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EUROPEAN
COMMISSION

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COMMISSION DECISION

of 20.12.2022

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

(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[1] , and in particular Article 36 (9) thereof,

Whereas:

1. DESCRIPTION OF THE PROJECT

(1) The Deutsche ReGas GmbH & Co. KGaA (Deutsche ReGas) intends to install and operate a liquefied natural gas (LNG) regasification terminal (‘the Deutsche Ostsee terminal’ or ‘the terminal’), in Lubmin, Germany.

(2) The regasification capacity of the terminal is ultimately expected to be 13.5 billion m³ (bcm) of natural gas per year. This regasification capacity will be increased in three steps.

(3) In the first phase, starting in December 2022, a regasification capacity of 4.5 bcm would be available. The set-up would be as follows:

– a FSU (Floating Storage Unit) firmly anchored outside the Greifswalder Bodden, which would serve as the terminal users’ loading and unloading point and as an interim storage facility for LNG. The FSU would have a reception capacity of approximately 138 000 m³;

– a FSRU (Floating Storage and Regasification Unit) located in the port of Lubmin as a regasification facility (port FSRU);

– at least three shuttle ships operating as a ‘virtual pipeline’ and transporting LNG from the FSU to the port FSRU;

– a connecting line for transferring the regasified LNG from the port FSRU to the transmission system (onshore connection line).

(4) In the second phase, starting on 1 December 2023, an additional regasification capacity of 7 bcm would become available. The set-up would be as follows:

[1] OJ L 211, 14.9.2009, p. 94.

– a firmly anchored FSRU (offshore FSRU) outside the Greifswalder Bodden will replace the FSU as the terminal users' loading and unloading point, intermediate storage and additional regasification facility;

– the port FSRU;

– an offshore connection line connecting the offshore FSRU to the transmission system;

– at least three shuttle ships transporting LNG temporarily stored in the offshore FSRU from the offshore FSRU to the port FSRU;

– the onshore connection line to transfer LNG regasified in the port FSRU to the transmission system.

(5) As a last step, starting on 1 October 2024, an additional regasification capacity of 2 bcm would become available. The set-up would be as follows:

– two firmly anchored FSRUs outside Greifswalder Bodden as loading and unloading points, intermediate storage facilities and regasification facilities for terminal users. For this purpose the port FSRU will be moved offshore;

– an offshore connection line from the FSRUs to the transmission system;

– a berthing station in the port of Lubmin. The onshore connection line built for phase one could be used for hydrogen, if applicable.

(6) In phase 1 the gas would enter the German gas network via the Greifswald entry point. It is not yet clear how the gas will be injected into the grid in the second phase. Different options are currently being considered.

(7) The DeutscheReGas GmbH is a partnership limited by shares (Kommanditgesellschaft auf Aktien (KGaA)). The shareholders are the following:

Shareholders	Place of residence or registered office	Share in %
[redacted]		

[redacted]

(8) [redacted]

(9) None of the shareholders have shares in the transmission grids that the terminal could be connected to, notably the NEL (Nordeuropäische Erdgasleitung), but also OPAL (Ostsee-Pipeline-Anbindungsleitung) or EUGAL (European Gas Pipeline Link).

(10) Deutsche ReGas has signed binding capacity contracts with [redacted] which are conditional on the granting of the exemption. [redacted]

2. NATIONAL PROCEDURE

(11) By letter dated 28 July 2022, Deutsche ReGas submitted a request for exemption from the third party access requirements and tariff regulation for a duration of 20 years as of the start of commercial operation to the German regulatory authority Bundesnetzagentur (BNetzA). In the course of the procedure, Deutsche ReGas submitted further information to the BNetzA. After verifying the completeness of the required documentation, the BNetzA informed the Commission of the exemption request on 10 October 2022.

(12) On 10 October 2022, the BNetzA issued the rules on capacity management and allocation for the terminal.

(13) On the basis of the capacity management and allocation rules Deutsche ReGas called for expressions of interest to gauge market interest. The call for expressions of interest lasted from 10 October 2022 to 21 October 2022. The call for expressions of interest was binding for the first phase and non-binding for the second phase. [redacted] undertakings expressed an interest to book long-term capacity at the terminal in the first phase and [redacted] undertakings expressed an interest to book capacities in the second phase. The undertakings expressed an interest in booking two times the volume that would be available at the terminal in the first phase and for the second phase interest was expressed for the total capacity of the terminal. [redacted] Following the binding expression of interest for the first phase, the contracts mentioned in recital (10) were signed.

