of Gazprom without the existence of the terminal.

- (d) The BNetzA confirms that the general requirement of transparent and non-discriminatory allocation of capacity also applies to long term capacity allocation after the initial allocation. In so far as section (4 (c) (2) of the operative part provides that ‘no further requirements for the long-term allocation of remaining capacity are defined’, this does not remove the general requirements in the heading of section (4).
- (e) As regards the arguments brought forward by DUH, the BNetzA argues as follows:
- DUH has not appealed the decision adopted by the BNetzA;
 - security of supply is a separate aim of German and Union law, in addition to and different from environmental protection;
 - Article 36 Directive 2009/73/EC is expressly applicable to LNG terminals. Any interpretation, which would implicitly exclude all LNG terminals from its scope must this be excluded;
 - the general objectives of German or Union law do not allow deduction of express obligations or interdictions, but can only be used in interpreting other terms of the legislation;
 - an exemption decision does not include a permission to operate a terminal, but is separate thereof. Thus, it cannot be assumed that the exemption for 25 years entails a guarantee to be permitted operating the terminal over this period. An environmental impact assessment is not required for exemption decisions, as these do not amount to or replace permitting procedures for the terminal. Environmental impact assessments are being conducted as part of the (not yet concluded) permitting procedures for the terminal;
 - decisions on which energy infrastructures are to be constructed should be based on market choices, not on regulatory decisions;
 - Possibilities for the import of green gases via the terminal are being assessed and cannot be excluded for the future. Furthermore, LNG imports in Brunsbüttel can allow reducing emissions from road transport or shipping;
 - The BNetzA conducted its own assessment on the development of gas demand and import needs. While the BNetzA concluded that until 2030 gas demand is, depending on the scenario, expected to slightly increase or slightly fall (and to fall significantly thereafter), the fall in EU gas production makes a need for increased imports likely. Furthermore, next to the need for additional import capacity, The BNetzA argues that the addition of import sources contributes to security of supply;
 - The BNetzA stresses that already the possibility of needing the infrastructure in the future means that it contributes to security of supply, independent of the actual later usage of the infrastructure;
 - in the Communication on an EU strategy for liquefied natural gas

and gas storage⁴, the Commission underlined the contribution of LNG terminals to security of supply while recognizing environmental challenges.

(20) The BNetzA also shared the questionnaire of the Commission with GLNG GmbH and RWE.

(21) GLNG GmbH notably provides the following comments:

- (a) delays in the procedure have the consequence that the final investment decision will need to be taken subject to the condition that the exemption is granted, and can impact financing and [REDACTED].
- (b) the terminal will not have negative impacts on security of supply or market functioning in other Member States;
- (c) GLNG GmbH is not party to contracts concluded on the secondary market. Thus, it could not implement a requirement to publish prices agreed in such contracts. In any event, publication of such prices or tariffs would not contribute to competition;
- (d) any booking limitation would reduce the value of capacity;
- (e) [REDACTED]
- (f) long-term capacity allocation for capacity not allocated in the first auction will follow non-discriminatory and transparent procedures, which could include another ‘open season’.

(22) RWE notably provides the following comments:

- (a) the factual situation for the South Hook terminal is very different from the GLNG. In particular, the South Hook terminal expansion capacity was planned for allocation to a single capacity holder. Furthermore, the decision of the BNetzA already contains a number of other requirements on transparency and non-discriminatory allocation;
- (b) requirements to publish pricing of secondary capacity in bilateral contracts would require publication of business secrets. This concern would not apply to capacity reallocated following a UIOLI procedure. However, the latter prices would, due to the specific situation of UIOLI procedures, not present a representative picture on pricing of capacity in general, and would thus not add significant transparency.

(23) Upon request by the Commission, GLNG GmbH provided further clarification on the financial planning of the terminal by email of 14 April 2021, notably as regards current expectations on construction costs, contract duration and internal rate of return.

5. ASSESSMENT OF THE EXEMPTION CONDITIONS OF ARTICLE 36 OF DIRECTIVE 2009/73/EC

5.1 General considerations

(24) Based on its assessment of the conditions listed in Article 36(1) of Directive 2009/73/EC and pursuant to Article 36(9) of that Directive, the Commission may

⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on an EU strategy for liquefied natural gas and gas storage, COM(2016) 49 final of 16 February 2016.

decide to require the regulatory authority to amend or withdraw its decision to grant an exemption.

- (25) In accordance with Article 36(9) of Directive 2009/73/EC the Commission's approval of an exemption decision ceases to have effect two years (in the event construction is not started) or five years (in the event operation has not started) after its adoption unless the Commission decides that any delay is due to major obstacles beyond control of the person to whom the exemption has been granted. The decision contains a condition that the commercial operation needs to start at the latest by 30 November 2025, thus within five years of adoption of the decision. However, the decision does not contain an explicit reference to the start of construction. As the BNetzA has set out in its reply to the questionnaire of the Commission, loss of validity of the Commission's approval would make the BNetzA decision illegal, and the BNetzA would need to decide on the revocation ('Widerruf') of its decision. The BNetzA argues that such a revocation would be possible based on section (9) of the operative part of the decision. However, section (9) of the operative part of the decision refers to amendments or the repeal of the *conditions and obligations ('Nebenbestimmungen') attached to the decision*, not of the decision itself. Whereas section 10 of the operative part of the decision allows for the revocation of the decision, this is subject to very specific requirements, which do not seem to include the loss or revocation of the Commission approval. Furthermore, experience has shown that long-lasting exemption decisions can require amendments. The Commission thus asks the BNetzA to expressly clarify that, should the Commission's approval lose its effect, be withdrawn or be amended, the BNetzA should be able to also withdraw or amend the notified decision.

5.2 Applicable legislation

- (26) In its decision, the BNetzA states that it assessed the exemption request on the basis of the national law implementing Directive 2009/73/EC without applying the changes introduced to its Article 36 by Directive (EU) 2019/692. This is based on a transitional provision included in German law which states that exemption requests for new infrastructure, which were submitted prior to 12 December 2019 are not subject to the new requirements. The present exemption request was submitted in 2018 and regarded as complete by the BNetzA on 7 May 2019.
- (27) In its questionnaire to the BNetzA, the Commission has raised doubts as regards an interpretation of Directive (EU) 2019/692 by BNetzA which would freely allow national law to add transitional rules. Directive (EU) 2019/692 does not provide for any express transitional provisions as regards the changes introduced in Article 36 Directive 2009/73/EC. Directive (EU) 2019/692 is applicable as of twenty days after its publication, thus as of 23 May 2019. As established by the Court of Justice ('Court') in case C-596/13 P⁵ explicitly referring to the exemption provisions under Directive 2009/73/EC, *'new rule of law applies from the entry into force of the act introducing it, and, while it does not apply to legal situations that have arisen and become definitive under the old law, it does apply to their future effects, and to new legal situations. It is otherwise, subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application (judgment in Gemeinde Altrip and Others,*

⁵ Judgement of the Court of 26 March 2015 in case C-596/13 P, European Commission v Moravia Gas Storage a.s., points 32-33.

