Bundesnetzagentur

- Ruling Chamber 7 -

Decision

File ref: BK7-19-037

In the administrative proceedings

concerning: the approval of an oversubscription and buy-back scheme of the transmission system operators for the offer of additional capacity in the single German market area ("KAP+")

1) bayernets GmbH, Poccistraße 7, 80336 Munich, legally represented by its management board,

applicant 1),

2) Ferngas Netzgesellschaft mbH, Reichswaldstraße 52, 90571 Schwaig b. Nürnberg, legally represented by its management board,

applicant 2),

3) Fluxys Deutschland GmbH, Elisabethstraße 11, 40217 Düsseldorf, legally represented by its management board,

applicant 3),

4) Fluxys TENP GmbH, Elisabethstraße 11, 40217 Düsseldorf, legally represented by its management board,

applicant 4),

5) GASCADE Gastransport GmbH, Kölnische Straße 108-112, 34119 Kassel, legally represented by its management board,

applicant 5),

6) Gastransport Nord GmbH, Cloppenburger Straße 363, 26133 Oldenburg, legally represented by its management board,

applicant 6),

7) Gasunie Deutschland Transport Services GmbH, Pasteurallee 1, 30655 Hannover, legally represented by its management board,

applicant 7),

8) GRTgaz Deutschland GmbH, Zimmerstraße 56, 10117 Berlin, legally represented by its management board,

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11) Nowega GmbH, Anton-Bruchausen-Straße 4, 48147 Münster, legally represented by its management board,

applicant 11),

12) ONTRAS Gastransport GmbH, Maximilianallee 4, 04129 Leipzig, legally represented by its management board,

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13) OPAL Gastransport GmbH & Co. KG, Emmerichstraße 11, 34119 Kassel, legally represented by its management board,

applicant 13),

14) Open Grid Europe GmbH, Kallenbergstr. 5, 45141 Essen, legally represented by its management board,

applicant 14),

15) terranets bw GmbH, Am Wallgraben 135, 70565 Stuttgart, legally represented by its management board,

applicant 15),

16) Thyssengas GmbH, Emil-Moog-Platz 13, 44137 Dortmund, legally represented by its management board,

applicant 16),

Parties summoned:

Gazprom export LLC, Ostrovskogo Sq. 2a letter "A", Saint Petersburg 191023, Russia, represented by its Director General [redacted],

Party summoned 1),

- Legal representatives: Gleiss Lutz Hootz Hirsch PartmbB Rechtsanwälte, Steuerberater, Dreischeibenhaus 1, 40211 Düsseldorf -

Uniper Global Commodities SE, Holzstraße 6, 40221 Düsseldorf, legally represented by its management board,

Party summoned 2),

- Legal representatives: Legal department of Uniper SE, Holzstraße 6, 40221 Düsseldorf -

Ruling Chamber 7 of the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, Tulpenfeld 4, 53113 Bonn, legally represented by its President Jochen Homann,

its Chair	Barbie Kornelia Haller,
its Vice Chair	Dr Werner Schaller
and its Vice Chair	Diana Harlinghausen

decided on 25 March 2020:

1) Operative part 1 of the decision of 20 September 2013 (BK7-13-019), pursuant to which point 2.2.2 of Annex I to Regulation (EC) No 715/2009 does not apply to interconnection points at which a "use-it-or-lose-it" mechanism for firm day-ahead capacity is already applied is revoked with effect for the period from 1 October 2021 (6am) to 1 October 2024 (6am). The original provision remains unaffected for the period from 1 October 2024 (6am).

2) The joint concept of the transmission system operators (TSOs) for an oversubscription and buy-back scheme (as at 1 October 2019, annex to this decision, page 1 et seq), supplemented by the "Process description of market-based instruments and capacity buy-back" (as at 21 November 2019, annex to this decision, page 16 et seq) is approved with substantive changes as follows:

   a) No price cap is set for the use of market-based instruments and the capacity buy-back.

   b) The process step of capacity buy-back is only combined with the simultaneous imposition of a prohibition of changes to inputs/offtakes that would damage the network on all H-gas market participants for the rest of the day if the TSOs make an assessment for a specific congestion situation that a threat or disruption to the security or reliability of the gas supply system cannot be removed or cannot be removed in a timely manner without this simultaneous measure.

   c) Additional capacity for each of the next two gas years, which fall under the above-mentioned period of application, can be offered at annual auctions.

   d) Ruling Chamber 9 will decide separately on the recognition of costs for the use of market-based instruments and the capacity buy-back in the proceedings BK9-19/606 ("KOMBI").

   In other respects, the application is rejected.

3) The following conditions are attached to the approval:

   a) The TSOs shall inform the Bundesnetzagentur in writing by 1 May of each calendar year of the amount of additional capacity, broken down by product, to be established at a bookable point and to be offered at the upcoming annual auction. Reasons shall be given for the amount and, unless the capacity is firm and freely allocable, the specific capacity product for each point.

   b) The TSOs shall submit a joint report to the Bundesnetzagentur by 1 December of each calendar year, with the first report due by 1 December 2022, evaluating the use of the market-based instruments and the capacity buy-back in the previous gas year. The report, which shall also be published on the websites of the TSOs, shall specify in particular:

i. whether, and to what extent, the marketed additional capacity had to be secured through the use of market-based instruments (number and scope of instances, breakdown of instruments used (eg locations where VIP wheeling was used, zones of spread products, transport paths of third-party network use), duration of securing, breakdown of the costs of securing capacity);

ii. whether, and to what extent, the marketed additional capacity could not be secured through the use of market-based instruments (number of instances, reasons why capacity could not be secured);

iii. whether, and to what extent, a capacity buy-back or a reduction of firm capacity was necessary (number and scope of instances of capacity buy-back, duration of reduction, breakdown of costs for the capacity buy-back).

4) The right to order payment of costs is reserved.

Rationale

I.

These administrative proceedings concern the decision of the regulatory authority on the approval of an oversubscription and buy-back scheme conceived by the applicants for the future single market area.

An oversubscription and buy-back scheme enables TSOs to offer capacity in addition to the regular technical capacity. Annex I to Regulation (EC) No 715/2009[1] was amended by a European Commission Decision[2] adding corresponding provisions under point 2.2.2. The amount of technical capacity offered is determined by calculations based on the existing infrastructure and taking into consideration both past and forecast utilisation and demand. "Non-technical" additional capacity is in addition to this amount.

(1) An amendment[3] to section 21 of the Gas Network Access Ordinance (GasNZV) required the TSOs to form a single market area from the two existing market areas, NetConnect Germany and GASPOOL, no later than 1 April 2022. The TSOs aim to meet this requirement by 1 October 2021 and intend to form a single market area called Trading Hub Europe. According to their calculations, the merger of the market areas will lead to a 78% reduction in (technical) firm, freely allocable entry capacity. Only the remaining sum would then be able to be offered on the basis of the physical infrastructure.

(2) Having regard to the market area merger and its presumed effects, the ruling chamber initiated these administrative proceedings on 23 May 2019 and announced them on the website and in the Official Gazette of the Bundesnetzagentur (11/2019 of 12 June 2019, order no 72/2019, page 1025 et seq). In the initiation order, the ruling chamber explained that its previous decision against the implementation of an oversubscription and buy-back scheme is likely not to be appropriate any more due to the changed framework conditions.

In the decision BK7-13-019 of 20 September 2013, the ruling chamber had decided that the provisions of point 2.2.2 of Annex I to Regulation (EC) No 715/2009 were not to be applied at interconnection points where a "use-it-or-lose-it" mechanism was already applied for firm day-ahead capacity. This was the case at all market area and cross-border interconnection points.[4]

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[1] Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (Official Journal L 211 of 14 August 2019, page 36).

[2] 2012/490/EU: Commission Decision of 24 August 2012 on amending Annex I to Regulation (EC) No 715/2009 of the European Parliament and of the Council on conditions for access to the natural gas transmission networks (OJ L 231 of 28 August 2012, page 16).

[3] First Ordinance amending the GasNZV of 11 August 2017, Federal Law Gazette Part I 2017 No 57, published in Bonn on 17 August 2017, page 3194.

[4] See operative part 1, sentence 2 of the decision of 20 September 2013, BK7-13-019.

The ruling chamber took the view that implementing an oversubscription and buy-back scheme in addition to the rules for re-nomination restriction at that time would have increased complexity for all market participants without bringing any significant advantages for the gas market.[5] It did not see any indication that the need for transport capacity could not be met on the basis of the physical infrastructure and the already implemented rules on re-nomination restriction. On the contrary, there was sufficient supply both of firm day-ahead capacity and of long-term capacity.

