EUROPEAN
COMMISSION

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COMMISSION DECISION

of 19.8.2022

on the exemption of Hanseatic Energy Hub GmbH LNG Terminal from certain provisions of Directive 2009/73/EC pursuant to Article 36 of the 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/EC ("Directive 2009/73/EC")[1] , and in particular Article 36 thereof,

Whereas:

1. DESCRIPTION OF THE PROJECT

(1) The Hanseatic Energy Hub GmbH (HEH) intends to construct and operate a liquefied natural gas (LNG) regasification terminal (the Stade terminal or the terminal) in an industrial zone outside the city of Stade in Germany. The terminal will be located next to the factory site of DOW Deutschland Anlagengesellschaft mbH (Dow). The objective is to use excess heat from the Dow-processes for the regasification of the LNG.

(2) The gasification capacity of the terminal is planned to be of 13.3 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 is planned to include two storage tanks with a capacity of 240 000 m³ each, thus a total storage capacity of 480 000 m³. The LNG terminal is expected to become operational in the [redacted].

(3) The Hanseatic Energy Hub GmbH is a joint venture of

- JOKI Vermögensverwaltung GmbH owned by Dr. Johann Killinger [redacted]. Dr. Johann Killinger is mainly active in the maritime logistic sector;
- Luxembourg Investment Company 404 S.a.r.l. (LIC) owned by Partners Group AG [redacted]. The Partners Group is an investment fund, whilst LIC invests solely into HEH;
- Fluxys Germany Holding GmbH owned by Fluxys Europe NV/SA [redacted]. Fluxys Germany Holding GmbH owns 90% of Fluxys Deutschland GmbH and 11% of Fluxys TENP GmbH. The latter two undertakings are certified and ownership unbundled transmission system operators;
- Dow [redacted], which is a multinational active in plastics, industrial intermediates, coatings and silicones;

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

- Manfred Schubert [redacted] who has no further shares in undertakings in the energy sector;
- Urban Stojan [redacted] who is active in the development of various projects in the energy sector;
- Dr. Dirk Baldeweg [redacted] who is mainly active in maritime logistics.

2. National procedure

(4) By letter dated 21 December 2020, HEH submitted a request for exemption from the third party access requirements and tariff regulation for a duration of 25 years as of the start of commercial operation to the German regulatory authority Bundesnetzagentur (BNetzA). In the course of the procedure, the HEH submitted further information to the BNetzA. After verifying the completeness of the required documentation, the BNetzA informed the Commission of the exemption request on 28 November 2021.

(5) On 29 November 2021, the BNetzA shared draft rules on capacity management and allocation with the HEH for comments. HEH commented on the impact of the proposed rules on the economic and financial feasibility of the project. Following further discussions, BNetzA finalized the rules and submitted them to HEH on 11 January 2022.

(6) On the basis of the capacity management and allocation rules HEH called for expressions of interest to gauge market interest. The call for expression of interest lasted from 21 March 2022 to 8 April 2022. [redacted] undertakings expressed an interest in booking capacity at the Stade terminal, for a total volume [redacted] bcm/a, i.e. [redacted]. The duration of the requested capacity bookings ranged between [redacted]. [redacted] A Memorandum of Understanding (MoU) has been signed with the energy utility EnBW (Energie Baden-Württemberg AG) for [redacted] and a call for binding offers was launched on 16 June 2022, open until 29 July 2022.

(7) 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 26 April 2022 to 10 May 2022 to give them a possibility to comment on the project description of the applicant and the capacity management and allocation rules. No comments were received in the course of this consultation.

(8) On 1 May 2022 HEH requested a possible adaptation of the requirement to allocate capacity at an equal ratio in case there is excess demand in the first auction for long-term capacity. HEH expressed the view that such a pro-rata allocation could lead to significant challenges. The BNetzA adapted the capacity management and allocation rules on 20 May 2022 to address this specific concern. According to the updated rules the allocation may take into account the duration and the volumes of the bookings, favouring longer bookings and higher volumes.

3. The notified exemption decision

(9) On 23 June 2022, BNetzA adopted an exemption decision (the notified decision), subject to further amendments pending a Commission decision, granting the requested exemption from third party access and tariff regulation requirements. The exemption is

granted for 25 years from start of operations for an annual capacity of 13.3 bcm, subject to a number of conditions.

(10) HEH 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

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

3.1.1. Booking requirements

(12) The booking requirements are the following:

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

(b) HEH 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 9 slots 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

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

(14) 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.

(15) The basic tariff to be applied at the time of the first allocation relates to a booking period of 20 years. For bookings with a shorter duration a surcharge is allowed. For bookings for a period of 15 to 19 years the surcharge cannot amount to an add-on of more than 10% to the basic tariff. For bookings with a longer duration then 20 years rebates are allowed. These rebates cannot be higher than 10% of the basic tariff. The surcharges and rebates are to be communicated to all potential users before the first allocation.