(14) BNetzA conducted a consultation pursuant to Article 36 (3) of Directive 2009/73/EC of all regulatory authorities in the Union, as well as all regulatory authorities that are members of the Council of European Energy Regulators ('CEER'), which includes the United Kingdom and Norway, from 10 October 2022 to 17 October 2022, to give them a possibility to comment on the project description of the applicant and the capacity management and allocation rules. No comments on the project at hand were received in the course of that consultation.

3. THE NOTIFIED EXEMPTION DECISION

(15) On 17 November 2022, BNetzA adopted an exemption decision ('the notified decision'), subject to further amendments pending a Commission decision. The notified decision grants the requested exemption from third party access and tariff regulation requirements. The exemption is granted for 20 years from the start of operations for an annual capacity of up to 13.5 bcm and subject to a number of conditions.

(16) The notified decision requires Deutsche ReGas to charge tariffs on the users of the terminal and apply the criteria listed in recitals (17 ff.) to manage and allocate capacity.

3.1. Long-term capacity

(17) Deutsche ReGas needs to apply non-discriminatory and transparent procedures for long-term allocation of capacity, respecting at least the following:

3.1.1. Booking requirements

(18) The booking requirements are the following:

- (a) all potential users of capacity need to be pre-registered with Deutsche ReGas;
- (b) Deutsche ReGas is free to offer a variety of products, as long as these are designed in a transparent and non-discriminatory manner;
- (c) minimum booking requirements for capacity bookings may not exceed 15% of the total annual capacity;
- (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

(19) For the first allocation of long-term capacity, bookings received during a predefined period of 10 working days need to be treated as received at the same point in time. The booking period needs to be announced 10 working days in advance, providing all the required information.

(20) In principle, excess demand for capacity is to 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.

(21) 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. The surcharge cannot amount to an add-on of more than 10% to the basic tariff. A rebate of up to 10% compared to the basic tariff is also permitted.

3.1.3. Long-term bookings after the first allocation

(22) 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

(23) 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 recitals (24) to (32) need to be respected.

(24) All potential users of capacity need to be pre-registered with Deutsche ReGas.

(25) Short-term capacity is to be allocated in slots, which will be distributed as equally as possible over the calendar year. Each slot allows for the offloading of at least 138 000 m^3 of LNG. In phase one there will be at least five slots per year and in phase two there will be a minimum of twelve slots per year.

(26) Slots are to be allocated annually at a predetermined and recurring date. Allocation of slots is to occur via auction, which have been 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.

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

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

(29) If a so-called undersell occurs in an auction round, the capacity is to 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 Deutsche ReGas.

(30) Only market participants that registered with Deutsche ReGas 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 allows for the participation of all registered market participants. Slots not sold in the two auctions are allocated on a first come first served basis over the course of the year.

(31) 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.

(32) 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 21 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 will be able to book the freed slot based on a non-discriminatory procedure to be established by the Deutsche ReGas. Should the slot not be marketed within three days, it is returned to the initial owner.

4. PROCEDURE AT THE EUROPEAN COMMISSION

(33) On 17 November 2022, BNetzA submitted the notified decision to the European Commission.

(34) On 21 November 2022, the Commission published a notice on its website, inviting stakeholders for comments within one week. No comments were received.

(35) On 21 November 2022, the Commission sent a number of questions to BNetzA to which it responded on 23 November 2022.

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

5.1. Legal basis

(36) 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;

(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.

(37) 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 when an exemption is requested:

(a) the national regulatory authority has to 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)).

(38) 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.

(39) Therefore it is necessary to assess whether the requirements set out in Article 36 of Directive 2009/73/EC are met.

5.2. Major new gas infrastructure

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

(41) The exemption is requested for the LNG terminal Deutsche ReGas. 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.*

(42) The main activity of the Deutsche Ostsee terminal in its various configurations will consist of so-called large-scale services. Large-scale services include berthing and unloading of LNG, intermediate storage and send-out of gas in regasified form to the transmission grid. All the different parts of the terminal are necessary in order to be able to offer this service. This includes the FSU, FSRU and the shuttle ships that form the terminal.