In the initiation order of 23 May 2019, TSOs were called on to present a concept for an oversubscription and buy-back scheme. An initial consultation was also carried out, with the following associations, authorities, stakeholders and companies taking the opportunity to submit comments: Equinor Deutschland GmbH (Equinor), party 1), party 2), Shell Energy Europe Ltd. (SEEL), GAZPROM Germania GmbH (Gazprom Germania), EnBW Energie Baden-Württemberg AG (EnBW), VNG Handel & Vertrieb GmbH (VNG), AGGM Austrian Gas Grid Management AG (AGGM), Verband der Chemischen Industrie e.V. together with VIK Verband der Industriellen Energie- und Kraftwirtschaft e. V. (VCI-VIK), [redacted], Initiative Erdgasspeicher e.V. (INES), EFET Deutschland - Verband Deutscher Energiehändler e.V. (EFET), PEGAS, BDEW Bundesverband der Energie- und Wasserwirtschaft e.V. (BDEW), RWE Supply & Trading GmbH (RWE), Commission de régulation de l'énergie (CRE), Vereinigung der Fernleitungsnetzbetreiber Gas e.V. (FNB Gas), BP Gas Marketing Ltd. (BP).[6]

Following the submission of the concept by the TSOs on 1 October 2019 (annex to this decision, pages 1-15), the ruling chamber made it and further deliberations the subject of the second consultation, which started on 11 October 2019. The ruling chamber requested that the TSOs include a more comprehensive process description and more detailed information about the product characteristics in the concept in order to improve understanding of the functioning of the market-based instruments and the capacity buy-back as well as for reasons of transparency and acceptance. The following associations, stakeholders and companies submitted responses to the second consultation: Fluxys SA (Fluxys), OMV Gas & Marketing GmbH (OMV), RWE Supply & Trading GmbH (RWE), AGGM Austrian Gas Grid Management AG (AGGM), Shell Energy Europe Ltd. (SEEL), BDEW Bundesverband der Energie- und Wasserwirtschaft e.V. (BDEW), EFET Deutschland - Verband Deutscher Energiehändler e.V. (EFET), EnBW Energie Baden-Württemberg AG (EnBW), Equinor Deutschland GmbH (Equinor), Vereinigung der Fernleitungsnetzbetreiber Gas e.V. (FNB Gas), Gazprom Marketing & Trading Limited (GMTL), party 1), Vereinigung der Fernleitungsnetzbetreiber Gas e.V. (INES), PEGAS, Commission de

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[5] Bundesnetzagentur, decision of 20 September 2013, BK7-13-019, pages 9-10.

[6] The first consultation document and the 18 responses are available at: https://www.bundesnetzagentur.de/DE/Service-Funktionen/Beschlusskammern/1_GZ/BK7-GZ/2019/BK7-19-0037/BK7-19-0037_VerfEinleit.html?nn=361360

régulation de l'énergie (CRE), party 2), Verband der Chemischen Industrie e.V. together with VIK Verband der Industriellen Energie- und Kraftwirtschaft e. V. (VIK-VCI), VNG Handel & Vertrieb GmbH (VNG), Gassco AS (Gassco). [7]

The TSOs submitted their "Process description of market-based instruments and capacity buy-back" (annex to this decision, pages 16-28) on 27 November 2019.

Party 1) was summoned to the proceedings with the decision of 19 September 2019, BK7-19-037-B1, and party 2) with the decision of 5 December 2019, BK7-19-037-B2. In a decision dated 11 March 2020, the ruling chamber refused the request by Equinor ASA, dated 7 February 2020, to be summoned to the proceedings for reasons of procedural economy.

In a further consultation in accordance with point 2.2.2 of Annex I to Regulation (EC) No 715/2009, the regulatory authorities of the adjacent Member States were invited in writing on 13 December 2019 to submit comments. The following authorities submitted responses: the Norwegian Ministry of Petroleum and Energy, the Belgian Commission for Electricity and Gas Regulation (CREG) and the French Energy Regulatory Commission (CRE).

On 17 December 2019, the TSOs submitted a proposal for the monitoring and publication requirements of the market-based instruments and capacity buy-back.

All parties involved in the proceedings were invited in writing on 10 February 2020 to give their final views by 21 February 2020. The regulatory authorities of the federal states, the Bundeskartellamt and the Committee of representatives of the federal state regulatory authorities were informed of the opening of proceedings on 23 May 2019. The involvement of the Committee, the Bundeskartellamt and the federal state regulatory authorities took place through the submission of the draft decision on 6 March 2020. The Bundeskartellamt declined to provide a response.

(3) In view of the large number of points covered by the determination and responses received, reference is made to the content of the responses in the respective part of the rationale. For further details, reference is made to the contents of the file.

[7] The second consultation document and the nineteen responses may be found by following the link given in footnote 6.

II.

The decision of 20 September 2013, BK7-13-019, is partially revoked. At the same time, the submitted concept for an oversubscription and buy-back scheme is approved subject to the substantive changes given in operative part 2(a) to (d) and the application for approval without these changes is in other respects rejected. Finally, the approval is attached to the conditions of operative part 3. The provisions specified are formally and substantively lawful.

Owing to the amount of information to be presented, the reasons for the decision are preceded by a structural overview:

1. Legal bases

The partial revocation of the decision under operative part 1 is based on section 29(2) sentence 1 of the Energy Industry Act (EnWG).

The approval decision under operative part 2 is based on point 2.2.2(1) sentence 1 of Regulation (EC) No 715/2009 in the version amended by Decision 2012/490/EU in conjunction with sections 29(1) and 56(1) sentence 2 EnWG.

The conditions under operative part 3 are based on the same provisions as operative part 2 and in addition on section 36(2) of the Administrative Procedure Act (VwVfG) and point 2.2.2(8) sentence 2 of Annex I to Regulation (EC) No 715/2009.

2. Formal legality

The formal requirements have been met.

2.1. Competence

As the authority that issued the decision of 20 September 2013, the Bundesnetzagentur, as represented by its ruling chamber, is responsible for its partial revocation.

The competence of the Bundesnetzagentur for the other provisions derives from section 56(1) sentence 1 para 2 EnWG. In accordance with this, the Bundesnetzagentur performs the responsibilities conferred upon the regulatory authorities of the Member States in Regulation (EC) No 715/2009. The Bundesnetzagentur's decision is taken here by the ruling chamber, section 59(1) sentence 1 EnWG.

2.2. Hearing and consultation

The ruling chamber has given the parties involved and the representatives of the economic sectors affected by the proceedings the opportunity to state their views pursuant to section 67(1) and (2) EnWG. Hearings were conducted with all parties involved in the proceedings before the decision was issued. In addition, the ruling chamber carried out two consultations to provide those not party to the proceedings with the opportunity to state their views.

2.3. Involvement of other domestic authorities

The involvement of other authorities has taken place to the extent required. The regulatory authorities of the federal states were informed of the opening of proceedings on 23 May 2019 in accordance with section 55(1) sentence 2 EnWG; the Bundeskartellamt and the Committee of representatives of the federal state regulatory authorities were also informed. The formal involvement of the Committee pursuant to section 60a(2) EnWG and of the Bundeskartellamt and

the federal state regulatory authorities pursuant to section 58(1) sentence 2 EnWG, with the opportunity to comment, took place through the submission of the draft decision on 6 March 2020.

2.4. Involvement of the regulatory authorities of adjacent Member States

In accordance with point 2.2.2(1) sentence 2 of Annex I to Regulation (EC) No 715/2009, the Bundesnetzagentur gave the national regulatory authorities of adjacent Member States the opportunity to state their views on the approval of an oversubscription and buy-back scheme.

3. Substantive legality

The decision is also substantively lawful.

3.1. Operative part 1: partial revocation of the decision of 20 September 2013, BK7-13-019

(1) Owing to changes in circumstances and the legal situation, operative part 1 of the decision of 20 September 2013, BK7-13-019, is partially revoked for the period from 1 October 2021 (6am) to 1 October 2024 (6am).

(2) In accordance with section 29(2) sentence 1 EnWG, the regulatory authority is authorised to subsequently amend conditions and methods for network access established or approved by it pursuant to section 29(1) EnWG to the extent this is necessary to ensure that they continue to fulfil the prerequisites for a determination or approval. The aim of this provision is to give the regulatory authority the flexibility to adjust decisions it has taken in the light of changes to the actual and legal situation.[8] Such changes may go as far as the complete revocation of determinations.[9] The entitlement to make changes under section 29(2) sentence 1 EnWG gives the regulatory authority a large amount of leeway for decision-making. [10]

(3) These conditions are met in this case.

(a) Section 29(2) sentence 1 EnWG applies to the revoked provision. While the provision in the earlier decision was only explicitly based on point 2.2.3(6) of Annex I to Regulation (EC) No 715/2009, in its aim and purpose as well as in the structure of the law, it is equivalent to a determination or approval decision on the conditions and methods for network access under section 29(1) EnWG. This follows not least from section 56(1) sentences 2 and 3 EnWG, which gives the Bundesnetzagentur the authority granted to it under the Energy Industry Act in the

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[8] Federal Court of Justice (BGH), ruling of 12 July 2016 – EnVR 15/15; Higher Regional Court (OLG) Düsseldorf, ruling of 29 July 2013 – VI-3 Kart 278/11.
[9] BGH, loc cit; OLG Düsseldorf, ruling of 4 February 2015 – VI-3 Kart 96/13.
[10] BGH, ruling of 9 April 2019 - EnVR 57/18.

implementation of Regulation (EC) No 715/2009 and according to which the procedural provisions of the EnWG are to be applied.

(b) Moreover, the revocation is necessary to continue to meet the conditions for a determination or approval. The provision is no longer appropriate owing to changes that have taken place in the circumstances and legal situation.

According to the revoked provision, point 2.2.2 of Annex I to Regulation (EC) No 715/2009 does not apply to interconnection points at which a "use-it-or-lose-it" mechanism for firm day-ahead capacity is already applied. As this mechanism – in the form of re-nomination restrictions – is implemented at all interconnection points, it can be seen that the ruling chamber had decided against the implementation of an oversubscription and buy-back scheme in general. The key factor for the decision of 20 September 2013 was that implementing an oversubscription and buy-back scheme in addition to the re-nomination rules for restrictions would have increased complexity for all market participants without bringing any significant advantages for the gas market.[11] At the time the decision was made, there was no indication that the need for transport capacity could not be met on the basis of the physical infrastructure and with re-nomination restrictions.

The upcoming market area merger has led the ruling chamber to change its view of the situation. The market area merger will have severe effects on establishing and offering technical capacity. According to calculations by the German TSOs,[12] the amount of firm, freely allocable entry capacity that can be secured by the existing infrastructure will reduce. This is due to the altered allocability between entry and exit points and the usability of the virtual trading point of the single German market area.

