EUROPEAN
COMMISSION

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COMMISSION DECISION

of 2.6.2023

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/EC ("Directive 2009/73/EC") [1], and in particular Article 36 thereof,

Whereas:

1. DESCRIPTION OF THE PROJECT

(1) The German LNG Terminal GmbH (German LNG) intends to construct and operate a liquefied natural gas (LNG) regasification terminal (the Brunsbüttel terminal or the terminal) in Brunsbüttel, Germany.

(2) The regasification capacity of the terminal is planned to be 10 billion m³ (bcm) of natural gas per year. The terminal would have two jetties and two ships could, in principle, be moored and unloaded at the same time. The terminal would have two storage tanks with a capacity of 165 000 m³ each, thus a total storage capacity of 330 000 m³. The LNG terminal is expected to become operational in [redacted]

(3) German LNG is owned by Gasunie LNG Holding B.V. (Gasunie). On 1 September 2021 Gasunie, the Kreditanstalt für Wiederaufbau AöR (KfW) and the GBV Zweiundreissigste Gesellschaft zur Beteiligungsverwaltung mbH (RWE) agreed that the KfW would take over a 50%, RWE 10% and Gasunie would retain 40% of German LNG's shares. This agreement is subject to a number of conditions, notably the obtention of State aid clearance for the project and has not yet materialised.

(4) Gasunie's parent company, N.V. Nederlandse Gasunie, is a European gas infrastructure company that transports natural gas and biogas in the Netherlands, Germany and the United Kingdom through its subsidiaries, the Dutch Gasunie Transport Services B.V., BBL V.O.F., and the German Gasunie Deutschland Transport Services GmbH. N.V. Nederlandse Gasunie also operates a natural gas storage facility, as well as an LNG terminal in the port of Rotterdam. Gasunie is leading the development of the Brunsbüttel terminal.

(5) KfW is a development bank of the Federal Republic of Germany and the German federal states and will finance the project as part of its shareholding.

[1] OJ L 211, 14.09.2009, p. 94.

(6) RWE is a wholly owned subsidiary of RWE AG, one of the world's leading publicly traded energy producers, which is also active in energy trading. Another wholly owned subsidiary of RWE AG, RWE Supply & Trading GmbH (RWE Supply & Trading), will be one of the first customers of the planned Brunsbüttel terminal.

(7) German LNG has signed binding [redacted], which are conditional on the granting of the exemption. ConocoPhillips has booked a total of [redacted] INEOS has booked [redacted] and RWE Supply & Trading [redacted]

(8) The Brunsbüttel terminal plans to offer three groups of services: basic services, dispatch services and ancillary services. Basic services would include berthing and unloading of LNG, regasification and send-out of the gas in regasified form to the transmission grid. Dispatch services would aim at redistributing LNG in liquid state by loading it on ships, trucks or train carriages. Ancillary services would be services which are operationally necessary to support the basic services, including the filling and the withdrawal of gas from the intermediary storage.

(9) German LNG intends [redacted], this would change the set-up of the project and thus, in the Commission's view, fall outside the scope of the current exemption decision.

2. NATIONAL PROCEDURE

(10) By letters dated 15 December 2022 and 8 February 2023, German LNG submitted a request for an exemption from the third-party access and tariff setting requirements set out in the German regulatory regime[2] for a capacity of 10 bcm/a over 20 years to the German regulatory authority Bundesnetzagentur (BNetzA). In 2021, the BNetzA had already issued an exemption for the Brunsbüttel terminal for 8 bcm/a and for a duration of 25 years[3]. As a result of the geopolitical situation and the outcome of market tests the project promoter wishes to construct a larger LNG terminal, than initially envisaged. The current exemption would replace the earlier one.

(11) In the course of the procedure, German LNG submitted further information to the BNetzA. After verifying the completeness of the required documentation, the BNetzA informed the Commission of the exemption request on 30 January 2023.

(12) On 3 February 2023, the BNetzA shared draft rules on capacity management and allocation with German LNG that would apply to the terminal, for comments.

(13) German LNG had already conducted market tests based on the capacity management and allocation rules approved under the 2021 exemption granted to German LNG, which are essentially the same as the capacity management and allocation rules contained in the current exemption. The first binding market test had been conducted in October-November 2019. As a result of this market test three market players demonstrated their interest to book capacity [redacted] RWE Supply & Trading expressed an interest for [redacted] INEOS for [redacted] and ConocoPhilips for [redacted] These expressions of interest were conditional on the obtention of an exemption.

[2] Verordnung zu regulatorischen Rahmenbedingungen für LNG-Anlagen vom 16. November 2022.
[3] BNetzA decision of 21 June 2021 (BK7-18-063-final).

(14) Following the exemption for 8 bcm/a granted by the BNetzA in 2021 and the changed geopolitical situation, a second binding market test was conducted from mid-July until mid-August 2022. At this second binding market test ConocoPhilips showed an interest to book an additional [redacted]. This expression of interest was also conditional on the obtention of an exemption.

(15) As these two market tests demonstrated that there was a market interest to enter into binding long-term contracts for a total of 9 bcm/a and this volume goes beyond what was covered by the 2021 exemption, German LNG decided to request a new exemption for a total of 10 bcm/a.

(16) BNetzA conducted a consultation pursuant to Article 36 (3) of Directive 2009/73/EC as amended by Directive (EU) 2019/692 of all regulatory authorities in the Union, as well as the United Kingdom and Norway from 31 January 2023 to 10 February 2023 to give them a possibility to comment on the project description of the applicant and the capacity management and allocation rules. No substantive comments were received in the course of this consultation.

3. THE NOTIFIED EXEMPTION DECISION

(17) On 15 March 2023, BNetzA adopted an exemption decision (the notified decision), conditional on the Commission's opinion. The decision grants an exemption from the third party access and tariff regulation requirements, detailed in the framework for regulated access to LNG terminals[4]. In the notified decision an exemption is granted for 20 years from start of operations for an annual capacity of 10 bcm. The exemption is subject to a number of conditions outlined in the following recitals.

(18) German LNG needs to charge tariffs on the users of the terminal and apply the criteria below to manage and allocate capacity.

3.1. Long-term capacity

(19) German LNG needs to apply non-discriminatory and transparent procedures for long-term allocation of capacity, respecting at least the below.

3.1.1. Booking requirements

(20) The booking requirements are the following:

(a) All potential users of capacity need to be pre-registered at German LNG.

(b) German LNG is free to offer a variety of products, as far as these are designed in a transparent and non-discriminatory manner.

(c) Minimum booking requirements for capacity bookings may not exceed 1 bcm per year.

(d) Minimum duration requirements for capacity bookings may not exceed 10 years.

(e) The booking year corresponds to the calendar year.