3.1.3. Long-term bookings after the first allocation

(16) 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

(17) 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 criteria in points (18) to (26) below need to be respected.

(18) All potential users of capacity need to be pre-registered with the HEH.

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

(20) Slots shall be allocated at the latest on 8 December of the year preceding the year for which the slots are allocated. Allocation of slots shall occur via auction, which shall be announced at least 4 weeks in advance. At least two weeks in advance, relevant information on the slots and pricing needs to be made available.

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

(22) 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.

(23) 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 HEH.

(24) Only market participants that registered with HEH 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.

(25) 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 only on duly justified basis, in particular where there are justified doubts with regard to the financial or technological capabilities of the prospective capacity holder. Capacity holders may resell the contracted capacity on the secondary market until 5 days before the date of the unloading slot.

(26) 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 HEH.

4. PROCEDURE AT THE EUROPEAN COMMISSION

(27) On 23 June 2022, BNetzA submitted the notified decision to the European Commission.

(28) On 1 July 2022, the Commission published a notice on its website, inviting stakeholders for comments within two weeks. No comments were received.

(29) On 1 July 2022, 4 July 2022 and 6 July 2022 the Commission sent a number of questions to BNetzA to which it responded on 5 July 2022, 8 July 2022 and 12 July 2022.

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

5.1. Legal basis

(30) According to Article 36 (1) of Directive 2009/73/EC major new gas infrastructure may, upon request, benefit from an exemption 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.

(31) Article 36 of Directive 2009/73/EC furthermore specifies a number of procedural steps that need to be respected 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 have to 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)).

(32) 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.

(33) 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

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

(35) 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.*

(36) The Stade terminal would offer two groups of services: large-scale and small-scale services. Large-scale services would include berthing and unloading of LNG, intermediate storage and send-out of gas in regasified form to the transmission grid. Small-scale services would aim at redistributing LNG in liquid state by loading it on ships, trucks or train carriages. The notified decision does not cover the small-scale services, as it considers that these services do not fall within the scope of 'LNG facility', as defined in Directive 2009/73/EC.

(37) The Commission shares the view of the BNetzA that small-scale services as described in the notification are not 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. This type of activity was not meant to be addressed by the provisions on LNG facilities in Directive 2009/73/EC. Where a separation of both types of activities is not possible, this could be different, as there may be a risk of cross-subsidisation. In the case of the Stade terminal, HEH has clarified, that the bookkeeping for the exempted and the non-regulated services (i.e. the large-scale and the small-scale services) will be clearly separated.

(38) The investment can also be considered as a major one within the meaning of Article 36 of Directive 2009/73/EC. Whereas there is no exact minimum threshold, the planned investment of [redacted]. is clearly sufficiently significant enough for the infrastructure to qualify as major. Furthermore, the planned annual capacity of 13.3 bcm which represents around 19% of the annual German gas consumption, can be considered significant.

(39) The infrastructure must furthermore be new. Article 2(33) of Directive 2009/73/EC specifies that new infrastructure *means an infrastructure not completed by 4 August 2003*. As the construction of the Stade terminal has not yet started and it is expected to start operations [redacted], it is to be considered new infrastructure in line with Directive 2009/73/EC

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

5.3. Procedural requirements

(41) 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.

(42) 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.

(43) As described in points (5) and (6) above BNetzA finalized the capacity management and allocation rules on 11 January 2022 and HEH conducted a market test from 21 March 2022 to 8 April 2022. As explained above, [redacted] undertakings expressed an interest in booking capacity at the Stade terminal amounting to around [redacted]. The duration of the requested capacity bookings ranged [redacted] years.

(44) 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.

(45) As explained in point (7) above, the BNetzA conducted a consultation of all regulatory authorities in the EU, as well as the UK and Norway. No comments were received during the course of this consultation.

(46) 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

(47) 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.

(48) The Commission notes that in general, an investment, which provides a new route or entry point to the relevant market and connects new upstream sources of gas from new suppliers to the market should increase the security of supply of that market in accordance with Article 36 (1)(a) of Directive 2009/73/EC.

(49) The Commission is of the view that the Stade 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 Stade terminal could replace other existing infrastructure or push other facilities out of the market.

(50) 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.

(51) 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[2]. 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* (COM(2022) 108 final) 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 LNG terminal Stade could cover around 19% of Germany's gas demand and the German government has stressed that additional LNG infrastructure is essential to diversify gas supplies away from Russia. As regards the source of any future gas imports, it should be noted that there is no certainty, as the terminal has not

[2] Including Bulgaria, Poland and the Netherlands, as well as certain undertakings in Germany.

yet signed any supply contracts, but the market test conducted by HEH shows that there is an interest from a broad variety of undertakings from various continents.