The ruling chamber takes the view that contractual congestion – situations where the level of firm capacity demand exceeds the technical capacity[13] – can no longer be ruled out with the same degree of certainty. Moreover, it is not necessary to wait until congestion occurs before implementing an oversubscription and buy-back scheme, as the measure can also be used preventively.[14] Ultimately, this kind of scheme will support the establishing of capacity requirements in the single German market area and the testing of market-based instruments, in the opinion of the ruling chamber. It is true that the TSOs take the view (in their responses to the first consultation) that oversubscription and buy-back schemes are only designed to remove contractual congestion, whereas the market area merger will cause physical congestion, ie situations where the level of demand for actual deliveries exceeds the technical capacity at some point in time.[15] However, the ruling chamber doubts this strict distinction of the scope of

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[11] Bundesnetzagentur, decision of 20 September 2013, BK7-13-019, pages 9-10.
[12] Presentation by the TSOs dated 6 February 2019 at the market dialogue event on the capacity model, available at https://www.marktgebietszusammenlegung.de (last accessed 25 March 2020).
[13] Article 2(1) point 21 of Regulation (EC) No 715/2009.
[14] As stated in the decision of 20 September 2013, BK7-13-019, page 10.
[15] Article 2(1) point 23 of Regulation (EC) No 715/2009.

application, because, for one, by definition contractual congestion is likely to occur and, for another, the risk of physical congestion is inherent in oversubscription and buy-back schemes. In principle, therefore, the ruling chamber sees the oversubscription and buy-back scheme as an opportunity to offer "non-technical" additional capacity.

(4) The ruling chamber has decided within the exercise of its discretion that a partial revocation is necessary. The revocation only applies to the period from 1 October 2021 (6am) to 1 October 2024 (6am), ie for the period of application of the submitted concept for an oversubscription and buy-back scheme.[16] Auctions occurring before that period are also covered mutatis mutandis if they allocate transport rights with relevant product duration. It is not currently possible to identify significant advantages from the implementation of an oversubscription and buy-back scheme in the period after 1 October 2024, but it is possible to identify disadvantages in the form of greater complexity. By that time, transport capacity requirements should be known. The very purpose of the oversubscription and buy-back scheme is to identify the sufficient amount of firm, freely allocable entry capacity in the single market area that must then be made available as technical capacity within the bounds of economic reasonableness.

3.2. Operative part 2: approval of the concept for an oversubscription and buy-back scheme with substantive changes

The joint concept of the TSOs for an oversubscription and buy-back scheme in the single market area (annex to this decision) is approved with the substantive changes of operative part 2(a) to (d). In this form, it corresponds to the requirements of point 2.2.2 of Annex I to Regulation (EC) No 715/2009 (see section **3.2.1**) and the other provisions of European and national law (see section **3.2.2**). Discretion has been exercised correctly as regards the substantive changes of operative part 2(a) to (d), insofar as these were not legally imperative in any case (see section **3.2.3**).

3.2.1. Compliance with the requirements of point 2.2.2 of Annex I to Regulation (EC) No 715/2009

Pursuant to point 2.2.2(1) of Annex I to Regulation (EC) No 715/2009, transmission system operators propose and, after approval by the national regulatory authority, implement an incentive-based oversubscription and buy-back scheme in order to offer additional capacity on a firm basis. In accordance with point 2.2.2(2) to (7)coxs, the following applies to the content of the concept: the oversubscription and buy-back scheme is intended to provide TSOs with an incentive to make available additional capacity, taking account of the technical conditions, and they should apply a dynamic approach with regard to the recalculation of the technical or additional capacity. The

[16] See pages 2, 7-8 of the annex to this decision.

oversubscription and buy-back scheme is to be based on an incentive regime reflecting the risks of TSOs in offering additional capacity. The scheme is to be structured in such a way that revenues from selling additional capacity and costs arising from the buy-back scheme or measures pursuant to paragraph 6 are shared between the TSOs and the network users. The national regulatory authority is to decide on the distribution of revenues and costs between the TSO and the network user. In determining the additional capacity, TSOs are to take into account statistical scenarios for the likely amount of physically unused capacity at any given time at interconnection points. Where necessary to maintain system integrity, TSOs are to apply a market-based buy-back procedure in which network users can offer capacity. A risk profile for offering additional capacity is to prevent excessive buy-back obligations. Pursuant to point 2.2.2(7) of Annex I to Regulation (EC) No 715/2009, TSOs must, before applying a buy-back procedure, verify whether alternative technical and commercial measures can maintain system integrity in a more cost-efficient manner.

The concept submitted meets these requirements:

3.2.1.1. Incentive-based scheme

The proposed concept is an incentive-based scheme.

(1) As an incentive-based scheme, the concept leaves the decision of whether and to what extent additional capacity should be marketed up to the TSOs. No decision is made by the authorities as to the amount of additional capacity to be marketed, neither in this approval nor in the run-up to the capacity auctions. There are no specific requirements regarding the determination of additional capacity at individual points in legal provisions, ordinances or European legislation. Rather, the TSOs must appropriately weigh up opportunities and risks to determine the additional capacity to be offered at a specific booking point. This basic approach of the concept makes clear it is an incentive-based and non-mandatory scheme.
(2) In the concept, the incentive to offer additional capacity is provided by the opportunity to offer capacity in the single German market area that exceeds the capability of the system during the period of application, ie until such time as the sufficient amount of firm, freely allocable entry capacity can be determined in the single market area, and to test the use of market-based instruments:

(a) The TSOs have conducted deterministic calculations based on the capability of the transmission systems and concluded that the market area merger will lead to a 78% reduction in firm, freely allocable entry capacity compared to the amount of firm, freely allocable entry capacity in the two separate German market areas. The TSOs and all consultation respondents who covered this point believe that there will not be enough firm, freely allocable entry capacity in the single German market area to meet demand.

(b) Despite the opinions expressed by the TSOs and apparently shared by other respondents to the first consultation (eg EnBW), there is no question of increasing the capacity on offer by measures in accordance with section 9(3) GasNZV before the annual auction in 2024.

(aa) Where the calculation of entry and exit capacity leads to the conclusion that a sufficient amount cannot be offered as freely allocable capacity, in accordance with section 9(3) GasNZV, TSOs must examine economically reasonable measures to increase the volume of freely allocable capacity on offer. The use of such measures should be kept to a minimum, section 9(3) sentences 2 and 4 GasNZV.

The applicability of section 9(3) GasNZV assumes that the "sufficient amount" of firm, freely allocable capacity is known. Only then can it be ensured that the use of the measures is kept to a minimum, ie only as much as is necessary. Without the sufficient amount being known, there would be a risk that capacity in excess of this amount would be offered and secured with measures incurring costs under section 9(3) GasNZV, which would be contrary to the goal of low-priced, network-based supply of gas for society as a whole (section 1(1) EnWG).

(bb) The sufficient amount of firm, freely allocable capacity for the single German market area has not yet been determined. It is essentially derived from the long-term capacity requirements confirmed in the scenario framework (section 17 GasNZV). In the scenario framework for the gas Network Development Plan (NDP) 2020-2030, which was confirmed by the Bundesnetzagentur on 5 December 2019, the TSOs carried over the capacity from the current, separate market areas to the single market area for planning purposes. The ruling chamber does not view this as a sound basis for the application of section 9(3) GasNZV. It takes the view that at the latest the scenario framework to be presented in 2023 for the gas NDP 2024-2034 is suitable for calculating the sufficient amount of firm, freely allocable capacity in the single German market area. This will also be the first scenario framework to take account of the booking of non-yearly transport capacity in the single German market area to determine the long-term capacity requirements. It is in line with section 17 sentence 2 para 8 GasNZV that knowledge of capacity requirements resulting from combining market areas in accordance with section 21 GasNZV must be taken into account.

(cc) Increasing the capacity on offer in accordance with section 9(3) GasNZV is thus only possible for the single German market area as of the annual auction in 2024 and for periods after 1 October 2024.

(c) The concept covers the period up to 1 October 2024. It will enable the TSOs to offer additional capacity beyond the capability of the system. Findings about the offer and marketing of this additional capacity can be used in the establishing of long-term capacity requirements (section 17 GasNZV) for network development planning and thus contribute to determining the sufficient amount under section 9(3) GasNZV.

The concept does not exclude the application of the criteria for determining additional capacity given in point 2.2.2(5) of Annex I to Regulation (EC) No 715/2009. However, it primarily envisages that the determination of the amount of additional capacity will be based on the difference between the requirement figures assumed in the scenario framework for the gas NDP 2018-2028 (drawn from the two separate market areas) and the technical capacity of the single German market area calculated by the TSOs using the capability of the system. There will thus be an incentive to make up, either fully or at least adequately, the shortfall in capacity caused by the merger of the market areas.

(d) In addition, the scheme provides an incentive to test the effectiveness and efficiency of the market-based instruments proposed by the TSOs before deciding on their use within the framework of section 9(3) GasNZV. The TSOs have repeatedly stated their wish to employ market-based instruments as measures to increase capacity in accordance with section 9(3) GasNZV (as stated in their response to the first consultation). Unlike the measures specifically mentioned in section 9(3) GasNZV, however, the market-based instruments proposed by the TSOs are not contracted ex ante in order to be able to offer additional capacity. On the contrary, they are only intended to be used to secure already allocated firm capacity in the event of congestion. There is therefore a risk that already marketed capacity might have to be reduced because market-based instruments are not sufficiently available or do not have the securing effect. Before the market-based instruments can be permitted within the framework of section 9(3) GasNZV, therefore, it must be shown that they are sufficiently available and reliable, that is to say, comparable with the instruments explicitly mentioned in section 9(3) GasNZV, especially the flow commitment.

(3) The above-mentioned incentives mean that it is unproblematic that the concept does not contain any ideal incentive to offer additional capacity for the possibility of achieving additional revenue. The provisions of point 2.2.2 of Annex I to Regulation (EC) No 715/2009 do not rule out an oversubscription and buy-back scheme being based on other incentive factors.