C-72/12, EU:C:2013:712, paragraph 22 and the case-law cited). In particular, according to settled case-law, procedural rules are generally taken to apply from the date on which they enter into force (judgment in Commission v Spain, C-610/10, EU:C:2012:781, paragraph 45 and the case-law cited), as opposed to substantive rules, which are usually interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that such an effect must be given to them (see judgments in Meridionale Industria Salumi and Others, 212/80 to 217/80, EU:C:1981:270, paragraph 9; Molenbergnatie, C-201/04, EU:C:2006:136, paragraph 31; and Commission v Freistaat Sachsen, C-334/07 P, EU:C:2008:709, paragraph 44).’

- (28) Against this background, first it is necessary to distinguish whether the changes introduced by Directive (EU) 2019/692 are procedural or substantive in nature.
- (29) Article 1 (5)(a) Directive (EU) 2019/692 amended the condition set out in Article 36 (1) point (e) of Directive 2009/73/EC. Whereas previously the provision stated that *‘the exemption must not be detrimental to competition or the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected’*, this was replaced by *‘the exemption must not be detrimental to competition in the relevant markets which are likely to be affected by the investment, to the effective functioning of the internal market in natural gas, the efficient functioning of the regulated systems concerned, or to security of supply of natural gas in the Union.’* Thus, the assessment now explicitly needs to consider effects on all relevant markets, effects on all regulated systems concerned (whether they are connected or not) and explicitly needs to consider effects of the exemption on security of supply in the Union. While arguably most of these requirements could already be implied from interpretation of the previous version of that provision, in light of the principle of energy solidarity, they are now made more explicit. Those changes concern substantive provisions on the material conditions for the grant of an exemption. In fact, the Court implicitly confirmed that the conditions for granting an exemption are substantive requirements, see point 37 case C-596/13 P. Therefore, in so far as the national legislation could consider the submission of a request as *‘situation that has arisen and become definitive’* or an *‘existing situation’*, it would be justified to apply the substantive legal requirements at the time of submission. There are however grounds to doubt whether such a situation can be deemed *‘definitive’* in this sense, as the Commission can request withdrawal of a national decision, and the national decision has not even been taken yet at the point in time of the request. In fact, the Court has established that national decisions are, for the purpose of the procedure at the Commission not to be considered as definitive⁶. Thus, the Commission would have to apply the legal requirements as amended by Directive (EU) 2019/692.
- (30) However, this could arguably be different for the procedure by the national regulatory authority. As the BNetzA had already confirmed completeness of the exemption request at the time of entry into force of Directive (EU) 2019/692, one could consider that this completeness would create a definitive situation for the purpose of the national procedure. On the other hand, as explicitly stated by the BNetzA in its letter of 29 April 2019 to GLNG GmbH, the confirmation of completeness did not preclude the BNetzA from requesting further information. Furthermore, even if the

⁶ Point 44 case C-596/13 P.

‘completeness’ were deemed a definitive situation, it is doubtful whether this would also concern the substantive analysis of the request.

- (31) In any event, this question can be left open, if the requirements under the amended legislation are also found to be met in the course of the Commission’s procedure. As the Commission can request changes on substance to the national decision should the new requirements not be met on substance, any error in the assessment as to the applicable law *ratione temporis* could be remedied by the required amendments.
- (32) Article 1(5), point (b) of Directive (EU) 2019/692 replaced Article 36(3) of Directive 2009/73/EC. As the present infrastructure is not connected to a third country, the only relevant addition is the requirement for the national regulatory authority to consult the national regulatory authorities of the Member States the markets of which are likely to be affected by the new infrastructure. A consultation obligation is a procedural provision. Thus, even if one were to consider the confirmation of completeness as an existing situation, one would need to apply this procedural step to existing situations. Against this background, the Commission in its questionnaire requested the BNetzA to proceed with the required consultation. The BNetzA has thereafter consulted all regulatory authorities of the Member States, as well as the regulatory authorities of the United Kingdom and Norway. Thus, this new procedural requirement has been complied with.

5.3 The market test and congestion management rules

- (33) Article 36(6) of Directive 2009/73/EC requires the conduct of a market test after the national regulatory authority has decided on the applicable congestion management rules.
- (34) The purpose of that test is to evaluate the demand for capacity in the project from third parties with the aim to assess the likelihood that capacity finds buyers and to evaluate the appropriate size of the project.
- (35) GLNG GmbH conducted an ‘open season’ procedure from January to April 2018. During this phase, [REDACTED]
[REDACTED]
[REDACTED].
- (36) Furthermore, on 16 October 2019 the BNetzA set out rules on capacity management and capacity allocation, which contained provisions on initial (primary) non-discriminatory long-term allocation, on reservation quota for short-term allocation or alternative capacity release mechanisms, on secondary markets and on UIOLI requirements. The market test was run on the basis of those rules from 29 October to 28 November 2019 and carried out by the terminal operator. The BNetzA explicitly stated that this formalised market test does not put into question the open season, but cannot be replaced by it either.
- (37) By letter of 3 December 2019, GLNG GmbH provided a summary of the market test outcome to the BNetzA. GLNG GmbH also voiced concerns regarding the delays applicable in the UIOLI requirements and the reservation of capacity for short-term allocation and argued that some market participants interested in booking capacity had also voiced such concerns.
- (38) Following the market test, [REDACTED] market participants had shown interest in the primary capacity:

MARKET PARTICIPANT	CAPACITY	CONTRACT DURATION
████	████ cm/a	████
████	████ cm/a	████
3RD CLIENT	████ cm/a	████

(39) Based on the information provided, the market test meets the requirements under Article 36(6) of Directive 2009/73/EC.

5.4 ‘Major new gas infrastructure’

(40) Article 36(1) of Directive 2009/73/EC specifies that major new gas infrastructure, that is to say interconnectors, LNG and storage facilities, qualify for an exemption.

(41) The exemption is requested for an LNG regasification terminal including LNG storage tanks. The terminal would offer three groups of services. The so-called ‘basic’ service includes services required for the import, offloading and regasification of LNG for injection into the transmission grid. The so-called ‘dispatch’ services aim at redistributing LNG in liquid state by reloading it on ships, trucks or train carriages. ‘Support’ services include the handling of gas, withdrawal from and storage in the storage tank. The notified decision does not include the ‘dispatch’ services in its scope, arguing that those do not fall into the scope of the provisions on LNG terminals in Directive 2009/73/EC.

(42) Article 2(11) of Directive 2009/73/EC defines the term ‘LNG facility’ as follows: “‘LNG facility’ means a terminal which is used for the liquefaction of natural gas or the importation, offloading, and re-gasification of LNG, and includes ancillary services and temporary storage necessary for the re-gasification process and subsequent delivery to the transmission system, but does not include any part of LNG terminals used for storage.”