3.1.2. First allocation of long-term capacity

(21) 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. The

[4] Verordnung zu regulatorischen Rahmenbedingungen für LNG-Anlagen vom 16. November 2022.

booking period needs to be announced 10 business days in advance, providing all the required information.

(22) In principle excess demand for capacity shall be allocated at an equal ratio to the different buyers. Deviating from this the allocation may take into account the duration and the volumes of the bookings, favouring longer bookings and higher volumes.

3.1.3. Long-term bookings after the first allocation

(23) For long-term bookings after the first allocation a maximum surcharge of up to 10 % compared to the tariff in the first allocation may be applied. The capacity allocation should be done in a transparent and non-discriminatory manner.

3.2. Short-term capacity

(24) A minimum of 10 % of the maximum annual capacity needs to be reserved for short-term bookings. For the short-term bookings, at least the following criteria need to be respected.

(25) All potential users of capacity need to be pre-registered with German LNG.

(26) The short-term capacity is to be allocated in slots that shall be distributed over the calendar year as equally as possible. Each slot shall allow for the offloading of at least 150 000 m^3 of LNG. There shall be a minimum of eight slots per year.

(27) Slots shall be allocated annually on a reoccurring date which is to be published. Allocation of slots shall occur via auction or another transparent and non-discriminatory procedure. The auction date is to be announced at least four weeks in advance and all relevant information shall be available at least two weeks before the annual auction.

(28) The starting price for the auctions can be at most 10 % higher than the base tariff.

(29) If an auction for short-term capacity is oversubscribed further auction rounds shall be held. Only those users who have already participated in the previous auction round may take part in the subsequent round. The starting price shall be increased in each round by a surcharge (a so-called price step). The price steps shall be determined in advance and communicated to the BNetzA, as well as interested parties.

(30) If a so-called undersell occurs in an auction round, the capacity shall be allocated among the auction participants of the last round via a non-discriminatory and transparent allocation procedure that has been determined and announced in advance by German LNG.

(31) Only market participants that registered with German LNG but did not book any long-term capacity may participate in the first auction for short-term capacity. Should capacity remain after this first auction, a second auction shall allow for the participation of all registered market participants. Slots not sold in the two auctions shall be allocated on a first come first served basis over the course of the year.

(32) Capacity booking contracts need to allow the market participants to resell their capacity rights on the secondary market to other registered market participants. Such a transfer may be rejected by German LNG only on a duly justified basis. All registered market participants will be informed about the available secondary capacity. Capacity holders may resell the contracted capacity on the secondary market until 20 days before the date of the unloading slot.

(33) Capacity booking contracts also need to contain a use-it-or-loose-it (UIOLI) provision. The UIOLI provision applies if a capacity holder announces at the latest 20 days prior to the slot that he 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 the German LNG.

(34) The Commission also notes that notified decision requires German LNG to inform the BNetzA without delay of all circumstances that require a reassessment of the exemption requirements. The explanatory part of the notified decision specifies that this also concerns the transfer of larger volumes of long-term capacities to other market players which may have a negative impact on competition. Indicatively, BNetzA suggested that this would concern transfers where a market player with a 30% market share in the upstream or downstream wholesale market books at least 65% of the terminal's long-term capacity for five years.

4. PROCEDURE AT THE COMMISSION

(35) On 15 March 2023, BNetzA submitted the notified decision to the Commission.

(36) On 22 March 2023, the Commission published a notice on its website, inviting stakeholders to submit comments on the project within two weeks. No comments were received.

(37) On 3 April 2023 the Commission sent questions to BNetzA to which it responded on 5 April 2023. Additional information was submitted by German LNG on 22 May 2023.

5. THE COMMISSION'S ASSESSMENT OF THE EXEMPTION CRITERIA IN ARTICLE 36 OF DIRECTIVE 2009/73/EC

5.1. Legal basis

(38) According to Article 36 (1) of Directive 2009/73/EC major new gas infrastructure may, upon request, be exempted, for a defined period of time from the third party access and tariff requirements, provided that the following cumulative criteria are met:

(a) the investment must enhance competition in gas supply and enhance security of supply;

(b) the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted;

(c) 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;

(d) charges must be levied on users of that infrastructure; and

(e) 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.

(39) Article 36 of Directive 2009/73/EC furthermore specifies a number of procedural steps that need to be taken by the national authorities and the applicant in the context of an exemption:

(a) the national regulatory authority shall consult the national regulatory authorities of the Member States the markets of which are likely to be affected by the new infrastructure (Article 36 (3));

(b) all potential users of the infrastructure must be invited to indicate their interest in contracting capacity before capacity allocation in the new infrastructure, including for own use, takes place (Article 36 (6)).

(40) Finally, in accordance with Article 36(9) of Directive 2009/73/EC the Commission's approval of an exemption decision ceases to have effect after two years if the construction of the infrastructure has not started or five years after its adoption if the infrastructure has not become operational. The approval will lose its effect unless the Commission decides that any delay is due to major obstacles beyond control of the person to whom the exemption has been granted.

(41) Below it will be assessed whether the requirements set out in Article 36 of Directive 2009/73/EC are met.

5.2. Major new gas infrastructure

(42) Article 36(1) of Directive 2009/73/EC specifies that major new gas infrastructure, that is to say interconnectors, LNG and storage facilities, may qualify for an exemption. Below it will be assessed whether the Brunsbüttel terminal qualifies both as an LNG facility and as major new gas infrastructure.

(43) The exemption is requested for an LNG regasification terminal including LNG storage tanks. 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.*

(44) As described in recital (8) above, the Brunsbüttel terminal plans to offer three groups of services: basic services, dispatch services and ancillary services. The notified decision only covers the basic and ancillary services. It does not cover the dispatch services, as it considers that these services do not fall within the scope of ‘LNG facility’, as defined in Directive 2009/73/EC.

(45) The Commission shares the view of the BNetzA that, contrary to the basic and ancillary services, the dispatch services as described in the notification are not to be considered part of an ‘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 that 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 facilities in Directive 2009/73/EC.

(46) The investment can also be considered as being ‘major’ within the meaning of Article 36 of Directive 2009/73/EC. Whilst there is no exact minimum threshold, [redacted] for the infrastructure to qualify as major. Furthermore, the planned annual capacity of 10 bcm which

represented around 11% of the German gas consumption in 2021, can also be considered significant.

(47) The infrastructure must also be new. Article 2(33) of Directive 2009/73/EC specifies that new infrastructure *means an infrastructure not completed by 4 August 2003*. [redacted], it is to be considered new infrastructure in line with Directive 2009/73/EC.

(48) The Commission therefore, concludes that the Brunsbüttel terminal constitutes a major new gas infrastructure within the meaning of Article 36 (1) of Directive 2009/73/EC and that the notified decision was correct not to include the dispatch services in the scope of the decision.

