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COMMISSION DECISION

of 22.1.2024

**prolonging the period of validity of the exemption of Hanseatic Energy Hub GmbH
LNG Terminal from certain provisions of Directive 2009/73/EC of the European
Parliament and of the Council pursuant to Article 36 of that Directive**

(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. **BACKGROUND**

- (1) The Hanseatic Energy Hub GmbH ('HEH') intends to construct and operate a liquefied natural gas (LNG) regasification terminal (the 'Stade terminal' or the 'fixed terminal') in an industrial zone outside the city of Stade in Germany. The gasification capacity of the terminal is planned to be 13.3 billion m³ (bcm) of natural gas per year.
- (2) HEH received an exemption from certain provisions of Directive 2009/73/EC for the Stade terminal under the condition that commercial operations would start by 19 August 2027. HEH has requested a prolongation of that exemption such that the commencement of commercial operations would be postponed until 19 August 2029.

2. **PROCEDURE**

- (3) On 23 June 2022, the German regulatory authority ('BNetzA') notified a decision to the Commission exempting the HEH fixed terminal from certain internal market provisions ('the notified decision').
- (4) On 19 August 2022, the Commission adopted a decision pursuant to Article 36(9) of Directive 2009/73/EC, requiring the BNetzA to amend the notified decision (the 'Commission Decision of 2022')². Article 3 of the Commission Decision of 2022 provides that, in accordance with Article 36(9) of Directive 2009/73/EC, the Decision is to lose its effect two years from its adoption in the event that construction of the Stade terminal has not yet started, and five years from its adoption in the event that the

¹ OJ L 211, 14.09.2009, p. 94.

² Commission Decision C(2022) 6098 final.

Stade terminal has not become operational, unless the Commission decides that any delay is due to major obstacles beyond the control of HEH fixed terminal.

- (5) On 19 September 2022 the BNetzA adopted its final decision exempting the HEH fixed terminal from certain internal market provisions (the “Exemption Decision”), implementing the amendments required by the Commission Decision of 2022.
- (6) Article 14 of the Exemption Decision provides that the exemption applies under the condition that the construction of the Stade terminal begins no later than 19 August 2024 and that the commercial operation starts no later than 19 August 2027, unless the Commission decides pursuant to Article 36(9) of Directive 2009/73/EC that any delays are due to circumstances beyond the control of the applicant.
- (7) On 5 December 2023, the BNetzA notified the Commission of HEH’s request to prolong the exemption so that the commencement of commercial operations could be postponed until 19 August 2029.
- (8) On 18 December 2023 the Commission published a notice on its website informing the public of the notification and inviting third parties to send their observations by 5 January 2024. The Commission has not received any observations in response.

3. NOTIFICATION BY THE BNETZA

- (9) The notification by the BNetzA summarises the grounds put forward by HEH explaining why it considers that a prolongation is required and its assessment of the compatibility of the prolongation with the requirements of Article 36(9) of Directive 2009/73/EC.

3.1. Reasons put forward by HEH

- (10) HEH explains that, although the start of the construction phase faced delays, it expects construction to start within the original deadline set by the Exemption Decision, i.e. before 19 August 2024. The construction was initially foreseen to last up to [REDACTED]. Given the delayed start and the fact that the construction-phase itself is expected to last longer, HEH claims that a prolongation of the exemption allowing commercial operations to be postponed to start no later than 19 August 2029 is required.
- (11) HEH puts forward four main reasons for the delays, which it considers to be beyond its control: (i) a market intervention by the Federal Ministry for Economic Affairs and Climate Action (‘BMWK’) chartering Floating Storage Regasification Units (‘FSRUs’) for the import of LNG to Germany, (ii) an amendment of the LNG-Beschleunigungsgesetz (LNG acceleration act) introducing additional requirements on HEH, (iii) the withdrawal of a HEH shareholder (Fluxys) from the project, (iv) an unforeseen need to coordinate between the construction of the fixed terminal and the Federal FSRU in Stade.

3.1.1. BMWK market intervention

- (12) HEH claims that the announcement by BMWK that it would charter five FSRUs to be deployed in Germany led to considerable uncertainties in the market directly impacting HEH’s project for the fixed terminal, [REDACTED]

- (13) In this regard, HEH states that whilst the non-binding market test for the fixed terminal conducted in March/April 2022 showed a market interest for triple the volumes offered by the terminal, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. In view of the uncertainty around the conditions at which the capacities would be offered at the Federal FSRUs and the possibility that they may become available below market prices led, according to HEH, to significant hesitation among initially interested customers.
- (14) HEH was only able to secure offers for an additional [REDACTED] long-term capacity in December 2022 and March 2023. HEH explains that, against this background, the BMWK's market intervention led to a postponement of the final investment decision and a delay of nearly [REDACTED] in HEH's project planning. HEH claims that the market intervention by the BMWK was beyond the control of HEH.