(43) In so far as LNG is offloaded from ships without being regasified, and subsequently reloaded onto other ships, trucks, or train carriages (which the notified decision refers to as ‘small call and large scale sector’), be it for further transport or directly to be used as fuel, the Commission agrees that this does not fall currently into the scope of ‘LNG facility’ as defined in Directive 2009/73/EC. The aim of Directive 2009/73/EC is to improve the functioning of the internal market for natural gas and of the interconnected gas network. Gas, which is imported in liquefied state, never leaves this state and is not transported via the interconnected gas network was not meant to be addressed by the provisions on LNG terminals in Directive 2009/73/EC. Where a separation of both activities is technically not possible, this could be different. However, in the case of the GLNG terminal, the offloading capacity is bigger than the regasification capacity, thus allowing to conduct dispatching and regasification services in parallel without negatively impacting each other. Also financially, both activities will be separated in bookkeeping to avoid cross-subsidisation between regulated and unregulated activities.

(44) The investment is also ‘major’ within the meaning of Article 36 Directive 2009/73/EC. Whereas there is no exact minimum threshold, the planned investment volume between EUR 450 and █████ million is clearly ‘major’. Furthermore, the

planned annual capacity of 8 bcm is significant even compared to an annual German gas consumption of less than 100 bcm.

- (45) The Commission therefore concludes that the GLNG terminal is an LNG facility within the meaning of Article 2(11) Directive 2009/73/EC and qualifies as a major new gas infrastructure within the meaning of Article 36(1) of that Directive, but that the notified decision was correct not to include the ‘dispatch’ services in the scope of the decision.

5.5 ‘The investment must enhance security of supply’ and ‘the exemption must not be detrimental to security of supply of natural gas in the Union’

- (46) The Commission notes that in general, an investment which provides a new route or entry point to the relevant market and connects new upstream sources of gas from new suppliers to the market should increase the security of supply of that market. However, that has to be assessed on a case-by-case basis.
- (47) The notified decision presents a detailed assessment on the security of supply benefits of the investment. There is currently no LNG terminal in Germany. Thus, the investment enables new supply sources and new routes towards Germany. However, it should be noted that there is free capacity at LNG terminals in other Member States, notably in the Netherlands, Belgium or France. The transmission networks of those Member States are directly connected to the German transmission system. It thus needs to be assessed whether, as argued by DUH, the free capacity in other terminals means that the GLNG terminal does not enhance security of supply. However, it should be noted that Directive 2009/73/EC does not require any such ‘enhancement’ of security of supply to be above a given threshold. Thus, also a comparatively small enhancement of security of supply is sufficient. For the same reason, it is sufficient if security of supply is enhanced for the Union, a part of the Union, or a given Member State, for as long as the terminal does not reduce security of supply in other areas of the Union.
- (48) Increases to security of supply can also result from reduced reliance on specific infrastructure elements. While the GLNG terminal is situated not far from other terminals, it uses different connection points which are not directly competing with the existing terminals. By reserving 10 % of annual capacity for short-term bookings and applying UIOLI requirements, the GLNG terminal would furthermore enable access to the terminal for a wide range of suppliers.
- (49) As regards the source of any future gas imports, it should be noted that there is no certainty. While the letter from the German minister for finance quoted by DUH does put the terminal into the context of increased LNG imports from the US, LNG is traded on a world market and imports could, over the 25 year exemption period, come from various sources. Differently from Commission Decision C (2020) 8948 final⁷ on the expansion of capacity at the South Hook terminal the project is not directly linked to a specific investment in upstream liquefaction facilities.
- (50) At the same time, the Commission has not received any comments from stakeholders which would indicate that the GLNG terminal could replace other existing infrastructure or push other facilities out of the market. Similarly, the consultation of other regulatory authorities by the BNetzA has not shown such a concern by other

⁷ https://ec.europa.eu/energy/sites/ener/files/documents/2020_south_hook_decision.pdf, Decision C(2020) 8948 final of 8 December 2020

authorities. To the contrary, the Danish regulatory authority Forsyngstilsynet expressly states that the terminal has the potential to increase competition and security of supply in the northwest-European gas market. This conclusion is, however, subject to ensuring that the capacities on the other infrastructures remain available in comparable quantity and quality (firmness) as before the investment. In particular, the Danish regulatory authority Forsyngstilsynet points out to the need to ensure that an appropriate amount of firm capacities from Denmark to Germany will remain available to the market.

- (51) DUH argues, however, that the security of supply concept should be interpreted in a broader sense, including environmental considerations. According to DUH, the BNetzA would have needed to include an environmental assessment in the analysis, based on reasoning under German and Union law. In particular, analysing the impact of the terminal on security of supply would, according to DUH, require an analysis of the environmental impact of the terminal.
- (52) In this respect, it should be noted that it is not for the Commission to comment on whether or not German law requires a particular assessment by the German regulatory authority. This question can thus be left open. It is, on the other hand, necessary to discuss whether Union energy law, and more specifically Directive 2009/73/EC, requires the Commission to include environmental concerns as part of the security of supply assessment.
- (53) While Directive 2009/73/EC does not include a definition of ‘security of supply’, the meaning of the term in Article 36 of that Directive cannot be interpreted independently of its context. Exemption decisions aim at enabling major new investments. The legislator has found that natural gas pipelines and LNG terminals are in principle eligible for exemptions. Thus, any reading, which would result in excluding an infrastructure from the possibility of receiving an exemption merely because it will transport or regasify natural gas would clearly be contrary to the legislator’s intent. While it is true that, as stated by DUH, climate change and the need to reduce fossil fuel consumption were less commonly known when the exemption possibility was first created, the legislator was very much aware of those considerations when Article 36 of Directive 2009/73/EC was last amended in 2019 and decided to maintain the exemption possibility for such infrastructure.
- (54) Furthermore, Article 194(1) c) TFEU expressly defines the promotion of energy efficiency, energy savings and the development of new and renewable forms of energy as a separate and parallel objective to ensuring security of supply. Thus, while investments in renewable energies can and will in many cases contribute to security of supply, this does not mean that investments in fossil fuels would be contrary to the security of supply objectives.
- (55) Finally, although the exemption period would run until 2050 at the latest, granting such a long exemption would in no way entail a permit or guarantee that the terminal may be operated over this period. Building permits and environmental assessments are separate from the exemption process, The purpose of the exemption process is not to decide *if a terminal should be built or may be operated but which regulatory requirements shall be respected for the operation of the terminal in the internal gas market.*
- (56) Against this background, the Commission finds that environmental impacts related to the production or use of gas imported via a major new infrastructure are not an

element to be considered as part of the security of supply assessment under Article 36 of Directive 2009/73/EC.