5.3. Procedural requirements

(49) Article 36 of Directive 2009/73/EC contains procedural requirements for the national authorities and the applicant, which include a market test and the consultation of authorities in likely to be affected Member States.

(50) Article 36(6) of Directive 2009/73/EC requires the conduct of a market test. The purpose of such a market test is to evaluate the market demand from third parties to assess the likelihood that capacity finds buyers and to evaluate the appropriate size of the project.

(51) As described in recitals (13) to (15) above German LNG conducted two market tests, a first one in 2019 and a second one in 2022. As a result of these market tests German LNG signed capacity contracts with three interested parties [redacted]. The contracts are conditional on the obtention of the exemption. The outcome of the market tests confirms the appropriateness of the size of the project.

(52) Article 36 (3) of Directive 2009/73/EC obliges 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.

(53) As explained in recital (16) above, the BNetzA conducted a consultation of all regulatory authorities in the Union, as well as the United-Kingdom and Norway. No substantive comments were received during the course of this consultation.

(54) The Commission therefore concludes that the procedural obligations contained in Article 36 (3) and (6) of Directive 2009/73/EC were respected by the applicant and the national regulatory authority.

5.4. Security of supply

(55) Article 36 (1)(a) and (e) of Directive 2009/73/EC stipulate that the investment must enhance security of supply and that the exemption must not be detrimental to security of supply of natural gas in the Union.

(56) The Commission notes that, 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 in accordance with Article 36 (1)(a) of Directive 2009/73/EC.

(57) The Commission is of the view that the Brunsbüttel terminal provides a new entry point into the German and thus the interconnected European gas market. Neither the Commission, nor the BNetzA have received any comments from stakeholders that

would indicate that the Brunsbüttel terminal could replace other existing infrastructure or push other facilities out of the market.

(58) The project promoter carried out an analysis based on the so-called Import Route Diversification Index (IRD). The IRD reflects the concentration of import routes by squaring the shares of the individual routes in the total capacity and then summing them up. If there is only one import infrastructure through which 100% of imports occur, the IRD has a value of 1. If there are ten import routes, each accounting for 10% of total capacity, then the IRD has a value of 0.1. The smaller the index, the more similarly sized transport routes are available, which is beneficial for supply security. The IRD for Germany is expected to remain under 0.2 over the next 10 years, with the Brunsbüttel terminal in place the index is expected to be 4% to 12% lower than in a situation without the terminal. The Commission considers that the IRD, therefore demonstrates that the diversification levels would be greater with the terminal than without the terminal.

(59) With regard to the connection to additional sources of gas from new suppliers, the BNetzA highlights that the terminal would help diversify the gas supply sources and increase independence from Russian gas.

(60) The current geopolitical situation shows that Russia is no longer a reliable source of gas supply. It has interrupted the deliveries of gas to several Member States already[5]. In January 2021 Russian gas covered 55% of Germany's and 40% of Europe's gas demand. In its Communication *REPowerEU: Joint European Action for more affordable, secure and sustainable energy*[6] (REPowerEU Communication) the Commission expresses the objective of phasing-out Russian gas and stresses the importance of diversification of gas supply, notably via LNG terminals to ensure Europe's security of supply. The Brunsbüttel terminal could cover around 11% of Germany's gas demand[7] and the German government has stressed that additional LNG infrastructure is essential to diversify gas supplies away from Russia, notably when adopting a law to accelerate the construction of LNG infrastructure in Germany on 1 June 2022[8].

(61) In addition, several modelling exercises were carried out to assess the impact of the terminal on the resilience of the German gas system. They compared the situation with the terminal to the situation without the terminal. Indicators used are the (i) N-1 criterion, which assesses whether peak consumption is covered if the largest infrastructure of a market defaults, (ii) the Residual Supply Index that measures the dependence of a market on the largest supplier and (iii) the System Adequacy Index looking at the remaining buffer at peak consumption times. The modelling shows that the Brunsbüttel terminal would increase the resilience of the German gas system and thus also the country's security of supply, as well as the security of supply of the interconnected European markets.

(62) The Commission considers that the decreased IRD resulting from the introduction of the terminal and the role it can play to help phase-out Russian gas show that the infrastructure allows for a more diversified gas mix. The N-1, the Residual Supply Index and the System Adequacy Index also indicate that the terminal increases the

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5 Including Bulgaria, Poland and the Netherlands, as well as certain undertakings in Germany.

6 COM(2022) 108 final;

7 Taking the gas demand in 2021 as a basis.

8 Gesetz zur Beschleunigung der planungsrechtlichen Genehmigungsverfahren für den Bau der LNG-Infrastruktur (LNG-Beschleunigungsgesetz).

resilience of the gas system. As such the Commission concludes that Brunsbüttel terminal contributes to security of supply in line with Article 36 (1)(a). Article 36 (1)(e) of Directive 2009/73/EC also specifies that the exemption as such must not be detrimental to security of supply of natural gas in the Union.

(63) Contrary to Article 36 (1)(a) of Directive 2009/73/EC, the requirement in point (e) does not focus on the impact of the investment as such, but on the impact of the exemption decision. Exemptions, which would allow to limit the access to critical infrastructure in the hands of a small number of market participants, could bring negative impact on security of supply in the Union for example. As dependence on a single or a small number of suppliers can allow such supplier(s) to take decisions, which negatively impact security of supply.

(64) The capacity management and allocation rules contained in the current exemption ensure access to a large number of market participants. They expressly require non-discriminatory capacity allocation, based on transparent criteria and procedures. It should be noted that the vast majority of long-term capacity is booked by undertakings that have not been significantly active on the German market so far. This in turn provides access to different sources of supply, via new suppliers. Increasing the number of access points to the EU gas network for new or smaller suppliers contributes to security of supply.

(65) In particular, also the strong anti-hoarding requirements contained in the exemption contribute to reducing the dependence on individual suppliers and enhancing the flexibility of the gas system. As described in recitals (24) to (31) 10 % of the terminal's capacity needs to be reserved for short-term bookings, giving preferential access to those not holding long-term bookings. The exemption also contains strict use-it-or-loose-it provisions.

(66) The Commission does not, therefore, observe a detrimental effect of the exemption on the Union's security of supply in the current case.

(67) Thus, the Commission concludes that the requirements in Article 36 (1)(e) and Article 36 (1)(a) of Directive 2009/73/EC with regard to security of supply are met.

5.5. Principle of solidarity

(68) As set out in case T-883/16[9] by the General Court and confirmed by the Court of Justice in C-848/19 P[10], the principle of solidarity also entails a general obligation on the Union and the Member States, in the exercise of their respective competences, to take into account the interests of all stakeholders liable to be affected. Notably, Member States shall 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 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 in order to take account of their interdependence and *de facto* solidarity.