(43) Apart from providing large-scale services Deutsche ReGas has expressed its intention to also offer so-called small-scale services. Small-scale services 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 the BNetzA considers that those services do not fall within the scope of 'LNG facility', as defined in Directive 2009/73/EC.

(44) The Commission shares the view of the BNetzA that small-scale 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, not to regulate gas that is imported in liquefied state, never leaves this state and is not transported via the interconnected gas network. Where a separation of large-scale and small-scale services is not possible, the conclusion could be different, as there may be a risk of cross-subsidisation. In the case of the Deutsche Ostsee terminal, Deutsche ReGas 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.

(45) 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 sufficiently significant for the infrastructure to qualify as major. Furthermore, the planned annual capacity of 13.5 bcm, which represents around 15% of the annual German gas consumption in 2021, can be considered significant.

(46) The infrastructure has furthermore to 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 Deutsche Ostsee terminal was not completed by 4 August 2003, it is to be considered new infrastructure within the meaning of Directive 2009/73/EC.

(47) The Commission therefore concludes that the Deutsche Ostsee 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 small-scale services in the scope of the decision.

5.3. Procedural requirements

(48) 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.

(49) 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.

(50) As described in recitals (12) and (13), BNetzA finalized the capacity management and allocation rules on 10 October 2022 and Deutsche ReGas conducted a market test from 10 October 2022 to 21 October 2022. As explained in recital (13), [redacted] undertakings expressed an interest in booking capacity in the first phase and [redacted] undertakings expressed an interest in booking capacity in the second phase at the terminal. The undertakings expressed an interest in booking two times the volume that would be available at the terminal in the first phase and for the second phase interest was expressed for the total capacity of the terminal. [redacted]

(51) 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.

(52) As explained in recital (14), the BNetzA conducted a consultation of all regulatory authorities in the Union, as well as the relevant authorities that are members of the Council of European Energy Regulators (‘CEER’), which includes the United Kingdom and Norway. No comments were received during the course of this consultation.

(53) 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

(54) Article 36 (1), points (a) and (e) of Directive 2009/73/EC provides 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.

(55) 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 in principle increases the security of supply of that market in accordance with Article 36 (1), point (a) of Directive 2009/73/EC.

(56) The Commission is of the view that the terminal provides a new entry point into the German and thus the interconnected European gas market. Through the OPAL pipeline gas could also easily be transported on to Czechia, Slovakia and Austria in particular. Neither the Commission, nor the BNetzA have received any comments from stakeholders that would indicate that the terminal could replace other existing infrastructure or push other facilities out of the market.

(57) With regard to the connection to additional sources of gas from new suppliers, the BNetzA highlights that the terminal would help to diversify the gas supply sources and decrease the dependence on Russian gas.

(58) The current geopolitical situation shows that Russia is no longer a reliable source of gas supply. It no longer delivers gas to several Member States[2]. In January 2021 Russian gas covered approximately 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 expressed the objective of phasing-out Russian gas and stressed the importance of diversification of gas supply, notably via LNG terminals to ensure Europe's security of supply. The Deutsche Ostsee terminal could cover around 15% 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 yet signed any capacity contracts, but the market test conducted by Deutsche ReGas shows that there is an interest from a broad variety of undertakings having access to various sources of LNG.

(59) Deutsche ReGas also submitted 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 terminal would increase Germany's security of supply and thus also the security of supply of the interconnected European markets.

(60) Whilst it can, therefore, be concluded that the infrastructure as such contributes to security of supply, Article 36 (1), point (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), point (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 to a small number of market participants could bring negative impacts on security of supply in the Union for example.

(61) In the current case, the capacity management and allocation rules described ensure access for a large number of market participants. They expressly require non-discriminatory capacity allocation, based on transparent criteria and procedures. This enables potential 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 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 also allow LNG cargoes intended for other regions to shift supplies to the Union in times of scarcity.

(62) The exempted Deutsche Ostsee terminal would effectively create additional supply options to the internal energy market at Union level.

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

[2] Including Bulgaria, Poland, Denmark, the Baltics, the Netherlands and Germany.