- (57) Article 36(1), point (e) of Directive 2009/73/EC was amended by Directive (EU) 2019/692. In accordance with that provision, it should also be verified that ‘the exemption must not be detrimental to security of supply of natural gas in the Union’. While similar to the requirement of Article 36(1)(a) of Directive 2009/73/EC before the amendment introduced by Directive (EU) 2019/692, the new requirement puts the focus not on the impact of the investment, but on the impact of the exemption decision. Furthermore, the geographical scope of the assessment is exclusively at the Union level. Very long exemption periods which monopolize access to critical infrastructure in the hands of a small number of market participants could bring negative impacts on security of supply in the Union. In theory, specific exemption conditions could also be to the detriment of security of supply, for example if an exemption decision prevented the investors from increasing interconnection to other Member States.
- (58) However, this is not the case here. While the exemption period is very long (25 years), this is not exceptional for LNG terminal exemptions. Furthermore, while the exemption allows long-term allocation of capacity, it expressly requires non-discriminatory capacity allocation based on transparent criteria and procedures. This is further strengthened by the conditions included in the notified decision. By making the exemption subject to considerable anti-hoarding requirements, notably by reserving 10 % of capacity for yearly bookings based on auctions or within-year bookings, and giving preferential access to this capacity to those not holding long-term bookings, the notified decision ensures non-discriminatory access for a large number of market participants. As specified in the notified decision, such access (notably in so far as within year access is possible) could be used by market participants with LNG intended for other areas of the world to shift supplies to the Union in times of scarcity.
- (59) Furthermore, such access reduces the dependence on individual market participants. One element of security of supply is having access to different sources of supply, including via different suppliers. Given that the terminal would allow suppliers of LNG direct access to Germany, and capacity for the terminal would be subject to non-discriminatory allocation, it is likely that new suppliers or suppliers with a small market share could gain access to the terminal. As dependence on a single supplier or a small number of suppliers can allow such supplier(s) to take decisions which negatively impact security of supply, reducing dependence on such suppliers not only improves competition but also contributes to security of supply. Independent of the geographic market definition, increasing the number of access points to the EU gas network for new or smaller suppliers therefore contributes to security of supply. This does not apply only to security of supply in Germany. As there is no indication that the terminal will result in the closure of other routes of supply, the additional route would also be available for supplies to the internal energy market at Union level.
- (60) Thus, the Commission concludes that the investment enhances security of supply and that the exemption is not detrimental to security of supply of natural gas in the Union.

5.6 ‘Principle of solidarity’

- (61) As set out in case T-883/16⁸, the General Court concludes that the principle of solidarity also entails a general obligation on the part of the Union and the Member States, in the exercise of their respective competences, to take into account the interests of other Member States possibly affected. Notably, Member States should endeavour, in the exercise of their powers in the field of energy policy, to avoid adopting measures likely to affect the interests of the Union and the other Member States as regards security of supply, its economic and political viability, the diversification of supply or of sources of supply, and to do so to take account of their interdependence and *de facto* solidarity.
- (62) In the notified decision, the BNetzA analysed whether the exemption was likely to affect the interests of other Member States. The BNetzA argues that the decision improves security of supply in Germany and, as other Member States can import from Germany, also in other Member States. Furthermore, the BNetzA argues that imports to the terminal would not dry out the supply in LNG and thereby possibly reduce available supplies for other Member States. As the terminal capacity of 8 bcm/a represents a very small share of the worldwide LNG supply (426 bcm in 2018, with a growing tendency), the added demand via the terminal would have negligible impact on other terminals possibility to access supply. Also, if a smaller geographic market for LNG supply at EEA level was defined, additional demand via the terminal would not prevent other LNG terminals from being supplied if there is demand.
- (63) The Commission had requested the BNetzA to also consult all concerned national authorities within the Union. Following the questionnaire of the Commission, the BNetzA has consulted all national regulatory authorities within the Union, as well as of Norway and the United Kingdom.
- (64) The Swedish Energimarknadsinspektionen confirmed that it has no objections to the decision.
- (65) The Danish Forsyngstilsynet finds that the LNG facility has the potential to increase competition and security of supply in the northwest-European gas markets, as well as enhancing the integration of the internal European gas market. However, the Forsyngstilsynet stresses the importance of ensuring sufficient southbound capacity at the German-Danish border, including non-discriminatory allocation of firm capacity between the interconnection point Ellund and the LNG facility after it becomes operational in 2025. The German National Development Plan 2018 has removed this firm capacity at the same time as integrating the (competing) capacity for the LNG facility. The Forsyngstilsynet describes that constructive discussions on a solution have been ongoing. The Commission agrees that where an LNG facility and an interconnector require the same physical capacity, non-discriminatory allocation between both import routes is required. The Commission would like to underline that the creation of new exempted infrastructure should not have negative impacts on the existing regulated system and that such negative impacts could, where they impact other Member States, also raise questions as regards the compatibility with the energy solidarity criterion. The Commission thus welcomes that constructive discussions are ongoing and stresses that finding a constructive solution which ensures adequate import possibilities is a prerequisite for the start of operation of the terminal, and lack

⁸ Judgment of the General Court of 10 September 2019 in Case T-883/16 Poland v European Commission, points 72-73.

of any solution would need to trigger a review pursuant to sections (8) and (9) of the operative part of the notified decision.

- (66) No other national authority provided comments. To the knowledge of the Commission, there are no concrete projects in other Member States which would be put into question by the implementation of the terminal. Neither Member States nor competitors have voiced concerns as regards the terminal. Supplies to the terminal would be entering the German entry-exit system for gas, and could thereafter also flow to other Member States. In so far as the principle of energy solidarity protects also environmental policy objectives, this is discussed separately below.
- (67) There is no indication that the planned project would negatively impact the security of supply and the economic or political viability of the Union or Member States. To the contrary, the creation of additional regasification capacity positively contributes to security of supply for Germany and the Union.
- (68) Based on the above, the Commission considers the requirements set out by the General Court on the basis of Article 194 TFEU to be met.

5.7 'The investment must enhance competition in gas supply ' and 'the exemption must not be detrimental to competition in the relevant markets which are likely to be affected by the investment'

- (69) The Commission notes that in order to analyse the competitive effect of the exemption, the relevant gas markets and in particular the question whether the investment leads to the creation or strengthening of a dominant market position needs to be considered. That has to be assessed on case-by-case basis.
- (70) Article 36 of Directive 2009/73/EC requires that the investment project enhances competition in gas supply and that the exemption is not detrimental to competition in the relevant markets which are likely to be affected by the investment. While these two requirements are not identical, they imply that the project must enhance competition to the benefit of the consumers⁹.
- (71) For the purpose of this decision, the Commission assumes that the product market affected by the investment is the market for upstream supply of natural gas (which includes development, production and supply of natural gas to large importers/wholesalers).
- (72) As regards the first requirement, investments which enable gas supplies from new sources tend to improve competition in upstream gas supply, unless those sources were controlled by undertakings with a strong or dominant position on the relevant market. The terminal is not directly linked to a specific upstream source. Therefore, upstream supply can come from the worldwide market for LNG supply. LNG imports can constitute a direct competitive constraint for imports of natural gas via pipelines¹⁰. Independent of whether the geographical market is defined as the Gaspool area, as Germany, or as a wider North-West-European area, the addition of further import routes and sources from the liquid and global LNG market is expected to enhance

⁹ 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, paragraph 30.

¹⁰ See e.g. COMP/M.6477 BP/Chevron/ENI/Sonangol/Total/JB of 16 May 2012, para 18.

competition in upstream gas supply. The construction of the terminal as such is thus expected to enhance competition in gas supply.