(52) The BNetzA also carried out several modelling exercises to assess the impact of the terminal on security of supply, where it has 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 LNG terminal would increase Germany's security of supply and thus also the security of supply of the interconnected European markets.

(53) Whilst it can, therefore, be concluded that the infrastructure as such contributes to security of supply, Article 36 (1)(e) of Directive 2009/73/EC specifies that the exemption as such must not be detrimental to security of supply of natural gas in the Union either. 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 impacts on security of supply in the Union for example. In theory, specific exemption conditions could also be to the detriment of security of supply, e.g. if an exemption decision prevented the investors from increasing interconnection to other Member States.

(54) The capacity management and allocation rules described above can reduce the dependence on individual suppliers. 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, reducing dependence on such suppliers not only improves competition but also contributes to security of supply.

(55) The capacity management and allocation rules ensure access for a large number of market participants. They expressly require non-discriminatory capacity allocation, based on transparent criteria and procedures. This in turn provides access to different sources of supply, including via different suppliers. Increasing the number of access points to the EU gas network for new or smaller suppliers contributes to security of supply. In particular also the strong anti-hoarding requirements (notably reserving 10 % of the capacity for short-term bookings and giving preferential access to this capacity to those not holding long-term bookings, as well as use-it-or-loose-it provisions) would allow LNG cargoes intended for other regions to shift supplies to the EU in times of scarcity.

(56) As there is no indication that the exempted terminal will cause the closure of other routes of supply, the additional route created by the Stade terminal would also be available for supplies to the internal energy market at Union level.

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

(58) 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

(59) As set out in case T-883/16[3] by the General Court and confirmed by the Court of Justice in C-848/19 P[4], the principle of solidarity also entails a general obligation on the part of the Union and the Member States, in the exercise of their respective competences, to take into account the interests of the other stakeholders. 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 to take account of their interdependence and *de facto* solidarity.

(60) 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 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 13.3 bcm/a represented 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.

(61) As described in point (7) above, BNetzA also consulted all national regulatory authorities of the Union, as well as of Norway and the United Kingdom and no comments were received. The Commission is also not aware of any Member State or competitor voicing concerns as regard the Stade terminal.

(62) There is, therefore, no indication that the planned project would negatively impact the security of supply and the economic or political viability of the Union or Member States. To the contrary, the creation of additional regasification capacity positively contributes to security of supply for Germany and the Union.

(63) Based on the above the Commission considers that the requirements set out by the General Court, based on Article 194 TFEU have been met.

5.6. Impact on competition

(64) 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[5].

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

[4] Judgment of the Court of Justice of 15 July 2021 in Case C-848/19-P Germany v European Commission, point 71.

[5] 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.

(65) The Commission notes that in order to analyse the competitive effect of the terminal and the exemption, the relevant gas markets and in particular the question whether the investment leads to the creation or strengthening of a dominant market position needs to be considered. This has to be assessed on case-by-case basis.

(66) For the purpose of this decision, the Commission assumes that the product market affected by the investment is the market for upstream supply of natural gas (which includes development, production and supply of natural gas to large importers/wholesalers).

(67) Firstly, investments, which enable gas supplies from new sources tend to improve competition in upstream gas supply, unless those sources were controlled by undertakings with a strong or dominant position on the relevant market. The terminal is not linked to a specific upstream source. Therefore, upstream gas supply is expected to come from the worldwide market for LNG supply. LNG imports can constitute a direct competitive constraint for imports of natural gas via pipelines[6]. Regardless of whether the relevant geographical market is defined as the Germany-wide, national 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 gas supply.

(68) 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 gas production or supply sectors.

(69) 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.

(70) Secondly, it needs to be ascertained whether the exemption, as opposed to the investment as such, could be detrimental to competition pursuant to Article 36(1)(e) of Directive 2009/73/EC. The impact of the exemption from third party access rules and tariff regulation on competition in the markets likely to be affected will, therefore, also be examined below.

(71) The capacity management and allocation rules applied to the terminal (see points (11) to (26) above) aim at ensuring that access is granted in a non-discriminatory and transparent manner. The first and subsequent allocations of long-term capacity is done according to transparent criteria. 10% of the capacity is set aside for short-term bookings and a secondary market, as well as a UIOLI provision is foreseen.

(72) To ensure transparency with regard to the secondary market, HEH intends to facilitate and promote secondary capacity through an electronic platform (bulletin board). On this platform, the demand for and the offer of capacity transfers or transfers of capacity will be displayed. HEH will enable interested market participants to access the bulletin board and register as terminal users even before concluding a transfer or usage transfer contract. The conditions for this will be published in a transparent and non-discriminatory manner on HEH's website.