(64) This is not contradicted by the fact that some of the shareholders' place of residence or registered office is outside the Union. [redacted]

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

5.5. Principle of solidarity

(66) As set out in case T-883/16[4] by the General Court and confirmed by the Court of Justice in C-848/19 P[5], 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 both of the European Union and of the various Member States that are liable to be affected and to balance those interests where there is a conflict. Notably, Member States have to 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.

(67) In the notified decision, BNetzA has analysed whether the exemption is likely to affect the interests of other Member States. BNetzA argues that the notified decision improves security of supply in Germany and other Member States, as gas imported through the Deutsche Ostsee terminal 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 ultimate terminal capacity of 13.5 bcm/a represents a very small share of the global LNG market (485 bcm were traded worldwide in 2019 and this has been increasing since), 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.

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[3] https://ec.europa.eu/energy/topics/international-cooperation/key-partner-countries-and-regions/united-states-america_en

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

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

(68) As described in recital (14), BNetzA also consulted all regulatory authorities in the Union, as well as all relevant authorities that are members of the Council of European Energy Regulators ('CEER'), which includes the United Kingdom and no comments relating to the planned terminal were received. The Commission is also not aware of any Member State or competitor voicing concerns as regard the terminal.

(69) 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.

(70) Therefore the Commission considers that the requirements set out by the Court of Justice, as based on Article 194 TFEU, have been met.

5.6. Impact on competition

(71) Article 36 (1), point (a) of Directive 2009/73/EC requires that the investment project enhances competition in gas supply and point (e) of that same paragraph requires the exemption not to be 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[6].

(72) 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.

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

(74) 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[7]. 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.

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

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

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6 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.

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

(77) 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), point (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 in recitals (78) to (80).

(78) The capacity management and allocation rules applied to the terminal (see recitals (16) to (32)) 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 cannot be booked by undertakings having signed long-term contracts when it is first made available to the market. In addition, a secondary market, as well as a UIOLI provision are foreseen.

(79) To ensure transparency with regard to the secondary market, Deutsche ReGas intends to facilitate and promote secondary capacity through an electronic platform. The conditions for the marketing of secondary capacity will be sent to all the registered clients of the Deutsche Ostsee terminal.

(80) 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 in section 5.6.1..

5.6.1. Impact of the exemption from third party access rules

(81) 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.

(82) Deutsche ReGas requested an exemption from third party access rules for the entire planned capacity at the Deutsche Ostsee terminal for a duration of 20 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

(83) 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 Deutsche Ostsee 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.

(84) 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.

(85) 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.

(86) [redacted] For the capacity which will become available in 2023 and 2024 it is

not yet clear which market participants will book the primary capacity. [redacted] It, therefore, seems unlikely that a single undertaking would book the entire available capacity. In addition, capacity can be shifted to other market participants via the secondary market.

(87) Whilst there are some initial indications, to whom the capacity will be allocated the total capacity allocation of the 13.5 bcm is not known at this stage. The impact of the exemption, therefore, also needs to be assessed based on assumptions. In the event that the remaining capacity were booked by new market entrants or small market participants 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.

(88) To assess the impact of the Deutsche Ostsee 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 useful, by analogy, in the current case[8]. The notified decision also looks at the impact on market shares[9].

(89) If the exemption would not lead (i) 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 Deutsche Ostsee terminal, it can be assumed that the exemption does not have a negative impact on competition.

5.6.1.2. Worst-case scenarios upstream wholesale market

(90) The notified decision distinguishes two types of worst-case scenarios. In the first scenario the biggest gas supplier on the North-West-European market books all available capacity[10] at the terminal (Scenario 1) and in the second scenario the market participant with the second biggest market share in the gas supply markets books all available capacity (Scenario 2). The expected impact on competition of both scenarios on the North-West-European market and the German market is assessed for 2023, 2024 and 2030. 2023 coincides with the first phase of the project where 4.5 bcm/a would become available at the terminal and 2024 would coincide with the start date of the second phase, when 13.5 bcm/a would be available. For 2023 a utilisation rate of 100% is assumed, whereas a utilisation rate of 70% is assumed for the following years[11]. Both scenarios assume the phase-out of Russian gas by 2025.

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8 The thresholds defined within the framework of merger controls stipulate that 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.