3.2.1.2. Cost-risk distribution

This decision, alongside the determination proceedings conducted by Ruling Chamber 9, BK9-19/606 ("KOMBI"), ensures appropriate risk distribution for the application of the oversubscription and buy-back scheme within the meaning of point 2.2.2(3) of Annex I to Regulation (EC) No 715/2009.

(1) There is no need for a joint approval decision by Ruling Chambers 7 and 9, as suggested by the TSOs in their concept description and response to the second consultation. The TSOs are correct in stating (for example, in their response to the first consultation) that it is not possible to view the content of the oversubscription model and the treatment of the incurred costs and revenues separately. This approval does not include a decision on the regulatory treatment of the incurred costs, see operative part 2(d). On 16 October 2019, Ruling Chamber 9 opened own-

initiative proceedings on the determination of costs for market-based instruments and for capacity buy-backs in the single German market area as volatile costs within the meaning of section 11(5) of the Incentive Regulation Ordinance (ARegV) under the file number BK9-19/606 ("KOMBI"). This was in response to the concept submitted on 1 October 2019 by the TSOs for an oversubscription and buy-back scheme as part of these proceedings. The "KOMBI" administrative proceedings are due to be concluded in the near future. Ruling Chamber 9 published a draft determination for consultation on 19 December 2019. In it, the costs for market-based instruments and capacity buy-backs approved as part of the oversubscription and buy-back scheme in this decision are classed as volatile costs within the meaning of section 11(5) ARegV. The regulatory treatment of the costs incurred under the oversubscription and buy-back scheme for the use of market-based instruments and for capacity buy-back has thus already been detailed in those proceedings in such a way that the ruling chamber can undertake an assessment of an appropriate risk distribution for these proceedings.

(2) The approved oversubscription and buy-back scheme rules out the TSOs generating additional revenue from the marketing of additional capacity. The TSOs have made clear, both in their concept description and in their response to the second consultation, that in view of this basic feature of the scheme, the related risks – that is, the costs for the use of the market-based instruments and capacity buy-backs – would therefore need to be borne fully by network users. The TSOs pointed out that they would not be able to influence the costs and these should not have an effect on the efficiency benchmarking. They argued that classing the costs as volatile would be inconsistent with a balanced risk distribution and thus also with the basic principle behind an oversubscription and buy-back scheme in accordance with Annex I to Regulation (EC) No 715/2009. The majority of responses by market participants to the consultations carried out for these proceedings supported the view of the TSOs (BDEW, EnBW, INES (in both consultations), EFET, RWE (in the first consultation) and VNG (second consultation)).

(3) The ruling chamber takes the view that the classification of costs as volatile within the meaning of section 11(5) ARegV, as proposed by Ruling Chamber 9, will lead to an appropriate risk distribution in accordance with the provisions of point 2.2.2 of Annex I to Regulation (EC) No 715/2009. It will lead to a recognition of revenues from the costs without delay. Effects on the efficiency benchmarking for the fourth regulatory period can be ruled out because costs for the use of market-based instruments and capacity buy-backs can only arise for the first time in the gas year 2021/2022, after the base year, which is 2020. The TSOs' concept for the oversubscription and buy-back scheme envisages that it will only be in place for a transition period running until 1 October 2024. Both this approval and the "KOMBI" proceedings refer to this. For the period up to 1 October 2024, the classification of the costs as volatile costs ensures that the TSOs will not be burdened with disproportionate cost risks. This does not rule out a reassessment, for example on the basis of new findings in good time before the fifth regulatory period (base year

2025), provided that the market-based instruments have been successfully tested by then and a transfer into the regime of section 9(3) GasNZV comes into consideration for the period after 1 October 2024.

3.2.1.3. Amount of additional capacity

The TSOs are to decide on the amount of additional capacity in compliance with their legal obligations. These legal obligations impose a sufficiently precise scope for decision-making, so there is no need for the concept to be further elaborated or for official provisions at this time.

(1) The incentive-based scheme leaves the decision of whether, and to what extent, additional capacity is marketed up to the TSOs (see the explanations in section **3.2.1.1**(1)). The TSOs will determine the additional capacity to be offered at a specific entry/exit point in accordance with point 2.2.2(5) of Annex I to Regulation (EC) No 715/2009, weighing up the opportunities and risks, without the need for an official decision in this respect. Some responses expressed concern that allowing TSOs this leeway could have negative consequences for network users (EFET, party 2), SEEL, INES in the second consultation). In the consultation process, party 1) maintained that it should only be possible for conditionally firm, freely allocable capacity to be additional capacity when the TSOs had done everything necessary to provide additional firm, freely allocable capacity. The need for additional capacity to be offered was pointed out not only in both public consultations but also in statements from the regulatory authorities of adjacent Member States (CRE, CREG).

(2) While the ruling chamber is adhering to the principle of the incentive-based scheme, it would also like to stress the obligation of the TSOs to provide the secure, low-priced and efficient network-based supply of gas for society as a whole (section 2(1) in conjunction with section 1 EnWG). Leeway for decision-making must be used in a way that is compatible with this central obligation. With regard to the decision on the amount of additional capacity, the ruling chamber judges three aspects to be key. First, in both these administrative proceedings (first consultation) and the scenario framework, the TSOs have consistently expressed their view that the calculated technical capacity will not meet existing demand and that the capacity currently offered in the separate market areas must be maintained. Second, the TSOs are not exposed to any unreasonable cost risk in their offer of additional capacity (their response dated 28 January 2020 to the KOMBI proceedings of Ruling Chamber 9, BK9-19/606, explicitly agrees with this). Third, the oversubscription and buy-back scheme is intended to ensure low-priced and efficient supply by specifying capacity requirements in the single market area; this can only work if the ability to offer additional capacity is actually used.

It would be contrary to the stated assumptions of the TSOs if the decision of a TSO on the amount of additional capacity would lead to significant deviations from the capacity currently offered in the separate market areas. Such a deviation could not obviously be justified with cost risks. The TSO's

considerations would have to be explained to the ruling chamber in any case (see operative part 3(a)).

3.2.1.4. Relevant network points

(1) The TSOs' concept envisages that the oversubscription and buy-back scheme will be able to be used in principle at all bookable points. However, according to the plan there will only be an offer of additional capacity at entry points in the H-gas network where there would otherwise be reduced capacity on offer due to the merger of the market areas. In their response to the second consultation, the TSOs clarified that this would also apply to entry points from storage facilities as well as entry points at cross-border interconnection points, production and LNG facilities. If firm, freely allocable capacity is offered as yearly capacity or as a seasonal product at entry points from storage facilities, the oversubscription and buy-back scheme will also be applied at these points.

(2) This design is compatible with point 2.2.2 of Annex I to Regulation (EC) No 715/2009.

(a) It is appropriate to limit the offer of additional capacity to entry points in the H-gas network. In accordance with Annex I of Regulation (EC) No 715/2009, an oversubscription and buy-back scheme comes into consideration as a congestion-management procedure in the event of contractual congestion. In the decision of 20 September 2013 (BK7-13-019), no instances of contractual congestion that would have made the introduction of an oversubscription and buy-back scheme necessary were identified. The merger of the market areas will only reduce the offer of firm entry capacity into the H-gas network. There is therefore no objection in principle to limiting the risk of contractual congestion to H-gas entry points in the single German market area.

Under point 2.2.1(1) of Annex I to Regulation (EC) No 715/2009, the provisions of point 2.2 apply to interconnection points between adjacent entry-exit systems and – subject to the decision of the relevant national regulatory authority – also to entry points from and exit points to third countries. Entry points from LNG terminals and from production facilities, as well as entry-exit points from and to storage facilities, are explicitly not subject to the provisions of point 2.2. The ruling chamber does not see that the oversubscription and buy-back scheme would necessarily have to be restricted to the abovementioned points. The purpose of this list is merely to distinguish the areas subject to regulation under the European legislation from those that are to remain within the responsibility of Member States. There is similar wording to point 2.2.1(1) in Article 2(1) of Regulation (EU) 2017/459.[17] The ruling chamber considers an application at H-gas entry points, as shown in the concept, to be necessary, because these are affected by the reduction in capacity. This should also apply explicitly to entry points from storage facilities. The intention of the GasNZV

[17] Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013 (OJ L 72 of 17 March 2017, page 1).

is to create an identical framework for the procurement of capacity at interconnection points and storage points (Bundesrat printed paper 419/17, page 14). This takes account of the fact that the injection of gas at an interconnection point and the use of a storage facility are interchangeable. This is why section 13(1) and (4) GasNZV sets out that capacity of entry points from or exit points to storage facilities must be allocated via an auction procedure in accordance with Regulation (EU) 2017/459, although the scope of the Regulation does not apply.

(c) Responses to the consultation called for the oversubscription and buy-back scheme to be applied at all H-gas entry points (including storage facilities) and welcomed the fact that it would be (EnBW, EFET, BDEW, VNG, VIK-VCI in the second consultation).

3.2.1.5. Uniform marketing of technical capacity and additional capacity

(1) The concept envisages a uniform marketing of additional capacity together with technical capacity. Apart from the offer period, from the point of view of shippers there should be no difference between technical capacity and additional capacity. Both types of capacity are to be subject to identical rules as regards transport, such as those concerning contractual arrangements, tariffs and transport operations.

(2) With this design, the concept is following the provisions of point 2.2.1(3) of Annex I to Regulation (EC) No 715/2009. In accordance with this provision, any additional capacity made available through the application of an oversubscription scheme must be offered in the regular allocation process. However, differences in the periods of time in which technical capacity and additional capacity are offered are justified. The requirement set out in Article 11(3) of Regulation (EU) 2017/459 for existing capacity to be offered for at least the upcoming five gas years only affects technical capacity and does not apply to additional capacity (see operative part 2(c) on the offer period for additional capacity).