(73) Therefore, whilst the rules attached to the exemption aim at ensuring fair competition, the potential impact of an exemption from third party access rules and tariff regulation specifically will be further assessed below.

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

5.6.1. Impact of the exemption from third party access rules

(74) Third party access seeks to ensure that all competitors in a given market have non-discriminatory access to the infrastructure and can compete on equal terms.

(75) HEH requested an exemption from third party access rules for the entire planned capacity at the Stade terminal for a duration of 25 years. In view of this exemption request, it is necessary to assess whether and to what extent the capacity holders would have the ability and the incentive to foreclose competitors on relevant markets adjacent to the LNG facility.

5.6.1.1. Incentive and ability to foreclose

(76) Foreclosure occurs when actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the capacity allocation at the Stade 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.

(77) The incentives to foreclose mainly emanate from the protection of capacity holder profits for their activities on adjacent markets, such as the downstream wholesale and retail gas markets.

(78) To assess whether capacity holders would have the ability and the incentive to foreclose competitors it needs to be examined whether the exemption would enable them to acquire or strengthen their dominant position on the market.

(79) To date, it is not clear which market participants will book the primary capacity. In the market test, [redacted] market participants have declared their intent to book capacity and one Memorandum of Understanding has been signed. [redacted] Furthermore, via the secondary market, capacity can be shifted to other market participants. Therefore, and unlike for exemption decisions where the final capacity allocation is known in advance, the impact of the exemption needs to be assessed based on assumptions. In the event that new market entrants or small market participants book the capacity there would be no reasonable doubt that newly created capacity would enhance competition. However, to assess potential negative effects to competition from the exemption, a reasonable worst-case scenario needs to be taken into account.

(80) To assess the impact of the Stade terminal on competition, the 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 controls, but they can also be applied in the current case[7]. The decision also looks at the impact on market shares[8].

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7 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.

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

(81) If the exemption would (i) not lead to a higher concentration on the market that the Commission would consider problematic in view of the HHI and (ii) not to an increase of the market shares up to a level that that would indicate a dominant market position, each compared to a situation without the exempted Stade terminal, it can be assumed, that the exemption does not have a negative impact on competition.

(82) The notified decision distinguishes two types of worst-case scenarios. In the first scenario the biggest supplier of LNG on the North-West-European market books a significant part of the available capacity at the terminal (Scenario 1) and in the second scenario the market participant with the biggest market share in the gas supply markets books a significant part of the available capacity (Scenario 2). HEH and the BNetZA evaluate both scenarios also for a geographic market that would encompass only Germany. The expected impact on competition of both scenarios on the North-West-European market and the German market is assessed for [redacted] i.e. the start of operation and [redacted]. Both scenarios assume the phase-out of Russian gas with two variables, a phase-out by 2025 and a phase-out by 2030. Earlier modelling had also assessed the scenarios without assuming a phase-out of Russian gas.

5.6.1.2. Largest LNG supplier booking long-term capacity (Scenario 1)

(83) In Scenario 1, the notified decision thus assumes that all long-term capacity at the Stade terminal will be booked by the biggest supplier of LNG in North-West Europe today, which is QatarEnergy.

Assumed relevant geographic market: North-West Europe

(84) For the North-West-European market the assumption is made that 100% of the terminal capacity is booked by QatarEnergy, but that the utilisation rate of the terminal is only 70%[9]. For the North-West-European region, the modelling shows that the HHI would vary only slightly between the counterfactual scenario (where the terminal is not built) and Scenario 1 and in any case not exceed the relevant threshold of a delta of 250. This applies both to the year [redacted] and [redacted]

(85) Based on the economic analysis submitted by the project promoters, the market share of QatarEnergy on the North-West-European market would increase by 2 to 3 percentage points in [redacted] and [redacted] whilst remaining below 20% in all scenarios. The increase in Qatar Energy's in market shares resulting from the exempted terminal would therefore be unproblematic. For the North-West-European market, the exemption would, therefore, under such a scenario not be detrimental to competition.

Assumed relevant geographic market: Germany

(86) Modelling was also carried out focusing solely on the German market and likewise under the assumption of an utilisation rate of [redacted] The decision considered that QatarEnergy would be a new entrant and the model assumes that it would book [redacted] of the long-term capacity. Under these assumptions the market shares of QatarEnergy would increase by 5 to 7 percentage points resulting in a market share of 20% to 25% depending on the scenario. The HHI of the market would be above 1 000 points, but the delta compared to the situation in which the Stade terminal would not be built would stay below 250 points. Thus, according to HEH and the decision, also for the

[9] This is based on average utilisation rate in North-West Europe that has been below 50% in the years 2017-2019. HEH alleges that assuming a 70% utilisation rate is a conservative approach.