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

10 Such a scenario does not take into account that 10% of the capacity is set aside for short-term bookings.

11 Given the current geopolitical situation the BNetzA expects the full use of German LNG terminals in 2023. Nevertheless, going forward, also in view of the multiple LNG terminals that are expected to come online in the near future and historic booking rates 70% is considered realistic. Between 2017 and 2021 utilisation rates at terminals in North-Western Europe varied between 6 and 73%.

Largest gas supplier booking entire capacity (Scenario 1)

(91) In Scenario 1, the notified decision assumes that the entire capacity at the Deutsche Ostsee terminal will be booked by the biggest supplier of gas in North-West Europe today, which is Equinor/Petoro.

Assumed relevant geographic market: North-West Europe

(92) If 100% of the terminal capacity were booked by Equinor/Petoro, the impact on competition in the upstream wholesale market is expected to be the following. For the North-West-European region, the modelling shows that the HHI would not exceed the relevant threshold of a delta of 250 in 2023 and 2030. It would be at 258 though in 2024.

(93) Based on the analysis submitted by the project promoters, the market share of Equinor/Petoro on the North-West-European market would increase by 2 to 5 percentage points in 2023, 2024 and 30, whilst remaining below 32% in all scenarios. Whilst in the scenario for the year 2024, the HHI delta exceeds 250, Equinor/Petoro would hold a market share that is not indicative of a dominant market position. For the North-West-European market, the exemption would, therefore, under such a scenario not be detrimental to competition.

Assumed relevant geographic market: Germany

(94) In the scenario in which Equinor/Petoro books 100% of the terminal's capacity the modelling for Germany shows that the HHI would exceed the relevant threshold of 250 in 2024 and 2030. The market share of Equinor/Petoro on the German market would increase by 5 to 12 percentage points in 2023, 2024 and 30 compared to a scenario in without the terminal, whilst remaining below 35% in all scenarios. Whilst in the scenario for the year 2024 and 2030, the HHI delta exceeds 250, but Equinor/Petoro would hold a market share that is not indicative of a dominant market position. For the German market, the exemption would, therefore, under such a scenario not be detrimental to competition.

Second largest gas importer books entire terminal capacity (Scenario 2)

(95) In Scenario 2, the second largest gas importer, namely Qatar Energy, would book the entire capacity at the terminal.

Assumed relevant geographic market: North-West Europe

(96) If 100% of the terminal capacity were booked by Qatar Energy, the impact on competition in the upstream wholesale market is expected to be the following. For the North-West-European region, the modelling shows that the HHI would not exceed the relevant threshold of a delta of 250 in 2023, 2024 and 2030. The terminal's impact on its market share would be neutral on Qatar Energy's market share which would remain below 27%. In the Commission's view, the exemption would, therefore, under the scenario, not be detrimental to competition under this worst-case scenario.

Assumed relevant geographic market: Germany

(97) For the German market, the modelling shows that in a scenario in which Qatar Energy would book 100% of the terminal's capacity the HHI would not exceed the relevant threshold of a delta of 250 in 2023, 2024 and 2030 either. The terminal could lead to an increased market share of up to 6% which would however remain below 28%. In the Commission's view, the exemption would, therefore, not be detrimental to competition under this worst-case scenario.

Conclusion upstream wholesale market

(98) None of the worst-case scenarios described in recitals 90 to 97. are detrimental to the competition on the upstream wholesale market. In addition, as described above the worst-case scenarios have not so far materialised, as other players have booked capacity, [redacted] is projected to have a [redacted] in both the German and the North-West-European the upstream wholesale markets. [redacted] is not active in the upstream wholesale market. The bookings can therefore be considered positive for competition on the upstream wholesale market.

5.6.1.3. Downstream wholesale market

(99) With regard to the downstream wholesale market BNetzA follows the argumentation provided by Deutsche ReGas which comes to the conclusion that no negative impact on competition can be expected as a result of the exempted LNG terminal. The justification entails the following elements.