(69) In the notified decision, BNetzA has analysed whether the exemption is likely to affect the interests of other Member States. BNetzA argues that the decision improves security of supply in Germany and other Member States, as the gas can be exported to them from Germany. Furthermore, BNetzA argues that imports to the terminal would

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9 Judgment of the General Court of 10 September 2019 in Case T-883/16 Poland v European Commission, points 72-73, ECLI:EU:T:2019:567.

10 Judgment of the Court of Justice of 15 July 2021 in Case C-848/19-P Germany v European Commission, point 71, ECLI:EU:C:2021:598.

not be of such a scale that there is a danger of fewer LNG imports available to other Member States. As the terminal capacity of 10 bcm/a represents a very small share of the worldwide LNG market (485 bcm traded worldwide in 2019), the added demand via the terminal would have a negligible impact on terminals in other Member States. BNetzA finally considers it unlikely that infrastructure which is essential for security of supply of other Member States will be abandoned due to the construction of the new terminal. On the contrary the German regulator notes that other Member States and the Commission's REPowerEU Communication envisage the construction of additional terminals.

(70) As described in recital (16) above, BNetzA also consulted all national regulatory authorities of the Union, as well as of Norway and the United Kingdom and no substantive comments were received. The Commission is also not aware of any Member State or competitor voicing concerns as regard the Brunsbüttel terminal.

(71) There is, therefore, no indication that the planned project would negatively impact the security of supply of gas 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.

(72) Based on the above the Commission considers that the requirements set out by the European Courts in Cases C-848/19 P and T-883/16, based on Article 194 TFEU have been met.

5.6. Impact on competition

(73) Article 36 (1)(a) of Directive 2009/73/EC requires that the investment project enhances competition in gas supply and Article 36 (1)(e) of Directive 2009/73/EC requires 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 both imply that the project must enhance competition to the benefit of the consumers[11].

(74) With regard to Article 36 (1)(a) of Directive 2009/73/EC, the investment's impact on competition in gas supply, it is considered that projects which enable gas supplies from new sources tend to improve competition, unless those sources were controlled by undertakings with a strong or dominant position on the relevant market. As the terminal is not linked to a specific upstream source for the provision of gas supply, the terminal is expected to source its gas from the worldwide market for LNG supply. Regardless of whether the relevant geographical market is defined as the German market or the regional North-West European market, the addition of further import routes and sources from the liquid and global LNG market is expected to enhance competition in upstream wholesale gas market and thus in gas supply.

(75) Also, the ownership structure of the LNG terminal is not expected to negatively affect the diversification potential, as none of the shareholders are large players in the gas production or supply sectors.

(76) The Commission also points out that the long-term contracts signed by German LNG were signed with parties, which have limited to no activity on the upstream wholesale market, thus fostering the entry of new market players. This further reinforces the

[11] 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.

Commission's conclusion that the investment enhances competition on the upstream wholesale market.

(77) The construction of the terminal as such is thus expected to enhance competition in gas supply in line with Article 36 (1)(a) of Directive 2009/73/EC.

(78) As concerns Article 36(1)(e) of Directive 2009/73/EC, it needs to be ascertained whether the exemption could be detrimental to competition in the relevant markets.

(79) To determine the competitive effect of the exemption, the relevant gas markets need to be analysed to establish whether the exemption could lead to the creation or strengthening of a dominant market position, which could allow for market foreclosure. This has to be assessed on a case-by-case basis.

(80) Foreclosure can occur when actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the capacity allocation at the Brunsbüttel terminal, 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.

(81) The impact of the exemption on competition in the markets likely to be affected will be analysed in the following sections. For the purpose of this decision, the Commission considers that the product markets affected by the exemption are the upstream wholesale market for gas (which includes development, production and supply of natural gas to large importers/wholesalers) and the downstream wholesale market for gas. The relevant geographical market is defined as at least the German market.

5.6.1. Competitive analysis provided by the BNetzA

(82) As concerns the competitive analysis pursuant to Article 36(1)(e) of Directive 2009/73/EC, BNetzA compares the situation with the terminal and the situation without the terminal, under the assumption that the terminal would not be built without the exemption. The analysis carried out by the BNetzA is described in more detail in the following recitals and is based on a consultant report[12] submitted by the project promoter.

(83) In the current case, it is known that three market players have booked all available long-term capacity (9 bcm/a) at the Brunsbüttel terminal. The remaining 1 bcm/a is reserved for short-term bookings in line with the capacity allocation rules. German LNG has signed binding [redacted] with ConocoPhillips for a total of [redacted] with INEOS for [redacted] and RWE Supply & Trading [redacted] This is why the competition analysis by the BNetzA focuses on these three players.

(84) To assess the impact of the exemption of the Brunsbüttel terminal on competition in the relevant markets, BNetzA's notified decision takes into account the Herfindahl Hirschman Index ('HHI'). The HHI measures the concentration in the market taking into account the market shares of all players (not only the major players). The Commission has defined thresholds within the framework of merger control which

[12] Frontier Economics „Ökonomisches Gutachten im Kontext des Antrags auf Ausnahmegenehmigung für das geplante LNG-Terminal in Brunsbüttel", 15.12.2022.

may point to competition concerns that can also be used as indicators in the current case[13]. The decision also looks at the impact of the exemption on market shares[14].

(85) BNetzA's notified decision takes the view that an exemption which would not lead to a problematic increase in concentration levels measured in HHI and would not lead to an increase of the market shares up to a level that could indicate a dominant market position, does not have a negative impact on competition.

5.6.1.1. Upstream wholesale market

(86) The BNetzA's notified decision assesses the impact of the exemption on the competition in the upstream wholesale market based on two scenarios. The first scenario ("Long-term bookers decisive") is based on the assumption that foreclosure is only to be feared, if the capacity is booked by one or more producers with a strong position on the upstream wholesale market. If, on the other hand, a trader books capacity at the terminal, a producer with a strong market position will not be able to utilize it, since the trader would already purchase LNG from alternative suppliers out of economic self-interest. In the first scenario, the hypothetical case is assessed where ConocoPhillips, INEOS and RWE Supply & Trading were active on the upstream wholesale market and would use the booked capacities for the regasification of their own (hypothetical) gas production.

(87) In a second scenario ("Long-term bookers dependent on producers"), a dependency of ConocoPhillips, INEOS and RWE Supply & Trading on certain upstream wholesale players is assumed by the analysis, based on the known contractual relationships between these undertakings have with upstream wholesale market players. In this scenario the booked capacities are allocated to these specific upstream wholesale market players.

(88) The scenarios compare the competitive situation with and without the terminal on the German and North-West European markets. They project market shares and concentration levels in the upstream wholesale market after the first year of the terminal's operations [redacted] and for 2034. The analysis assumes booking levels of 70% and the short-term capacity is allocated based on current market shares. The scenarios also assume the phase-out of Russian gas and do not foresee gas flows from that country to Germany or North-West Europe at the start of operations in [redacted] or beyond.