- (73) As regards other geographical markets, if a national market definition was applied, the addition of an import possibility through Germany could improve competition in neighbouring markets as well. Should import capacity from Germany be already fully booked, or the given Member State be exporting to Germany, the addition of the terminal would leave competition in the neighbouring market unchanged.
- (74) The requirement of Article 36(1), point (a) of Directive 2009/73/EC is met in case competition is enhanced in at least one market and not reduced in any other market as a result of the investment. However, it must be verified if the exemption is detrimental to competition in the relevant markets likely to be affected by the investment pursuant to Article 36(1)e) Directive 2009/73/EC.

5.7.1 *The exemption from third party access ('TPA')*

- (75) TPA seeks to ensure that all competitors in a given market have non-discriminatory access to the infrastructure, including LNG facilities, and can compete on equal terms.
- (76) GLNG GmbH requested an exemption from TPA for 25 years. The BNetzA decided to grant this request for the entire planned capacity of 8 bcm/a. It is necessary to assess whether and to what extent the capacity holders would have the ability and the incentive to foreclose¹¹ competitors on relevant markets adjacent to the LNG facility.

Incentive and ability to foreclose

- (77) The incentives to foreclose mainly emanate from the protection of capacity holder profits for their activities on adjacent markets, such as the German downstream wholesale and retail gas markets. To answer this question, it needs to be assessed if the exemption would enable a market participant to acquire or strengthen its dominant position on any market.
- (78) To date, it is not clear which market participants will book the primary capacity. In the market test, █████ market participants have declared their intent to book capacity. The identity of one of the █████ interested undertakings was not disclosed by GLNG GmbH. █████
█████ Furthermore, via the secondary market, capacity can be shifted to other market participants. Therefore, different from exemption decisions where the final capacity allocation is known in advance, the impact of the exemption needs to be assessed based on assumptions. Assuming that new market entrants or small market participants book the capacity there is no doubt that newly created capacity would enhance competition. However, to assess potential negative effects to competition from the exemption, a reasonable worst case scenario needs to be taken into account.

¹¹ The present analysis of incentive and ability to foreclose is broadly based on the Commission's Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07, C265/6 of 18 October 2008). 'Foreclosure' in this context means where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the allocation of capacity of the GLNG, thereby reducing these companies' ability and/or incentive to compete. Such foreclosure may discourage entry or expansion of rivals or encourage their exit. Foreclosure thus can be found even if the foreclosed rivals are not forced to exit the market: It is sufficient that the rivals are disadvantaged and consequently led to compete less effectively. .

- (79) The notified decision distinguishes two types of worst case scenarios. Either the undertaking which is the biggest supplier of LNG on the North-West-European market books 100 % of the available capacity ('Scenario 1'), or the market participant with the biggest market share in the gas supply markets books this capacity ('Scenario 2'). Both scenarios are assessed first on the basis of a North-West-European geographic market, and then based on a German market.

Scenario 1

- (80) In Scenario 1, the notified decision thus assumes that all LNG will be imported from the biggest supplier of LNG in North-West Europe today, Qatar Petroleum ('QP'). Assuming 100 % of the terminal capacity is booked by QP, the notified decision comes to the conclusion that the Herfindahl Hirschman Index ('HHI') would vary only slightly compared to the contrafactual scenario (where the terminal is not built). This applies both to the year 2023 () and 2030.
- (81) Based on the economic analysis submitted by the project promoters¹², the market share of QP on a North-West-European market would increase from 10 to 12 % in 2023 (with QP as third biggest market participant) and from 19 to 21 % in 2030 (with QP as second biggest market participant, behind Gazprom and before Equinor). Whereas total market concentration would remain considerable, this is due to the high existing market shares of Russian and Norwegian suppliers. Thus, based on this market definition, the exemption would not be detrimental to competition.
- (82) Assuming a national market for Germany only, the market share of QP on this market would be 12 % in Scenario 1. QP would be a new market entrant. The market share of Gazprom on a national German market in 2023 would be 45 % without the terminal and only 40 % with the terminal fully booked by QP. Market shares in 2030 would be 14 % for QP and 46 % for Gazprom, the latter share still lowered due to the QP bookings. Thus, even the extreme assumption that all capacity was booked by QP would improve competition on a national geographic market, as it would reduce the market share of the largest market player and create a new significant competitor.

Scenario 2

- (83) In Scenario 2, Gazprom would be assumed to book all of the capacity at the terminal. The market share in a North-West-European market would increase from 26 to 31 % in 2023 and from 29 to 34 % in 2030. While market concentration would be high, this would be largely similar to current market conditions.
- (84) However, this would be very different on a national market covering only Germany in Scenario 2. Here, already the counterfactual (no terminal is built) would see very high market shares for Gazprom in the upstream supply of natural gas of 39 % (based on the study submitted by the project promoters) or even 45 % (based on the analysis conducted by BNetzA in the notified decision) in 2023. If Gazprom booked all of the terminal capacity, its market share on a national market would increase to 45 % (study submitted by GLNG GmbH) or 56 % (notified decision). For 2030, the submitted study would see an increase in the market share of Gazprom from 54 % to 60 % via the terminal capacity. The notified decision provides no percentage share, but notes that competition would worsen. Based on the differences for 2023, one could assume the methodology applied by the BNetzA would give market shares for Gazprom significantly higher than 60 %.

¹² Frontier Economics, Ökonomische Begutachtung Brunsbüttel LNG Terminal, 10 August 2018.

- (85) As set out in the notified decision, the German competition authority Bundeskartellamt regards the geographical market for upstream gas supplies to be 'at least national' in scope, which is in line with the Commission's opinion for the purpose of this decision. It is correct that Germany is very well interconnected to neighbouring Member States in North-Western Europe, and that there is considerable free capacity. Nonetheless, the notified exemption would be granted for a period of 25 years. In view of the significant changes expected on the energy markets until 2050, and the considerable reduction in the role of natural gas over this period, it is not guaranteed that interconnection capacity will remain as high as it is today, for example via the conversion of pipelines to transport of hydrogen. Furthermore, while capacity may be available in large parts of the year, it is also important to take account market power possibilities in situations of scarcity, for example due to severe cold, maintenance periods, or interrupted connections. In order to ensure effective competition, situations where market participants and policy responsables in one Member State know that they will depend on a single market participant in crisis situations should be avoided.
- (86) Against this background, an exemption which could bring with it the further strengthening of a clearly dominant position under one plausible and commonly used market definition would have to be seen as detrimental to competition.
- (87) Indeed, the results of the market test and contract negotiations do not give any indications that Scenario 2 would realise. Nonetheless, the Commission believes it is important to address such a serious concern, as the eventuality of this scenario becoming reality cannot be fully excluded. Furthermore, exactly because the scenario 2 is unlikely to occur, addressing it via additional conditions which only have an impact in case the scenario would otherwise realize does not pose a disproportionate burden on the investor.
- (88) The Commission therefore requests the BNetzA to include a condition which limits capacity bookings – including via the secondary market – of dominant undertakings. As trades on the secondary market require approval of GLNG GmbH, this requirement can be enforced accordingly.
- (89) In its answer to the questionnaire of the Commission, the BNetzA argues that such a limitation could already be defined pursuant to section (8) of the operative part of the notified decision. Section (8) requires GLNG GmbH to notify the BNetzA of all developments which could affect the fulfillment of the exemption requirements. While indeed one could argue this to be the case, the condition is neither very clear on what could constitute such a development, nor would it oblige the BNetzA to amend or repeal its decision, or even provide a clear legal basis for the BNetzA to do so. Thus, the Commission does not consider this provision to be sufficient.
- (90) The BNetzA also argues that a booking limitation, if deemed necessary by the Commission, should not be below the expected market share of Gazprom in 2023 (55 %). First, it needs to be noted that in the notified decision, BNetzA expects the market share of Gazprom in 2023 to be of 45 % in the absence of the terminal, whereas it would have a share of 56 % only if all the GLNG capacity was booked by Gazprom. The market share which should not be further increased would thus be of 45 % rather than of 55 %. The different figures quoted in the BNetzA reply to the questionnaire of the Commission originate from the Frontier Economics study submitted by the project promoters. These figures have however not been used as a basis for the notified decision, where BNetzA instead conducted its own assessment. In so far as the notifying authority has deviated from the submitted study in its own