(100) The first argument the project promoter makes is that access to terminal capacity allowing for the import of gas does not constitute an advantage for a downstream wholesale market player, as a result of the high liquidity of the wholesale market. Second, estimated market shares of the seven largest downstream wholesale market players are established based on their sales figures. These market shares show the existence of a competitive downstream wholesale market in Germany. No market player has more than 26% and the HHI for the downstream wholesale market is at 1 700. Third, the current market situation compared to a situation in which the terminal would come into operation was examined to establish whether there could be a negative impact on competition. The analysis models various booking scenarios by undertakings that have shown an interest in booking capacity at the LNG and comes to the conclusion that there would be no negative impact on competition in any of the scenarios.

(101) [redacted] Given the fact that [redacted] are not active to any significant extent yet on the German market, these bookings are expected to have a positive impact on competition in German downstream wholesale market.

(102) Based on the above, the Commission concludes that the terminal is not expected to have a negative impact on competition on the German or North-West European downstream wholesale markets.

5.6.1.4. Conclusion wholesale market

(103) The competition analysis of the upstream and downstream wholesale market has not pointed to any specific competition concerns at this stage. Nevertheless, the Commission considers it prudent to introduce a safeguard to ensure the terminal does not negatively impact competition in the future, as the exemption for the Deutsche Ostsee terminal covers a time period of 20 years and it is difficult under current geopolitical and market conditions to make robust long-term projections.

(104) In order to ensure that the terminal's impact on competition remains positive the Commission asks the BNetzA to introduce the following competition safeguard into

the notified decision: should a market player wish to book 65% or more of the capacity available for long-term bookings for a duration of five years or more, the Deutsche Ostsee terminal should notify the BNetzA who 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 BNetzA shall assess the impact on competition and introduce safeguards should this be required..

(105) Subject to the introduction of the competition safeguard in recital (104), it can be concluded that the exemption is not detrimental to competition on the upstream and downstream wholesale market.

5.6.1.5. Other affected markets

(106) 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*'.

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

(108) 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.

(109) With respect to the German retail market, in 2021 the aggregate market share of the four undertakings with the highest sales (CR4) were 26% (like in the previous year) for clients with a standard load profile and 24% (previous year: 28%) for clients with a registering power measurement[12]. The Commission therefore sees no risk that bookings at the terminal may lead to a foreclosure or possible foreclosure of this market.

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

5.6.1.6. The exemption from tariff regulation

(111) 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.

(112) Additionally, as the shareholders of the terminal are not active in the supply of gas, there is no risk that charging a high tariff to receive a higher rate of return from the infrastructure point of view, can be exploited from a perspective of a vertically integrated company, by internal cross-subsidisation.

5.6.2. Conclusion

(113) Therefore the Commission concludes that granting the exemption from third party access and regulated tariffs is not detrimental to competition, subject to the introduction of the safeguards mentioned in recital (104).

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[12] Bundeskartellamt/Bundesnetzagentur, Monitoringbericht 2022, p. 357.

5.7. The level of risk

(114) In accordance with Article 36 (1), point (b) of Directive 2009/73/EC the level of risk attached to the investment has to be such that the investment would not take place unless the exemption is granted.

(115) Germany introduced a framework for regulated access to LNG terminals on 16 November 2022[13]. Deutsche ReGas explained that it would not take the final investment decision ('FID') if the terminal would be subject to the regulated regime. This is due to the significant costs of the project and the high risk of non-use. Only an exemption can give the investor sufficient certainty. Whilst long-term contracts are possible under the regulated regime, uncertainty about revenues remains as tariffs are set on an annual basis under that regime[14]. As interested parties would not know what tariff they would have to pay, it would provide a disincentive to enter into long-term contracts. Due to the costs and the uncertainties, possible long-term contracts are however essential for the project developer to feel sufficiently confident to take the final investment decision.

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

(117) The relevant Guidance[15] issued by the Commission states 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.

(118) With regard to the risk of non-use it can be noted that there have been initial bookings for 3.6 bcm for around [redacted]. For the remainder of the long-term capacity (8.1 bcm) a non-binding market test has shown interest for bookings [redacted] for the total volume. It should be noted, however, that several LNG terminals are currently open for binding offers and it is highly uncertain whether the players expressing an interest in the non-binding phase will actually book binding capacity. Even if they book long-term capacity, they only expressed an interest for capacity bookings of [redacted]. A final point adding to the risk of non-use is the requirement on the terminal to keep 10% of the capacity available for short-term bookings.