German market, the exemption would in such a scenario not be detrimental to competition.

(87) The Commission requested further information and modelling for the assumption that QatarEnergy would book 100% of the capacity under the assumption of a capacity utilisation rate of [redacted]

(88) According to the information received in response to these requests for information, assuming an utilisation rate of [redacted] as suggested by HEH, QatarEnergy's forecasted market shares would remain below 30% in [redacted] in a scenario where QatarEnergy booked 100% of the long-term capacity. At the same time, the market concentration would increase by a delta of 364 points to 1 511 points. In view of QatarEnergy's projected moderate market shares in this scenario such an HHI delta would in the Commissions view not be detrimental for competition.

(89) The Commission therefore considers that under the assumption of QatarEnergy booking 100% of the capacity, and under an assumed utilisation rate of [redacted] the requested exemption would not be detrimental to competition. Whilst in the scenario for the year [redacted] the HHI delta exceeds 250, QatarEnergy would still hold only moderate market shares that are not indicative of a dominant market position.

5.6.1.3. Largest gas importer books long-term capacity (Scenario 2)

(90) In Scenario 2, the largest gas importer, namely Equinor/Petoro would book all of the long-term capacity at the terminal.

Assumed relevant geographic market: North-West Europe

(91) Looking at the North-West-European market, the analysis in the decision shows that the HHI increases only marginally for the year [redacted] but increases from 1 170 to 1 426, i.e. by a delta of 256 points for [redacted] This increase is higher than the threshold below which the Commission considers a market concentration to be unproblematic for competition, but the BNetzA argues that the concentration of the market is still within the lower end of the bandwidth of 1 000 to 2 000 points and that it is, therefore, not problematic from a competition perspective.

(92) The Commission notes that Equinor/Petoro's market share would also increase slightly by 4 to 5 percentage points to a maximum market share of 33% in [redacted] This is still well below the threshold of 40%, below which dominance is not likely (though dominance with a market share may still arise in specific cases e.g. where competitors face serious capacity limitations)[10]. In the Commission's view, because of the moderate impact on market shares the exemption would, therefore, under the scenario of an assumed North-West-European market, not be detrimental to competition.

Assumed relevant geographic market: Germany

(93) For the German market, the BNetzA explains that a significant increase in market concentration can be avoided if Equinor/Petoro does not book more than 35% of the long-term capacity and, simultaneously, QatarEnergy does not book more than 30%. In such a case the HHI increase of maximum 245 points and a maximum market share of 33% would remain below the relevant thresholds that would be relevant to identify

[10] Commission (2009/C 45/02) (Communication from the Commission - Explanation of the Commission's priorities for the application of Art. 82 of the EC Treaty to exclusionary conduct by dominant undertakings), para. 14.

a market concentration concern, i.e. an increase of the HHI by over 250 points and a market share of over 40%.

(94) To better understand the impact of possible capacity bookings, including the dynamics caused by simultaneous booking by Equinor/Petoro and QatarEnergy, the Commission requested further information that would demonstrate the effects on the market shares and the HHI for all different constellations, including booking of high capacity shares by Equinor/Petoro.

(95) According to the information received in response to these requests for information, assuming an utilisation rate of [redacted] as suggested by HEH, the highest market shares forecasted for Equinor/Petoro would be 40% in [redacted] in a scenario where Equinor/Petoro would book 100% of the long-term capacity and the market concentration would increase by a delta of 736 point, i.e. almost tripling the delta that the Commission would consider an non-detrimental. Without the terminal their market share is projected to be 26% in [redacted]

(96) The BNetzA considers that the introduction of booking caps is not required, because it is unlikely that Equinor/Petoro would import more than 35% of the Stade terminal capacity. This is because the Norwegian government has stated that the gas extraction is already at its maximum capacity and the 2020 European Ten Year Network Development Plan expects a decrease of Norwegian gas imports of 25% between 2020 and [redacted] The BNetzA therefore considers that the exemption does not have a negative impact on competition in the German market.

(97) The Commission takes a different view on the impact on competition in the German market. In view of Equinor/Petoro's possibly higher booking shares with respect to the Stade terminal and the market shares and the market concentration resulting therefrom, the Commission considers that at least in one scenario Equinor/Petoro may attain a dominant market position by reaching a market share of 40%. The market concentration demonstrated by the HHI delta exceeds the threshold of 250 points in several instances, i.e. even if Equinor/Petoro booked less than 100% of the terminal capacity.

(98) Since it cannot be excluded that certain capacity booking shares of Equinor/Petoro may result in Equinor/Petoro's dominant market position in [redacted] the Commission considers that restrictions are required to ensure that the exemption is not detrimental to competition. The Commission considers that a negative impact on competition can be avoided, if Equinor/Petoro will be limited in its ability to book capacity.