(3) Respondents to the consultation welcomed the uniform marketing of technical capacity and additional capacity (EFET, BDEW, VNG in the second consultation).

3.2.1.6. Priority use of market-based instruments, with capacity buy-back as last resort

(1) The planned scheme to maintain system integrity in the event of congestion is compatible with the provisions of point 2.2.2 of Annex I of Regulation (EC) No 715/2009.

The concept envisages the use of new market-based instruments to remove capacity congestion, with capacity buy-backs as a last resort. All other cost-free system-related and market-related measures within the meaning of section 16(1) EnWG should be exhausted first. In the event of congestion, the new market-based instruments should be used according to a price-based merit order list (MBI-MOL).

(2) Some responses to the second consultation (party 1), VIK -VCI, INES) called for the capacity buy-back to be included in the strongly cost-oriented merit order list. They argued that this was the only way to avoid an excessive financial burden for shippers, other market participants and ultimately final customers. Other respondents, by contrast, welcomed the fact that the capacity buy-back should only be used as a last resort (VNG, EnBW, RWE, EFET, party 2), SEEL in the second consultation). EnBW pointed out that the capacity buy-back could lead to measures under section 16(2) EnWG more quickly, because a capacity buy-back only relates to the zone with a surplus of gas and does not take adequate account of the zone with a deficit of gas.

(3) The ruling chamber takes the view that the concept does not give rise to objections in this respect:

(a) Pursuant to point 2.2.2(7) of Annex I to Regulation (EC) No 715/2009, the concept is based on a cost-efficient approach, because, before applying a buy-back procedure, it is verified whether alternative technical or commercial measures can maintain system integrity in a more cost-efficient manner. Moreover, in line with point 2.2.2(6) of Annex I to Regulation (EC) No 715/2009, a market-based buy-back procedure is kept available.

(b) The ruling chamber does not expect any significant additional costs from the "last resort" provision, as opposed to including the buy-back in the merit order list. Shippers that are willing to participate in a buy-back procedure are generally likely to be ready to reduce their nomination within the framework of the spread product as well. This should have an advantageous effect on the costs of the spread product. Furthermore, the TSOs put their initial estimates of the annual costs for the use of market-based instruments at about €30m to fully close the capacity shortfall.[18] This sum was based exclusively on market-based instruments. The ruling chamber therefore sees the capacity buy-back less as an instrument to reduce costs and more as a last monetary incentive for shippers to adjust their transport requests in such a way that a general reduction of already nominated capacity in accordance with section 16(2) EnWG can be avoided.

Ultimately, a residual risk of increased costs is acceptable in the light of the aims and incentives of the oversubscription and buy-back scheme. The ruling chamber does not view cost efficiency (point 2.2.2(7) of Annex I to Regulation (EC) No 715/2009) as the sole criterion, ruling out the consideration of other aspects. It was thus possible to take into account that the capacity buy-back could have a severe impact on the market. EnBW correctly highlighted the risk of emergency measures. The TSOs also consider it necessary to link the capacity buy-back to a prohibition of changes to inputs/offtakes that would damage the network.

The oversubscription scheme is intended to prove the suitability of the proposed market-based instruments to secure technical capacity. It would be contrary to this aim if the capacity buy-back

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[18] See slide 43 of the TSOs' presentation at the market dialogue event on 6 February 2019.

were included in the merit order list and repeatedly turned out to be the most cost-effective instrument. Contracted capacity is an indication of shippers' needs. A transmission system should be of corresponding dimensions. If, from the perspective of shippers, financial incentives were to outweigh their original transport requests, the connection to the shippers' original needs would be lost and so would be the actual dimension of the transmission system needed to cover requirements. For this reason, a "last resort" provision for the capacity buy-back is not only appropriate but also necessary, otherwise it would not be possible to verify whether the congestion situations that occur could also have been removed with market-based instruments, without the capacity buy-back, or whether shippers' needs would have had to be met using other measures, such as network expansion.

(4) The ruling chamber does not consider it necessary to make a final determination on the composition of costs of individual market-based instruments in the approval of the concept. In the second consultation, some respondents (EFET, EnBW, GMTL) called for German capacity tariffs to be factored into the market-based instruments of third-party network use and wheeling.

The ruling chamber considers the decisive point for an approval to be that the underlying principles of the process are defined, including the cost-efficient use of market-based instruments using a merit order list. The ruling chamber takes the view that the cost components of the individual instruments should be determined as part of a further elaboration and refinement of the concept (see also section 3.2.2.1(1)).

3.2.2. Compatibility with other legal requirements

Taking into account the changes set out in operative part 2(a) to (d), the concept is also compatible with other provisions and regulatory requirements of national and European law.

3.2.2.1. Market-based instruments and capacity buy-back

(1) In its second consultation document, the ruling chamber requested a more detailed description of the functioning of the market-based instruments and the capacity buy-back. The TSOs met this request by submitting a "Process description for market-based instruments and capacity buy-back" (annex to this decision, page 16 et seq). The description of the market-based instruments and the capacity buy-back is therefore now sufficiently detailed and precise to enable the ruling chamber to carry out an examination based on legal and regulatory requirements and to approve the concept under the terms of this decision.

The ruling chamber takes the view, however, that further elaboration and refinement, in particular on individual aspects of the market-based instruments and the capacity buy-back, will be needed for the practical implementation and application of the concept. The TSOs also drew attention to this need in the course of the final hearing. The ruling chamber believes that further elaborations

will not give rise to any concerns with respect to the approval given in this decision, provided that such elaborations are based on the concept approved in this decision and serve its implementation, as with, for instance, those relating to publications for accessing the market-based instruments and the capacity buy-back. In the course of these administrative proceedings, the TSOs submitted a set of slides entitled "Market-based instruments and capacity buy-back, publications and monitoring" (as at 10 December 2019) that included details of the planned publications in connection with accessing the market-based instruments and the capacity buy-back. The ruling chamber generally considers the procedure presented to be an appropriate, detailed description of the approved concept. For example, the ruling chamber considers the additional information for shippers about a push service to be in line with market requirements.

In this sense, the TSOs should make further elaborations based on the concept approved in this decision and serving its implementation in order to address individual questions, for instance about the chronological sequence for access and about IT implementation, some of which were also raised in the consultations and which need to be clarified for the practical implementation and application of the concept. The ruling chamber believes it would therefore be appropriate for the TSOs to develop joint guidelines that would familiarise market participants with the practical use of the market-based instruments and the capacity buy-back and address unanswered questions of detail. It could make sense for other market participants to also be involved in drawing up these guidelines and to agree on effective implementation rules in consultation with the TSOs and in line with the TSOs' approved concept. Implementation requirements to be standardised should be included in the gas cooperation agreement (KoV).

Party 1) suggested in the final hearing that the proposed publications could be underpinned by a legal obligation. The ruling chamber does not consider this to be necessary at the present time. The ruling chamber expects the TSOs to comply with the publication concept in practice.

(2) The concept's market-based instruments and the capacity buy-back (annex to this decision) are compatible with the system under section 16(1) EnWG.

(a) In accordance with section 16 EnWG, it is part of the TSOs' system responsibility to take system-related and market-related measures (section 16(1) EnWG) and, if necessary, so-called emergency measures (section 16(2) EnWG) to remove threats and disruptions to the security or reliability of the gas supply system. A threat to the security and reliability of the gas supply system is to be presumed "[…] where the security or reliability of the system and thus gas transport is threatened or disrupted due to technical framework conditions or due to a deficit of gas or a surplus of gas in networks or market areas."[19] Possible causes include in particular transportation

[19] *Scholze* in: Elspas/Graßmann/Rasbach (eds), EnWG, section 16, margin no 6: based on the legal definition of section 13(4) EnWG for electricity transmission networks.

congestion, when it is not possible to transport the gas volumes to the consumption areas even though sufficient gas volumes are being injected into the market area.[20] There is a possibility of such transportation congestion when the current market areas are merged because of the limited exchange capacity. When choosing specific measures under section 16 EnWG, TSOs are tied to the purposes of the EnWG (section 2(1) in conjunction with section 1(1) EnWG); the choice of measures must therefore be based on suitability, necessity and the extent of the negative effects on the gas supply and the network users (degree of interference).[21]

(b) Sufficient account is taken of these requirements through the "Process description for market-based instruments and capacity buy-back" (annex to this decision, page 16 et seq) submitted by the TSOs in the proceedings. In the understanding of the ruling chamber, the process description outlines the TSOs' standard procedure in the event of network congestion. It does not rule out other measures or other chronological sequences in the event that the TSOs conclude as part of their system responsibility that a threat or disruption cannot otherwise be removed or cannot otherwise be removed in a timely manner.

(c) The ruling chamber considers both the market-based instruments and the capacity buy-back to be measures within the meaning of section 16(1) EnWG. The fact that the process description seems to place these instruments outside the scope of section 16(1) EnWG is not relevant, as long as the choice of measures meets the abovementioned legal criteria. The ruling chamber considers this to be the case, taking into account the changes set out in operative part 2(a) and (b).

(d) The question can be left open as to whether the proposed instruments are all to be seen as market-based measures or whether some are to be seen as system-related measures within the meaning of section 16(1) EnWG. While the TSOs consider "VIP wheeling", "third-party network use" and "spread product" to be "market-based" instruments, some respondents (EFET in the second consultation) recommended a differentiation.