decision, it does not appear convincing to rely on the same study for the purpose of defining amendments to the notified decision.

- (91) Furthermore, it should be highlighted that exemptions are *exceptional* and need to be justified by the positive impact on the market that the investment brings. While Article 36(1), point (e) Directive 2009/73/EC provides that ‘the exemption must not be detrimental to competition’, this is not limited to the pure development of market shares. Indeed, as stated above, dependence on a single undertaking can have a stifling effect on competition in many ways. This effect could be even stronger if the same dominant undertaking had access to an increasing number of routes to supply the cornered market. Against this background, and in view of the fact that currently no bookings by dominant undertakings are expected or seen as necessary to ensure realization of the terminal, the Commission believes that, an exemption framework which would allow for bookings of a terminal capacity share that is higher than the presumably dominant player’s market share without the exempted infrastructure would have to be seen as detrimental to competition.
- (92) Gazprom’s market share is expected in the notified decision to be of 45 % in 2023, if a national market definition is assumed. German law considers market shares above 40 % to be grounds for a presumption of dominance. With a market share of 45 %, followed by a second undertaking with a market share of 26 %, there are strong indications that Gazprom would in Scenario 2 be in a dominant position. This position would be strengthened if Gazprom could increase its market share via bookings at the terminal. This requires bookings higher than the comparable market share in the counterfactual. Therefore, bookings of more than 45 % of the terminal’s annual capacity by an undertaking¹³ with a dominant position on a – for the purpose of this decision – assumed relevant geographic market of Germany should be excluded. This limitation is to apply to all forms of capacity bookings, including short term capacity and capacity sold on the secondary market. For the latter, avoiding to violate the booking limitation would be a legitimate cause for GLNG GmbH to refuse the approval of the transfer of capacity. Several parallel requests should be dealt with in a non-discriminatory manner, e.g. in the order of receipt of the requests.
- (93) There are a number of requirements in the notified decision to avoid hoarding of capacity. As pointed out by the BNetzA, the notified decision does not create a situation where one capacity holder automatically becomes the sole beneficiary of discriminatory capacity allocation. To the contrary, the initial auction, reservation of short-term capacity and UIOLI principles render hoarding more difficult. However, the Commission does not agree that this fully addresses concerns related to secondary markets. 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 understands the concerns raised regarding the publication of prices or tariffs for trades on the secondary market. To ensure sufficient transparency on capacity available on the secondary market without overly impacting the freedom of market participants to agree prices and conditions for such a transfer of capacity, the Commission believes that the *volume* and *timing* of capacity available on the secondary market should be accessible on a non-discriminatory basis. This could be ensured for example via a notification requirement from the capacity holder to GLNG GmbH sufficiently in advance of any sale of capacity, so that GLNG GmbH could provide the information

¹³ The term undertaking is to be understood as defined in the Court jurisprudence based on Articles 101 and 102 TFEU.

on volume and timing of secondary capacity available to all pre-registered market participants.

- (94) To ensure that the exemption is not detrimental to competition, the Commission thus requires the BNetzA to amend the notified decision with the purpose of excluding bookings of more than 45 % of the terminals annual capacity by an undertaking with a dominant position on a – for the purpose of this decision – assumed relevant geographic market of Germany, and with the purpose of including an obligation on GLNG GmbH to inform at least all pre-registered market participants without undue delay of the volume and timing of capacity being made available on the secondary market.

Other affected markets

- (95) Article 36(1), point (e) of Directive 2009/73/EC requires the assessment of ‘all markets which are likely to be affected by the investment’. If the geographical market was defined as regional, no other upstream gas supply markets would be affected. There is also no indication that the terminal or the exemption would be detrimental to competition on downstream supply markets.
- (96) Regarding other possibly affected product markets, there is no indication that the construction of the terminal under the conditions of the exemption decision would have a negative effect. Notably, there is no indication that the decision would result in the market exit or foreclosure of other, existing terminals. Where the addition of one terminal does not result in the market exit or foreclosure of other terminals, but merely creates competitive pressure on those other terminals, this is as such a positive effect on competition in the internal market.
- (97) If national markets are defined, the terminal and the exemption could in principle affect other national markets in the vicinity. All national regulatory authorities were given the opportunity to comment. None raised concerns to this effect. Geographically, the closest other Member State is Denmark. The Danish regulatory authority noted that the terminal has ‘the potential to increase competition and security of supply in the NW European gas markets of which Denmark is a part, as well as enhancing the integration of the internal European gas market.’ Furthermore, the Danish regulatory authority explained that until 2019 Denmark was continuously exporting gas to Germany, and that this was expected to resume after construction works in the Danish system finish in 2023. If Denmark is exporting to Germany, the addition of an LNG terminal in Germany would have limited impact on the Danish market.
- (98) The Commission has no grounds for concern as regards the impact on competition on possible other affected markets.

The exemption from tariff regulation

- (99) Since the tariffs charged by the terminal do not discriminate between the different capacity holders, and tariff increases after the first booking round are limited to 10 % of the base tariff, the foreseen exemption from tariff regulation for the full amount of capacity is not detrimental to competition.

5.7.2 Conclusion

- (100) Therefore, the Commission concludes that granting the exemption from TPA and regulated tariffs is not considered to be detrimental to competition in Germany if the expected capacity bookings are realised.

- (101) However, a capacity cap for dominant undertakings of 45% is considered as necessary to remedy the risk of strengthening possible dominant positions on a – for the purpose of this decision – assumed relevant geographic market of Germany in the future, and minimum transparency requirements on the secondary market are necessary to ensure sufficient competition on the relevant market.