(119) Deutsche ReGas has confirmed that the final investment decision will depend on the exemption and the possibility for long-term capacity bookings. An exemption would set the regulatory framework allowing for long-term capacity bookings ensuring a targeted cash flow and reduce the risk to a level allowing the investment to go ahead. The measures that have been undertaken so far are considered to be preparatory measures and the "point of no return" has not yet been crossed according to the project promoters. The measures undertaken so far have either been based on [redacted] or are conditional on obtaining the exemption. Should the exemption fail to materialise Deutsche ReGas would lose less than [redacted] of the total investment costs.

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13 Verordnung zu regulatorischen Rahmenbedingungen für LNG-Anlagen.

14 In accordance with paragraph 14 of the Verordnung zu regulatorischen Rahmenbedingungen für LNG-Anlagen.

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.

(120) 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 very uncertain. Whilst it is expected that there will be high demand for LNG capacity in the short and medium-term as a result of the Russian supply cuts, it is challenging to foresee 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.

(121) It should also be noted that there are currently plans for several LNG terminals in Germany, most notably five Federal FSRUs and fixed terminals in Stade, Brunsbüttel and Wilhemshaven. The Deutsche Ostsee 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 Deutsche Ostsee terminal.

(122) 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 government to achieve climate neutrality by 2045. The LNG-Beschleunigungsgesetz currently envisages the phase-out of natural gas consumption in Germany by 2043. The Commission has also highlighted the importance of increased energy efficiency and the need to save gas in its REPowerEU Plan[16] and the Save gas for a safe winter Communication[17]. Those policy objectives and initiatives are likely to lead to a reduced demand for natural gas.

(123) With regard to the risk of a change in costs and/or revenues in the future it should be noted that revenues are uncertain to a large extent at this stage, as binding capacity bookings have only been concluded for 3.6 bcm for [redacted] and non-use of the terminal may lead to lower than 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.

(124) 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.

(125) The risk of non-use and changing costs and/or revenues impacts the finances of the terminal. Deutsche ReGas has submitted its expectations as regards the returns of the project. [redacted] also considering the requirement to reserve 10% of the capacity

[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.

for short term allocation which was initially not allocated. This constitutes a considerable risk for Deutsche ReGas.

(126) 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 should be equal to or less than the expected period for cost recovery of the new infrastructure.

(127) The exemption is requested for 20 years. Deutsche ReGas explained that it envisages a [redacted] for the first FSRU. For the second FSRU it envisages [redacted] It should also be noted that Deutsche ReGas has calculated its return and the tariffs [redacted] Whilst Deutsche ReGas has entered into [redacted] capacity contracts for the first phase of the project, it will not know who will book capacity for how long for the capacity becoming available in the second phase.

(128) [redacted] This is why the [redacted] contract duration is not the determining factor with regard to the duration of the exemption. The duration of the depreciation or the lease of the FSRUs and the assumed tariff period on the other hand are essential factors. In view of this, the Commission considers that an exemption for 20 years is justified.

(129) Comparing the exemption duration with the possibility of allocating capacity under the regulated regime, the Commission notes that the exemption is not providing additional benefits in terms of the duration. While there is a cap of 20% of the capacity to be allocated not longer than 15 years[19], there are no explicit caps for the total duration of capacity products on offer at LNG terminals in the regulated regime.

(130) Considering the risks of non-use as well as uncertainties around the future costs and revenues described in recitals (114) to (129) the Commission concludes that the risk criterion within the meaning of Article 36 (1), point (b) of Directive 2009/73/EC is met.

5.8. Unbundling requirement

(131) Article 36 (1), point (c) of Directive 2009/73/EC provides 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.

(132) None of the shareholders of the Deutsche ReGas is currently directly involved in the transmission, distribution, storage, production or distribution of natural gas or the operation of an LNG facility.

(133) The transmission networks to which the terminal can be connected are owned and operated by certified transmission system operators.

(134) 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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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.

19 Paragraph 5 (5) of the Verordnung zu regulatorischen Rahmenbedingungen für LNG-Anlagen.

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), point (c) of Directive 2009/73/EC is therefore met.