5.6.1.2. Long-term bookers decisive (Scenario 1)

(89) In Scenario 1, the notified decision thus considers that ConocoPhillips, INEOS and RWE Supply & Trading are active on the upstream wholesale market. It compares the evolution of market shares, as well as the concentration levels on the upstream wholesale market in a situation with and without the terminal.

Relevant geographic market: North-West Europe

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13 The thresholds are defined in the Horizontal Merger Guidelines (Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal C 31, 05.02.2004, p. 5). HHIs below the 1 000 points indicate markets where competition concerns are generally not present (due to high competition). If the HHI value is between 1 000 and 2 000 points, but the change (in this case due to the exemption) is less than 250 points, there are usually also no competition concerns. If the HHI value is above 2 000 points, but the change (in this case due to the exemption) is less than 150 points, there are also usually no competition concerns.

14 If the market share rises above 40% an undertaking can be considered dominant.

(90) For the North-West European region, the modelling shows that the HHI is expected to be 45 points lower[15] in 2027 in a situation with the terminal compared to a situation without the terminal. In 2034 the HHI is expected to be 77 points lower with the terminal[16]. Concentration levels are also expected to be lower with the terminal when assuming a utilisation rate of 100%. This means that the exemption is thus expected to reduce the market concentration in this scenario.

(91) The market share of the largest market player on the upstream wholesale market is projected to remain the same in 2027 and to decrease by 1 percentage point in 2034 because of the exemption, whilst remaining well below 30%. This also holds true when assuming a utilisation rate of 100%.

(92) For the North-West European market, the exemption would, therefore, under such a scenario not be detrimental to competition, but is even expected to have a positive impact, according to the BNetzA.

Relevant geographic market: Germany

(93) For the German market, the BNetzA explains that a considerable decrease in concentration levels is also expected. The HHI is expected to be 160 points lower in 2027 in a situation with the terminal then without[17]. In 2034 the HHI is even expected to be 202 points lower[18]. The market share of the biggest upstream wholesale market player is expected to be 3% lower in a situation with the terminal then in a scenario without the terminal. This holds true for 2027 and 2034, where the market share of the biggest upstream wholesale market player is not expected to be higher than 22%.

(94) For the German market, the exemption would, therefore, under such a scenario not be detrimental to competition, but is even expected to have a positive impact, according to the BNetzA.

5.6.1.3. Long-term bookers dependent on producers (Scenario 2)

(95) In Scenario 2, the notified decision considers that ConocoPhillips, INEOS and RWE Supply & Trading are dependent on specific upstream wholesale market players with whom they have contractual relationships and booking volumes are allocated to these upstream wholesale market players. It compares the evolution of market shares, as well as the concentration levels on the upstream wholesale market in a situation with and without the terminal.

Relevant geographic market: North-West Europe

(96) Looking at the North-West European market, the analysis in the decision shows that in a situation with the terminal in place the HHI increases by 51 points for the year 2027[19] and 43 points for the year 2034[20], remaining well below the critical threshold of 250 points. The market share of the biggest player in the upstream wholesale market also increases slightly by 1 to 2 percent, whilst remaining well under 30%. A utilisation rate of 100% does not significantly change these conclusions.

(97) The exemption would, therefore, not be detrimental to competition on the North-West European market under this scenario, according to the BNetzA.

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15 1 016 points with the terminal, instead of 1 061 points without the terminal.
16 907 points with the terminal, instead of 830 points without the terminal.
17 978 points with the terminal, instead of 1 138 points without the terminal.
18 965 points with the terminal, instead of 1 168 points without the terminal.
19 1 112 points with the terminal, instead of 1 061 points without the terminal.
20 950 points with the terminal, instead of 907 points without the terminal.

Relevant geographic market: Germany

(98) In the second scenario the concentration levels on the German market measured in accordance to the HHI are expected to be 112 points higher in 2027 and 158 points higher in 2034 with the terminal in place[21]. This remains below the critical delta of 250 points. Also, the market shares of the biggest upstream wholesale market player are expected to remain below 30%. Even in a scenario where a utilisation rate of 100% is assumed, the HHI delta would amount to 174 points in 2027[22] and 245 points in 2034[23] and the market shares of the biggest upstream wholesale market player would not be larger than 31%.

(99) For the German market, the exemption would, therefore, under such a scenario not be detrimental to competition, but have a rather neutral impact, according to the BNetzA.

5.6.1.4. Conclusions on the upstream wholesale market

(100) Based on the above, the BNetzA concluded that the exemption is not detrimental to competition on the upstream wholesale market. To the contrary, the analysis seems to indicate that the exemption is expected to have a neutral to positive impact on the competition in this market.

5.6.1.5. Downstream wholesale market

(101) With regard to the downstream wholesale market BNetzA follows the argumentation provided by German LNG, which comes to the conclusion that no negative impact on competition can be expected as a result of the exempted terminal, but that it is rather expected to have a positive impact. The justification entails the following elements.

(102) Among the parties booking long-term capacities, only RWE Trading & Supply features among the seven biggest downstream wholesale market players with a market share of 5%. The other players are not significantly active on the German downstream wholesale market. German LNG also submits that the market concentration on the downstream wholesale market would be 235 points lower on the HHI scale with the terminal then without[24] and that the market shares of the largest three market players would reduce by 2% as a result of the exemption, remaining well below 30%.

(103) Based on the above, the BNetzA concluded that the exemption is not detrimental to the competition on the downstream wholesale market.

5.6.2. Conclusions of the BNetzA

(104) The BNetzA, having verified the data sources and calculations of the submitted consultant report finds that the competitive analysis credibly demonstrated that the exemption would not be detrimental on competition on all affected markets. It concludes that the bookings of the three market players at hand will rather enhance competition.

(105) At the same time, seen that the capacities are fully tradeable on the secondary market, in order to exclude potential negative effects on competition in future, when on the secondary market large capacities could be transferred for extended periods of time to an undertaking with potential market power, the BNetzA introduces a competition safeguard. According to the safeguard, German LNG, which needs to give its approval

21 1 325 points with the terminal, instead of 1 168 points without the terminal.
22 1 312 points with the terminal, instead of 1 138 points without the terminal.
23 1 412 points with the terminal, instead of 1 168 points without the terminal.
24 1 547 points with the terminal, instead of 1 781 points without the terminal.

to every capacity transfer at the terminal, should notify for review to the BNetzA all capacity transfers which could potentially negatively affect competition. As indicative orientation for the capacity transfers to be notified, the BNetzA recalls the thresholds laid down by the Commission Decision in the Lubmin case[25].