5.8 ‘The level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted’

- (102) The terminal investment entails significant investment in infrastructure that is associated with sizeable risks of financial, regulatory, political and technical nature.
- (103) There is no specific regulatory framework for access to regulated LNG terminals in Germany, thus it is difficult to compare the situation with or without the exemption.
- (104) Under a typical regulated access system, the owner of the infrastructure enjoys a large degree of revenue certainty and protection from volume or construction risks, provided that its investments are approved, and the revenues are guaranteed through regulated tariffs approved by a regulatory authority to be paid by the users of the infrastructure. That mechanism ensures the compatibility between the size of the project and the level of the resulting tariffs. No such revenue certainty is currently provided for GLNG as the terminal is a purely commercial initiative and not a project imposed or required by the regulator. It should be noted that recent legislative changes (see section 39f(1) Gasnetzzugangsverordnung introduced in 2019) mean that 90 % of the connection costs to the transmission grid for LNG terminals are to be covered by the transmission system operator, and thus socialised between all gas customers in Germany. This does result in a reduced risk for investments in LNG terminals in Germany. However, the cost of the terminal investment remains significant, most recently estimated at more than EUR ■■■ million, and no socialisation element exists for this cost.
- (105) ■■■ and will be based on the requirements set out in this decision, market test, ■■■ provide an estimate on the expected risk. Based on the information provided by GLNG GmbH, even if all 7.2 bcm were booked as long term capacity for 25 years, ■■■. This target rate, which GLNG GmbH states to be ■■%, appears not excessive in view of the risks inherent in an investment in a fully exempted LNG terminal.
- (106) The terminal is intended to be financed on the basis of long-term capacity bookings based on a share of capacity of the terminal. Long term capacity bookings are capable of providing a sufficient basis for ensuring project financing of terminals. While such a model could be provided for under national law for regulated TPA, this would require a clear and explicit legal basis to ensure sufficient certainty for long-term investments. The exemption from regulated tariffs enables a competitive tariff, increasing the possibility of attracting capacity bookings.
- (107) Furthermore, the development of the international supply and demand of LNG until 2050 is not certain. There is, also in view of significant free capacity at other European terminals, a considerable risk of non-use of the terminal capacity. In so far as DUH argues that the assumptions on gas demand and gas imports to Germany are too high, a reduction of those assumptions would further increase the investment risk. Similarly, should future regulatory changes or market developments require a use of the terminal for other types of gases than natural gas, for example for hydrogen, this could be expected to require significant further investment. In so far as the exemption is also

intended to reduce regulatory risk, it should be noted that an exemption decision does not automatically shield against all changes to the regulatory framework. While legislation may provide that it does not, or not fully, apply new requirements to exempted infrastructure, there is no guarantee this will be the case. Finally, the risk of non-use is increased by the uncertain development of the worldwide LNG market, where both significant liquefaction and regasification capacity is coming onto the market, and the direction of trade flows is difficult to predict.

- (108) GLNG GmbH has confirmed that no final investment decision has been taken, and [REDACTED]. According to GLNG GmbH, [REDACTED]. In fact, as the exemption decision determines the legally binding framework for capacity allocation, any previously concluded contract would be subject to significant uncertainty.
- (109) Also RWE, one of the interested market participants considering the booking of capacity, underlined that for the decision whether or not to book capacity, the detailed conditions for the use of capacity are decisive and need to be clear in advance.
- (110) Subsidies, which would be granted to the investors can considerably reduce the investment risk. The parallel granting of an exemption and of subsidies is not excluded *per se*, but the granting of subsidies can 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.
- (111) The Commission notes that, based on the available information, no public support has been granted so far for the terminal construction. GLNG GmbH has informed the BNetzA that [REDACTED]. The Commission wishes to underline that any [REDACTED] would be relevant for the assessment of the necessity of the exemption. Thus, such a subsidy would need to be reported to the BnetzA and would need to trigger a review of the exemption decision as per sections (8) and (9) of the operative part of the notified decision.
- (112) As regards the duration of an exemption, the relevant Guidelines¹⁴ specify that, the following should be taken into consideration:
- (a) throughput contracts for terminals, duration of underlying transportation contracts for pipelines and cables, or upstream and downstream supply contracts, or both;
 - (b) the level of risk, notably, the duration of the exemption does not have to correspond to the full length of the amortisation period. The exemption duration should be equal to or less than the expected period for cost recovery of the new infrastructure.

- (113) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Given the above, the Commission considers that

¹⁴ 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 SEC (2009) 62 final.

the investment risks justify the exemption, and that the exemption does not go beyond what is necessary in order to mitigate these risks.

(114) In light of what has been said, the Commission considers the scope and duration of the exemption proportional.

(115) Based on the above, the Commission concludes that the risk criterion within the meaning of Article 36(1), point (b) of the Directive 2009/73/EC is met.

5.9 ‘The infrastructure must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that infrastructure will be built’

(116) The current shareholders of the GLNG GmbH are Gasunie LNG Holding B.V., Oiltanking GmbH and Vopak LNG Holding B.V. All three shareholders have equal shares and voting rights in the joint venture.

(117) The transmission network to which the terminal will be connected is owned and operated by Gasunie Deutschland Transport Services GmbH, certified as ownership unbundled transmission system operator. Gasunie Deutschland Transport Services GmbH is also a subsidiary of Gasunie. GLNG GmbH declares that the terminal and the transmission system will be separated as regards information, operation, and bookkeeping. This is further guaranteed by section (10), point (b) of the operative part of the notified decision, which allows the BNetzA to withdraw the decision should the transmission system and the terminal not be sufficiently unbundled by entry into operation of the terminal.

(118) The Commission therefore considers this requirement to be fulfilled.

5.10 ‘Charges must be levied on users of that infrastructure’

(119) Access to the terminal will be subject to charges. This is further guaranteed by section (3) of the operative part of the notified decision, which specifically requires the terminal to charge tariffs.

(120) The notified decision requires capacity allocation, and thereby also tariffs, to be non-discriminatory, and allows a maximum 10% increase compared to the base tariff for bookings after the first booking round.

(121) It follows that the terminal charges will be imposed equally on the users of the infrastructure and no charges for the terminal investment will be imposed to final consumers in Germany in line with Article 36(1) of Directive 2009/73/EC.

5.11 ‘The exemption must not be detrimental to the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated systems concerned’

(122) The terminal as such will improve the functioning of the internal gas market by increasing its liquidity and flexibility further through enabling additional LNG imports. Those imports are different from the traditional sources of gas currently imported in Germany and could be different from those currently imported in the North-West region.

(123) The functioning of the regulated system may not be comprised. There are three critical elements which need to be analyzed in this decision.

(124) First, German law provides that the connection costs of LNG terminals is to be borne to 90 % by the transmission system operator, and thus by the regulated system.

However, this would apply in principle to all LNG terminals. It is therefore not a consequence of the exemption. Furthermore, even if such consequences of the investment itself were to be considered (as the investment would not take place without the exemption), it needs to be stressed that connection of the terminal to the transmission system can legitimately be considered a part of the transmission system. Therefore, while different approaches would certainly be possible, it can be justified if those costs are included in the general transmission tariff, rather than the costs of the terminal. The actual appropriateness of such allocation can only be seen in the context of the wider national tariff framework. Therefore, the Commission considers this not to be contrary to the possibility of granting an exemption.