However, section 16(1) EnWG does not give rise to a strict ranking between system-related and market-related measures.[22] The standard priority use of system-related measures is based not on an order of use laid down in law but on the fact that system-related measures have less impact on the network users than market-related measures. For instance, the use of integrated network storage or downstream networks connected to both of the current market areas involves neither specific costs for measures nor restrictions on transport rights. Costs for system-related measures (such as compressor energy) are incurred by the TSOs as operative costs and are taken into account in the charges as volatile costs. The classification of those instruments that cannot be

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[20] *Scholze* in: Elspas/Graßmann/Rasbach (eds), EnWG, section 16, margin no 8.
[21] *Scholze* in: Elspas/Graßmann/Rasbach (eds), EnWG, section 16, margin no 22; *Bourwieg* in: Britz/Hellermann/Hermes, EnWG, 3rd ed, 2015, section 16, margin no 5; *Tüngler* in: Kment, EnWG, 2nd ed, 2019, section 16, margin no 13.
[22] *Scholze* in: Elspas/Graßmann/Rasbach (eds), EnWG, section 16, margin no 21.

clearly allocated to either pair of terms is therefore of no practical importance, at least as long as the choice of measures is based on suitability and necessity and the extent of the negative effects on the network users and the gas market (degree of interference) is taken into account.

(e) Measured against these principles, the fact that the concept bases the choice of measures on a tiered-pricing merit order list cannot be objected to. The ruling chamber takes the view that none of the market-based instruments generally constitute a particularly serious intervention in the market that would be an argument against tiered pricing. Nevertheless, the ruling chamber considers it necessary to analyse the market-based instruments in order to determine whether possible market interventions outbalance the guarantee of cost-effective use. If, for example, the use of third-party networks in adjacent market areas limits the short-term capacity available in those market areas to such an extent that the market participants' usual trading activity is restricted, this would need to be taken into account when deciding on the order in which the market-based instruments are used. Responses in the second consultation (BDEW, party 2), SEEL) also called for changes to the order in which the market-based instruments are used if individual instruments, in particular third-party network use, were found to result in more severe market distortions.

(f) In the concept, the use of existing system-related measures and the use of existing market-related measures represent the first two steps in the process (annex to this decision, pages 19-20), before determining the need for market-based instruments (step 3), drawing up a merit order list for market-based instruments and accessing the instruments (step 5) and, as a last resort measure, buying back capacity (step 6) (annex to this decision, page 20 et seq). With respect to using existing market-related measures to remove and prevent threats or disruptions to the security or reliability of the gas supply system, priority use of these measures in compliance with the abovementioned legal criteria cannot be objected to. One example is interrupting interruptible capacity, which is a cost-neutral market-based instrument to be used in principle before using the cost-incurring market-based instruments in the merit order list. In these cases too, however, the choice of measures needs to take into account the effectiveness of each measure in relieving the congestion and the associated negative effects on the network users and the gas market, in addition to the costs. The TSOs stated in the final hearing that they do not generally consider interrupting interruptible internal bookings to be effective in removing congestion between the two current market areas. In the ruling chamber's understanding as set out above in (b), the concept approved in this decision does not prevent sufficient account being taken of this when the concept is practically implemented.

(3) The instrument of third-party network use is compatible with legal unbundling requirements. The ruling chamber does not share the concerns raised about this by some respondents in the second consultation (EFET, EnBW, RWE, VNG, OMV). In particular, third-party network use and

the associated acquisition and use of capacity rights by the TSOs is not a sales activity that is prohibited for TSOs as a competitive activity.

(a) While there is no legal definition of the term "sales", several provisions refer to the term (see section 3 para 38 and section 10b(3) sentence 1 EnWG ("sale of energy")). The shareholding prohibition in section 10b(3) sentence 1 EnWG, for example, serves to implement Article 18(3) sentence 1 of Directive 2009/73/EC.[23] According to Article 18(3) sentence 1 of Directive 2009/73/EC, the shareholding prohibition applies to subsidiaries of the vertically integrated undertaking that perform functions of production or supply. According to Article 2 point 7 of Directive 2009/73/EC, "supply" means "the sale, including resale, of natural gas, including LNG, to customers". This makes it clear that in German law the terms "supply" and "sales" presuppose an act of selling (see also Bundesnetzagentur decision of 20 May 2014, (BK7-13-073), page 9 et seq).

(b) In the case of third-party network use, however, energy (gas) is not sold at any time but is merely transported via a third-party network on a short-term basis in order to remove congestion. It therefore solely involves using the acquired capacity rights. This specifically enables the TSOs to fully meet their legal obligations and would thus constitute one of the cases allowed under Article 32(2) of Directive 2009/73/EC, which entitles TSOs, if necessary for the purpose of carrying out their functions including in relation to cross-border transmission, to have access to the networks of other TSOs.

Pursuant to section 11(1) sentence 1 EnWG, operators of energy supply networks are required in particular to operate, maintain and optimise in line with requirements secure, reliable and efficient energy supply networks in a non-discriminatory manner. In this context, operators are required under section 20(1) sentence 1 EnWG to grant non-discriminatory network access to everyone according to objectively justifiable criteria and to arrange access by offering (firm) entry and exit capacity (section 20(1b) sentence 1 EnWG, section 8(2) sentence 1 GasNZV). These requirements mean that operators not only have to offer (firm) entry and exit capacity but also naturally have to be able to accommodate the marketed capacity and transport rights in their own networks. This is no longer possible specifically in the event of congestion, and only becomes possible again by using third-party networks on a short-term basis. The same also applies to the other market-based instruments (VIP wheeling, spread product).

Using a third-party network on a short-term basis therefore ultimately enables TSOs to operate or optimise more reliable networks, as they are then able to offer more (firm) entry capacity in the long term.

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[23] 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 (OJ L 211 14.08.2009, page 94).

(4) A sufficiently clear distinction can be made between the spread product and balancing gas. Several respondents in the second consultation (party 2), BDEW, EnBW) drew attention to the need to be able to differentiate and distinguish between the spread product and balancing gas.

(a) According to section 2 para 12 GasNZV, balancing gas means the gas volumes used by the network operators to guarantee network stability. This is confirmed by section 27 GasNZV, which states that balancing gas is used, as far as technically necessary, to balance fluctuations in load in order to guarantee technically safe and efficient network operation in the market area. The spread product, by contrast, does not generally serve to balance fluctuations in load or guarantee network stability, but is intended for use specifically as part of the oversubscription and buy-back scheme to remove actual transportation congestion that is caused by the market area merger. The spread product is therefore used solely for capacity purposes and thus does not constitute balancing gas.

(b) This distinction is of particular importance because the costs for the spread product may not be allocated to the balancing regime (neutrality charges for balancing) under the determination of 19 December 2014 (BK7-14-020 – GaBi Gas 2.0), but have to be recovered as a capacity measure through the network charges in accordance with Ruling Chamber 9's "KOMBI" determination. The spread product does not constitute other balancing activity within the meaning of operative part 7(a)(cc) or (b)(ee) GaBi Gas 2.0. It has no connection with the market area managers' balancing activities but is instead used solely for capacity purposes, as stated above. This is also why the costs cannot be allocated to the balancing regime.

(c) Finally, the characteristics of the spread product also differ from balancing gas. According to the process description, the spread product is characterised by the fact that gas is bought and sold in different zones at the same time. The spread product therefore involves gas being withdrawn from a congestion zone with a surplus of gas at the same time as gas being injected into a congestion zone with a deficit of gas. This is not the case with balancing gas which, by contrast, usually involves either a deficit being balanced out by injecting gas or a surplus being balanced out by withdrawing gas.

(5) The concept's re-nomination restriction for parties offering a spread product (annex to this decision, page 24) cannot essentially be objected to.

According to the concept, parties offering a spread product will be subject to a re-nomination restriction. Parties are to enter into a contractual obligation under which they may not, on balance, subsequently increase their inputs into or decrease their offtakes from the upstream congestion zone. The same applies conversely to the downstream congestion zone.
Some respondents (EFET, EnBW, party 2), BDEW, RWE, SEEL, Equinor) stated in the second consultation that it was not necessary to have a restriction for shippers beyond that in Annex 4

section 25 KoV (terms and conditions for the balancing group contract) in the form of a re-nomination restriction.

The TSOs are required as part of their system responsibility under section 16(1) EnWG to choose suitable measures taking into account the abovementioned criteria. The ruling chamber believes this can be assumed in the case of this measure. The ruling chamber does not regard the re-nomination restriction to constitute restrictions for providers that go beyond what is necessary to achieve the physical effect. If further restrictions are intended, this additional market intervention would need to be assessed against the specified criteria. With respect to the contractual terms and conditions, the arrangements should – as proposed – be comparable to those in Annex 4 section 25 KoV (terms and conditions for the balancing group contract).

(6) The subject of these proceedings was the joint concept for an oversubscription and buy-back scheme presented by the TSOs. The ruling chamber has therefore only examined the compatibility of the market-based instruments proposed in the concept with the legal framework. The ruling chamber has not assessed other measures which might come into consideration, some of which were suggested in the second consultation.

3.2.2.2. Suspension of short-term marketing

(1) According to the concept, the marketing of short-term (day-ahead and within-day) capacity at entry points belonging to the upstream congestion zone (the zone in front of the congestion) will be suspended during the period when market-based instruments are used or capacity is bought back. Marketing will be suspended until the congestion is eliminated in order to prevent further short-term bookings for inputs or offtakes that would worsen the congestion.

(2) Many respondents (party 2), EFET, BDEW, PEGAS, RWE, VNG, GMTL, Equinor) were critical of the suspension of short-term marketing, while one respondent (EnBW) was in favour.

(3) If TSOs, taking into account system integrity, safety and operating requirements, consider themselves unable to award further firm transport rights on a short-term basis, they are not obliged to do so. Suspending short-term marketing as and when required, which – together with the use of market-based instruments and capacity buy-back – serves to prevent inputs and offtakes through short-term bookings that would worsen congestion, can in principle be regarded as a measure under section 16(1) EnWG. It could be classed as a market-related measure (section16(1) para 2 EnWG). The accepted distinction between this and system-related measures is that the network users are involved. In this case, no agreements are concluded with network users about compensation, disconnections or the use of storage. However, the measure can be classed as market-related because network users are unable to acquire short-term capacity even though the information published and the applicable allocation methodology had led them to expect this.