3.1.2. *Amendment of the LNG-Beschleunigungsgesetz*

- (15) HEH explains that the Gewerbeaufsichtsamt Lüneburg (the local authority responsible for issuing the necessary permits) had confirmed in February 2023 that all required documents had been submitted for the obtention of a permit under the law for the protection against harmful environmental effects caused by air pollution, noise, vibrations and similar processes ("Bundesimmissionsschutzgesetz"). In April 2023, however, an amendment of the LNG-Beschleunigungsgesetz was announced. The amendment introduced as an additional prerequisite for the obtention of the permit the assessment of the suitability of LNG facilities for the import of hydrogen and hydrogen derivatives.
- (16) HEH explains that the amendment of the LNG-Beschleunigungsgesetz necessitated the provision of additional documents by HEH and their examination by the Federal Institute for Materials Research and Testing. Overall, according to HEH, this led to an unforeseeable delay of three months, caused by a legislative change beyond their control.

3.1.3. *Changes to the shareholder composition and change of operator*

- (17) HEH puts forward that Fluxys Germany Holding GmbH (Fluxys) [REDACTED]
[REDACTED], following a strategic re-evaluation of its LNG strategy. Fluxys did not only have a stake of [REDACTED] in HEH, it was also foreseen to become the technical and operational manager of the Stade terminal. Due to the withdrawal, HEH had to find a new shareholder and a new operator for the fixed terminal. In [REDACTED], an agreement was found with Enagas, which agreed to take over Fluxys' shares, as well as its technical and operative responsibilities. HEH claims that the delays caused by these changes were beyond its control.

3.1.4. *Coordination between the Federal FSRU at Stade and HEH's fixed terminal*

- (18) HEH also submits that the BMWK only announced in the summer of 2022 that one of the Federal FSRUs would be located at Stade. The FSRU will start operations at the

beginning of 2024 and would ultimately be replaced by the fixed terminal developed by HEH.

- (19) This means, according to HEH, that the construction of the fixed terminal would have to take place whilst the FSRU is already in operation. This would require extensive coordination in order to avoid that the construction of the fixed terminal impacts the operation of the FSRU, notably for the works at the LNG jetty. The same jetty will first be used by the FSRU terminal and later by the fixed terminal. Nevertheless, structural interventions are required before the jetty can be used by the fixed terminal.
- (20) As the works will have to be carried out in a manner that does not disrupt the operation of the FSRU, HEH takes the view that this will only be possible during very specific time slots. There would also be limitations for the storage of materials and the manoeuvring of machines and terminal components on the jetty.
- (21) Initially HEH had estimated that the work on the jetty would take [REDACTED]. Due to the restrictions resulting from the installation of the FSRU a delay [REDACTED] [REDACTED] expected.

3.2. Assessment of the BNetzA

- (22) The BNetzA subscribes to the reasons put forward by HEH and concludes that a prolongation of the exemption is justified.
- (23) With regard to the market intervention by the BMWK, the BNetzA observes that it is part of entrepreneurial activities to anticipate market conditions and to factor these into sound project planning in terms of time and financial impact. In its view, the high volatility in the LNG market should have been reflected in HEH's project planning and marketing. However, in the specific case at hand, the BNetzA agrees that the market intervention by the BMWK, which consists of leasing multiple FSRUs, went beyond normal market conditions that could have been anticipated. Therefore, in the view of the BNetzA, the intervention and the delays caused by it were beyond the control of HEH.
- (24) With regard to the amendment to the LNG-Beschleunigungsgesetz, the BNetzA considers that legal changes can always occur and need to be taken into account in any entrepreneurial activity. Accordingly, the BNetzA considers that the time that HEH needed to compile the necessary documentation was within HEH's control. However, the BNetzA submits that HEH could not have anticipated the time required for the relevant authority to assess whether the project would meet the additional requirements introduced by the amendment to the LNG-Beschleunigungsgesetz. Hence, the BNetzA concludes that the delays resulting from the assessment whether the project is suitable for the import of hydrogen and hydrogen derivatives were beyond the control of HEH.
- (25) With regard to the withdrawal of Fluxys from the project, the BNetzA states that Article 36 (9) of Directive 2009/73/EC requires that delays are caused by circumstances beyond the control of the person to whom the exemption was granted. In the view of the BNetzA, the term 'person' refers in the broader sense to the company HEH, but in the narrower sense it also refers to each individual shareholder of HEH. Should an individual shareholder decide that a jointly pursued project is no longer viable, that shareholder will make an individual decision to withdraw from the project without the other shareholders having any influence on this. To be able to further pursue the project, a replacement for Fluxys had to be found. Against this