(99) As mentioned above the Commission also notes that an earlier competition assessment had been carried out in anticipation of the exemption request in which it was assumed that Russian gas imports would continue to play an important role. This assessment came to the conclusion that the exemption of the Stade terminal may lead to a negative impact on competition on the German market, in case the largest importer – in this case Gazprom – would book 90% of the terminal's long-term capacity[11]. In such a scenario Gazprom was projected to attain a market share of 65% in [redacted] with the terminal, rather than 64% without the terminal. By [redacted] the modelling projected Gazprom's market share to be 66% with the terminal, rather than 65% without the terminal.

[11] This scenario assumed a utilisation rate of [redacted] The negative impact on competition would, therefore arise, once approximately 63% of the terminal capacity were used by Gazprom.

(100) Whilst the Commission assumes that Russian gas will be phased-out in the coming years, the current geopolitical situation shows how rapidly the market fundamentals evolve and change. Even if the modelling above depict extreme scenarios, they are intended to allow the Commission to conclude that the Stade terminal would not be detrimental to competition even in the most unexpected situations. Equinor/Petoro would give rise to competition concerns in a scenario where Russian gas were phased-out and Gazprom would give rise to competition concerns in a scenario in which Russian gas would not be phased-out. Furthermore, the relative position of other players on the market could evolve and change considerably during the period in which the exemption applies. Therefore, the Commission considers it justified that safeguards are introduced.

(101) Taking into consideration the utilisation rates at which the competition concerns arise, the Commission considers that undertakings which had the same market share as Equinor/Petoro or higher (i.e. Gazprom) on the market for upstream supply of natural gas in Germany in 2021, should not be allowed to book more than [redacted] of the Stade terminal's long-term capacity. The cap is considered to be proportionate as it would not negatively affect undertakings who currently hold a lower market share. Those undertakings do not cause a threat to competition as they are not projected to strengthen or acquire a dominant position, even if they book more than 65% of the terminal's capacity.

(102) Furthermore, in the event that, during the period of application of the exemption at stake in the present case, an undertaking expressed its intention to book more than [redacted] of capacity at the terminal for a period of [redacted] years or longer, the German regulatory authority shall determine the market share of that undertaking on the market for upstream supply of natural gas in Germany at that point in time. If, according to this determination, the market share of the undertaking is 20% or higher, the German regulatory authority shall conduct a prospective analysis of the effects of such booking on competition. If the prospective analysis demonstrates that the booking of more than 65% by such undertaking may have a negative impact on competition, the undertaking would not be allowed to book more than 65% of the terminal's capacity.

(103) With such limitations in place the Commission can confirm that the exempted terminal will not have a negative impact on competition.

5.6.1.4. Other affected markets

(104) Article 36(1), point (e) of Directive 2009/73/EC requires the assessment of '*all markets which are likely to be affected by the investment*'.

(105) Other markets that could possibly be affected by the investment are the LNG import terminals, the wholesale downstream market and the retail market.

(106) With regard to LNG import terminals, there is no indication that the investment 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 country. Where the addition of one terminal does not result in the market exit or foreclosure of other terminals, but merely creates competitive pressure on those other terminals, this is as such a positive effect on competition in the internal market.

(107) Furthermore, the Commission notes that it is not aware of any facts that would indicate the existence of a dominant market player on the wholesale downstream market for gas (liquefied natural gas and/or natural gas) both on an assumed North-West European market and on an assumed national market of Germany.

(108) Also with respect to the German retail market, in 2020 the aggregate market share of the four undertakings with the highest sales (CR4) were 26% (previous year: 24%) for clients with a standard load profile and 28% (previous year: 29%) for clients with a registering power measurement[12]. The Commission, therefore, sees no risk of bookings at the Stade terminal may lead to a foreclosure or possible foreclosure of this market.

(109) Therefore, the Commission has no grounds for concern as regards the impact on competition on possible other affected markets.

5.6.1.5. The exemption from tariff regulation

(110) Since 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, the foreseen exemption from tariff regulation is not expected to be detrimental to competition.

5.6.2. Conclusion

(111) On the basis of the above, the Commission concludes that granting the exemption from third party access and regulated tariffs may be detrimental to competition on the market for upstream supply of natural gas in Germany[13].

(112) Therefore, the Commission requires the BNetzA to amend the notified decision with the purpose of excluding bookings of more than [redacted] of the terminals annual capacity designated for long-term booking by any undertaking with the same market share as Equinor/Petoro or higher on the market for upstream supply of natural gas in Germany in 2021.