Such a measure is compatible with the TSOs' tasks and system responsibility provided that the choice of measure has been based – in accordance with the abovementioned criteria – on suitability and necessity and taking into account the extent of the negative effects on the gas supply and the network users. At the present time, the ruling chamber sees no reason to generally doubt this and essentially call into question the use of this measure. Nevertheless, it is currently difficult to estimate in particular how often the measure will be used and thus the extent of the associated negative effects on the gas market and the network users. It will be part of the TSOs' system responsibility to regularly review compliance with the abovementioned legal criteria when the concept is implemented and in light of the experience gained.

(4) The ruling chamber takes the view that no other assessment can be derived from the arrangements for determining and offering capacity. TSOs are not obliged to actually offer all product durations at all times, ie shippers cannot rely on always being able to make short-term bookings.

TSOs are required to determine technical capacity (section 9(1) sentence 1 GasNZV), maximise technical capacity (section 9(2) sentence 3 GasNZV) and offer technical capacity on a yearly, quarterly, monthly, daily and within-day basis (section 11(1) GasNZV). Technical capacity must, however, always be determined and offered taking into account system integrity and operating requirements (see definition of technical capacity, section 2 para 13 GasNZV). Article 6 of Regulation (EU) 2017/459 also states that the maximum technical capacity must be made available to network users "taking into account system integrity, safety and efficient network operation". These requirements apply not only to the initial calculation of technical capacity before the annual auctions but also to non-yearly capacity marketing. Short-term changes and findings must also allow TSOs to adjust the capacity on offer in line with operating requirements.

(5) Nevertheless, suspending short-term marketing as and when required has a negative effect on the market. In this respect, the ruling chamber shares the concerns raised by several respondents in the consultation and by party 2) in the hearing. Suspending short-term marketing does not result in market exclusion, but it affects market participants' interest in short-term bookings. Shippers might wish to use such bookings for instance to balance their balancing groups on a short-term basis. There is also a negative effect on market transparency, as short-term marketing will not necessarily be possible even though available capacity has been published. However, the ruling chamber does not share the overall negative opinion expressed by party 2). Short-term marketing is only to be suspended for capacity rights that could potentially worsen congestion. Shippers will still be able to use the market area's entry points that are not affected, for instance to balance balancing groups on a short-term basis, as mentioned above. The restriction on shippers is not insignificant. However, the ruling chamber believes this is not disproportionate to the difficulty that the TSOs would otherwise face in eliminating the threat: they would need to use market-based instruments at the same time as marketing capacity rights that

could potentially worsen congestion. In light of this, the TSOs should also use the test phase for the market-based instruments in the oversubscription and buy-back scheme to examine how to minimise the suspension of short-term marketing. If, after the test phase, the TSOs also considered using market-based instruments within the framework of section 9(3) GasNZV, they would need to examine – in the course of network development planning – the extent to which these instruments would be preferable to network expansion. Possible restrictions for market participants, such as suspending short-term marketing as and when required, should be taken into due account in addition to financial aspects.

3.2.3. Substantive changes to the concept

(1) Approval is given subject to the modified substantive provisions set out in operative part 2(a) to (d) ("aliud"). The modified provisions ensure in particular that the requirements laid down in section 16 EnWG and section 2(1) in conjunction with section 1(1) EnWG are met. The substantive provisions have the effect that only this version of the concept may be implemented. It is therefore not necessary to request a revision as provided for by point 2.2.2(8) of Annex I to Regulation (EC) No 715/2009.

The ruling chamber considers the changes set out in operative part 2 to be necessary. Discretion has been exercised correctly as regards the changes.

3.2.3.1. No price cap

(1) In accordance with operative part 2(a), there will be no price cap for the use of the market-based instruments and the capacity buy-back (point 3.3 of the concept). According to the concept, emergency measures pursuant to section 16(2) EnWG would have taken the place of the market-based instruments once the upper limit had been reached. Emergency measures have the effect that all service obligations are suspended and liability for economic damage is excluded (section 16(3) EnWG).

The ruling chamber has doubts regarding the legal admissibility of the proposed price cap. However, it is not necessary to make a final assessment because, at least on the basis of current findings, a price cap is not necessary and would not be expedient.

(2) The ruling chamber's legal doubts are linked to the question as to whether it is permissible not to use market-based instruments for cost reasons. A price cap would enable the use of emergency measures pursuant to section 16(2) EnWG even though promising market-based instruments would be available.

(a) Under the provisions of point 2.2.2(5) of Annex I to Regulation (EC) No 715/2009, due account must be taken of the (cost) risk associated with offering additional capacity; however, the assessment of the risk must already take place when determining the amount of additional

capacity. This does not imply that it is permissible not to use capacity-securing measures for cost reasons in the event of congestion. In addition, the use of emergency measures when the upper price limit is reached would affect not only the marketed additional capacity but also the technical capacity. Holders of transport rights would be equally affected, for instance by capacity reductions. The oversubscription and buy-back scheme could therefore have a not insignificant effect on the "firmness" of the technical capacity.

(b) Furthermore, the use of system-related and market-related measures under section 16(1) EnWG is in principle restricted not by costs but only by availability and effectiveness. According to section 16(2) EnWG, emergency measures are used only when a threat or disruption to network integrity cannot be removed or cannot be removed in a timely manner using measures as referred to in section 16(1) EnWG, and not simply when measures prove to be particularly costly. Even if a price cap under section 16 EnWG could be justified by the aim of a low-priced energy supply (section 2(1) in conjunction with section 1 EnWG), having to determine the upper limit according to objective criteria would pose a difficulty.

(3) Regardless of these legal doubts, the ruling chamber does not consider a price cap to be necessary in order to take due account of the cost risk. The fact that as many as three market-based instruments are available in a price-based merit order list should largely rule out disproportionate cost burdens and essentially limit the risk of misuse. In addition, point 2.2.2(5) of Annex I to Regulation (EC) No 715/2009 requires due account to be taken of the cost risk when determining the amount of additional capacity. Also, the concept does not rule out annual adjustments to the amount of additional capacity on offer during the period of application of the oversubscription and buy-back scheme and therefore enables the TSOs to react to actual cost developments if necessary. Finally, account is also taken of the cost risk through limiting the period for the offer of additional capacity (see operative part 2(c)).
A price cap does not make sense in this context either. It would be contrary to the aim of providing sufficient proof of the availability and effectiveness of the market-based instruments by means of the oversubscription and buy-back scheme. In a congestion situation where the upper price limit is reached and, under the proposed concept, emergency measures pursuant to section 16(2) EnWG would be taken, it would not be possible to determine whether the congestion could also have been removed with sufficiently available market-based instruments and without emergency measures.

(4) The ruling chamber's concerns already raised in its consultation document of 11 December 2019 about the introduction of a price cap were shared by all the respondents commenting on this point. In the final hearing, the TSOs proposed reassessing whether there were indications of abusive pricing and whether a price cap should possibly be introduced at a later point in time on the basis of the experience gained, in particular with the spread product. In this context, the ruling chamber considers in particular the reporting and monitoring requirements laid down in operative

part 3(b) to be suitable to gain possible indications and findings. Furthermore, the possibility of revising the approval at a later point in time is not ruled out if findings from the practical implementation indicate the need for a different assessment.

3.2.3.2. No automatic prohibition of inputs/offtakes damaging the network when capacity is bought back

(1) In accordance with operative part 2(b), the capacity buy-back will not be linked automatically to the imposition of a prohibition of changes to inputs/offtakes that would damage the network on all H-gas market participants for the rest of the day. This ensures that in the event of congestion the TSOs will assess the prerequisites for emergency measures pursuant to section 16(2) EnWG before taking such a measure.

(2) According to the process description (point 2.3.4 Capacity buy-back (process step 6) (annex to this decision, pages 24-5)), the capacity buy-back would automatically be accompanied by the imposition of a prohibition of changes to inputs/offtakes that would damage the network on all H-gas market participants for the rest of the day. This would mean that, on balance, market participants in the upstream congestion zone would not be allowed to subsequently increase their inputs or decrease their offtakes. The same would apply conversely to the downstream congestion zone.

(3) While the ruling chamber considers the capacity buy-back to be a (market-related) measure under section 16(1) EnWG, imposing a prohibition of changes to inputs/offtakes that would damage the network on all market participants constitutes an emergency measure within the meaning of section 16(2) EnWG, for which the legal prerequisites must be met.

(a) Prohibiting changes to inputs/offtakes that would damage the network definitively rules out the use of non-nominated elements of booked capacity. The ruling chamber takes the view that there are only slight differences between withdrawing capacity before its initial nomination, withdrawing nominated capacity and prohibiting re-nomination. By abolishing the re-nomination prohibition for day-ahead capacity (Bundesnetzagentur decision of 14 August 2015, BK7-15-001, pages 23-4), the ruling chamber made it clear that it considers the flexible use of transport rights to be essential. In this respect, the right to and possibility of re-nomination is in principle to be assumed. The proposed prohibition would be imposed not on a contractual basis and therefore not as a market-related measure under section 16(1) EnWG, but as an emergency measure that the TSOs are only legally entitled to take when the prerequisites of section 16(2) EnWG are met. Unlike the corresponding prohibition accompanying the spread product (see point 2.3.3.4 of the process description, annex to the decision, pages 23-4), a prohibition would be imposed not only on the party contracting to the capacity buy-back but on all H-gas market participants in the upstream and downstream congestion zones.