(106) In points 443 to 445 of the explanatory part of the exemption decision, the BNetzA has indicatively explained, notifiable are capacity bookings that lead to a market participant holding at least 65% of the terminal's capacity available for long term booking, including initial primary and subsequent secondary bookings, for a period of at least five years, whereby this market participant would achieve a market share of at least 30% on the upstream or downstream wholesale market at any point in time during its booking period.

5.6.3. The Commission's assessment

(107) Based on the information currently available and the analysis provided, the Commission has no grounds for concern and shares BNetzA's conclusion as regards the impact on competition on the markets, which could possibly be affected by the exemption.

(108) The Commission also notes with regard to LNG import terminals, there is no indication that the exemption would result in the market exit or foreclosure of other, existing terminals. On the contrary, additional LNG terminal capacity is planned in Germany and in another North-West European countries. 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.

(109) Based on the available booking information for the primary market, the extensive analysis of the BNetzA comparing a situation with and without the terminal concludes that the exemption is not detrimental to competition on the upstream and downstream wholesale markets and other affected markets.

(110) At the same time, given that capacities on the secondary market are freely tradable it considers that transfers of large volumes of capacity could potentially negatively impact competition in the future. The Commission acknowledges that the BNetzA introduced a competition safeguard in form of a market review clause for secondary capacity.

(111) The Commission points out however, that the competition safeguard introduced by the BNetzA is only described in the explanatory part but is not included in the operative part of the notified decision. It also notes that the thresholds the BNetzA mentions are only indicative. The Commission considers, that this risks having a negative impact on the legal and operational certainty for the execution of this safeguard.

(112) Therefore, the Commission considers that the competition safeguard introduced by the BNetzA needs to be adapted to provide sufficient legal and operational certainty for its execution.

(113) As a general principle, a market assessment clause can only be considered effective if it is legally binding. In the Commission's view, the inclusion of the market review

[25] Commission decision of 20 December 2022 on the exemption of Deutsche ReGas GmbH & Co. KGaA LNG Terminal in Lubmin (Germany) from certain provisions of Directive 2009/73/EC pursuant to Article 36 of that Directive.

clause into the operative part of the decision of the BNetzA is necessary to create sufficient clarity and legal certainty regarding its implementation.

(114) It has to be kept in mind that an assessment by the BNetzA does not equal a prohibition of the booking in question, neither do the thresholds of the review clause represent intervention thresholds. The thresholds included in the safeguard introduced in the notified decision merely trigger a competitive assessment of the booking in question on the market, which enables the BNetzA to form a view on the competitive situation in a timely manner and intervene only in case of concrete concerns.

(115) In light of the above considerations, the Commission asks the BNetzA to include a safeguard into the operative part of its notified decision a provision which ensures that a market player who achieves with any booking a total level of 65 % or more of the capacity available for long term booking at the terminal for a duration of five years or more, combining primary capacity bookings and capacity purchased on the secondary market, German LNG shall notify the BNetzA. The competent national authority shall determine whether this market player holds a market share of 30% or more on either the German upstream or downstream wholesale market for gas. In the event that this market player holds a market share of 30% or more on any of these markets, the competent national authority shall assess the impact on competition and introduce safeguards should this be required.

(116) Should the competent national authority find that the intended booking would lead to a situation that would be detrimental to competition by risking to create or strengthen a dominant market position by an undertaking, the BNetzA shall limit the capacity and/or the duration of the intended booking by the concerned market player.

(117) Should the competent national authority find that the intended booking would not lead to a situation on any of the affected markets that would be detrimental to competition, it shall inform German LNG accordingly and German LNG may continue with the booking process.

(118) Considering also the specific circumstances of this exemption request, the Commission does not consider that additional competition conditions going beyond the safeguard are necessary to come to the conclusion that the exemption does not have a negative impact on competition in the upstream wholesale market.

5.6.4. Scope of the exemption: Impact of the exemption from third party access rules

(119) Under the Directive 2009/73/EC, regulated third party access rules should ensure that all competitors in a given market have non-discriminatory access to the infrastructure and can compete on equal terms. Germany adopted a regulatory regime for third party access to LNG terminals in November 2022 transposing the requirements of Directive 2009/73/EC. As a first step it needs to be determined in how far the capacity management and allocation rules contained in the exemption deviate from the regulated regime.

(120) Like the regulated third-party access regime, the capacity management and allocation rules applied to the terminal under the exemption (see recitals (19) to (34) above), also aim at ensuring that access is granted in a non-discriminatory and transparent manner. This holds true for the first and subsequent allocations of long-term capacity, but also for short-term bookings. 10% of the terminal's capacity is set aside for short-term bookings and a secondary market, as well as a UIOLI mechanism are foreseen.

(121) The differences between the capacity management and allocation rules under the exemption and the regulated regime are therefore minimal as the exemption as such

does not significantly alter third-party access to the terminal and ensures that access remains transparent and non-discriminatory.

(122) As a result of the capacity management and allocation rules contained in the exemption RWE Supply & Trading was subject to the same transparent and non-discriminatory capacity management and allocation rules as the other undertakings booking long-term capacity. The fact that RWE Supply & Trading and RWE belong to the same parent company did not play a role. In addition, the binding offer was made in the context of the 2019 market test, when RWE had not yet entered into agreements to become a shareholder of the terminal.

(123) This is also acknowledged by the BNetzA and it refers to a 'limited' exemption from third party access rules.

(124) It should be recalled, that the main difference, and the main benefit of the exemption, is the additional legal certainty, which facilitates the conclusion of long-term contracts: it provides legal certainty with regard to the third-party access requirements for the duration of the exemption, whilst the regulated rules may change.

(125) In the event that new market entrants or small market participants book such long-term capacity there is no reasonable doubt that newly created capacity would actually enhance competition. The long-term capacities at the Brunsbüttel terminal are booked by such new market entrants or small market participants, which is why the Commission concludes that based on the information currently available and the analysis provided, the terminal does not negatively impact the competition on the upstream or downstream wholesale market.

(126) The Commission considers that the exemption will not lead to higher market concentration or market shares compared a situation where the terminal was to be operated under the current regulated regime.

5.6.5. Scope of the exemption: The exemption from tariff regulation

(127) Also the impact of the tariff exemption on competition needs to be ascertained. An exemption from tariff regulation could in principle impact competition between terminals or between terminal users.

(128) It should be noted that also the exemption from regulated tariffs is narrow in scope. The main advantage of the exemption is that tariffs can be fixed for the duration of the exemption, whereas regulated tariffs are subject to regular verification and possible adaptation by the BNetzA. Regulated tariffs are also subject to a maximum rate of return, whereas exempted terminals could in principle set tariffs aiming at higher returns.

(129) With regard to competition between terminals, the possibility of setting higher tariffs is not considered problematic for the competition, as it would make the terminal less attractive, and parties would simply book at other terminals. It should also be noted that in this specific case the targeted return on the investment is not above the returns that would be possible under the regulated regime. The exemption from tariff regulation is, therefore, not expected to be detrimental to the competition between terminals.