(113) Furthermore, the Commission requires BNetzA to amend the notified decision and invites the BNetzA to determine the market share of undertakings on the market for upstream supply of natural gas in Germany, in the event that any such undertakings expresses its intention to book more than [redacted] of capacity at the terminal designated for long-term booking for a period of 10 years or longer during the exemption period. If, according to this determination, the market share of this undertaking is 20% or higher, the BNetzA shall conduct a prospective analysis of the effects of such booking on competition. Should the prospective analysis demonstrate that the booking of more than [redacted] of the terminal's annual capacity available for long-term booking by such undertaking may have a negative impact on competition, the undertaking would not be allowed to book more than [redacted] of the terminal's annual capacity available for long-term booking.

5.7. The level of risk

(114) In line with 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.

(115) There is no specific regulatory framework for regulated access to LNG terminals in Germany, so one cannot compare the situation with the exemption to a situation under a regulated regime. The BNetzA has started looking into an access regime for LNG terminals[14], but any potential rules will not be known by the time the exemption

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[12] Bundeskartellamt/Bundesnetzagentur, Monitoringbericht 2021, p. 340.

[13] This is without prejudice to market definition for the purpose of future Commission decisions, in particular in the field of competition and State aid.

[14] A public consultation was held from 28 June 2022 to 26 July 2022.

procedure will be finalised. It is not possible, therefore, to take such a potential regime into account in the context of this exemption.

(116) Under a typical regulated access system, the owner of the infrastructure enjoys a large degree of revenue certainty and protection from volume or construction risks, as the revenues are guaranteed through regulated tariffs to be paid by the users of the infrastructure. No such revenue certainty is currently provided for HEH as the terminal is a purely commercial initiative.

(117) The cost of the terminal investment is significant. The most recently estimate is that it would amount to EUR [redacted], and no socialisation element exists for this cost.

(118) The relevant Guidance[15] 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/or revenues in the future.

(119) With regard to the risk of non-use it can be noted that the request for binding offers has been launched, [redacted]. A Memorandum of Understanding was signed with EnBW for [redacted] of the capacity and the non-binding market test has shown [redacted], but it must be noted that several LNG terminals are currently open for binding offers and the outcome is far from certain.

(120) HEH has confirmed that the final investment decision will depend on the exemption and the long-term capacity bookings. According to HEH, none of the prospective clients is willing to conclude such contracts prior to the exemption decision. In fact, as the exemption decision determines the legally binding framework for capacity allocation, any previously concluded contract would be subject to significant uncertainty. An exemption allowing for long-term capacity bookings, can therefore reduce the risk to a level allowing the investment to go ahead.

(121) 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 just one year ago, 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 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.

(122) It should also be noted that there are currently plans for several LNG terminals in Germany, most notably in Brunsbüttel and Wilhemshaven. The Stade terminal is, therefore, unlikely to enjoy an unchallenged position in relating to the service it provides. The competing projects also increase the risk of non-use of the Stade terminal.

(123) Finally, European and German climate goals also render the project riskier. 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 so-called *Osterpaket* issued by the German government on 6 April 2022 already

[15] 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.

provides a strong push for renewable energies and an action plan to further improve energy efficiency has also been presented in May this year. The Commission has also highlighted the importance of increased energy efficiency and the need to save gas in its REPowerEU Plan[16] and the very recent Save gas for a safe winter Communication[17]. These policy objectives and initiatives are likely to lead to a reduced demand for natural gas.

(124) With regard to the risk of a change in costs and/or revenues in the future it should be remarked that revenues are uncertain to a large extent as this stage, as binding capacity bookings have not yet been concluded and non-use of the terminal may lead to lower then expected revenues. In addition, future regulatory changes or market developments may require the terminal to adapt to importing other types of gases than natural gas, for example for hydrogen, which could require significant further investments.

(125) Subsidies, which would be granted to the investors can considerably reduce the investment risk. The parallel granting of an exemption and of subsidies is not excluded per se, but the granting of subsidies can require limiting the exemption, for example to a part of the capacity or to a shorter duration, as exemptions should be limited to what is necessary. The Commission notes that, based on the available information, no public support has been granted so far for the terminal construction and there is no intention to do so in the future.

(126) The risk of non-use and changing costs and/or revenues impacts the finances of the terminal. HEH has submitted its expectations as regards the expected returns of the project. [redacted]

(127) Another question, which needs to be assessed is whether the duration of the exemption is justified in view of the risks related to the project. For such an assessment the relevant Guidelines[18] specify that contractual arrangements should be taken into account and that the duration of the exemption duration should be equal to or less than the expected period for cost recovery of the new infrastructure.

(128) The exemption is requested for 25 years. HEH 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 the standard tax depreciation of an LNG terminal amounts to 25 years. BNetzA considers that this period is sufficient to reflect the high risks of the project and to create a sufficiently stable investment climate. It also corresponds to the duration of other exemption decisions for LNG terminals, which are generally granted for a period of 20 to 25 years.