(b) The use of emergency measures pursuant to section 16(2) EnWG presupposes that a threat or disruption to the security or reliability of the gas supply system cannot be removed or cannot be removed in a timely manner with measures under section 16(1) EnWG. In this respect, it is sufficient for the TSOs to assess the use of system-related or market-related measures under section 16(1) EnWG as not promising. However, the TSOs must make this assessment by examining and evaluating the specific congestion situation. Measures under section 16(1) EnWG can be assessed as not promising if measures already taken have proved to be ineffective or if they are generally considered to be unsuitable in the specific (temporal) situation.[24] The ruling chamber takes the view that the proposal in the concept – for the capacity buy-back to automatically be accompanied by the imposition of a prohibition of changes to inputs/offtakes that would damage the network on all H-gas market participants for the rest of the day – is not compatible with these rules. Firstly, it prevents the TSOs from assessing whether the legal prerequisites for such a prohibition accompanying the capacity buy-back pursuant to section 16(2) EnWG are met in a specific congestion situation when the concept is practically implemented. Secondly, automatically imposing a prohibition cannot be regarded as the conclusion of an advance assessment of the prerequisites of section 16(2) EnWG because it would not guarantee that account is taken of the particular circumstances of individual congestion situations. In particular, due account could not be taken of the extent to which the market-based instruments already used in the preceding process steps to remove specific congestion (section 16(1) EnWG) have had a positive effect in terms of reducing the congestion and whether this affects the assessment of the necessity of a prohibition of changes to inputs/offtakes that would damage the network pursuant to section 16(2) EnWG.

(c) Operative part 2(b) enables the TSOs to assess the legal prerequisites for emergency measures under section 16(2) EnWG on the basis of the specific congestion situations anticipated following the market merger. The TSOs must assess in each congestion situation whether imposing a prohibition of changes to inputs/offtakes that would damage the network on all market participants is necessary in addition to the re-nomination restriction for the contracting party (see spread product, *3.2.2.1* (5)). Contrary to the TSOs' concern raised in the final hearing, the physical effect can thus be applied to either the individual contracting party or to all shippers in the market area.

If the TSOs find that measures under section 16(1) EnWG are not sufficient, it is still permissible to impose a prohibition of changes to inputs/offtakes that would damage the network on all market participants. In this case, the prohibition can also take place at the same time as the capacity buy-back (section 16(1) EnWG). In this context, party 1) stated that a prohibition should not be allowed to have a negative effect on the balancing groups in the single market area. Shippers should still

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[24] *Hartmann/Weise* in: Danner/Theobald (eds), Energierecht, August 2019, section 13, margin no 48.

be able to balance their inputs/offtakes so as not to incur further restrictions, costs or damage. Moreover, account should be taken of any flexibility in supply contracts. In this respect, the ruling chamber does not see the need to modify the concept presented. Just as short-term marketing is only to be suspended in the event of congestion for capacity rights that would worsen the congestion (see *3.2.2.2* (5)), the re-nomination restriction for the whole of the market area is only to rule out changes that would worsen the congestion. Shippers are able to balance their entry/exit positions at least using the market area's network points that are not affected.

(4) The majority of the respondents were critical of the proposal for a general re-nomination restriction (EFET, RWE, VNG, SEEL, Equinor).

3.2.3.3. Marketing for two years possible

(1) Operative part 2(c) gives the TSOs the possibility to offer additional capacity for each of the next two gas years falling under the period of application of the oversubscription and buy-back scheme at annual auctions; this differs from the offer period proposed in the concept. When initiating the proceedings, the Ruling Chamber envisaged an offer period of less than five gas years, in contrast to the marketing time frame for technical capacity. According to the concept, additional capacity would be offered at annual auctions for only the next gas year falling under the period of application. The ruling chamber believes that – as with the capacity product and the amount of capacity – it is up to the TSOs to decide how far they use this possibility.

Annual auction (expected)	**Offer of additional capacity**	**Notes**
6 July 2020	gas year 2020/2021: no additional capacity	period before market area merger
	gas year 2021/2022: additional capacity	expected to be first gas year of market area merger
	gas year 2022/2023: additional capacity	
5 July 2021	gas year 2021/2022: additional capacity	
	gas year 2022/2023: additional capacity	
4 July 2022	gas year 2022/2023: additional capacity	
	gas year 2023/2024: additional capacity	
3 July 2023	gas year 2023/2024: additional capacity	last year of period of application

The ruling chamber is explicitly giving the TSOs this possibility in operative part 2(c) because it believes it makes sense for the rhythm to be in line with the network development planning process. As stated above (*3.2.1.1* (2)(b)(bb)), there is a close connection with determining the (long-term) capacity requirements in the network development planning process. The sufficient amount of capacity for the single German market area is expected to have been determined according to criteria developed in the network development planning process by the time the

oversubscription and buy-back scheme expires. After this, provision as technical capacity under section 9(3) GasNZV will come into consideration.

(2) The majority of the respondents (EnBW, BDEW, EFET, VNG) were in favour of an offer period of at least two years, while some regarded a period of one year as appropriate (party 1). The TSOs announced in the hearing that they initially intend to continue offering additional capacity for just one gas year at a time.

3.2.3.4. Recognition of costs in the determination proceedings BK9-19/606 ("KOMBI")

Operative part 2(d) makes it clear that this decision does not cover the regulatory treatment of the costs incurred through the oversubscription and buy-back scheme. The contents of the concept relating to this are not covered by the approval issued through this decision. A decision on the regulatory treatment of costs for the use of the market-based instruments and the capacity buy-back is covered solely in Ruling Chamber 9's determination proceedings BK9-19/606 ("KOMBI") (see also *3.2.1.2*).

3.3. Operative part 3: secondary provisions

(1) The approval is issued subject to the secondary provisions set out in operative part 3.

(2) Pursuant to section 36(2) para 4 VwVfG, a discretionary decision may be accompanied by a provision requiring the party subject to the provision to do, tolerate or abstain from doing an act (condition). In deciding on the actual secondary provision, the authority must again exercise its discretion in line with the purpose of empowerment and observe the legal limits of discretion (section 40 VwVfG). The secondary provision may not be contrary to the purpose of the administrative act (section 36(3) VwVfG).

(3) The secondary provisions set out in operative part 3 meet these requirements. The attachment of secondary provisions under section 36 VwVfG is in principle also possible upon indirect application of Union law.[25] Moreover, the approval of the concept constitutes a discretionary decision, especially in light of point 2.2.2(8) sentence 3 of Annex I to Regulation (EC) No 715/2009 (request for revision), which gives the regulatory authorities leeway with respect to legal implications.

(a) Operative part 3(a) requires the TSOs to inform the Bundesnetzagentur in writing by 1 May of each calendar year of the amount of additional capacity, broken down by product, to be offered for a bookable point at the upcoming annual auction. The TSOs are free to publish this information, taking account of legal requirements. In addition, reasons must be given for the specific amount of additional capacity for each point. This requirement serves the purpose of monitoring the

[25] *Ramsauer* in: Kopp/Ramsauer, VwVfG, 18th ed, 2017, section 36, margin no 6.

practical implementation of the approved concept. The reporting deadline of 1 May of each calendar year has been chosen so that the TSOs do not need to decide on the amount of additional capacity too early but also so that the Bundesnetzagentur is given sufficient notice of the planned procedure. According to Article 11(4) and (8) of Regulation (EU) 2017/459, the annual yearly capacity auctions are held on the first Monday of July each year, and TSOs are to notify network users at least one month before the auction starts of the amount of firm capacity to be offered. The requirement to give reasons enables the Bundesnetzagentur to understand the factors taken into account in determining the amount of additional capacity. While the approval given in operative part 2 does not specify any particular capacity amounts, the approval and Ruling Chamber 9's decision on the recognition of costs give the TSOs a certain leeway. Use can be made of the leeway in compliance with the purposes and objectives of the EnWG (section 2(1) in conjunction with section 1 EnWG). If the total capacity offered at a point through the oversubscription scheme corresponds to the gas NDP 2018-2028, which is the upper limit specified in the concept, no further reasons need to be given – as recommended by the TSOs in the hearing – since in this case the TSOs are making full and non-objectionable use of the incentives set by the scheme.

(b) Operative part 3(b) requires the TSOs to submit a joint report to the Bundesnetzagentur by 1 December of each calendar year (with the first report due by 1 December 2022) evaluating the use of the market-based instruments and the capacity buy-back in the previous gas year. The report, which is also to be published on the TSOs' websites, is to include specific information about the use of the market-based instruments and the capacity buy-back. This requirement also serves the purpose of monitoring the practical implementation of the approved concept. In addition, publication of the information serves to enable the network users to understand the extent to which the use of the market-based instruments and the capacity buy-back is necessary as well as the costs – relevant to the network charges – that are associated with such use.

3.4. Operative part 4: reservation of the right to order payment of the costs

A separate notice of the costs (fees and expenses) will be issued in accordance with section 91 EnWG.

Information on legal remedies

An appeal may be filed against this decision within one month of service of the decision. Appeals must be filed with the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, Tulpenfeld 4, 53113 Bonn. It is sufficient if the appeal is received by the Higher Regional Court of Düsseldorf within the time limit specified (address: Cecilienallee 3, 40474 Düsseldorf).

The appeal must be accompanied by a written statement setting out the grounds for appeal. The written statement must be provided within one month of filing the appeal. The period begins with the lodging of the appeal and may be extended by the court of appeal's presiding judge upon request. The statement of grounds must state the extent to which the decision is being contested and its modification or revocation sought and must indicate the facts and evidence on which the appeal is based. The appeal and the grounds for appeal must be signed by a lawyer.

The appeal has no suspensory effect (section 76(1) EnWG).

Barbie Kornelia Haller	Dr Werner Schaller	Diana Harlinghausen
Chair	Vice Chair	Vice Chair