- (125) Second, as highlighted by the Danish regulatory authority, the inclusion of the terminal in the German network development plan 2018 had as a consequence that cross-border capacity from Denmark to Germany was reduced to 0. This would, as such, be detrimental to the effective functioning of the internal market in natural gas and of the regulated system. However, the Danish regulator has in his answer to the consultation expressly confirmed that constructive discussions on a solution have taken place, and that such a solution should be found as soon as possible, and clearly in time before capacity in the Denmark-Germany direction is expected to be required again.
- (126) The Commission would like to highlight that should no solution be found to ensure appropriate firm capacity at the German-Danish border in both directions, which can be subject to non-discriminatory capacity allocation, this would constitute a detrimental effect to both the internal market and the effective functioning of the concerned regulated system as well as security of supply. The detrimental effect would materialise if less gas were imported from Denmark to Germany. In case trade with biomethane were to diminish this could also have an environmental impact. Thus, should no or only much lower than previously existing capacity be available at the start of operation of the terminal, this would require a review of the notified decision pursuant to sections (8) and (9) of the operative part of the notified decision.
- (127) Third, the Commission notes [REDACTED]. In case that the exemption ends before the project lifetime, the Commission recommends that the BNetzA clarifies the expected value, if any, for including the terminal in a regulated asset base. Should the risks of non-use or underuse of the terminal realise, this should not result in socialisation of those risks after the end of the exemption, as otherwise the risk would not have justified granting the exemption in the first place.
- (128) On this basis, the Commission considers this requirement to be fulfilled.

5.12 Other matters

5.12.1 Environmental impact

- (129) , DUH argues that the GNLG would have a major detrimental impact on the environment and that an exemption, which would allow this investment to take place, should be refused based on this ground.
- (130) Though the legislator hasn't included a condition relating to the environmental impact of a new investment under article 36, the Commission has the following observations. The impact on the environment of GNLG is uncertain and depends on many factors, e.g. whether the terminal causes additional fossil gas imports into the EU, rather than

displacing other fossil gas imports, the origin of those imports, and the other energy sources displaced by an increased import of fossil gas, which often can be more polluting than fossil gas.

- (131) No national authority has raised such impacts as problematic in the consultation. Furthermore, such uncertain impacts could also be mitigated by numerous political and legal measures, including existing measures such as the emissions trading system which puts a general limit on CO₂ emissions notably from power generation in the EU. In the course of the exemption period it could also include future political or legal measures against which the exemption provides no barrier, as it only exempts from some provisions of the gas Directive. It is important to stress that this decision is without prejudice to the application of the Union environmental law.
- (132) As regards the argument by DUH that the GLNG would be used to import LNG from the United States of America, arguing that such gas would be produced via environmentally harmful methods, it is important to note that the terminal capacity will be allocated via non-discriminatory procedures and there is no certainty that all or the majority of the gas would come from unconventional sources.
- (133) It should be noted that the construction of the terminal does not necessarily mean that larger volumes of natural gas are imported or used. Indeed, as both DUH and GLNG GmbH have described independently, there is considerable free import capacity at other terminals and gas pipelines. Increasing the number of routes and sources for natural gas therefore does not automatically increase the share of natural gas in the EU energy mix.

5.12.2. Review clause

- (134) The notified decision lays down in section (10) of the operative part that any infringement of the conditions set in that decision can result in modifications to or revocation of the decision.
- (135) In section (9) of the operative part, the notified decision furthermore provides that the conditions attached to the decision can be amended if this is required due to changes in factual circumstances. However, section (9) does not seem to allow the BNetzA to withdraw the exemption should this be required. As changes in factual circumstances can remove the justification of an exemption (for example if very high subsidies reduced the risk to an extent which no longer justifies the granting of an exemption), the Commission asks the BNetzA to adjust section (9) accordingly.
- (136) Furthermore, the granting of exemption decisions is subject to a review by the Commission. If the conditions to the exemption decision were changed, this could also change the Commission's assessment of the conditions to grant an exemption. Therefore, the Commission requests the BNetzA to amend its decision such that changes to the exemption decision or to the conditions attached to it, or a revocation of the exemption decision, are to be notified to the Commission for comments as set out in Article 36 of Directive 2009/73/EC.

5.12.2 State aid and application of competition law

- (137) Any plan to grant state aid through public funds, including the Union Structural funds, to the terminal project is subject to the notification requirements to the Commission pursuant to Article 108 of the TFEU.
- (138) This decision is without prejudice to the application of the rules on competition and State aid rules of Union law. In particular, the criteria and the methodology used to

assess the enhancement of competition in gas supply and potential detriment to competition in the relevant markets which are likely to be affected by the investment under Article 36 of Directive 2009/73/EC are not necessarily identical to those used to perform an assessment under Article 101 or 102 TFEU or Council Regulation (EC) No 139/2004.

6. CONCLUSION

- (139) In light of what has been stated and provided that the notified decision is amended in accordance with this Decision and that the BNetzA duly takes into account this Decision when taking decisions addressed to GLNG GmbH, the Commission takes the view that an exemption may be granted to GLNG GmbH in accordance with Article 36(9) of Directive 2009/73/EC. The Commission is to be informed about the final decision pursuant to Article 36(9) Directive 2009/73/EC.

HAS ADOPTED THIS DECISION:

Article 1

The Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen ('BNetzA') shall amend, in accordance with Article 36(9) of Directive 2009/73/EC, its Decision No BK7-18-063 of 30 November 2020 (the notified decision) notified to the Commission on 8 December 2020, in accordance with Article 36(8) of Directive 2009/73/EC.

Article 2

The BNetzA shall monitor and, at the request of the Commission, report on the implementation of the conditions set out in this Decision.

Article 3

The BNetzA shall amend its decision to safeguard full compliance with the conditions set out in Article 36(1) of Directive 2009/73/EC by introducing a limitation excluding bookings of more than 45 % of the terminals annual capacity by undertakings with a dominant position on a – for the purpose of this decision – assumed relevant geographic market of Germany, and by including an obligation on GLNG GmbH to inform without undue delay at least all pre-registered market participants of the volume and timing of capacity being made available on the secondary market.

Article 4

The BNetzA shall amend section (9) of its decision to ensure that, should factual changes require a revocation of the decision, such a revocation is allowed for under that decision. This should include the situation if the operation of the terminal would only allow for a firm capacity at the German-Danish border in both directions in a much lower quantity than the capacity that was offered prior to the inclusion of the terminal in the German network development plan without giving interested parties equal opportunities to book this transmission capacity. The BNetzA shall amend sections (9) and (10) of its decision so that amendments to the decision including the revocation of the decision shall be notified to the Commission pursuant to Article 36 of Directive 2009/73/EC, which may request amendment or withdrawal of the changed decision. The BNetzA shall also amend section (10) of its decision to clarify that revocation or amendment of the decision is possible in case the Commission decision were to be amended or revoked.

Article 5

This Decision is addressed to the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, Tulpenfeld 4, 53113 Bonn, Germany.

Done at Brussels, 25.5.2021

For the Commission
Kadri SIMSON
Member of the Commission