(130) With regard to competition between terminal users it should be noted that the tariffs charged by the terminal do not discriminate between the different capacity holders, and tariff increases for long-term capacity allocated after the first booking round are limited to 10 % of the base tariff. This is why the Commission concludes that, the

foreseen exemption from tariff regulation is not expected to be detrimental to competition between terminal users.

(131) Therefore, the Commission concludes that the exemption from tariff rules is not detrimental to competition between terminals and terminal users.

5.6.6. Conclusion

(132) On the basis of the above, the Commission concludes that the construction of the terminal as such is thus expected to enhance competition in gas supply in line with Article 36 (1)(a) of Directive 2009/73/EC and that the exemption is not detrimental to competition and thus complies with Article 36(1)(e) of Directive 2009/73/EC. In order to ensure that the competition safeguard introduced by BNetzA provides legal and operational certainty for its execution, the Commission considers that it needs to be adapted.

5.7. The level of risk

(133) Pursuant to Article 36 (1)(b) of Directive 2009/73/EC the level of risk attached to the investment must be such that the investment would not take place unless the exemption is granted.

(134) German LNG explained that it would not take the final investment decision if the terminal would be subject to the framework for regulated access to LNG terminals[26], as it does not provide sufficient legal certainty to convince financial institutions to support the project. This is mainly because the regulatory framework could change over the years and BNetzA can revise tariffs submitted by the terminal operator on an annual basis under the regulated regime. To sufficiently manage the risk of the project, long-term contracts providing certainty about future revenue streams are required. Under the regulated regime, this is not possible.

(135) The relevant Guidance[27] issued by the Commission stipulates that two main aspects need to be taken into account when assessing the risk of an investment: the risk of non-use of the infrastructure and the risk of a change in costs and revenues in the future. It also needs to be assessed whether the duration of the exemption is justified in view of the risks related to the project.

(136) With regard to the risk of non-use it should be noted that German LNG has concluded three [redacted]. It argues, however, that these contracts are conditional on the granting of the exemption and that such contracts would not have materialised under the regulated regime. This is because the regulated regime does not grant sufficient certainty to the undertaking booking capacity in terms of tariffs. This is why the risk of non-use would be greater under the regulated regime.

(137) Furthermore, securing upstream supply for capacity users is relevant when assessing the risk of non-use of LNG terminals. The development of the international supply and demand of LNG over the duration of the requested exemption is not certain. Whilst there was significant free capacity at European LNG terminals in 2021, this no longer holds true as a result of the latest geopolitical developments which have led to a fall in imported pipeline gas and a surge in LNG imports. It is very difficult at this stage to

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26 Verordnung zu regulatorischen Rahmenbedingungen für LNG-Anlagen.

27 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.

foresee the outcome of these geopolitical developments and the long-term demand for LNG capacity at European terminals. Even if in a more global context significant liquefaction and regasification capacity is coming onto the market, the direction of trade flows is also difficult to predict, as demand and willingness to pay may increase also in other regions, notably Asia.

(138) It should also be noted that there are currently plans for several additional LNG terminals in Germany, most notably in Stade and Wilhemshaven. These competing projects also increase the risk of non-use of the Brunsbüttel terminal.

(139) Finally, European and German climate goals also render the project riskier in terms of non-use. The European Green Deal's ambition of reaching climate neutrality by 2050 is mirrored by the ambition of the German governments to achieve climate neutrality by 2045. The law to accelerate the construction of LNG infrastructure in Germany, which was adopted on 1 June 2022, stipulates in paragraph 5 that LNG terminals should no longer be used to import LNG by 2043. In addition, the so-called *Osterpaket* issued by the German government on 6 April 2022 provides a strong push for renewable energies and an action plan to further improve energy efficiency has also been presented in May 2022. The Commission has also highlighted the importance of increased energy efficiency and the need to save gas in its REPowerEU Plan[28] and the Save gas for a safe winter Communication[29]. These policy objectives and initiatives are likely to lead to a reduced demand for natural gas.

(140) Based on the above elements, the Commission concludes that the terminal faces a considerable risk of non-use.

(141) With regard to the risk of a change in costs and/or revenues in the future, it should be remarked that revenues under the regulated regime would be uncertain, as such regime could evolve over time, and possible non-use of the terminal under the regulated regime would lead to lower revenues.

(142) The investment required to build and operate the Brunsbüttel terminal is significant. [redacted], but these costs are uncertain, since in practice they cannot be fully planned and secured ex-ante in complex construction projects like the one at hand. In the course of the planning of the Brunsbüttel terminal, budgeted costs have already increased significantly over time, not least due to the considerable general and construction-specific price increases in recent months. Most of these costs are irreversible investment costs.

(143) The finances of the terminal are very much dependent on how it is used. German LNG has submitted its expectations as regards the returns of the project. [redacted]. If only 50% of the capacity were booked the terminal would be loss-making. The duration of the operation of the terminal and the potential risk of non-use which would exist without the exemption would directly impact the viability of the project.

(144) Subsidies, which would be granted to the investors can considerably reduce the investment risk and increase certainty about returns to the private investors. 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.

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[28] Communication from the Commission: REPowerEU Plan (COM(2022)230) of 18 May 2022.

[29] Communication from the Commission: Save gas for a safe winter (COM(2022)360) of 20 July 2022.

(145) The Commission notes that public support is envisaged for the terminal. The public support takes [redacted]. Whilst this support reduces the project risk to a certain degree, [redacted]. This is why the Commission concludes that the support does not lower the risk to a degree that would put the granting of an exemption into question. Should additional support be foreseen, a new evaluation of the risk criteria would be required, however.

(146) The Commission concludes that the terminal also faces a considerable risk of changing costs and/or revenues in the future. This directly impacts the finances of the terminal and justifies the exemption. The uncertainty is due to the fact that regulated tariffs are established on an annual basis leading to less predictability and making long-term contracts less attractive. The risk is somewhat reduced by the envisaged public support but does not protect German LNG against possible losses in the future.

(147) It also needs to be assessed whether the duration of the exemption is justified in view of the risks related to the project. For such an assessment the relevant Guidelines[30] specify that contractual arrangements should be taken into account and that the duration of the exemption should be equal to or less than the expected period for cost recovery of the new infrastructure.

(148) The exemption was initially requested for 20 years, although German LNG later submitted that it considers 15 years to be sufficient. German LNG points out that a sufficiently reliable projection of costs and revenues for the period of amortisation of the terminal is needed for the investment to go ahead and explains that [redacted] BNetzA considers that a 20-year exemption is justified by the high risk of the project. It also corresponds to the duration of other exemption decisions for LNG terminals, with which German LNG will be competing.