background, the BNetzA considers that the delays incurred as a result of the need to find a replacement were beyond the control of HEH.

- (26) The BNetzA also considers that the need to coordinate between the Federal FSRU at Stade and HEH's fixed terminal could not have been foreseen by HEH. The installation of the Federal FSRU at Stade and subsequent prolongation of the construction phase were beyond HEH's control.

4. LEGAL ASSESSMENT

- (27) Article 36 (9) of Directive 2009/73/EC provides that the Commission's approval of an exemption decision loses its effect two years from its adoption in the event that construction of the infrastructure has not yet started, and five years from its adoption in the event that the infrastructure has not become operational, unless the Commission decides that any delay is due to major obstacles beyond the control of the person to whom the exemption has been granted.
- (28) In the current case, HEH contends that the commercial operation of the infrastructure cannot commence five years from the adoption of the Commission Decision of 2022 due to circumstances beyond the control of HEH. Instead of starting commercial operations by 19 August 2027, HEH has requested a prolongation of the Exemption Decision allowing for the commencement of commercial operations by 19 August 2029.
- (29) It is necessary to assess whether the reasons put forward by the project promoter and endorsed by the BNetzA support their view that delays are due to major obstacles beyond the control of HEH and whether the exemption can be prolonged to allow the uptake of commercial operations to be postponed by two years.
- (30) First, it is necessary to assess whether the reasons causing the delays can be considered major obstacles. The market intervention by the BMWK could not be anticipated and initial uncertainty about capacity bookings resulted in delays of the planned final investment decision. Similarly, the LNG-Beschleunigungsgesetz led to additional requirements without the fulfilment of which HEH could not acquire a permit for the Stade terminal and the withdrawal of Fluxys led to a situation [REDACTED] [REDACTED] Finally, the installation of the Federal FSRU led to additional coordination requirements without the fulfilment of which the fixed terminal could not be completed. In the Commission's view, a project cannot proceed without accomplishing the steps listed above and they can all be considered major obstacles.
- (31) Second, it needs to be ascertained whether these developments are outside the control of the person to whom the exemption was granted, i.e. HEH. Here the Commission agrees with the analysis carried out by the BNetzA that the volatility of the LNG market and changes in legislation are risks that entrepreneurs are faced with. Nevertheless, the specific market intervention by the BMWK and the decision to place a Federal FSRU at Stade were beyond the control of HEH. The same holds true for the amendment of the LNG-Beschleunigungsgesetz.
- (32) Third, it needs to be examined whether these major obstacles led to a delay that justifies a prolongation of the exemption until 19 August 2029. HEH has demonstrated that the project was delayed by [REDACTED] due to the market intervention of the BMWK, the decision to place the Federal FSRU at Stade and the requirements contained in the LNG-Beschleunigungsgesetz. Therefore as assessed by the BNetzA,

a prolongation of the exemption by two years is justified in view of the complexity of the project and the requirement to closely coordinate the works with the operations of the Federal FSRU.

5. CONCLUSION

- (33) Therefore, in accordance with Article 36 (9) of Directive 2009/73/EC, the exemption should be prolonged, as sufficient grounds exist to postpone the latest date by which the commercial operation must start from 19 August 2027 to 19 August 2029,

HAS ADOPTED THIS DECISION:

Article 1

In Commission Decision C(2022) 6098 final, Article 3 is replaced by the following:

“Article 3

In accordance with Article 36 (9) of Directive 2009/73/EC, this Decision shall expire on 19 August 2024 in the event that the construction of the LNG terminal has not yet started and on 19 August 2029 in the event that the LNG terminal has not become operational by that date, unless the Commission decides that any further delay is due to major obstacles beyond the control of Hanseatic Energy Hub GmbH. “

Article 2

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

Done at Brussels, 22.1.2024

For the Commission

Kadri SIMSON

Member of the Commission