5.9. Charges

(135) Article 36 (1), point (d) of Directive 2009/73/EC specifies that charges must be levied on users of the infrastructure at hand. Deutsche ReGas has declared that tariffs will be charged to the users of the terminal. As outlined in recital (16), the operative part of the notified decision, furthermore, specifically requires the terminal to charge tariffs. The requirement to levy charges set out in Article 36 (1), point (d) of Directive 2009/73/EC is therefore fulfilled.

5.10. Impact on the internal market and regulated systems

(136) Article 36 (1), point (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.

(137) 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.

(138) Furthermore, the terminal should not compromise the regulated system to which it is connected. Deutsche ReGas has reached out to the operators of the NEL pipeline[20] and the OPAL pipeline[21] who are jointly responsible for the onshore connection pipeline linking the Deutsche Ostsee terminal to the German gas network. They have assured Deutsche ReGas firm capacity required to feed the gas into the German gas network in the first phase. Deutsche ReGas has also reached out to GASCADE Gastransport GmbH and was granted the required entry capacity for phase two. For the moment three different possibilities of connecting the offshore pipeline to the German gas network are being discussed.

(139) The notified decision explains that the feed-in capacity is considered to be sufficient and that no network expansion would be required, considering that the gas volumes which would be imported through the terminal would amount up to approximately 25% of the volumes which were previously imported via Nord Stream 1. Russia is not expected to resume its gas supplies to Europe via Nord Stream 1 in the foreseeable future, also due to the massive damage caused to Nord Stream 1 by the explosions which took place on 26 September 2022. The terminal would therefore allow for the more efficient use of existing regulated infrastructure that is currently underutilised, as it previously transported gas imported via Nord Stream 1, notably the NEL, OPAL and EUGAL pipelines.

(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), point (e) of Directive 2009/73/EC are thus fulfilled.

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[20] NEL Gastransport GmbH, Gasunie Deutschland Transport Services GmbH and Fluxys Deutschland GmbH.

[21] Opal Gastransport GmbH& Co. KG and Lubmin Brandov Gastransport GmbH.

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[22].

[22] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

6. CONCLUSION

(143) In light of what has been stated the Commission takes the view that an exemption could be granted to Deutsche ReGas in accordance with Article 36 (9) of Directive 2009/73/EC. The Commission is to be informed about the final decision pursuant to Article 36 (9) Directive 2009/73/EC,

HAS ADOPTED THIS DECISION:

Article 1

The Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (‘BNetzA’) shall amend its Decision No BK7-22-086 of 17 November 2022 granting an exemption to Deutsche Ostsee terminal as follows in order to safeguard full compliance with the conditions set out in Article 36 (1) of Directive 2009/73/EC:

(a) The BNetzA shall require that Deutsche ReGas notify to BNetzA without delay any instance of a market player in the German upstream and/or downstream wholesale market (seller and/or buyer side) that intends to book a capacity of 65% or more of the overall capacity available for long-term booking for five years or more at the Deutsche Ostsee terminal, including first binding capacity contracts for the second phase and any capacity added or made available thereafter as well as capacity bookings on the secondary market.

(b) The BNetzA 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.

(c) In the event that this market player holds a market share of 30% or more on any of these markets, the BNetzA shall assess the possible impact on competition of that intended booking in light of the case law of the European Court of Justice, as well as the enforcement practice of the European Commission and the German competition authority with regard to Articles 101 and 102 TFEU, before the booking can take place. The assessment by the BNetzA shall take into account in particular the capacity and the duration of the intended booking. The BNetzA is invited to consult the German competition authority for the purpose of this assessment.

(d) Should the BNetzA 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 one or more undertakings, the BNetzA shall limit the capacity and/or the duration of the intended booking by the concerned market player in the primary and secondary markets. In the context of applying Article 36 (1), point (e) of the Gas Directive, it is assumed that a risk to create or strengthen a dominant market position exists if the booking in question would result in a market share of the undertaking(s) concerned of 40% or more at any point in time of the booking duration.

(e) Should the BNetzA 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 Deutsche ReGas accordingly and Deutsche ReGas may continue with the booking process.

Article 2

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

Article 3

The notified decision shall contain an expiry date taking proper account of Article 36 (9) of Directive 2009/73/EC.

Article 4

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

Done at Brussels, 20.12.2022

For the Commission
Kadri SIMSON
Member of the Commission