(149) As mentioned above, contractual arrangements, most notably the length of capacity-booking contracts, are also an indicator used to determine the appropriate duration of an exemption. German LNG has signed three [redacted]

(150) German LNG itself envisages [redacted].

(151) [redacted] The utilisation of the terminal after 15 years is left open and the residual value is uncertain. [redacted]. Such a terminal would not fit the description of the exempted terminal and would thus not be covered by the current exemption, as explained in recital (9) above. [redacted]

30 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.

[redacted]

(152) The duration of the exemption should be limited to what is required to sufficiently manage the risk of the project and allow the infrastructure investment decision to be taken. It should be noted that the duration of the exemption does not pre-empt the duration of the terminal's use. Following an exemption, the terminal can continue to operate under the relevant regime.

(153) Given the fact that the operation of the Brunsbüttel terminal in its initial set-up is planned [redacted] and the fact that German LNG contends that a 15 year exemption would be sufficient to allow the project to go ahead, the Commission assumes that German LNG's investment decision will be based [redacted]. The relevant Guidance[31] issued by the Commission emphasises that throughput contracts for terminals should be taken into account and that [redacted]. On this basis the Commission considers that an exemption of 15 years would allow to sufficiently de-risk the project to go ahead.

(154) This does not conflict with the exemption decision in the Lubmin case[32] where the exemption period was longer than the first long-term contract the operator of the terminal entered into, because contrary to the current case, where all long-term capacity has been allocated, the majority of the final long-term capacity had not yet been allocated at the Lubmin terminal when the exemption decision was taken.

(155) Considering the risks of non-use as well as uncertainties around the future costs and revenues described above the Commission concludes that the risk criterion within the meaning of Article 36(1) (b) of Directive 2009/73/EC is met, if the duration of the exemption is modified by the BNetzA to 15 years.

5.8. Unbundling requirement

(156) Article 36 (1)(c) of Directive 2009/73/EC prescribes that 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.

(157) The transmission network to which the terminal will be connected is owned and operated by Gasunie Deutschland Transport Services GmbH, certified as an ownership unbundled transmission system operator. Like German LNG, Gasunie Deutschland Transport Services GmbH is a subsidiary of Gasunie. Gasunie, German LNG and Gasunie Deutschand Transport Services are legally separate entities and German LNG explicitly declared that the terminal and the transmission system will be separated as regards information, operation, and bookkeeping.

(158) The LNG facility is, therefore, owned by a natural or legal person, which is separate at least in terms of its legal form from the system operator in whose system the infrastructure will be built. In addition, the operative part of the notified decision

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31 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.

32 Commission decision of 20 December 2022 on the exemption of Deutsche ReGas GmbH & Co. KGaA LNG Terminal in Lubmin (Germany) from certain provisions of Directive 2009/73/EC pursuant to Article 36 of that Directive.

allows BNetzA to withdraw the decision should there be changes leading to a situation where the transmission system and the terminal were not sufficiently unbundled. The unbundling requirement set out in Article 36 (1)(c) of Directive 2009/73/EC is therefore met.

5.9. Charges

(159) Article 36 (1)(d) of Directive 2009/73/EC specifies that charges must be levied on users of the infrastructure at hand. German LNG has declared that tariffs will be charged to the users of the Brunsbüttel terminal. As outlined in recital (18) above, the operative part of the notified decision, furthermore, specifically requires the terminal to charge tariffs. The requirement to levy charges set out by Article 36 (1)(d) of Directive 2009/73/EC is therefore fulfilled.

5.10. Impact on the internal market and regulated systems

(160) Article 36 (1)(e) of Directive 2009/73/EC states that 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.

(161) Due to the additional gas imports and some short-term capacity, the terminal will increase the flexibility and liquidity at the German Trading Hub Europe and possibly other European trading points. The terminal will also contribute to the diversification of gas imports as it offers new capacity enabling new market actors to access the European gas market. The exemption is therefore expected to generate developments which positively impact the functioning of the internal market in natural gas.

(162) Furthermore, the terminal is not expected to compromise the regulated system to which it is connected. To ensure the overall optimisation of the energy network and the availability of sufficient feed-in capacity when the terminal will start operating, German LNG has reached out to the operator of the relevant transmission grid (Gasunie Deutschland Transport Services GmbH). The transmission system operator subsequently took the required feed-in capacity into account when carrying out modelling in preparation of the latest national network development plan (Netzentwicklungsplan Gas 2020–2030), which aims to ensure the optimal utilisation of the in the regulated networks.

(163) It can therefore be concluded that the exemption would not be detrimental to the effective functioning of the internal gas market, or the efficient functioning of the regulated systems concerned and that the two requirements listed in Article 36 (1)(e) of Directive 2009/73/EC are thus fulfilled.

5.11. Other matters

5.11.1. State aid and application of competition law

(164) 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 and the approval by the Commission pursuant to Article 108 of the TFEU. This explicitly holds true regarding the currently envisaged support to the Brunsbüttel terminal by the German government.

(165) This decision is without prejudice to the application of the Union rules on competition and State aid. 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

(166) In light of the foregoing, an exemption may be granted to German LNG pursuant to Article 36(9) of Directive 2009/73/EC, subject to the amendments in the operative part of this Decision. BNetzA should inform the Commission about the final exemption 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 BK7-22-140 of 15 March 2023 (the notified decision), in accordance with Article 36(8) of Directive 2009/73/EC.

Article 2

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

Article 3

BNetzA shall amend its decision to safeguard full compliance with the criteria of Article 36(1) by changeing the duration of the exemption in point 3 of the operative part of the notified decision. The exemption period shall correspond to 15 years.

Article 4

BNetzA shall introduce a requirement in the operative part of its decision that German LNG shall notify the BNetzA if at any point in time during the period of the exemption a market player achieves a total level of 65 % or more, combining its bookings of primary capacity and bookings on the secondary market, of the capacity available for long term booking at the terminal for a duration of five years or more. The competent national authority shall determine whether this market player holds a market share of 30% or more on either the German upstream or downstream wholesale market for gas. In the event that this market player holds a market share of 30% or more on any of these markets, the competent national authority shall assess the impact on competition. The BNetzA is invited to consult the German competition authority for the purpose of this assessment.

Should the competent national authority find that the intended booking would lead to a situation that would be detrimental to competition by risking to of createing or strengthening a dominant market position by an undertaking, the BNetzA shall take appropriate measure to prevent a situation that would be detrimental to competition, for example, by limiting the capacity and/or the duration of the intended booking by the concerned market player.

Should the competent national authority find that the intended booking would not lead to a situation on any of the affected markets that would be detrimental to competition, it shall inform German LNG accordingly and German LNG may continue with the booking process.

Article 5

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

Done at Brussels, 2.6.2023

For the Commission
Kadri SIMSON
Member of the Commission