(129) As mentioned above, contractual arrangements, most notably the length of capacity-booking contracts, are also an indicator used to determine the appropriate duration of

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

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

[18] 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.

an exemption. The exemption should sufficiently de-risk the project allowing the project promoter to take the final investment decision. HEH explained that the investment decision would be taken on the basis of binding long-term capacity bookings. [redacted]

(130) Given the above, the Commission considers that the exemption should not be granted for longer than the requested 25 years, as this corresponds to the standard tax depreciation of LNG terminals. The exemption should also not be shorter than 20 years, which is at the lower end of what has been granted to other LNG terminals and risks significant negative impacts on the rate of return of the project (see point (119) above). The Commission considers that the appropriate duration for the exemption is, therefore, at 20 years, but could granted be up to 25 years, [redacted] If the duration of the exemption is determined in this way, the Commission considers that the investment risks justify the exemption, and that the exemption does not go beyond what is necessary in order to mitigate these risks.

(131) 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. The duration should be no shorter than 20 years and no longer than 25 years. The duration can be above 20 years if [redacted]

5.8. Unbundling requirement

(132) 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.

(133) None of the shareholders of the HEH is currently involved in transmission, distribution, operation of an LNG facility, storage, production or distribution of natural gas.

(134) 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.

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

5.9. Charges

(136) Article 36 (1)(d) of Directive 2009/73/EC specifies that charges must be levied on users of the infrastructure at hand. HEH has declared that tariffs will be charged to the users of the Stade terminal. As outlined in point (10) 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

(137) 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.

(138) 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.

(139) Furthermore, the terminal should not 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, HEH has reached out to the operator of the relevant transmission grid (Gasunie Deutschland Transport Services GmbH). The transmission system operators 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) avoiding inefficiencies in the regulated system. Financially it should be noted that the exemption shields the regulated system from the costs of the Stade terminal and the risks related to the investment.

(140) It can therefore be concluded that the exemption is not detrimental to the effective functioning of the internal gas market or the efficient functioning of the regulated systems concerned and that these two criteria 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

(141) Any plan to grant state aid through public funds, including the Union Structural funds, to the terminal project is subject to the notification requirements to the Commission pursuant to Article 108 of the TFEU.

(142) This decision is without prejudice to the application of the rules on competition and State aid rules of Union law. In particular, the criteria and the methodology used to assess the enhancement of competition in gas supply and potential detriment to competition in the relevant markets which are likely to be affected by the investment under Article 36 of Directive 2009/73/EC are not necessarily identical to those used to perform an assessment under Article 101 or 102 TFEU or Council Regulation (EC) No 139/2004.

6. CONCLUSION

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

HAS ADOPTED THIS DECISION:

Article 1

(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 BK7-20-107 of 23 June 2022 (the notified decision), in accordance with the provisions of this Article, in order to safeguard full compliance with the conditions set out in Article 36(1) of Directive 2009/73/EC.

(2) The BNetzA shall change the duration of the exemption in point 3 of the operative part of the notified decision. The exemption period shall correspond [redacted] that the contract is concluded for 20 to maximum 25 years. [redacted] the exemption shall be granted for 20 years.

(3) The BNetzA shall amend the notified decision with the purpose of excluding capacity bookings of more than 65% of the terminals annual capacity designated for long-term booking by Equinor/Petoro, as well as undertakings which had the same or a higher market share than Equinor/Petoro on the market for upstream supply of natural gas in Germany in 2021.

(4) The BNetzA shall amend the notified decision and introduce a clause establishing that:

(a) In the event that an undertaking expresses its intention to book more than 65% of the terminal's annual capacity available for long-term booking for a period of 10 years or longer during the exemption period the BNetzA shall determine the market share of this undertaking on the market for upstream supply of natural gas in Germany at that point in time.

(b) If the market share of the undertaking determined under lit. a. above is 20% or higher on the market for upstream supply of natural gas in Germany, the BNetzA shall conduct a prospective analysis of the effects of such booking on competition. Should the prospective analysis demonstrate that the booking of more than 65% of the terminal's annual capacity available for long-term booking by such undertaking may have a negative impact on competition, the undertaking would not be allowed to book more than [redacted] of the terminal's annual capacity available for long-term booking.

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

In line with Article 36(9) of Directive 2009/73/EC, the Commission's decision shall lose its effect two years from its adoption in the event that construction of the LNG terminal has not yet started, and five years from its adoption in the event that the LNG terminal has not become operational unless the Commission decides that any delay is due to major obstacles beyond control of Hanseatic Energy Hub GmbH LNG Terminal. The notified decision should contain an expiry date and take proper account of this provision.

Article 4

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

Done at Brussels, 19.8.2022

For the Commission
Margrethe VESTAGER
Executive Vice-President